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Droit international

Vito J. Bumbaca

# Habitual Residence in International Family Law

## Theory, Practice and Reform

UNIVERSITÉ DE GENÈVE
FACULTÉ DE DROIT

Schulthess
ÉDITIONS ROMANDES

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# PREFACE

In 2022, the notion of habitual residence as a global family law connecting factor for the determination of international jurisdiction and the applicable law continues to fuel and enrich the scholarly debate among private international law scholars. National and regional, even international, courts such as the International Court of Justice, the Court of Justice of the European Union and the European Court of Human Rights, have been occupied and absorbed by its analysis, on many occasions entailing lengthy and detailed assessments affecting the efficiency of judicial proceedings worldwide. Typical examples are those dealing with child protection, children being the most vulnerable and carefully considered in this book: *Michnea v. Romania* in which the Strasbourg Court intervened almost three years after the child abduction; *Monasky v. Taglieri* whereby the US Supreme Court adjudicated the child return affected by an almost four-year proceeding; *HR* involving a two-year litigation ended before the Luxembourg Court. Only recently, the Italian Court of Cassation was called upon to provide an interpretation of habitual residence in a three-year child custody proceeding (*Cass. Civ. Sez. I, 5.1.2022 n. 161*), where it was stated that the notion's controversial determination facing fragmented guidance would essentially lead to conflicts of jurisdiction and of judgments. Also in relation to adults, the determination of habitual residence is subject to much discussion even though it has more rarely been addressed in the case law.

Habitual residence applies within international family law treaties and domestic private international law acts. It largely replaced domicile and nationality in international uniform law, namely within the Hague Conventions and European Union Regulations. The *contrast* between uniform and domestic conflict-of-law rules in the manner of exploiting habitual residence is well-known. Some legislations provide a definition of habitual residence, others avoid to do so in line with the positions taken by the Contracting States of the Hague Conference on Private International Law and the European Union Member States in the framework of the relevant family law instruments. This is clearly explained by the analysis of Dr Vito Bumbaca, which begins with a historic overview of the notion of habitual residence since its origins, namely within the Hague Convention of 1896 on Civil Procedure.

This extensive study offers a cross-cutting assessment of the whole area of international family law, including aspects of intersection with other subject matters such as the protection of asylum seekers and refugee law. It is in fact

in relation to asylum that Dr Bumbaca envisages the possible replacing of habitual residence where its use may seem unrealistically applicable. To resolve the abovementioned contrast, the author suggests that habitual residence is improved by virtue of a uniform fact-based guidance originating from comparative case law involving similar scenarios. According to this method, specific *decisive* elements should be primarily applicable to the majority of common cases. On a subsidiary basis, additional *non-decisive* elements may apply. This two-step process constitutes the *two-fold test approach* advanced by Dr Bumbaca. Such an approach appears fairly original and practical, in particular as the author scrutinizes more than 400 rulings in various fields, often interconnected, emanating from *national* (Argentina, Australia, Belgium, Brazil, Canada, China, Finland, France, Germany, Hong Kong, India, Ireland, Italy, Jamaica, Luxembourg, Malawi, Portugal, Russian Federation, Seychelles, Singapore, South Africa, South Korea, Spain, Switzerland, Taiwan, United Kingdom, United States), *regional* (CJEU, ECrtHR, Economic Court of the Commonwealth of Independent States), and *international* (ICJ, UN Committee on the Rights of the Child) courts and quasi-judicial committees. Inherently, Dr Bumbaca recommends adapting habitual residence according to the principle of *personal proximity* targeting the closest and cross-border coordinated evaluation of the parties' interests within the proceedings, especially those involving children and vulnerable adults. Unsurprisingly enough, the notion of *best interests* is central to this approach and substantially linked to habitual residence.

Coordinated mechanisms such as the *transfer of jurisdiction* and the *assessments* of the beneficiary's interests carried out by central authorities and international NGOs may also favour the tracing of habitual residence. Dr Bumbaca's inquiry aims to practically touch upon these mechanisms in order to resolve conflicting interpretations by different courts, each of which retaining jurisdiction on the basis of their own assessment of habitual residence, ultimately impacting the applicable law. It is admitted that coordination may not always lead to a solution. The author thus opts for the recourse to a *super partes court* to adjudicate on a potential unsatisfactory habitual residence result. Visionary as this might be today, the arguments offered by Dr Bumbaca seem to possess a valid background in so far as other practices have been achieved at the EU level, particularly concerning the Unified Patent Court in the field of intellectual property law. *Family arbitration* is an innovative option recalled by this author.

Habitual residence may not be established or it may be settled in more than one country. This would lead to the issue of which connecting factors should operate in these situations. Some solutions are put forward for each of the two respective issues. First, *physical presence* as an essential requirement should replace habitual residence when this cannot be established because of the lack of relevant attachments. This rule is already enshrined in the Hague

Convention of 1996 on Child Protection and in the Hague Convention of 2000 on Adult Protection. Dr Bumbaca has interestingly extended this rule throughout other family law instruments, by adapting its operation at the relevant point in time crystallised in each relevant treaty. Second, in cases of a simultaneous or alternate habitual residence, this study differentiates the two situations. In the case of a simultaneous habitual residence, the CJEU and other national courts have concluded that this is contrary to legal predictability and certainty, as it is also maintained by the author. An alternating habitual residence may instead arise, whereby it is suggested to adopt a principal habitual residence, which in many circumstances would find consensus.

This book has therefore the merit of examining various solutions and proposals for reform with the ultimate objective of improving the practical operation of habitual residence, a well-known yet still elusive notion in international family law.

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# Executive Summary

**1.** My professional activity as '*Legal Advisor Regulatory Affairs*' dealing in particular with child and adult protection has directed me to choose the topic of habitual residence in cross-border family *disputes* as the initial subject of this study. The academic assignment as '*Collaborateur de l'enseignement et de la recherche*' at the Faculty of Law of the University of Geneva has allowed me to enlarge its scope towards 'habitual residence in international family law' as a transversal book in the realm of international family law. This summary explains the general issues and the salient aims underpinning this 4-year inquiry.

## Book Overview and Proposal

**2.** "In civil jurisprudence it too often happens that there is so much law, that there is no room for justice, and that the claimant expires of wrong in the midst of right, as mariners die of thirst in the midst of water (*cit.* Charles Caleb Colton)". Habitual residence in international family law has been referred to, *inter alia*, as: '*cavillo giuridico*', '*daseinsmittelpunkt*', '*résidence effective*', 'uniform standard', 'domicile', 'factual domicile', 'ordinary residence', 'permanent residence', 'permanent home', 'permanent stay', 'home state'. The principal elements assessing habitual residence have been employed differently and incoherently: physical presence, intent, duration, administrative residence, place of work, place of fortunes, school, primary carer's social life, prospective relocation, extended family presence. Such multiple references, with no international uniform guidance provided through a comparative contextualised fact-based analysis, have oftentimes caused to obviate the habitual residence founding objectives and characteristics. These are namely qualified proximity, actuality, flexibility and adaptability, which shall support access to effective justice in the cross-border family setting.

**3.** International family law covers important topics affecting people's interests and rights, such as birth, harmonious development, economic capacity, health, education, social integration, family harmony, legal predictability and certainty. Any family relationship encountering issues of access to effective justice arising out of conflicting or wrong habitual residence determinations may trigger negative impacts towards the said interests and rights. Custody,

abduction, divorce, property relations, testamentary dispositions, incapacity are some of the matters related to the individual's habitual residence operation.

**4.** Reference is made to the following, non-exhaustive, scenarios: (i) A child who lives with both parents in one State and is wrongfully removed to, or retained in, another State by one of his/ her parents: a judgment determining the child's habitual residence in the latter State may affect his/ her harmonious development, parent-child relationship, social integration and education. (ii) Parental disputes concerning unborn children or newborns may also influence the conditions and decisions relating to his/ her birth and family environment. (iii) A marital or partnership separation in State A, place of common 'conjugal life', followed by a property regime claim in State B, place of separate 'professional life': determining habitual residence in favour of one of the two spouses or partners in State B, regardless of the common *family* attachments in State A, may damage, among others, the other spouse's or partner's property rights and economic capacity. (iv) As an example of non-conflictual context, a *de cujus* who planned his/ her succession under the law of one State, which after death is determined under the law of another State based on a wrong habitual residence interpretation, would hinder the principles of predictability and certainty (v) An incapacitated Adult living in one State removed to another State against his/ her *interests* may impact his emotional and financial stability as well as health. Ultimately, this study aims to overcome the potential misleading employment of habitual residence affecting, as showed, people's daily life.

**5.** Habitual residence finds its origins in the 19th Century as a *quasi*-standardised cross-border notion, an inter-country concept applicable to civil matters. It determines a qualified proximity between the beneficiary of international family law, which is this book's focus area of law, and the competent forum and *jus*. Issues of (non-)recognition and (non-)enforcement of judgments and measures, as well as international cooperation, are also linked to habitual residence. In matters of international cooperation, reference is made to the collaborative approach among judicial, administrative (*i.e.* Central Authorities) and other authorities (*i.e.* NGOs) involved in the transnational family relationship, including to assess the above-mentioned qualified proximity.

**6.** Qualified proximity refers to a realistic and actual nexus that is, in principle, the most appropriate to ensure effective access to justice and to protect the beneficiary's interests. Such a nexus shall refer to a particular point in time, which is sometimes indicated in the relevant treaty (*i.e.* seisin, marriage celebration, death). Depending on the family law context, derogations from habitual residence may occur when the better placed forum of another State is more appropriate to deal with the case. This is typically the transfer of

jurisdiction provided in the field of parental responsibility, which may also affect the applicable law determination, and whose extended operation within the whole international family law area is advocated in this study.

**7.** In the family law Hague Conventions and European Union Regulations, habitual residence has been principally endorsed, superseding domicile and nationality. These are, on many occasions, alternative or subsidiary connecting factors. The endorsement of habitual residence is also contained, alternatively or subsidiarily, in some domestic legislations (*i.e.* China, Dominican Republic, Georgia, Jamaica, Russian Federation, South Korea, Taiwan, United Kingdom) not bound by some or all of the relevant family law treaty objectives. This book examines the national and international operation of habitual residence, with the primary objective of the study being to support its treaty-based implementation. In this regard, the findings show that in some national legal orders, habitual residence operates in a similar way as in the international setting (*i.e.* Canada, Germany, Spain, United Kingdom), as opposed to others where its domestic interpretation may differ from the international practice (*i.e.* Argentina, Russian Federation, South Africa, Switzerland).

**8.** The interplay of habitual residence with modern connecting factors, such as mere presence and closest connection, reflects the important need to face increasing migration issues, in particular concerning asylum seekers and refugees whose habitual residence can hardly be established. In its absence, recourse should in principle be made to closest connection and, subsidiarily, mere presence.

**9.** With respect to closest connection, whose lack of harmonised guidance is also noticed, this study suggests a uniform interpretation indicated by *prospective acclimatization*. The latter should apply only in the absence of habitual residence, in order to avoid overlaps between the two factual notions, each of which determining a 'closest connection'.

**10.** To acquire habitual nature, each individual's residence should be characterised by specific decisive elements. Such elements should be assessed at an appreciable period, which is often missing in the relevant family law treaties. These elements should be found in the comparative case law analysis applicable to analogous family contexts. Complementary, non-decisive, elements may circumstantially support the habitual residence assessment. These two factual steps represent the *two-fold* test approach implemented in this study.

**11.** Ultimately, when dealing with interconnected family contexts involving both children and adults, recourse should be made to an intradisciplinary uniform family law approach – a family habitual residence. In practice, specific decisive or non-decisive elements would commonly apply for both the child's and the adult's habitual residence determination.

**12.** When the habitual residence determination proves complex, tie-breaker rules should operate in order to solve potential conflicts of jurisdiction and laws. These are: (i) the principal habitual residence of the individual(s) founded on personal interests; and (ii) the continuing physical presence of the individual(s) as an essential prerequisite of habitual residence.

**13.** A complex determination of habitual residence may require the intervention of *super partes* entities based on the beneficiaries' agreement or an established international power. This approach should be tailored considering the family context at stake. Reference is especially made to the potential role of family arbitration and the CJEU mandate, particularly in the fields of divorce, property regimes and successions. With regard to the protection of children and incapacitated adults, the activities of the UN Committee on the Rights of the Child and the UN Committee on the Rights of Persons with Disabilities are duly examined.

**14.** Overall, this study supports the recourse to habitual residence in international family law as an inter-country concept, which is old in its origins and modern in its objectives. Habitual residence is adaptable and flexible when considering each family context. It is actual and close when determining the realistic nexus with justice. It should be uniform when applicable to analogous family relationships. This study generally advocates for a harmonised beneficiary-centred approach, ensuring predictability, certainty and continuity in international family law, as well as "assisting the prompt and efficient progress of cases" (*cit.* Sir James Munby).

**15.** The possible transnational conflicting operation of habitual residence, affecting people's interests and rights in similar family contexts, does not rely on the absence or presence of an international legal definition, but on the lack of uniform factual guidance. A uniform fact-based determination, life adapted, is therefore required for the most effective and efficient use of habitual residence. This would be more compatible with the founding objectives and characteristics of habitual residence, unlike a legalistic approach. In this sense, an international handbook should be conceived at the Hague Conference on Private International Law, with the support of other entities such as the UN Committee on the Rights of the Child, the UN Committee on the Rights of Persons with Disabilities, the European Commission (DG Justice) and the Council of Europe (Committee on Legal Co-operation), in order to establish a guide applicable to the various family law instruments adopting habitual residence.

Vito Bumbaca
*Dr. iur.*

# Table of Contents


Executive Summary IX

Table of Contents XIII

Table of Cases XXIII

Table of Legislation XLI

Abbreviations and Terminology LIII

Acknowledgements and Dedications LVII

**Introduction 1**

**Part I: Concept and Operation of Habitual Residence 11**

Chapter I: History and Origins 11

Section I Hague Conventions and Social Justice 12

§ I. Historical Roots of Habitual Residence 12

§ II. Focus on the 1902 Hague Convention on Guardianship 13

Section II International Family Law Conventions after World War II 17

§ I. Hague Conference Activity During 1950 17

§ II. UN Convention on the Recovery Abroad of Maintenance 1956 17

§ III. Geneva Convention 1951 and its 1967 Protocol 18

§ IV. Hague Conference Activity During 1960 20

§ V. Specific Focus on the Hague Convention 1961 and the Protection of Minors 20

§ VI. Hague Conference Activity During 1970 22

§ VII. Hague Conference Activity During 1980 25

Section III Focus on the Contemporary Family Law Conventions 27

§ I. Hague Convention 1980 on the Civil Aspects of International Child Abduction 27

§ II. Hague Convention 1993 29

§ III. Hague Convention 1996 31

§ IV. Hague Convention on the International Protection of Adults 34

§ V. Some Remarks on the Lugano Convention 37

§ VI. Hague Convention 2007 38

§ VI. Hague Protocol 2007 40
Section IV European Union Family Law Regulations 42
§ I. Realistic Expectations from the Brussels Convention 1968 to the Brussels II Regulation 43
§ II. EU Family Law Acquis in the 21st Century: Brussels IIA and Rome III 46
§ III. EU Parental Responsibility and the CJEU Guidance on Habitual Residence 48
§ IV. EU Maintenance Regulation 53
§ V. EU Succession Regulation 55
§ VI. Dublin III 58
§ VII. EU Property Regimes' Regulations 2016 62
Section V Habitual Residence in the Policies of the Council of Europe 64
Chapter II: Comparative Perspective: National Operation of Habitual Residence 66
Section I Common Law Legal Systems 67
Section II Civil Law Legal Systems 69
Section III Mixed Legal Systems 74
Section IV Focus on Shari'a Law 75
Section V Asian Practice 76
Section VI Directions for Inter-country Habitual Residence 78
Chapter III: Habitual Residence Interplay 79
Section I Nationality 79
§ I. Conflicts of Nationalities 79
§ II. Nationality and Proximity 82
§ III. Statelessness 83
§ IV. Bottomline on the Interplay of Habitual Residence with Nationality 85
Section II Domicile 86
§ I. Characteristics of Domicile 86
§ II. Civil Law Notion of Domicile in its Interplay with Habitual Residence 88

§ III. Common Law Notion of Domicile in its Interplay with Habitual Residence 93
§ IV. Suitable International Approach Differentiating Domicile from Habitual Residence 95
Section III Residence 96
§ I. Residence Simpliciter 96
§ II. Tax Residency 97
§ III. Ordinary Residence 100
§ IV. Permanent Residence 101
§ V. Prospective Use of the Different Grounds of Residence 103
Section IV Physical Presence and Prospective Acclimatization 104
§ I. Physical Presence 104
§ II. Prospective Acclimatization 104
Chapter IV: Basis for a Two-fold Test Approach 107
Section I Habitual Residence Uniform Application 107
§ I. Harmonised Terminology 107
§ II. Initial Uniform Reference 109
§ III. A Proposed Handbook and/ or Protocol as an International Guide 109
Section II Habitual Residence under Social Security Law 111
Section III Alternate Habitual Residence or Concurrent Habitual Residence 112
§ I. Alternate Habitual Residence or Résidence Alternée 112
§ II. Concurrent Habitual Residence 114
Section IV Absence of Habitual Residence 115
Section V Forum (Non)Conveniens or Transfer of Jurisdiction 116
§ I. Common Law Forum Conveniens 116
§ II. Similarity with the Civil Law Transfer of Jurisdiction 118
§ III. Lis Pendens Rule and the Consistent Transfer of Jurisdiction 119
Section VI Forum Shopping 120
Conclusions 121
**PART II: Marriages, Registered Partnerships and Property Regimes 123**
Chapter I: Marriages and Registered Partnerships 124
Section I National Conflict-of-law Rules 124

§ I. Jurisdiction of the Administrative Authorities for the Celebration or Registration 125
§ II. Formal and Substantive Validity 129
§ III. Rules on Recognition 133
Section II Effects of Marriages: in particular the Name 136
§ I. International Instruments 137
§ II. Jurisdiction and Applicable Law 138
Section III Habitual Residence and its Interplay with other Connecting Factors 142
§ I. Celebration of Marriages and Partnerships: Key Points 142
§ II. Effects of Marriage to the Name: Key Points 145
§ III. Interpretation of Habitual Residence 147
§ IV. Summary of Recommendations 148
Chapter II: Property Relations 149
Section I Property Regimes within National Legal Orders 150
Section II EU Regulations 152
§ I. Jurisdiction and Applicable law 152
§ II. Practical Implementation 154
§ III. Adapting Habitual Residence to Different Contexts 157
§ IV. Pros and Cons of the Proposal 158
§ V. Some Remarks on the Guiding Operation of Habitual Residence 160
§ VI. (Minimal) Operation of Habitual Residence on the Validity of Agreements 161
Section III Hague Convention 1978 and Related Practice 162
§ I. Case law Analysis 163
§ II. Two-fold Test Approach Applied in Context 165
Section IV National Perspectives 166
§ I. Property Relations in the Context of Nordic Situations 166
§ II. Turkey-EU 167
§ III. US-EU 170
§ IV. UK-EU 173
§ V. Switzerland-EU 176

Section V Two Habitual Residences 179
§ I. Alternate habitual residence 179
§ II. Concurrent Habitual Residences 183
Section VI Absence of Habitual Residence 187
§ I. Case Studies 187
§ II. Current Issues 188
§ III. Proposed Resolution Model on 'Mere' Presence 191
§ IV. Proposed Resolution Model on Prospective Acclimatization 192
§ V. Lis Pendens 192
Section VII Proposed Model for a Collaborative Determination and Transfer of Jurisdiction 193
Conclusions 194
**PART III: Divorce, Parental Responsibility and Maintenance 199**
Chapter I: Divorce 199
Section I Habitual Residence under the Hague Convention 1970 200
Section II EU Acquis in Divorce Matters 202
§ I. Brussels IIA: Guiding Principles for the Habitual Residence Uniform Determination 202
§ II. Pre- and Post- Brussels IIA: National Case Law 206
§ III. Rome III: Relevant Provisions and Preliminary Remarks 209
§ IV. Rome III: National Case Law 210
Section III Prorogation of Jurisdiction 211
Section IV Concentrate Jurisdiction under the EU Acquis and the Swiss Legislation 213
Section V Divorce Conflict-of-law Rules in the US and Turkey 215
§ I. US-EU 215
§ II. Turkey-EU 216
§ III. Prospect of an International Convention on Divorce 218
Section VI Concurrent, Alternate, Absence of Habitual Residence 219
§ I. Concurrent Habitual Residence 219
§ II. Alternate Habitual Residence 221
§ III. Absence of Habitual Residence: Mere Presence or Prospective Acclimatization? 223

§ IV. Lis Pendens, Collaborative Determination and Transfer of Jurisdiction 225
Chapter II: Parental Responsibility 226
Section I Establishing of the Parent-Child Relationship 227
§ I. Legal Parentage and Surrogacy 227
§ II. National PIL Rules on Parent-Child Relationship 229
§ III. Habitual Residence within Intercountry Adoption 233
Section II Child Custody and Visiting Rights 236
§ I. General Jurisdiction under Brussels IIA 236
§ II. General Jurisdiction under the Hague Convention 1996 239
§ III. Continuing Jurisdiction under Brussels IIA and the HC-1996 243
§ IV. Transfer of Jurisdiction under Brussels IIA and the HC-1996 247
§ V. Temporary Jurisdiction under Brussels IIA and the HC-1996 249
§ VI. Rules on Applicable Law under the HC-1996 252
§ VII. Alternate Habitual Residence 254
§ VIII. Concurrent Habitual Residence 258
§ IX. Absence of Habitual Residence 261
§ X. Intercountry Child Assessments 264
§ XI. Home State under the US UCCJEA 265
Section III International Child Civil Abduction 270
§ I. Case Law Analysis 271
§ II. A Child Centred Approach: Factual Proximity and Best Interests 281
§ III. Alternate Habitual Residence in Relation to Abduction 283
§ IV. Absence of Habitual Residence in Relation to Abduction 285
Chapter III: Maintenance 287
Section I Maintenance Legal Framework 288
§ I. Hague Convention 1973 288
§ II. Hague Protocol 2007 289
§ III. Hague Convention 2007 293
§ IV. EU Maintenance Regulation 295
Section II Maintenance as a Principal Matter and Ancillary to Parental Responsibility/ Divorce 296

§ I. CJEU Case Law 297
§ II. National Case Law 302
Section III Alternate and Absence of Habitual Residence 306
§ I. Absence of Habitual Residence 308
§ II. Alternate Habitual Residence 310
Conclusions 311
**Part IV: Incapacitated Adults 317**
Chapter I: The 'New' International Protection of Adults 317
Section I The EU Protection of Adults 318
Section II Hague Convention 2000 320
§ I. Vulnerability, Interests and Proximity: An Adult-centred Approach 321
§ II. General Jurisdiction and Applicable Law 324
§ III. Determination of Habitual Residence 325
§ IV. Change of Habitual Residence 328
§ V. Absence of Habitual Residence 329
§ VI. Transfer of Jurisdiction 332
§ VII. Concurrent Subsidiary Jurisdiction: Nationality and In Rem 333
§ VIII. Concurrent Temporary Jurisdiction 334
§ IX. Party Autonomy 335
Section III Two Habitual Residences 336
§ I. Alternate Habitual Residence 336
§ II. Concurrent Habitual Residence 337
Section IV International Adult Abduction 339
Chapter II: Beyond the Treaty Rules 343
Section I US Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act 344
§ I. Primary Home-state Jurisdiction 344
§ II. Primary Significant-connection Jurisdiction 346
§ III. Special Jurisdiction 347
Section II National conflict-of-law Rules of Canada and China 347
§ I. Canada (Ontario) 347

§ II. China 349
Section III Lessons Learned from other National Connecting Factors 349
Conclusions 350
**Part V: International Successions 355**
Chapter I: EU Succession Regulation 356
Section I Habitual Residence: Guiding Indicators and Derogations 356
§ I. Assessment for Jurisdiction and Applicable Law 356
§ II. Debated Rules and Excluded Factors 358
§ III. The Principle of (Specific) Coincidence on Habitual Residence 361
§ IV. Closest Connection and the 'Situation de Précarité Economique ou de Besoin' 363
§ V. EU Uniform Interpretation 365
Section II Relevant Legal Framework 367
§ I. Provisions on Jurisdiction and Applicable Law 367
§ II. Validity of the Testamentary Dispositions 370
§ III. Party Autonomy: A Proposed Model 371
Chapter II: EU Jurisdiction over Property Regimes and Successions 372
Section I Coincidence of Forum and *Jus* 373
Section II Concentrate Jurisdiction 374
Chapter III: Remarks on the EU25- Swiss, UK and US Contexts 376
Section I Swiss PIL Rules Before the 2018 Ongoing Reform 377
§ I. Current Operation of Swiss Domicile and the EU25 Habitual Residence 378
§ II. Current Operation of the Swiss and the EU25 Habitual Residences 380
Section II Swiss PIL Rules After the 2018 Ongoing Reform 382
§ I. Habitual Residence Exclusion 382
§ II. Jurisdiction and Applicable Law under the 'Avant-projet' 384
Section III UK and the US Conflict-of-law rules 387
§ I. UK-EU25 387
§ II. US-EU25 390
Chapter IV: Potential Issues Arising Out of Habitual Residence Determinations 391

Section I Absence of Habitual Residence 392
§ I. EU25 Legal Context 392
§ II. Swiss-EU25 Current Remedies 393
§ III. Proposed Rules 394
Section II Alternate and Concurrent Habitual Residence 396
§ I. The Context and the Current Remedy 396
§ II. Proposed Rules 398
Section III Transfer of Jurisdiction 399
Conclusions 400
**Part VI: The Future Prospect: Conclusive Remarks** **403**
Reference List 409
Appendix 1 Conferences and Workshops 443
Appendix 2 Interviews 444
Appendix 3 Curriculum Vitae 444

# Table of Cases

## International decisions and socio-legal cases

### International Court of Justice

Nottebohm, (Liechtenstein v. Guatemala) I.C.J. Rep. 111 [1953]

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# Abbreviations and Terminology

| | |
|---|---|
| ADR | Alternative Dispute Resolution |
| AG | Advocate General |
| ART. | Article and articles |
| ATF | Swiss Federal Court case law |
| BIIA/ Recast | Council Regulation (EC) No 2201/2003of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (Brussels II A)<br>Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast) |
| BIC | Best interests of the child |
| BID | Best interests determination |
| Brussels I/ Recast | Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters<br>Regulation (EU) No 1215/2012 of the European Parliament and Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) |
| CP | Child protection |
| CJEU/ ECJ | Court of Justice of the European Union |
| COE | Council of Europe |
| Court of Cassation, Cour de Cassation, Corte di Cassazione, Cass. | National Supreme Court, in particular in France and Italy |
| Court, court | Capital letter refers to a specific Court. Small letter refers to courts in general |
| ECHR/ ECtHR | European Convention on Human Rights/ European Court of Human Rights |
| EP/ EC | European Parliament/ European Commission |
| EU Council/ European Council | Council of the European Union |
| EU Property Regimes' | Council Regulation (EU) No 1103/2016 |

| | |
|---|---|
| Regulations | implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes<br>Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships |
| EU Regulation and Directive | Regulation has binding legal force within the national legal order. Directive is enacted through national law, and it may require transposition into national law through a domestic act |
| Ff. | Following pages citation |
| Gift inter vivos | Donations during the life of the deceased |
| HC(s) | Hague Convention(s) |
| HR | Habitual Residence |
| Ibid. | Ibidem concerning already cited sources |
| ICJ | International Court of Justice |
| ISS/s | International Social Service/s |
| IHNJ | International Hague Network of Judges |
| LDIP/SPILA | Loi Fédérale Suisse sur le Droit International Privé/ Swiss Act on Private International Law |
| Member State, Contracting State, state | Member State generally refers to the EU. Contracting State generally refers to a Convention. 'state' generally refers to a state of the US |
| OECD | Organisation for Economic Cooperation and Development |
| PR | Parental Responsibility, also comprising custody and visitation |
| Professio juris | Choice of applicable law |
| Professio fori | Choice of forum |
| Ratification, signature | Ratification is the process through which a State agrees to implement a Convention. Signature indicates the approval of a State to subsequently ratify a Convention |
| Reservation | Indicates the State objection to a single provision or to the whole Convention towards another State |

| | |
|---|---|
| SCC/ SPC | Supreme Court of Canada/ Supreme People's Court of the People's Republic of China |
| Succession Agreement/ Pacte successoral according to the Succession Regulation 2012 | Type of disposition of property upon death the admissibility and acceptance of which vary among the Member States. The binding effects of such an agreement as between the parties, should be without prejudice to the rights of any person who, under the law applicable to the succession, has a right to a reserved share or another right of which he cannot be deprived by the person whose estate is involved |
| TF | Swiss Federal Tribunal/ Swiss Federal Court |
| TFEU | Treaty on the Functioning of the European Union |
| UAGPPJA | Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act 2007 |
| UCCJEA | Uniform Child Custody Jurisdiction and Enforcement Act 1997 |
| UK/ UKSC | United Kingdom/ UK Supreme Court (formerly House of Lords) |
| UNCRC/ UN CRC | New York Convention on the Rights of the Child 1989/ Committee on the Rights of the Child |
| UNCRPD | Convention on the Rights of Persons with Disabilities 2006 |
| US | United States of America |

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# Introduction

## Book Structure

**1.** This monograph covers a transversal study over cross-border family issues involving marriage, registered partnership, parent-child relationship, divorce, custody, visitation, relocation, maintenance, property regimes, succession, surrogacy, migration, international protection of incapacitated adults. Other than this *Introduction*, the book is divided into six parts. Four parts (II to V) are considered *thematic parts*. The first and last parts (I and VI) concern the *bases* of, and the *general conclusions* to, this study, respectively. The parts are presented as follows:

I. Concept and Operation of Habitual Residence
II. Marriages, Registered Partnerships and Property Regimes
III. Divorce, Parental Responsibility and Maintenance
IV. International Protection of Adults
V. International Successions
VI. The Future Prospect: Conclusive Remarks

**2.** Book *Parts* are composed of chapters each of which examines specific family issues such as historical roots and evolutionary process of habitual residence, tax residency, ordinary residence, domicile, nationality, forum shopping, *forum conveniens, lis pendens*, jurisdiction of administrative authorities over marriage and partnership, parent-child relationship, property relations, unaccompanied minors, intercountry assessments, child and spousal support, modern connecting factors, succession planning, alternative adjudication models. Each *Part* and related *chapters* explore a specific family context wherein habitual residence may, or indeed does, play a pivotal role in determining international jurisdiction and applicable law. *Chapters* are divided in to sections and subsections in accordance with the degree of analysis.

**3.** *Parts* also cover interconnected family contexts, involving a particular *beneficiary* of Private International Law, adults or children, sometimes both of them as a family. In this regard, *synergies* between multilateral legal

instruments, the *coordination* of family law provisions and the related *intradisciplinary* operation of habitual residence are further examined.

**4.** A conclusion to each *Part* features *final proposals.* These are intended to support possible future legislative work, in particular at the Hague Conference on Private International Law, the United Nations Committee on the Rights of the Child, the European Commission of the European Union, as well as to encourage harmonisation at the State level. They advise on final objectives to achieve through specific instruments such as *soft-law instruments, alternative adjudication models, and comparative studies*. The recourse to final proposals allows for this extensive work to serve a "concrete purpose", a target to be achieved, thus for the present study not to be lost in the depths of our minds (*cit.* William Walker Atkinson, emphasis added). In substance, this book specifically targets: (i) A harmonisation of the elements, factors, of habitual residence; (ii) A uniform operation of habitual residence towards consistency and continuity in international family law as to the determination of the competent court and applicable law; (iii) The reducing of judicial fragmentation among the Court of Justice of the European Union and national courts' practices, excluding a technical or artificial definition of habitual residence; (iv) The introducing of alternative, modern, rules to support, derogate from or replace habitual residence in specific contexts.

# Background

**5.** "International case law demonstrates the inconsistent treatment of habitual residence by courts across the globe. While the Abduction Convention strives for unanimity, courts determine habitual residence on their own terms. Some look to parental intent, some look to time, some look to the child's integration, and some weigh all of the facts in the case. Courts have necessarily embedded their own brands of habitual residence as a result of the Abduction Convention's limited guidance, a shortcoming that the 1996 Convention retains. Parents thus face a lack of uniformity among international courts. They further face uncertain determinations in the courts that lack a time-bound and categorical approach to habitual residence. Private international law therefore demands a uniform, concrete standard for jurisdiction in cross-border cases"[1].

**6.** Habitual residence[2] in international family law is topical with regard to the determination of international jurisdiction[3] and applicable law. It is a factual

[1] T. M. HEINE, Habitual Residence, Home State, and Cross-Border Custody Jurisdiction: Time for a Temporal Standard in International Family Law, *Vermont Law School publications*, 2011, p. 68.

[2] The term 'residence' does not always refer to habitual residence. In specific circumstances, it indicates 'temporary', '*quasi*-habitual', 'prospective', or 'provisional' residence, intended to determine a prospective acclimatization in contexts whereby residence has not reached yet a habitual character. In other circumstances, the term corresponds to 'ordinary', 'permanent', or tax/ fiscal

notion *quasi*-standardised by the Hague Conference on Private International Law[4], intentionally without an international definition being specified[5]. The reason for such *legal vacuum* is that habitual residence should better respond to proximity through a *fact-based approach* revealing the place of a 'family's life' and 'family's home'. A different interpretation[6] may be required for the identification between the place of *the child's life and home/ adult's life and home.* The inquiry adopted here identifies a set of *common factors*, which should provide a habitual residence harmonised assessment through a child's and adult's separate perspectives. Such an assessment should occur at a *particular moment in time*, according to the relevant treaties and/ or national private international law or conflict-of-law rules[7] referring to habitual residence as a primary, alternative, subsidiary connecting factor[8].

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residence. In this same respect, domicile and nationality may also support the habitual residence assessment. In this study, the term 'assessment' implies the identification of elements/ factors that are useful to determine the habitual-residence jurisdiction and law, which the beneficiary is actually close with, and are considered the most suited to fulfil the proximity principle for the effective protection of the beneficiary's interests.

3 In private international law the meaning of international jurisdiction refers particularly to the rules determining the competent court. R. MICHAELS, Jurisdiction, Foundations in: J. BASEDOW *et al.* (eds.), Forthcoming, in: Encyclopedia of Private International Law, 2016.

4 Reference is exclusively made to the field of international family law. This is the area that governs the assessment of habitual residence in cross-border *civil* relationships involving families. The cross-border context indicates a scenario that is *inter*-country when involves more than one State (*i.e.* Italian-Swiss, French-German). In some circumstances, the *intra*-country territorial context, such as within the United States or the United Kingdom, will be considered. The term '*quasi*-standardised' does not imply a harmonised definition of habitual residence, which is excluded in this study. It contemplates the uniform fact-based approach of habitual residence that is supported in this study. In practice, standardisation is not fully achieved due to the fragmented national reference.

5 P. LAGARDE, Explanatory Report on the Hague Convention 1996, HccH publications, 1998, § 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 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. It would have indeed risked disturbing the interpretation of numerous other conventions utilising the same concept"; P. R. BEAUMONT/ P. MCELEAVY, The Hague Convention On International Child Abduction, 1999, p. 89: "To preserve this versatility the Hague Conference has continually declined to countenance the incorporation of a definition"; J. MURPHY, International Dimensions in Family Law, 2005, p. 215: "Although the term 'habitual residence' was deliberately left undefined in the Hague Convention […]".

6 A. LIMANTE, Establishing habitual residence of adults under the Brussels IIa regulation: best practices from national case-law, *Journal of Private International Law*, Vol. 14, No. 1, 2018, p. 163, "However, until now the CJEU has, in family law matters, mainly advised on the interpretation of a child's habitual residence in cases of parental responsibility and child abduction, while habitual residence of adults was addressed only marginally, solely as a link to the habitual residence of a child. The concept of an adult person's habitual residence for the purposes of Article 3 of the Regulation is still awaiting authoritative clarification by the CJEU".

7 This study also examines national conflict-of-law rules, although its primary objective is to analyse the treaty-based implementation of habitual residence.

8 Personal connecting factors refer to the rules of private international law that operate to establish a particular nexus between an individual and the competent forum and *jus*. The interplay of connecting factors is valued in specific family contexts analysed in this study. In international family law the main connecting factors, other than habitual residence, are domicile and nationality. Physical presence is also gaining success, particularly towards the determination of jurisdiction in the field of migration that has important links with private international law. It also applies in the context of urgent and/ or provisional jurisdiction in the field of child and adult protection.

**7.** This study is not intended to provide, or to argue in favour of, an international uniform definition of habitual residence. An artificial, legalistic, interpretation should be avoided[9]. A similar approach would lead to misleading interpretations of its original aim[10]. The latter refers to the assessment of a qualified degree of factual proximity in an increasingly transnational mobile family context. Qualified proximity contemplates the realistic and actual nexus established between the beneficiary (children and adults) of justice[11] and the State internationally competent[12], whose law may be applicable[13], exercising jurisdiction.

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9 P. STONE, The Concept of Habitual Residence in Private International Law, *Anglo-American Law Review*, 2000, p. 343: "Despite constant judicial emphasis on the need to adhere to the ordinary meaning of the concept, and to avoid undue artificiality or technicality". See also D. HILL, Private International Law, 2014, p. 16: "There is no single accepted definition of the concept, with a policy decision taken not to provide such a definition in order to leave habitual residence from the rigid legal rules that have so bedevilled the determination of domicile"; J. YOKOYAMA, Private International Law in Japan, 2017, p. 33: "The factual aspect of the concept has been stressed in Japan. It is true that it should be as free as possible from elements fictitious or artificial".

10 The recourse to habitual residence in international family law, reflects the difficulties encountered in the past with domicile and nationality in their international implementation. The principal objections are that domicile is corroborated by an artificial or technical definition requiring a permanent intent. In addition, there is a non-negligible distinction between the common legal notion and the civil legal notion of domicile. On the other hand, nationality may face remoteness, as well as uncertainty, with regard to the question of multiple nationalities. Therefore, habitual residence should neither overlap with legal interpretations/ definitions, nor require legal conditions for its establishing. See M. KEYES, Jurisdiction in International Family Litigation: A Critical Analysis, *UNSW Law Journal*, Vol. 27 (1), 2004, p. 47: "Ordinary residence is a preferable basis of jurisdiction to citizenship and domicile, in that it is more likely to indicate a real and substantial connection between the forum and at least one of the parties. It arguably represents the most practically significant connection between individuals and states, and the fact that it requires proof only of a short-term intention to remain within a particular jurisdiction means it is more responsive than domicile to the conditions of modern life. According to STONE, '[h]abitual residence may fairly be regarded as having eclipsed domicile […]". Ibid. BEAUMONT/ MCELEAVY, p. 89: "The strength of habitual residence in the context of family law is derived from the flexibility it has to respond to the demands of a modern, mobile society; a characteristic which neither domicile nor nationality can provide". P. M. NORTH/ J. J. FAWCETT, Cheshire and North's Private International Law, 12th edn., Butterworths, London, 1992, p. 166-169. P. ROGERSON, Habitual Residence: The New Domicile?, *International and Comparative Law Quarterly*, Vol. 49 (1), 2000.

11 This reference concerns access to justice. This is a fundamental principle of international law, well-established in many treaties *inter alia*: the European Convention on Human Rights (art. 6 and 13) and the UN Universal Declaration of Human Rights (art. 8 and 10). Access to justice is intended in this study as the corresponding right/ obligation to access/ provide effective legal remedies in cross-border family relationships (see General Assembly resolution 67/1; Opinion of Advocate General Colomer on Roda Golf & Beach Resort SL, 5 March 2009, C-14/08).

12 K. BOELE-WOELKI, Common Core and Better Law in European Family Law, 2015, p. 357: "The role of habitual residence as an autonomous connecting factor is important in so far as this criterion is the most appropriate by which to express a geographical and material proximity between the dispute or the parties and the court of the competent jurisdiction, and to guarantee a good administration of justice and respect for procedural justice. […] On the other hand, the judges who are geographically close to litigious facts are the most suitable to estimate the situation and to take appropriate measures […]. When the courts are in close proximity, it is easier to establish disputed facts because investigations, hearings and inquiries can be carried out more easily, and information is more accessible".

13 The question of parallelism between forum and *jus* depends on the contextualised private international law rules. In its absence, habitual residence may still establish the link between the individual and the applicable law.

**8.** Qualified proximity, and the corresponding habitual residence fact-based approach, refer to a circumstantial anamnesis[14] that should consider specific elements determining the place of an individual's regular life and home at a relevant time. Elements should be indicated in a uniform and *quasi*-exhaustive manner. In particular, their relevance, weight, and hierarchical role should be assessed clearly, possibly through an explanatory reference or guide[15]. This fact-guided, as opposed to a legally-defined, interpretation of habitual residence should lead to a uniform inter-country[16] operation of habitual residence in accordance with the treaty-based family scenario[17]. The aim and operation of habitual residence have been adapted to the transnational setting, in that a national or international definition is systematically avoided. Thus, habitual residence does not relate to a single national interpretation, although over the years the domestic legislative efforts in conceptualising it within national legal orders have affected its foundations. In particular a uniform interpretation of habitual residence would be required in a specific family context[18], even if an intra-disciplinary[19] approach, within the whole

[14] This study adopts the term 'anamnesis' with reference to the result of the assessment. It indicates a comprehensive solution which considers all the circumstantial factors from a beneficiary's perspective (*i.e.* child, adult).

[15] The possibility of adopting a handbook in the framework of the joint activities of the Hague Conference on Private International Law and the European Union, is primarily supported in this study. The UN system is also relevant for inquiry. In this regard, one option would be to submit the current proposal within the framework of the UN Committee on the Rights of the Child (UNCRC) and the UN Committee on the Rights of Persons with Disabilities (UNCRPD) activity towards the approval of a general comment. A regional solution identified in this study, relates to an explanatory guide within the activities of the Council of Europe Committee of Ministers. A modern Resolution along the lines of the Resolution (72) 1 On the Standardization of the Legal Concepts of "Domicile" and of "Residence", 18 January 1972, may be submitted before the COE Member States.

[16] This study argues that habitual residence should operate as an inter-country concept, fundamentally by endorsing it in a uniform manner, and avoid domestic 'free-standing' legislative adaptations. A fragmented national reference would intrinsically clash with its harmonised treaty operation. The habitual residence endorsement outside treaties should consider its factual identity and its international dimension in specific family contexts, pursuing legal continuity in the realm of international family law. In practice, its assessment should be compatible with the case law analysis rendered in analogous cross-border family situations. Particularly within intra-EU cases, the domestic implementation of habitual residence should rely on the CJEU family law guidance depending on the beneficiary's perspective. In inter-EU cases, this study recommends to still adopt the supportive guidance of the CJEU, as a regional uniform practice, and to refer to the national comparative case law analysis inherent in the area of family law at stake. The latter methodology is also advised in cross-border cases not involving the EU.

[17] S. OTHENIN-GIRARD, commentaire ATF 5A_809/2012, 8 January 2013, p. 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*".

[18] M. ZHANG, Habitual Residence v. Domicile: A Challenge Facing American Conflicts of Laws, *Maine Law Review*, Vol. 70 (2), 2018, p. 183: "The growing trend in favor of habitual residence is readily discernible—not only in areas of family law, but also in the areas of commercial law in general". Note 6, LIMANTE, p. 164: "As was repeatedly held by the CJEU, 'habitual residence' in the context of

international family law area, should not be excluded. The importance of recalling a uniform operation of habitual residence, lies in the respect of fundamental guiding law principles such as predictability[20], legal certainty[21] and continuity[22].

**9.** Currently, the international interpretation of habitual residence is left to a national judicial or administrative authority[23]. National authorities may refer to their domestic *quasi*-definition or *contextualised legislative reference*[24] of habitual residence[25]. They may employ their *full discretion* in the use of factors, relying either on their national case law or on the case law of the Court of Justice of the European Union applicable to different contexts, which could result in conflicting national anamneses[26]. In absence of any international

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the Regulation should not be directly linked to any national concept and should be kept in line with the case law of the CJEU".

19 Intra-disciplinary, in this study, consists in the uniform operation of habitual residence, through similar factors, but different beneficiary's perspective (child or adult), within the whole area of international family law. It is argued that there are specific factors that can be implemented in both children's and adults' contexts, which should be interpreted from the beneficiary's viewpoint (*cf. infra* part III, chapter I).

20 M. PFEIFFER, Legal certainty and predictability in international succession law, *J. Priv. Int. Law*, Vol. 12, No. 3, 2016, p. 566: "The author looks at the extent to which the provisions of the EU Succession Regulation provide for legal certainty and predictability in enabling EU citizens to plan their international estates in advance".

21 G. BIAGIONI, Jurisdiction in Matters of Parental Responsibility Between Legal Certainty and Children's Fundamental Rights, European Papers, Vol. 4, No. 1, 2019, p. 289: "For this reason, in accordance with the proximity principle and having in mind the objective of legal certainty, it is for the legislator to single out the connection that, in the abstract, is seen as the most consistent with the best interests of the child, while domestic courts are only expected to verify its existence in each case".

22 Predictability, in this study, refers to the principle according to which any individual, prior to the intervention of the authority, judicial or administrative, or to the effects of the applicable law, both determined through habitual residence, should know in advance if the place where he or she lives, that he or she considers the place of his/ her life and home, is equally considered as such from a legal point of view. Certainty, in this study, indicates the required clear-cut determination of habitual residence allowing effective access to justice. Continuity, in this study, denotes the consistent assessment and operation of habitual residence among judges, central authorities and all other actors, in similar circumstances.

23 G. P. ROMANO, Conflicts between parents and between legal orders in respect of parental responsibility, in: Yearbook of Private International Law, Vol. 16, 2015, pp. 129-166 doi: 10.9785/9783504384784-007. An interview carried out by the present author with the Swiss Central Authority revealed that they are rarely competent over the habitual residence anamnesis, which is more left to the tasks of the judicial authorities.

24 A definition explains the meaning of a word. This study argues that the national references to habitual residence indicate the contextualised interpretation of the notion in which additional factors should be assessed, without providing a clear or concrete definition. In some circumstances, reference is made to *quasi*-definition, which is employed interchangeably with 'contextualised legislative reference', when specific factors are mentioned in the domestic provision, although without fully endorsing a legal definition.

25 J. THIBAULT, La notion de « résidence habituelle » dans les affaires de divorce à l'épreuve des interprétations anglaise et française : une harmonisation en danger ?, in: Les blogs pédagogiques de l'Université Paris Nanterre, 2018. Available at: <https://blogs.parisnanterre.fr/content/la-notion-de-«-résidence-habituelle-»-dans-les-affaires-de-divorce-à-l'épreuve-des-interprét>.

26 Note 6, LIMANTE, p. 164: "However, the Court's own interpretation of "habitual residence" is far from uniform – it varies depending on the area of EU law and instrument at issue. Therefore, interpretations used in other EU policy areas cannot be simply copied for the assessment of habitual

guidance, the family relation at stake, taking place in a transnational dimension, may encounter different national interpretations of habitual residence applicable within the frame of the same handled case. A situation in which different national interpretations of habitual residence are applicable, may result in locating *multi(-habitual) residences*[27]. In such a context, the use of the term 'habitual', intended to denote a *sufficient degree of continuity*[28] of a *settlement*[29] in one particular place of life and home, will have realistically vanished. This situation would ultimately lead to 'multi-national' allegedly *competent* jurisdictions[30], otherwise said conflicting jurisdictions, as opposed to the international *competent* jurisdiction of a 'multinational' entity or, specifically, a court[31].

**10.** This study adopts a *two-fold test approach* aimed at assessing habitual residence in a uniform manner. The approach relies on the treaty-based and the comparative case law analyses duly provided[32]. According to this method, specific *decisive elements* should be primarily applicable to the great number of

residence under the Regulation as the content of this concept depends on the contexts where it is used. In national law of the EU Member States, there are many terms developed to define a person's ties with a state: one would find such concepts as 'domicile', 'residence', 'permanent residence', 'habitual residence', 'temporary residence', 'stay', which are used in many areas, including family and succession law, social security, tax and migration matters. In many aspects those concepts overlap, deceivingly inviting national courts to apply purely national law criteria for handling habitual residence issues in the context of the Regulation. Several examples can be given".

27 The issue of multi(-habitual) residences arising from different national interpretations of habitual residence, should not be glossed with the other issues, examined in this study, concerning alternate or concurrent habitual residence. The latter notions refer to the situation in which an individual has, through a factual settlement, established two habitual residences in two States, either at a different, or at the same, point in time. See G. P. ROMANO, Quelques remarques sur le nouveau Règlement n° 1103 du 24 juin 2016, in: FamPra.ch, 1/2019, p. 45: "*C'est que la recherché de la résidence habituelle des époux – ou de l'époux, demandeur ou défendeur selon les cas, dont elle est pertinente aux fins de la compétence – donne souvent du fil à retordre aux tribunaux des Etats membres. Et dans les cas d'une dualité ou pluralité de résidences réelles et régulières entre lesquelles les époux ont l'« habitude » de distribuer leur vie internationale* […]. *Il n'est dès lors pas surprenant que les juges ont tendance à considérer que si l'une de ces résidences se trouve sur leur territoire, cela suffit pour fonder leur compétence*".

28 In *re Bates* [23 February 1989] WL 1683783.

29 Ibid.

30 G. P. ROMANO, Vers des tribunaux transnationaux pour les familles transnationales? L'exemple de la responsabilité parentale, *Semaine Judiciaire*, II 2, 2019, p. 275: "*Chacun de ces Etats, notamment les Etats de résidence des parents dont chacun est «candidat» à recevoir la résidence future, post-séparation, du mineur, a «voix au chapitre», détient le pouvoir de participer à la détermination du régime de garde et des relations personnelles. Seulement, les juges de ces deux Etats ne se prononcent pas ensemble, en même temps, conjointement et collégialement, mais bien de manière disjointe, chacun de son côté, au moyen des décisions mononationales, rendues à des moments différents*".

31 Ibid., p. 246: "*Un litige italo-suisse ou helvético-chinois opposant les parents d'un enfant italo-suisse ou helvético-chinois ne peut qu'être soumis à un tribunal «mono-national» — ou bien italien ou bien suisse ou bien chinois —, non pas à un tribunal transnational, binational ou mixte, italo-suisse ou helvético-chinois, qui précisément n'existe pas*".

32 The following jurisdictions have been significantly useful for the comparative law analysis subject of this inquiry: Australia, Brazil, Canada, China, Denmark, France, Germany, Italy, Jamaica, New Zealand, Portugal, Russian Federation, Seychelles, Singapore, South Africa, Spain, Switzerland, the Netherlands, Turkey, United Kingdom and United States.

common cases[33]. On a subsidiary basis, additional *non-decisive elements* may apply[34]. This two-steps process constitutes the two-fold test approach. The decisive and non-decisive elements will be indicated in the final proposals of each book part. The exclusion of specific elements, *irrelevant* for the determination of habitual residence, will contextually occur.

**11.** The two-fold test approach should be supported by complementary rules applicable in specific circumstances identified as borderline cases[35]. In the latter scenario, the recourse to *tie-breaker rules*[36] is envisaged. These rules refer to the continuing[37] physical presence and the centre of family interests. Furthermore, when habitual residence cannot be determined, or is not established, the use of *replacing rules* is proposed. These are *prospective acclimatization*[38] or mere presence[39].

**12.** Ultimately, the two-fold test approach should rely on specific derogation rules founded on the principle of better appropriateness. The operation of such rules should be duly contextualised. Specifically, the principle of (best) interests[40] should trigger derogation from habitual residence in the context of child and adult protection. In addition, the rules on transfer of jurisdiction and on *lis pendens* should govern the procedure for such a derogation[41].

**13.** The employment of new judicial, non-judicial, *quasi*-judicial mechanisms is considered in this inquiry. First reference is made to the role of inter-country child assessments as a non-judicial, collaborative, practice. The role of

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33 In this study, they are interchangeably referred to as 'leading' or 'topical' cases. In such a scenario, the issue with habitual residence refers to the sole absence of international guidance, which the two-fold test approach should provide.

34 These may also be considered as complementary to the key elements.

35 These refer to alternate or concurrent habitual residences (*cf. infra* part I, chapter IV, section III).

36 These rules should determine the existence of a principal habitual residence. The term 'tie-breaker rules' refers also to the OECD Model Convention method for the assessment of tax residency. The latter taxation approach inspired this study. The term 'tie-breaker rules' holds a different scope here, which is to face and solve conflicts of habitual residence determination. Albeit, the methodology of the two contextualised terms is similar (*cf.* part I, chapter III, section III).

37 The term 'continuing' indicates the regular degree of presence that is in principle required for the individual's settlement. Such a presence implies that a qualified degree of proximity, established at a relevant time, is maintained through regular contacts with that particular place of settlement.

38 Prospective acclimatization indicates the individual's stay in one country that is not yet habitual. It refers to a prospective habitual residence, a situation of closest connection in absence of habitual residence (*cf. infra* part I, chapter IV, section IV).

39 In the context of the 'tie-breaker rules', physical presence freezes jurisdiction and/ or applicable law in the place of principal habitual residence, while in the situation concerning the absence of habitual residence, physical presence replaces habitual residence. The degree of proximity differs in the two contexts in that is a continuing physical presence in the former, and a mere presence in the latter, scenario.

40 This fundamental principle in the field of child protection is enshrined in art. 3 of the UN Convention on the Rights of the Child 1989. This study supports a similar beneficiary-centred approach also in contexts involving adults (part IV).

41 Transfer of jurisdiction is a rule envisaged in the context of parental responsibility. This study advocates for its operation within the whole area of international family law (*cf.* part I, chapter IV, section V).

mediators, curators, trustees, social workers and child professionals is fundamental. Their activity may come into play prior to the intervention of judges. The International Social Service (hereinafter ISS)[42] represents a clear example of how international coordination and cooperation are relevant to assess the interests of children and families through a multidisciplinary approach[43]. The main innovation brought by such assessments is that they allow a *collaborative way* across borders to determine, *inter alia*, if the State in question represents the child's place of life and home. Why could this assessment not amount to an additional effort of two national judicial authorities[44] to determine which place, relying on specific elements, would better indicate a sufficient degree of stability in the best interests of the child? Again, why could this assessment not also be extended to the adult's habitual residence? These two questions are relevant to this inquiry, particularly when the habitual residence determination proves complex in the field of child and adult protection.

**14.** Modern alternative judicial or *quasi*-judicial resolution methods refer to *super partes* entities. This study supports the guiding interpretation of habitual residence provided by the Court of Justice of the European Union. In this regard, it will be argued that a special, supranational and impartial, instance may be established according to the mandate and the prerogatives of the Luxembourg Court. Such an instance should intervene in conflicting interpretations of habitual residence arising out of national practices[45]. A similar proposal is envisaged in the fields of international protection of children and adults with reference to the activities of the UN Child Rights Committee and the UN Committee on the Rights of Persons with Disabilities.

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42 Typical assessments are those indicated in the HC-1996, art. 32(a): 'report on the situation of the child'. These are also called 'welfare reports', or 'home studies'. Substantially, their aim is to prove whether the State of the child's presence – where he or she lives and goes to school – constitutes the right family environment for his/ her harmonious development. ISS is sometimes mandated by central authorities, or even by judges and curators, to conduct (intercountry) child assessment reports.

43 S. PANNAIKADAVIL-THOMAS/ V. BUMBACA, The role of international social services in private international law, in: Yearbook of Private International Law, Vol. XIX, 2017/2018, p. 534.

44 See *i.e.* 'UK-Pakistan Judicial Protocol on Children Matters', 2003, <https://www.gov.uk/government/publications/pakistan-child-abduction/pakistan-child-abduction>; and 'Judicial Protocol Regulating Direct Judicial Communications Between Scotland, and England & Wales in Children's Cases', 2018, <https://www.judiciary.uk/wp-content/uploads/2018/07/judicial-protocol-cross-border-uk-cases-july2018-1.pdf>. To a similar extent, although in different contexts, the 'OECD coordination model', for the resolution of conflicts arising out of individual's and non-individual's tax residency determinations, or the 'Eurojust cooperation model', should be further explored in relation to the area of international family law. Concerning the Eurojust cooperation model, it is said that: "*Ensuite, les autorités compétentes concernées doivent commencer à coopérer et à coordonner leurs actions pour éviter de gaspiller les ressources, d'effectuer des tâches redondantes ou d'enfreindre le principe ne bis in idem. Dans la plupart des cas, le dialogue, la confiance mutuelle et la coordination entre les autorités compétentes permettent de trouver une solution.* […] *Eurojust occupe une position privilégiée pour soutenir les efforts déployés par les autorités concernées pour coopérer et trouver des solutions* […]".

45 This is particularly, but not only, the case of concurrent habitual residence.

Lastly, it is suggested that recourse to arbitration schemes in the international family law area should be encouraged as an amicable out-of-court dispute resolution[46].

[46] Note 30, ROMANO.

# Part I: Concept and Operation of Habitual Residence

**15.** This Part is composed of four chapters. *Chapter I* deals with the historical background of habitual residence. *Chapter II* analyses the national operation of habitual residence. *Chapter III* confronts the interplay of habitual residence and other connecting factors. *Chapter IV* provides the initial guiding directions for the two-fold test approach supported in this study. The *Conclusion* refers to a short list of proposals relating to this Part.

## Chapter I: History and Origins

**16.** The concept of habitual residence as an inter-country[47] connecting factor was mentioned for the first time in the Hague Convention on Civil Procedure 1896[48]. The recourse to habitual residence in the said Convention is not apparent. Part of the academic opinion alludes to a bilateral French-Prussian Treaty 1880 in which the notion was already employed, potentially deriving from the German concept known as *gewöhnlicher Aufenthalt*[49]. With no further enquiry into the operation of habitual residence within the said Convention[50], mention of it serves to underline the historical trans-national roots of habitual residence which date back to more than one century ago. A detailed analysis of habitual residence within the treaties adopted during the 20th and 21st Centuries will be helpful to identify the origins of this concept to date.

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47 Ibid. Introduction and fn. 16.

48 Art. 15: "*Dans tous les cas, le certificat ou la déclaration d'indigence doit être délivré ou reçu par les autorités de la résidence habituelle de l'étranger, ou, à défaut de celle-ci, par les autorités de sa résidence actuelle*".

49 M. VAN HOOGSTRATEN, La codification par traités en droit international privé, *Recueil Des Cours*, Vol. 122, 1967, p. 359; L.I. DE WINTER, Nationality or Domicile? The present state of affairs, *Recueil Des Cours*, Vol. 128, 1969, p. 423; *Académie de droit international de La Haye, Recueil Des Cours*, Martinus Nijhoff, II, *tome* 233, 1993, p. 55.

50 This instrument falls outside the area of law pertinent for this inquiry.

# Section I Hague Conventions and Social Justice

## § I. Historical Roots of Habitual Residence

**17.** The first use of habitual residence within the activities of the Hague Conference on Private International Law refers to the *Guardianship Convention*[51]. The importance of this Convention lies in the fact that it has been the only international family law treaty preserved within the framework of the Treaty of Versailles[52]. Following this Treaty, important changes occurred to the World's legislative assets, particularly due to the creation of the International Labour Organisation, in 1919, as a desired universal social justice.

**18.** International Labour Organisation policies brought significant developments to legislation concerning children. In particular, reference is made to the endorsement of important legal instruments such as the Minimum Age (Industry) Convention 1919[53], the Hours of Work (Industry) Convention1919[54], and the Maternity Protection Convention 1919[55]. These aimed to promote social welfare and the protection of individuals, especially women and children. With the same noble intent, in 1924 the League of Nations concluded the Geneva Declaration of the Rights of the Child (known as *Declaration of Geneva*). This Declaration constituted the first international human rights legal instrument advocating for the child's well-being, addressing children's rights.

**19.** The Hague, as a geographical nexus, was involved directly in the context of social justice, prior to the intervention of ILO and the League of Nations. It was the venue for the promotion of peace and disarmament, which brought to the endorsement of the Hague conventions 1899 and 1907[56]. In parallel, the Hague

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51 Convention relating to the settlement of guardianship of minors of 12 June 1902 available only in the French language <https://www.hcch.net/en/instruments/the-old-conventions/1902-guardianship-convention>. See P. NYGH, The Hague Convention on the Protection of Children, *Netherlands International Law Review*, XLV, Vol. 28, 1998, p. 2: "The Convention (1902) [...] reflected the legal and social assumptions that most of those states shared: firstly, that the state had a fundamental interest in the children who were its subjects; secondly, that the most relevant tie which connected the child to the state was that of nationality, which the wife and children shared by force of law with the husband and father, thirdly, that the widowed mother required male supervision in her task of bringing up the children which should be the prerogative of the authorities of the nationality of her late husband, ever if she returned to her homeland, and fourthly, that protection of patrimonial interests of extended family was as important as the personal care of children".

52 This referred to a context of worldwide peace that brought World War I to an end. See A. DYER, The Internationalization of Family Law, *Davis Law Review,* Vol 30, 1997, p. 630 ff.

53 Fixing the Minimum Age for Admission of Children to Industrial Employment (eif 1921).

54 Limiting the Hours of Work in Industrial Undertakings to Eight in the Day and Forty-eight in the Week (eif 1921).

55 Concerning the Employment of Women before and after Childbirth (eif 1921).

56 Concerning disarmament, the laws of war and war crimes. In 1899, on the occasion of the Hague peace conference, 26 States were reunited at the Hague following the invitation of the Russian Tsar

Conference on Private International Law had begun its activity on the *progressive unification of the rules of private international law*[57]. It was launched, in 1893, by T.M.C Asser (Nobel Peace Prize 1911)[58].

**20.** The Hague Conference initially endorsed six treaties, principally focused on family law[59]. Beyond the Convention on Civil Procedure (1896), other legal instruments were the Convention '*pour régler les conflits de lois en matière de mariage*' (1902), the Convention '*pour régler les conflits de lois et de juridictions en matière de divorce et de séparations de corps*' (1902), the Convention '*pour régler la tutelle des mineurs*' (1902), the Convention '*concernant les conflits de lois relatifs aux effets du mariage sur les droits et les devoirs des époux dans leurs rapports personnels et sur les biens des époux*' (1905), and the Convention '*concernant l'interdiction et les mesures de protection analogues*' (1905).

## § II. Focus on the 1902 Hague Convention on Guardianship

**21.** The Hague Convention on Minor Guardianship was initially ratified by thirteen States[60], mainly belonging to the European Region. Its scope[61] was precisely to govern the determination of guardianship by the law of the Contracting State of the child's nationality (article 1) – the Convention dealt with applicable law only[62]. It extended, by virtue of consular or diplomatic means, the extra-territorial effects of the law of the child's nationality to the Contracting State of his/ her habitual residence[63] (article 2). The law of the Contracting State of the child's habitual residence is applicable if guardianship cannot be determined under the law of the Contracting State of the child's nationality (article 3)[64]. In addition to the Convention on civil procedure and

Nicholas II. A second peace conference took place in 1904, this time based on a US initiative, attended by 43 States.

57 Art. 1 of the Statute.

58 In 1894, European States, including Germany, Austria-Hungary and Russia, which were still empires, reunited at the Second Session of the Hague Conference on Private International Law to agree on, *inter alia*, future activities and policies in matters relating to children. These have developed during the last century until today, becoming pivotal within the Hague Conference's mandate. The latter was endorsed by its current 86 Members (the EU is one of them), having now extended far beyond European borders. Literature can be found in the *actes de la IIe session de la Conférence de la Haye*, available at: <https://www.hcch.net/fr/publications-and-studies/publications2/proceedings-of-the-diplomatic-sessions>.

59 Save the Convention on civil procedures (1896, later 1905 and 1954). Ibid. DE WINTER, p. 376.

60 Germany, Austria, Belgium, Spain, France, Hungary, Italy, Luxembourg, Netherlands, Portugal, Romania, Sweden and Switzerland.

61 The material scope of the Convention covers both minor's person and property (art. 6) – the same as the one provided in the Hague Child Protection Conventions 1961 and 1996 *infra*.

62 *Boll*, Application of the Convention of 1902 Governing the Guardianship of Infant (Netherlands v. Sweden) 1958 I.C.J Rep. 8, p. 55.

63 If the State of habitual residence did not oppose.

64 "*Toutefois, la tutelle du mineur ayant sa résidence habituelle à l'étranger s'établit et s'exerce conformément à la loi du lieu, si elle n'est pas ou si elle ne peut pas être constituée conformément aux dispositions de l'article 1er ou de l'article 2".*

the Guardianship Convention, the HC-1905 Convention '*concernant l'interdiction et les mesures de protection analogues'* had also adopted habitual residence as a subsidiary connecting factor to nationality[65].

**22.** In 1931[66], a Protocol[67] was adopted concerning the international jurisdiction of the Permanent Court of International Justice, the predecessor of the International Court of Justice (hereinafter ICJ)[68]. This marked the first and only ICJ intervention in the operation of the 1902 Guardianship Convention, to some extent concerning the difficulties inherent in the concept of nationality and the importance of guaranteeing child protection in the State of habitual residence[69].

**23.** In 1951, during its seventh session, the Hague Conference approved a statute[70] that equipped the Conference with a legal personality and the creation of a permanent secretariat known as the 'Permanent Bureau'. The intent was also to extend the scope of the Guardianship Convention towards *child protection,* which became an important pillar of the Permanent Bureau's activity.

**24.** In 1958, the ICJ was asked to intervene on the validity of a Swedish protection measure. Sweden represented the child's habitual residence, albeit Netherlands was the country of the child's nationality. This judgment pointed out the usefulness of habitual residence in guaranteeing access to justice in the State of the child's presence where immediate protection is needed.

**25.** The case concerned an infant, Marie Elisabeth, of Dutch nationality residing (permanently)[71] in Sweden, of Dutch father and Swedish mother. In December 1953, Marie Elisabeth's mother died in Sweden. In March 1954, the father – who was already the minor's guardian by operation of Dutch law (article 378 of the Civil code) – filed for registration of guardianship before the Swedish authorities, which was accepted. The same authorities appointed Marie Elisabeth's maternal grandfather as her custodian (*god man*) under their

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65 HC-1905, art. 2: "*L'interdiction ne peut être prononcée que par les autorités compétentes de l'Etat auquel la personne à interdire appartient par sa nationalité* […]"; art. 4: "*Les autorités de l'Etat, sur le territoire duquel un étranger dans le cas d'être interdit aura sa résidence habituelle, informeront de cette situation, dès qu'elle leur sera connue, les autorités de l'Etat dont l'étranger est le ressortissant* […]".

66 Diplomatic sessions on private international law ceased until 1925, because of the WWI, for which the Hague peace conferences occupied the whole scene.

67 Available at: <https://www.hcch.net/en/instruments/the-old-conventions/1931-protocol>.

68 K. LIPSTEIN, One Hundred Years of Hague Conferences on Private International Law, *ICLQ*, Vol. 42, No. 3, 1993, p. 558.

69 Ibid. DE WINTER, p. 426.

70 Entered into force in 1955.

71 B. MACCHESNEY, Case Concerning the Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v. Sweden), The American Journal of International Law, Vol. 53, No. 2, 1959, p. 436.

national law[72]. In April 1954, the Swedish authorities placed the infant under the regime of protective upbringing (*Skyddsuppfostran*)[73], which was a public measure. Accordingly, Marie Elisabeth was placed under the guardianship of a public authority with the purpose of preventing potential harm to the child[74]. In June 1954, the Dutch authorities instituted Marie Elisabeth's guardianship in favour of a deputy guardian, her father being still considered as guardian by operation of law. They therefore appealed to remove the protective upbringing regime. In September 1954 the Swedish authorities dismissed the appeal and cancelled the registration of the father's guardianship. Judicial and administrative disputes followed[75], until 1957 when the Dutch authorities decided to submit a request before the ICJ for judgment over the alleged Sweden's non-compliance with the 1902 Hague Convention. The Dutch authorities challenged the regime of protective upbringing established by the Swedish authorities, relying on the 1902 Convention scope to govern guardianship according to the law of the minor's nationality. The Swedish authorities argued that the father had caused his daughter serious health problems, therefore his guardianship could not apply in Marie Elisabeth's best interests. They further supported that her continuous residence was in Sweden[76].

**26.** The ICJ clarified that the aim of the 1902 Guardianship Convention was to solve conflict of laws related to guardianship matters only. In context, the case concerned public care orders (such as the Swedish upbringing order), therefore the Court maintained that these fell outside the scope of the Convention. According to the Court, such measures were subject to public

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72 M. JÄNTERÄ-JAREBORG / A. SINGER / C. SÖRGJERD, Parental Responsibility, National Report, University of Uppsala, Sweden, 2013, p. 1: "The concept of parental responsibilities is not used in autonomous Swedish legislation. Instead, Swedish law distinguishes between the concepts of custody (vårdnad, chapter 6 Swedish Children and Parents Code) and guardianship ('*förmynderskap*', chapters 9-15 in part Swedish Children and Parents Code)". For the law of that time, please refer to the 1924 Guardianship Act.

73 Ibid. p. 17: "Protective upbringing which constitutes an application of the Law is superimposed, when that is necessary, on either, without bringing either to an end but paralyzing their effects to the extent that they are in conflict with the requirements of protective upbringing".

74 Ibid. p. 18: "Guardianship and protective upbringing have certain common purposes. The special feature of the regime of protective upbringing is that it is put into operation only in respect of children who, for reasons inherent in them or for causes external to them, are in an abnormal situation - a situation which, if allowed to continue, might give rise to danger going beyond the person of the child. Protective upbringing contributes to the protection of the child, but at the same time, and above all, it is designed to protect society against dangers resulting from improper upbringing, inadequate hygiene, or moral corruption of young people".

75 Ibid. MACCHESNEY, p. 436 ff.: "the Swedish Child Welfare Board at Norrköpping placed the child under the regime of protective upbringing in 1954; The Dutch Cantonal Court appointed a deputy guardian who, together with the father, filed opposition against the Swedish decision in 1954. The Dutch Court at Dordrecht discharged the father as guardian in 1954 and appointed another person, Ms Catharina Postema; the Swedish Supreme Administrative Court discharged the maternal grandfather as 'god man' but maintained the regime of protective upbringing. The case reached the ICJ".

76 T. BUCK, International Child Law, 3rd ed. (London and New York, 2014) p. 64.

policy restrictions purported to protect children – the protection of children was not yet contemplated by this Convention[77]. The Court confirmed the principle according to which the law governing guardianship of a minor is that of his/ her nationality. Furthermore, the Court concluded that the obligations of protecting a child according to the (local) law of the State where he or she resides should be respected, even though these are not set out directly in the provisions of the said Convention[78]. The ICJ thus rejected the application of the Netherlands, because no violations of the Convention were found.

**27.** This judgment defined the potential limits of the Guardianship Convention and drew attention to the *intersection of private and public law* measures[79]. In our view, it also brought awareness to the public dimension of private international law[80]. In addition, the decision affirmed the critical absence of child protection within the Convention and allowed for further developments towards the Convention Concerning the Powers of Authorities and the Law Applicable in respect of the Protection of Minors (hereinafter HC-1961)[81].

**28.** Following the work of the Permanent Bureau, the HC-1961 entered into force. This Convention emphasised the broader intent of the Hague Conference to focus on the protection of all minors in respect of their best interests. The latter principle was thus enshrined in this Convention for the first time in the field of private international law.

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77 Ibid.

78 Ibid. p. 67: "In providing that guardianship and, in particular, that the guardian's right to custody should be governed by the national law of the infant, the Convention was intended to determine what law should be applied to settle these points. It was intended, in accordance with the general purpose of the Conferences on Private International Law, that it should put an end to the divergences of view as to whether preference ought to be given in this connection to the national law of the infant, to that of his place of residence, etc., but it was not intended to lay down, in the domain of guardianship, and particularly of the right to custody, any immunity of an infant or of a guardian with respect to the whole body of the local law. The local law with regard to guardianship is in principle excluded, but not all the other provisions of the local law".

79 *Separate opinion of Judge Sir Hersh Lauterpacht*, I.C.J. Reports, 1958, p. 89: "Admittedly, the legal issue as thus expressed by the Parties in their pleadings and Conclusions in the present case touches directly upon a difficult and controversial question which has constituted one of the crucial problems in the sphere of private international law and which brings into prominence the relation between private and public international law".

80 A. MILLS, Rediscovering the Public Dimension of Private International Law in: *Hague Yearbook of International Law*, 2011, p. 14.

81 M. SIMON-DEPITRE, La protection des mineurs en droit international privé, après l'arrêt Boll de la Cour internationale de justice, in: Travaux du Comité français de droit international privé, 21-23e année, 1963, p. 128: "*C'était, vous l'avez dit, un élément accessoire. Dans certains cas, la résidence habituelle jouait, tandis qu'ici la résidence habituelle est au coeur même de la Convention*". In reference to the 1902 and 1961 Hague Conventions.

# Section II International Family Law Conventions after World War II

## § I. Hague Conference Activity During 1950

**29.** With the end of WWII, the Hague Conference concentrated its main activity on important family law topics, in addition to commercial law and procedure, improving the legal framework of the initial treaties adopted at the beginning of 20th Century[82].

**30.** In 1956, the Hague Convention on the law applicable to maintenance obligations towards children was approved[83]. This Convention provides that the law of the child's habitual residence applies primarily (article 1)[84]. The law must be of the Contracting State, the Convention not being *erga omnes* (article 6)[85]. An exception is set out in favour of the law of the forum, if the law of the child's habitual residence does not allow him/ her to exercise the right to maintenance (article 3).

**31.** In 1958, the Hague Convention concerning the recognition and enforcement of decisions relating to maintenance obligations towards children was endorsed[86]. This instrument is complementary to the HC-1956. The Convention provides that the decisions on child's maintenance issued by the competent authorities of one Contracting State should be recognised in all the other Contracting States. The competent authorities are alternatively those of either the debtor's habitual residence or the creditor's habitual residence at the time of lodging, or those of the Contracting State where the debtor has expressly accepted to appear (article 3).

## § II. UN Convention on the Recovery Abroad of Maintenance 1956

**32.** The Hague Conventions are not the only treaties applying to private international law or cross-border family issues, particularly in the case of maintenance. The UN Convention, to which 64 States are parties, is an example of the coordinated efforts, among different entities and institutions, to

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82 Ibid. LIPSTEIN, p. 586 ff.

83 Applicable to 14 States, available at: <https://www.hcch.net/en/instruments/conventions/status-table/?cid=37>.

84 The Convention does not apply over spouses' maintenance (art. 5).

85 Derogation is possible in favour of the law of the forum under three cumulative conditions: a) lodging; b) nationality of the debtor and the child; c) habitual residence of the debtor (art. 2).

86 Applicable to 20 States, available at <https://www.hcch.net/en/instruments/conventions/status-table/?cid=38>.

facilitate the solving of humanitarian problems[87]. This instrument does not directly employ the concept of habitual residence. It refers to residence when it allows a dependent beneficiary to secure an order of maintenance in the place of the respondent's residence. The latter notion refers to mere presence[88]. This treaty is particularly cited here to show evidence of the synergies between various actors of international family law.

## § III. Geneva Convention 1951 and its 1967 Protocol

**33.** The UN has played an important role in issues involving international law *tout court*[89]. This comprises interconnected topics falling under the remedies of public and private international law. Migration, or more precisely, the international protection of migrants, particularly concerning recognised refugees[90] and asylum seekers, touches directly upon international family law.

**34.** The term *habitual residence* is employed a significant number of times in this Convention Relating to the Status of Refugees[91]. For instance, the State of the former habitual residence of a recognised refugee should be determined by the State of his/ her actual habitual residence, in order to assess the (im)possibility of exercising rights and obligations in the former State, ascertaining the (in)applicability of the Convention[92]. More interestingly, article 12(1) refers to the fact that the personal status of a refugee should be governed by the law of his/ her domicile, and in absence of such, by the law of his/ her residence.

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87 Helping in avoiding serious legal and practical difficulties affecting human beings.

88 P. CONTINI, The United Nations Convention on the Recovery Abroad of Maintenance, *St. John's Law Review*, Vol. 31, 1956, p. 12 ff.

89 Public and Private international law.

90 In this study the term 'refugee' may also cover asylum seekers, although for refugee law specialists this terminology would appear somewhat imprecise. According to the International Organisation for Migration (IOM), an asylum seeker "is someone whose claim has not yet been finally decided on by the country in which he or she has submitted it", as opposed to a refugee who is either "a person who qualifies for the protection of the United Nations provided by the High Commissioner for Refugees (UNHCR) […] regardless of whether or not he or she is in a country that is a party to the 1951 Convention or the 1967 Protocol" or "A person [encountering] a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion [under the 1951 Geneva Convention and the 1967 Protocol]. As it proves difficult to always follow this distinction, and given that the private international law remedies apply to asylum seekers and refugees alike (note 5, LAGARDE, p. 555), reference will be made to both terms interchangeably.

91 As well as in its Protocol containing the same provisions. The Convention also refers to the place of residence (without 'habitual' nature). This is the case for the purposes of the refugee's entitlement of rights and obligations attached to the possession of the nationality of the State in which he or she resides (art. 1 lit. E). Additional provisions are contemplated for the purpose of holding various rights and obligations: art. 7(2) refers to three years of residence for the exemption of legislative reciprocity; art. 17(2) for the acquiring of labour rights; art. 10 refers to continuity of residence for the purpose of acquiring a new residence following a 'forced' displacement, or for the purpose of returning to his/ her residence prior to the 'forced' displacement.

92 For the purposes of the Convention, a resident should be entitled to acquire rights and obligations in the same manner as the citizens of that country.

Furthermore, article 14 provides that the artistic rights and industrial property of a refugee should be protected in the State of his/ her *habitual residence*. Article 16 states that refugees should have access to courts in their State of habitual residence.

**35.** One of the indicators to identify habitual residence is the intent to establish a continuing residence of some duration. The latter does not necessitate a minimum period of time. It refers to a significant period of *de facto* residence[93]. Professor Hathaway has given guidance in the past by conceiving a threefold test. This refers to the notion as that particular place where the person has spent a significant period of *de facto* residence of at least one year, where a *de facto* abode was established, as opposed to a merely ongoing transient presence. In relation to *former habitual residence*, Professor Hathaway concludes that it should be the place where a person can legally return[94]. In respect of a *de facto* abode, it is said that this might refer to the person's centre of interests[95] or also the place of a *de facto* home[96].

**36.** The handbook to this Convention states that a refugee may have different former habitual residences. It clarifies that the assessment of at least one of them would be sufficient to allow his/ her return therein[97]. According to Professor Hathaway's interpretation[98], the term 'residence', which should indicate *simple residence* or *temporary residence*, would be composed of two factors: a) physical presence; b) intention to establish residence[99].

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93 *Maarouf v. Canada* No. 93-A-343, Trial Division, Cullen J., Toronto, November 30; Ottawa, December 13, 1993, p. 3: "The Board erred in dismissing Kuwait as a 'country of former habitual residence' on the basis that the applicant was not legally able to return there. With respect to Lebanon, the Board erred in finding that the applicant had not established a significant period of *de facto* residence in that country".

94 J. HATHAWAY, The Law of Refugee Status (Toronto: Butterworths, 1991) p. 63.

95 A. GRAHL-MADSEN, The Status of Refugees in International Law (Leiden: A. W. Sijthoff, 1966) p. 160.

96 J. HATHAWAY, Refugees and Asylum, in: B. OPESKIN/ R. PERRUCHOUD/ J. REDPATH-CROSS, Foundations of International Migration Law, 2012, p. 184.

97 UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (Geneva, January 1992), § 104: "A stateless person may have more than one country of former habitual residence, and he may have a fear of persecution in relation to more than one of them. The definition does not require that he satisfies the criteria in relation to all of them".

98 Conference 'Families Beyond Borders: Migration with or without Private International Law', 28-29 March 2019, University of Ghent, that both Professor Hathaway and this Author attended.

99 International family law has provided a more adaptable solution by referring directly to the term 'physical presence' within the Hague Conventions 1996 and 2000 on the protection of Children and Adults, respectively, in those circumstances where habitual residence cannot be determined (art. 6 of both the Conventions).

## § IV. Hague Conference Activity During 1960

**37.** In 1961, the Hague Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions was approved[100]. This Convention provides that a testamentary disposition should be valid according to internal law. The latter refers, alternatively, to the laws of either the place where the testament was made; or of the Contracting State of the testator's nationality, domicile, habitual residence at the time it was made or at the time of death; or of the place of the immovables' location (article 1)[101].

**38.** In 1965, the Hague Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions was endorsed, but no ratifications occurred. It afterwards ceased to have effect in 2008. The tendency in the 1960s, reflected by this instrument, was to adopt children from similar socio-legal contexts and not from developing countries as was the case in 1980. This seems to be the main reason that rendered this Convention incompatible with the later practice[102]. The 1965 Convention had referred to habitual residence, together with nationality, of the adopter and adoptee as a primary connecting factor (article 1).

## § V. Specific Focus on the Hague Convention 1961 and the Protection of Minors

**39.** The Convention concerning the powers of authorities and the law applicable in respect of the protection of infants[103] enounces, in articles 1 and 2, the jurisdiction of the judicial and administrative authorities in the Contracting State of the child's habitual residence over his/ her person or property. The same authorities can apply measures provided by their domestic law. This Convention was innovative, compared to the 1902 Guardianship Convention. For the first time it designated the rules governing international jurisdiction and applicable law, following *parallelism*[104]. In addition, the Convention

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100 Applicable to 42 States, available at <https://www.hcch.net/en/instruments/conventions/status-table/?cid=40>.

101 This provision clarifies that the determination of domicile in one place should be governed by the law of that place save derogation for its determination to the *lex fori* (ar. 9). Habitual residence is also mentioned in relation to one of the cumulative conditions for refusal to recognise a decision on testamentary disposition. In this regard, art. 11 provides, *inter alia*, that if the testator was domiciled or habitually resident in the State in which recognition is sought, such decision may be refused.

102 H. VAN LOON, Hague Convention of 29 May 1993 on Protection of Children and Cooperation in Respect of Intercountry Adoption, *International Journal of Children Rights*, Vol. 3, 1995, p. 463.

103 Austria, France, Germany, Italy, Latvia, Lithuania, Luxembourg, Netherlands, Poland, Portugal, Spain, Switzerland and Turkey.

104 The terms 'parallelism' and 'coincidence' will be used interchangeably in this study. They refer to the concentration of forum and *jus* in the same State.

specified mechanisms of cross-border cooperation between the authorities located in both Contracting States of habitual residence and nationality – '*service de renseignements mutuel*'[105].

**40.** The explanatory report to this Convention highlights the reasons for its endorsement: a) the societal changes and evolutions, considering migration and globalisation; b) the increasing issues concerning parental responsibility, therefore the continuing need of child protection; c) the importance to consistently govern child's protective measures, rather than guardianship only; d) the importance of the individual's *effective centre of living*, considered as the principal forum in regulating cross-border matters[106]. If the first three reasons were probably due to the societal changes that occurred after the WWs, the last one represents the clear advent of habitual residence in protecting the child's welfare *where he or she effectively lives*[107]. Within the Convention, habitual residence supersedes, as was already the case in 1902, the notion of domicile[108].

**41.** Some difficulties were encountered in the implementation of the 1961 Convention, particularly concerning 'competing jurisdiction'[109]. The latter refers to the derogation provided in the Convention, which designates the law and the jurisdiction of the Contracting State of the child's nationality if his/ her best interests so require (articles 3-4-6)[110].

**42.** The question pertaining to *best interests* is a fundamental one. Firstly, because finally the protection of the child's interests becomes a central element to the determination of both international jurisdiction and applicable law. In

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105 These were proposed by the International Social Service. See W. DE STEIGER, Explanatory Report on the 1961 Hague Minors Protection Convention, HCCH publications, 1961, p. 11.

106 Ibid. p. 8-9.

107 Ibid. p. 9: "*Ainsi, il a fallu reverser l'ordre des rattachements en faisant intervenir, en premier lieu, les autorités de l'État de la résidence habituelle qui, il faut le reconnaitre, sont en général mieux à même d'apprécier la situation dans laquelle se trouve un mineur, ainsi que les mesures de protection indiquées en l'espèce*".

108 Ibid. DYER, p. 636: "*The 1961 Convention used the factually-based term "habitual residence" instead of the term "domicile," because "domicile" had taken on different connotations in different countries*"; and DE STEIGER, p. 13: "*Ainsi on évite de nouveau les difficultés d'interprétation, qui surgiraient certainement, si l'on avait retenu comme point de rattachement le domicile, concept juridique, dont le contenu varie de pays à pays et dont une qualification autonome serait difficile à imposer*".

109 This refers to the general jurisdiction exercised by the Contracting State of the child's habitual residence (art. 1) and the special jurisdiction of the Contracting State of the child's nationality (art. 4). See ibid. LAGARDE, p. 539.

110 Council of Europe, Compendium of Texts on the 3rd European Conference on the Nationality and the Child, Strasbourg, 17 April 2008, p. 56; P. LORTIE/ C. ARMSTRONG HALL, Tools in International Law For the Protection of Unaccompanied and Separated Children, in: F. Burton, International Family Law, Policy and Practice, Vol. 5, No. 1, 2017, p. 13: "The general basis of jurisdiction under the 1996 Convention is the habitual residence of the child (Art. 5). This solution responds to the difficulties created by the concurrent bases of jurisdiction in the 1961 Hague Convention, which could result in conflicting decisions (i.e. jurisdiction of habitual residence and nationality jurisdiction)".

this regard, the habitual residence assessment should be child-centred. Secondly, because it clarifies, for the consequent conception and drafting of the HC-1996, that habitual residence should reflect the child's best interests[111]. The Swiss Federal Court has given initial guidance with regard to the use of a child-centred approach for the determination of his/ her habitual residence[112].

## § VI. Hague Conference Activity During 1970

**43.** In 1970, the Hague Convention on the Recognition of Divorces and Legal Separations was approved[113]. It represented an adaptation of the 1902 Convention on conflicts of law and jurisdiction adopted in the same field[114]. The HC-1970 provides that a decision on divorce or legal separation rendered in one Contracting State should be recognised in all other Contracting States (article 2)[115]. The Convention clarifies that if the notion of domicile is applicable under the national legal system of the Contracting State of origin (State that has rendered the decision), the 'conventional' concept of habitual residence should also include the 'internal' notion of domicile (article 3). This rule was conceived in particular for common law countries but also for some civil law countries such as France[116]. Habitual residence is also mentioned for the purposes of the refusal of recognition of a decision[117]. The explanatory report to this Convention refers to habitual residence as a notion composed of objective and subjective elements. The objective elements comprise the place of living in more or less permanent fashion and the subjective element indicates the intent. According to the same report, the *intent* helps to determine, in the event of multiple habitual residences, which residence is the 'most habitual'.

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111 L. SILBERMAN, The 1996 Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children: A perspective from the United States, in: J. BASEDOW/ I. MEIER/ A. K. SCHNYDER/ T. EINHORN/ D. GIRSBERGER, Private Law in the International Arena, 2000, p. 707.

112 For an interpretation of habitual residence under this convention, please refer to ATF 5C.273/2000, § 3.b.c.: "*la résidence habituelle d'un enfant se détermine ainsi d'après le centre effectif de sa propre vie et ne peut simplement être déduite juridiquement de la situation du parent qui en a la garde* […] *Une telle question ne se pose nullement dans la présente espèce, l'enfant A._____ ayant toujours vécu en Suisse*".

113 Applicable to 20 States, available at <https://www.hcch.net/en/instruments/conventions/status-table/?cid=80>.

114 P. BELLET/ B. GOLDMAN, Explanatory Report on the 1970 Hague Divorce Convention, HccH publications, 1968 (original French version), p.2.

115 If at the date of the petition alternatively the respondent has his/ her habitual residence in the State of the decision; or the petitioner has his/ her habitual residence in the State of the decision and such habitual residence has continued for not less than one year immediately prior to the petition, or the former spouses' last common habitual residence was therein. Other alternative conditions, such as common nationality, are also mentioned in the said provision.

116 Ibid. BELLET/ GOLDMAN, p. 13.

117 Art. 19 says that if the habitual residence of both spouses was in a State that did not provide for divorce at the time when the same was obtained, then the decision may not be recognised. This rule is subject to State reservation at the time of ratification or accession.

Conscious that such determination may prove difficult, according to the report, a person may have more than one habitual residence. A factual enquiry on the duration showing that more than a brief occasional stay has taken place in more than one Contracting State, should establish the existence of more than one habitual residence[118].

**44.** In 1973, the Hague Convention Concerning the International Administration of the Estates of Deceased Persons was endorsed[119], albeit very poorly ratified. The Convention allocates primary jurisdiction[120] to the administrative authorities of the Contracting State of the deceased's habitual residence (article 2). The law of designation[121] should be the one of the Contracting State of the deceased's habitual residence. Exceptional derogation is set out in favour of the law of the Contracting State of the deceased's nationality if both States (of habitual residence and nationality) have made the corresponding declaration[122]. Habitual residence is also mentioned as one of the conditions for the refusal of recognition (article 14).

**45.** On the same date (1973), the Hague Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations was approved[123]. It represented an enlargement of the scope of the 1956 Hague Convention adopted in the same field[124]. The Convention applies to obligations between spouses[125] and towards children in respect of family maintenance (article 1). For the purposes of this Convention, international jurisdiction is attributed to the Contracting State of the debtor's or creditor's habitual residence at the time of the petition (article 7)[126]. It is said, without prejudice to the rules allocating jurisdiction under article 7 of this Convention[127], that a Contracting State competent according to other rules in

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118 Ibid. BELLET/ GOLDMAN, p. 11.

119 Applicable to 3 States: Czech Republic, Portugal and Slovakia.

120 For the delivery of the international certificate designating the person/s entitled to administer the estate of the deceased, as well as related powers of administration.

121 Of the holder of the certificate and of his/ her powers.

122 Art. 31: "For the purposes of, and subject to, the conditions set out in Article 3, a Contracting State may declare that if the deceased was a national of that State its internal law shall be applied in order to designate the holder of the certificate and to indicate his powers". Other derogations are possible (art. 3 and 4).

123 Applicable to 24 States, available at <https://www.hcch.net/en/instruments/conventions/status-table/?cid=85>.

124 M. VERWILGHEN, Explanatory Report on the 1973 Hague Maintenance Conventions, HCCH publications, 1972, p. 26.

125 Also through 'intermediaries'. Art. 1(2): "a maintenance debtor and a public body which claims reimbursement of benefits given to a maintenance creditor".

126 Alternatively, jurisdiction is possible in favour of the spouses' common nationality at the time of the petition, or if the defendant expressly accepts the seised jurisdiction, even by *de facto* defending therein.

127 Ibid. VERWILGHEN, p. 43.

matters involving divorce or marriage annulment may also exceptionally extend its jurisdiction over maintenance (article 8).

**46.** Again, on the same date (1973), the Hague Convention on the Law Applicable to Maintenance Obligations was endorsed[128], completing the previous legal framework on recognition and enforcement. It caused the enlarging of the scope of the 1958 Convention adopted in the same field[129]. The applicable law can be the one of a non-Contracting State – this Convention is *erga omnes* (article 3). The Convention, article 4, has attributed primary importance to the law of the creditor's habitual residence, and to the law of the new creditor's habitual residence as soon as a change occurs[130]. An exceptional rule is set out in favour of the common nationality of the creditor and debtor, only if the law of the State of the creditor's habitual residence does not allow him/ her to obtain maintenance (article 5)[131]. In spousal maintenance, or maintenance involving persons related by affinity, the debtor may oppose the claim if such obligation does not exist under the internal law of the State of common nationality or, in the absence of common nationality, of the State of the debtor's habitual residence (article 7). A derogation[132] from the rules set out under articles 4 to 6, is provided in favour of the law that applied to the divorce or marriage annulment, which should also govern spousal maintenance (article 8). The explanatory report to the HCs-1958 and 1973 clarifies that habitual residence was given a leading role[133]. The notion is better suited to patrimonial aspects for humanitarian reasons, avoiding practical issues surrounding domicile[134].

**47.** In 1978, the Hague Convention on the Law Applicable to Matrimonial Property Regimes was approved[135]. The Convention is *erga omnes* (article 2). It is said primarily that a choice of applicable law, before marriage, is possible alternatively in favour of the nationality of either spouse, or the habitual residence of either spouse at the time of designation, or either spouse's new

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128 Applicable to 15 States, available at: <https://www.hcch.net/en/instruments/conventions/status-table/?cid=86>.

129 Preamble: "Desiring to coordinate these provisions and those of the Convention of the 24th of October 1956 on the Law Applicable to Maintenance Obligations in Respect of Children […]"; art. 18: "This Convention shall replace, in the relations between the States who are Parties to it, the Convention on the Law Applicable to Maintenance Obligations in Respect of Children, concluded at The Hague, the 24th of October 1956".

130 Reservation could be made in favour of the internal law of the State of common nationality plus that of the debtor's habitual residence (art. 15).

131 Additionally, if neither laws (of habitual residence and of nationality) allow the creditor to obtain maintenance, the internal law (*lex fori*) of the seised authority will apply (art. 6).

132 Ibid. VERWILGHEN p. 84.

133 Ibid. p. 79.

134 Ibid. p. 42: "*meanings varying from country to country, problems raised by the domicile of dependence and by the domicile of origin*".

135 Applicable to France, Luxembourg and Netherlands.

habitual residence after marriage (article 3)[136]. In absence of choice of law, the law would be the one of both spouses' first habitual residence after marriage (article 4). A derogation[137] is available in the same provision in favour of the law of the spouses' common nationality (article 4 al. 1 and 2). In absence of either common habitual residence or common nationality, the law of the State most closely connected would apply. A change in nationality or habitual residence will not affect the first applicable law (designated or by operation of law) under this Convention (article 7)[138].

**48.** On the same date (1978), the Hague Convention on Celebration and Recognition of the Validity of Marriages was endorsed[139]. The idea behind this Convention was to adapt and enlarge the scope of the previous 1902 Convention adopted in the field[140]. The Convention indirectly allocates international jurisdiction for the celebration of marriages to the Contracting State of nationality or habitual residence of either spouse, when the substantive requirements of that Contracting State internal law are met (article 3). The explanatory report to this instrument states that the use of habitual residence within this Convention was the result of the 'greater role' given to this concept within the Hague activity after WWII[141].

## § VII. Hague Conference Activity During 1980

**49.** In 1980, the Hague Convention on International Access to Justice concerning civil and commercial matters was approved[142]. This Convention does not apply to issues falling under international family law exclusively[143], but it shows the operation of habitual residence towards cross-border civil and commercial relations generally. Article 1 endorses the principle under which

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136 It is also possible to designate the law of the property situs as applicable to immovables. The choice of applicable law is also valid during the marriage (art 6).

137 A limit to the derogation is provided in art. 5(2) which states that if the spouses' habitual residence at the time of marriage is retained (for instance following a relocation without establishing a new habitual residence), for a period of not less than five years, the general rules under art. 4 should apply. This is unless additional conditions set out in art. 5(2) are fulfilled, which are not relevant for the purposes of habitual residence.

138 Art. 7 states that in absence of choice of law, the law of the spouses' habitual residence would apply. It further provides the specific conditions according to which the previous applicable law is replaced.

139 Applicable to Australia, Luxembourg and the Netherlands.

140 Å. MALMSTRÖM, Explanatory Report on the 1978 Hague Marriage Convention, Hague Publications, 1976, p. 10.

141 Ibid. p. 16.

142 Applicable to 28 States, available at <https://www.hcch.net/en/instruments/conventions/status-table/?cid=91>.

143 G. A. L. DROZE/ A. DYER, The Hague Conference and the Main Issues of Private International Law for the Eighties, *Northwestern Journal of International Law & Business*, Vol. 3, 1981, p. 197; and G. MÖLLER, Explanatory Report to the Access to Justice Convention, HccH publications, 1980, p. 267.

individuals habitually resident, or formerly habitually resident, in one Contracting State should be considered as nationals of that State for the purpose of accessing legal aid in each Contracting State.

**50.** In 1989, the Hague Convention on the Law Applicable to Succession to the Estates of Deceased Persons was endorsed, without the obtention of ratifications. The Convention referred principally to the law of the (Contracting or non-Contracting) State of the deceased's habitual residence at the time of his/ her death (articles 2 and 3), provided that the deceased was also a national of that State[144]. As an alternative rule, it is said that the law of the State of the deceased's habitual residence also applies when he or she was (ordinarily)[145] resident therein for a period of not less than 5 (continuous)[146] years preceding his/ her death[147]. A *professio juris* is possible if, at the time of designation, the deceased was a national or a habitual resident of that State (article 5). The explanatory report clarifies the reason why the position of the Hague Conference was more in favour of habitual residence rather than nationality. The latter, according to the report, was considered arbitrary and not at all reflective of the place of the deceased's home[148]. The notion of *closer connection* refers to the place where the deceased had established his/ her personal and family life more than in another[149]. Such notion could serve as an important assessment to determine whether among different residences, potentially of 'habitual' nature, one may be considered 'principal'[150].

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144 The idea of this rule was to avoid conflicts of nationalities concerning dual nationals.

145 D. W. M. WATERS, Explanatory Report on the 1989 Hague Succession Convention, Hague Publications, 1988, p. 36.

146 Ibid.

147 A derogation is available if the deceased was manifestly more closely connected to a State of which he or she was a national. The law of the State of the deceased's nationality may also apply unless he or she was more closely connected to another State at the time of his/ her death.

148 Ibid. WATERS, p. 23.

149 Relevant indicators are nationality, immediate family, personal ties, the nature and location of his/ her employment or business, the permanence of his/ her place of residence (apparent home), the principal situs of his/ her personal assets, the journeying and reasons of the same (Ibid. WATERS, p. 36).

150 Ibid. p. 39: "What happens, however, if there are two laws (or more) which are 'more closely connected' with the deceased at his death than the law of his nationality? For instance, the de cujus leaves his national State, State I, in northern Europe to live in the gentle climate of the Mediterranean. He sets up his home in State J, where he is joined by his wife and youngest child who is still living at home. Here he becomes part of the community and builds himself ultimately the home of his dreams. However, he is an author, and his publisher carries on business in State K in North America. He often visits his publisher in State K, and has a *pied à terre* there where he spends long periods of time and he and his wife have many friends in authorship and the arts. He has no family in State I at his death, and never goes there. It would seem there is a 'more close connection' with either State J or State K. The Convention does not employ the term, the closest connection, but that is what it must be interpreted to mean in the example just given. That was Commission II's intention".

# Section III Focus on the Contemporary Family Law Conventions

## § I. Hague Convention 1980 on the Civil Aspects of International Child Abduction

**51.** This Convention (hereinafter HC-1980) deals with the child's wrongful[151] removal or retention from the Contracting State of his/ her habitual residence to another Contracting State. Consequently, the Convention applies and is effective, in principle, if the child is habitually resident in one Contracting State (article 4) and if he or she is subject to wrongful removal to another Contracting State. The primary objective of the Convention, according to article 1(a), is the child's prompt[152] return to his/ her habitual residence except for exhaustive and specific exceptions: a) the child's change of habitual residence (article 12.2)[153]; b) the left-behind parent's acquiescence (article 13.1 lit. a); c) the child's grave risk of physical or psychological harm (article 13.1 lit. b); d) violation of human rights and fundamental freedoms (article 20). The second objective of the Convention, according to article 1(b), is to ensure the respect of custody and visiting (or access) rights granted under the law of one Contracting State – specifically the one of the child's habitual residence prior to wrongful removal – in the other Contracting States. The Canadian Supreme Court and the Finnish Supreme Court, which both referred to the Court of Justice of the European Union long-standing reasoning[154], provided important

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151 Art. 3: "The removal or the retention of a child is to be considered wrongful where -

a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention".

152 Art. 11(1): "The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children". Art. 12(1): "[…] a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith".

153 "The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment". See also *Re C (children: anticipatory retention)* [2018] UKSC 8: § 34: "The Convention cannot be invoked if by the time of the alleged wrongful act, whether removal or retention, the child is habitually resident in the State where the request for return is lodged. In such a case, that State has primary jurisdiction to decide on the merits, based on the habitual residence of the child and there is no room for a mandatory summary return elsewhere without such a decision. It may of course be that in making a merits decision, the court of the requested State might determine that it is in the best interests of the child to be returned to his previous home State, and indeed might do so without detailed examination of all possible evidence, as the English courts may do"; and Cass. Civ., sez. IV, No. 9767/2019.

154 *I.e. Purrucker v. Pérez*, C-296/10, EUC:2010:665; *W and V v. X,* C-499/15, EU:C:2017:118, *Mercredi v. Chaffe* [2011] C-497/10.

insights for the habitual residence assessment approach under this Convention. In the landmark case 'Balev'[155], the Canadian Supreme Court considered the child's life (*family and social environment in which the child's life developed*) prior to removal, and the child's links with that Contracting State prior to removal and with the later Contracting State after removal, as well as the circumstances of the child's relocation, as decisive factors[156]. The Finnish Supreme Court, in the judgment 'KKO'[157], looked with particular attention at the age of the child (who was 5 at the time of the proceedings, therefore *no longer totally dependent on her parents*), enrolment in school, hobbies, friends, languages (English and Dutch), which denoted, for the Court, that the child had an established social environment in Belgium. The Finnish Court also considered the living duration, being longer in Belgium than in Finland. It concluded that the temporary nature of a stay does not preclude the child's acquisition of habitual residence and it did not deem relevant the Finnish nationality of the child.

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155 *Office of the Children's Lawyer v. Balev*, [2018] 1 SCR 398, 2018 SCC 16 (CanLII). This case concerned two children born respectively in 2003 and 2005 in Germany, to a Canadian couple who got married in Ontario and moved to Germany in 2001. In 2008, the family purchased a house in which they all lived together. The children were enrolled at school in Germany, except for two visits to Ontario during which time they attended school therein. In 2011, their parents separated and reunited in 2012 – during this time custody was granted to the father. The children struggled at school in Germany, and their parents agreed on their relocation to Ontario for the 2013-2014 school year (until 15 August 2014) – custody was consequently transferred temporarily to their mother so that the children could enrol at school in Canada. They were regularly in contact with their father, and he went to visit them twice in Ontario. In March 2014, because the father assumed that their mother had no intention of relocating back to Germany, he filed an application for return under the HC-1980 and custody proceedings before the German Courts – the Ontario Court was also seised of the matters but it consented for the children to remain in Canada for schooling reasons. Both applications were rejected and the children returned to Germany in October 2016. The mother initiated custody and access proceedings in Germany. Sole custody was granted to her and the children moved to Canada in April 2017. The Ontario Superior Court of Justice issued the return in first instance, the Divisional Court reversed this decision, and the Court of Appeal reinstated it. The decision was appealed before the Supreme Court. The Court concluded that the children were currently living in Canada with their mother who was entitled to their custody by virtue of a German decision – State of the previous children's habitual residence – therefore no legal issues were outstanding.

156 To determine the children's habitual residence, the Canadian Supreme Court refers to three approaches: a) the parental intention approach; b) the child centred approach (child's acclimatization); c) the hybrid approach (all relevant considerations arising from the facts). The Court opted for the 'hybrid approach' which relies on the principles of harmonisation and better suitability with the text, structure and purpose of the Hague Convention.

157 FI:*KKO*:2019:37. This case is about a child born in the UK, in 2013, to a Finnish father and a British mother (there is no evidence about the legal status of the couple, whether married or not). The family lived in the UK, where the parents had joint custody, and after they moved to Finland for a living duration of eight months. In between, from May 2016 to 1 October 2018, the family had lived in Belgium by reason of the father's professional activity there. On 22 October 2018 (although it is not entirely clear from the decision whether the family moved all together to Finland after its stay in Belgium), the mother filed a return order in Finland arguing that the child's habitual residence was in Belgium and that the father wrongfully retained the child in Finland. The father challenged it and argued that the child was by now habitually resident in Finland. The case was brought before the Finnish Supreme Court. The Court concluded that although the child's habitual residence was in Belgium, there was no evidence to support the wrongful nature of the relocation to Finland. Thus, the mother's claim was rejected.

## § II. Hague Convention 1993

**52.** The objectives of the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (hereinafter HC-1993) were directly inspired by the UN Convention on the Rights of the Child (hereinafter UN Convention 1989), in particular through its article 21. The HC-1993 introduces important procedural safeguards and standards for the protection of children involved in intercountry adoption processes (HC-1993, Preamble and article 1)[158]. This Convention, article 4, provides the procedural requirements that the prospective adoptive parents should fulfil, namely: suitability, matching through accredited bodies, consent[159], and the conformity of the process to the adoptee's best interests. This last condition, being also a universal principle enshrined in the said UN Convention 1989[160].

**53.** The Contracting State of the child's habitual residence – in the *state of origin* – has jurisdiction to determine whether the child is adoptable (articles 2 and 4 lit. a). The Contracting State of the prospective adoptive parents' habitual residence – in the *receiving state* – has 'shared jurisdiction' (articles 2 and 5 lit. a). Habitual residence, namely of the adoptee where the greatest bulk of the jurisdiction is allocated, applies within the Convention as a prevalent connecting factor[161].

**54.** In December 2016, the Hague Permanent Bureau submitted a proposal to the Contracting States[162], specifically by identifying relevant elements for the determination of habitual residence within the framework of the Convention. This proposal followed the 2015 Special Commission[163]. It was published in 2018[164]. On this matter, the Permanent Bureau also submitted a questionnaire to the Contracting States highlighting important factors used to assess habitual residence[165]. The Permanent Bureau refers to habitual residence as the '*the main connecting factor used in all the modern Hague Children's Conventions*'[166].

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158 Founded on the principle of international cooperation between the Contracting State of origin and the Contracting State of destination.

159 Of both the prospective adoptive parents and adoptee.

160 This principle remains more a theoretical standard to be interpreted and implemented case-by-case. See N. CANTWELL, The Best Interests of the Child in Intercountry Adoption, UNICEF publications, 2014, p. 1: "However there is no universal agreement on who is ultimately responsible for determining what is in a child's best interests, nor on what basis the decision should be made", p. 1.

161 W. DUNCAN, The Hague Convention on the Protection of Children and Cooperation in respect of intercountry adoption 1993 - Some issues of relevance to sending countries, in: Intercountry Adoptions, Martinus Nijhoff, 1995, p. 227.

162 Hague, <https://www.hcch.net/en/instruments/conventions/status-table/?cid=69>.

163 HccH, Globalisation and International Mobility: Habitual Residence and the Scope of the 1993 Convention, Preliminary Document No 4, 2015.

164 Habitual Residence and Scope of the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, HCCH Publications, 2018.

165 'Length of time that the relevant individual(s) has/ have been living in the State' (Residency requirement: Cyprus (2 years), Madagascar (5 years), Monaco (more than 6 months per year), Peru

**55.** It is said that the *fact-based approach* is cardinal for the habitual residence determination. Concerning the prospective adoptive parents, such approach should rely on their *individual's domestic and professional life*[167]. Nationality, which is not relevant for the applicability of the Convention, may be used together with other factors for the habitual residence determination[168]. In case the factors composing habitual residence cannot be ascertained, the Permanent Bureau encourages a *consultation process* between the competent central authorities (of both Contracting States involved) aimed at informing the prospective adoptive parents about their (in)eligibility to file an application for (intercountry) adoption[169]. In relation to such process, the Permanent Bureau refers to the habitual residence of the prospective adoptive parents; but one should conclude that the child's habitual residence is also a matter subject to this *consultation*[170]. The UK courts[171] gave important guidance concerning the habitual residence assessment within this Convention. In the judgment 'M and T'[172] decisive factors were the limited duration of the stay in the US, the

(2 years) and Turkey (more than 6 months per year). 'Personal and social ties to the State' (Belgium, Bulgaria, Burkina Faso, Canada (Ontario), Chile, Colombia, Finland, France, Germany, Ireland, Lithuania, Norway, Philippines, Slovenia and Spain). 'The main centre of professional activities of the person(s)' (Bulgaria, Burkina Faso, Canada (Ontario), Colombia, Finland, Germany, Monaco, Peru, Philippines, Slovenia and Turkey)). 'Their intention(s) concerning their residence in the State (e.g., demonstrated by the reasons for their stay, their work or tax connections with that State (or another) or their ownership of real property' (Bulgaria, Canada (Ontario, Quebec), Colombia, Denmark, Lithuania, Norway and Turkey). Germany answered the questionnaire by saying that habitual residence, or 'actual centre of life', is determined autonomously and some factors such as tax residency should not affect such determination. The latter was also the position of the Italian Court of Cassation in an Italian/ Romanian intercountry adoption process. In relation to the determination of the prospective adoptive parents' habitual residence for the purposes of the recognition of an adoption decree under Italian law ('legge 184 del 1983', amended 2001), the Court stated that in addition to the temporal factor of two years ('residenza anagrafica'), habitual residence should be interpreted as a continuous stay revealing a significant degree of integration. The Court's reasoning implied that the establishing of a domicile for taxation purposes would not count for the determination of habitual residence (Cass., sez. I civ., 18 march 2006, no. 6078).

166 Note 164, p. 8.

167 Permanent Bureau of the Hague Conference on Private International Law, Guide to Good Practice No 1: The Implementation and Operation of the 1993 Hague Intercountry Adoption Convention, Family Law (Jordan Publishing Limited), 2008, p. 108 (Section 8.4.4.) - "In line with this, some States emphasised that this is a fact-based, case-by-case analysis (see 2014 Questionnaire No 2, Question 36: Finland, New Zealand and Sweden)".

168 Note 164, p. 9.

169 Ibid. p. 35.

170 Ibid. p. 54: "*It is important that such matters are addressed so that the parties and, in particular, the child, may benefit from the protection of the Convention where it applies*".

171 *M and T (Proposed Convention Adoption - Habitual Residence)* [2015] EWFC B239.

172 The case dealt with two children aged 4 at the time of the proceedings. No indications are given concerning their nationality, although it might be presumed that they both held British nationality. A care order was issued in the UK. Accordingly, the children were placed at their step-maternal great aunt's domicile who, together with her husband, represented the prospective adoptive parents. They all lived in the US. The UK Court, which held parental responsibility for the two children, authorised relocation to the US upon the condition that they would return before the jurisdiction of the same Court, no later than 12 weeks after the relocation. The prospective adoptive parents applied for an adoption order under UK law. The US authorities determined them as eligible and suitable adoptive parents. However, it was tragically discovered that one of the two children had

intention of the court holding parental responsibility to retain jurisdiction in the *child's welfare best interests*, and the obligation for both children and carers to return to the UK, together with a *real prospect to return*.

## § III. Hague Convention 1996

**56.** In 1996, the Permanent Bureau adopted the new Child Protection Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children[173] – the HC-1961 had to be revised[174]. The improvements brought by the new Convention were mainly directed to develop an efficient cooperation system between authorities, and provide specific provisions on cross-border recognition of protective measures, which were in part missing in the previous instrument[175].

**57.** It was also important to again avoid 'competing jurisdiction'[176]. The importance of determining international jurisdiction and applicable law by virtue of the child's habitual residence is therefore reinforced in the Convention. In this respect, article 5 provides that the judicial and administrative authorities of the child's habitual residence have 'primary' jurisdiction to take measures directed to the protection of the child's person and property[177]. Lastly, but not less importantly, the Convention's foundations are inspired by the universal principles of the UN Convention 1989, one of which advocates for the best interests of the child as a primary consideration[178].

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been sexually assaulted by the prospective father. The prospective mother separated from, and later divorced, her husband. The US authorities withdrew their prior approval. The UK local authority ordered the return of the children to the UK and they sought the removal of the step-maternal great aunt from parental care. The US authorities attended the hearings and presented the possibility for the step-maternal great aunt to still adopt the children under US law upon specific conditions. It was said that "there is clear and unequivocal evidence that both of the children are happy and well settled with E […] in a loving home" (§ 24). The UK courts concluded that the two children, despite their integration in the US, were habitually resident in the UK.

173 At the present time 53 States have ratified the Child Protection Convention: <https://www.hcch.net/en/instruments/conventions/status-table/?cid=70>.

174 LAGARDE, p. 539: "The revision of the 1961 Convention on the powers of authorities and the law applicable in respect of the protection of minors fits into this general context. It also has more specific causes having to do with the relatively limited success of this Convention, as well as the imperfections revealed by more than twenty years of application".

175 Ibid. LAGARDE, p. 541.

176 There were situations where the authorities of the Contracting State of the child's nationality were prevailing over those of the Contracting State of the child's habitual residence closer to the child and frequently better able to assess his or her situation and needs (ibid).

177 P. H. PFUND, The Developing Jurisprudence of the Rights of the Child – Contributions of the Hague Conference on Private International Law, *ILSA Journal of Int'l & Comparative Law*, Vol. 3:665, 1996, p. 673.

178 Ibid. LAGARDE, p. 543.

**58.** Lawful relocation entails an effective and automatic change of habitual residence according to article 5(2). The Convention, as it was for the HC-1961, excludes the principle of *perpetuatio fori*[179] except when the relocation occurs in a non-Contracting State, or Brussels IIA applies[180] (*cf. infra* section III herein). Article 6 provides that whenever habitual residence cannot be determined, particularly for displaced or refugee children, *physical presence*, or mere presence, suffice to establish international jurisdiction. This principle does not exclude the possibility of acquiring habitual residence at a later moment in that Contracting State or in another one[181]. Article 7(1) deals with international child abduction. This provision indicates that the Contracting State of the child's habitual residence prior to wrongful removal remains competent over custody until the child has acquired habitual residence in another State.

**59.** Articles 8 and 9 allow, as an exception, subject to a request *ex officio* or upon parental agreement for transfer of jurisdiction in favour of the authorities of another Contracting State better placed to assess and protect the child's best interests[182]. The Convention clarifies in article 8(2) which Contracting States can be equally considered as *better placed*: a) the State of the child's nationality; b) the State of the child's presence; c) the State where the judge has been seised of divorce proceeding; d) the State of the child's substantial connection. Article 10 extends the powers of the divorce jurisdiction over custody proceedings to take direct measures over the child's person or property in connection with the divorce proceedings. This is an exception subject to three cumulative conditions, namely: a) parental agreement; b) the habitual residence of one of the parents or the holder of parental responsibility; c) the child's best interests. This 'prorogation of jurisdiction'[183] over custody ceases as soon as the divorce decision is rendered or the divorce proceeding comes to an end for any other reason (article. 10.2). Articles 11 and 12 provide for the power of the Contracting State of the child's presence to implement protective measures of urgent or of provisional character. This jurisdiction ceases as soon as the court of competent jurisdiction under articles 5 to 10 decides over the protective measures previously taken.

**60.** With specific regard to applicable law, the governing provisions in the Convention are *erga omnes* (article 20). This is generally determined in the State

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179 Ibid. p. 555. This term will be interchangeably used with the one of 'continuing jurisdiction'.

180 K. GATZSCHE, Child Protection in Flight Situations: The Hague Child Protection Convention and Unaccompanied Minors, *Cuadernos de Derecho Transnacional*, Vol. 11, No. 1, 2019, p. 346-347.

181 Ibid. LAGARDE, p. 556. See also, U. MAGNUS/ P. MANKOWSKI, Brussels IIbis Regulation, Sellier European Law Publishers, 2012, p. 161.

182 The authorities of a State, which believe they are better placed, they can also request the transfer of jurisdiction.

183 In accordance with Brussels IIA, art. 12.

of the child's habitual residence[184], save the exception of the law of the State of substantial connection with the child set out in article 15(2)[185].

**61.** The courts in Switzerland and in Portugal gave inspiring guidance concerning the operation of habitual residence under this Convention. According to the Swiss Federal Court in 'ATF 5A_136/2018'[186], decisive elements were that, although the child was living in France, he was attending *school and accessing health care* in Switzerland. The Court of Appeal in Portugal, in its ruling 'Acórdão do Tribunal da Relação de Évora'[187], principally looked at the family duration from 2017 to 2019, the family intention to relocate to Portugal where the father was professionally more stable, the children's integration in terms of school and entourage, the lack of stability in Brazil, and the better parental stability in Portugal to care for the two children in their best interests. The Portuguese Court referred to the child's habitual residence as the

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184 The judgments or measures taken in the Contracting State whose international jurisdiction is established under the rules of chapter II of the Convention shall be recognised in all the Contracting States (art. 23). Judgments and measures will be subject to refusal if incompatible with later judgments or measures taken in the State of the child's habitual residence that is a non-Contracting State, and the later judgments or measures are recognisable in the requested Contracting State. Additional grounds for refusal are provided in art. 23(2), not directly related to habitual residence.

185 Art. 16, paragraphs 1 and 3, provides that the attribution or extinction of parental responsibility, which were governed by operation of law according to the law of the child's habitual residence, continues to apply in case of relocation to a new habitual residence. This rule does not apply if the person was not yet entitled to hold parental responsibility in the State of the child's habitual residence prior to the relocation (art. 16.4).

186 ATF 5A_136/2018. This case concerned a child, Swiss national, born in 2006. On 22 February 2013, the Geneva Court issued the divorce of the child's parents and granted parental responsibility and custody to the mother with a visiting right to the father. The same court applied two typical Swiss protective measures named '*curatelle d'éducation'* and '*curatelle d'organisation et de surveillance des relations personnelles'*. On 7 January 2016, the same Court granted shared parental responsibility to the parents (the mother's appeal for sole custody was rejected). On 2 and 3 May 2016, the TPAE was seised by the 'Service de protection des mineurs' (SPMI). Consequentially, a (super)provisional measure was implemented, removing the child's custody from the mother (due to mental illness and consequent hospitalisation) and granting it to the father (in charge of monitoring the child's state of mind, together with the guardian and a psychiatrist). The SPMI also fixed the child's residence at the father's domicile, in France. The child continued to be enrolled at a Swiss school, in the District of the mother's domicile, and accessed medical care there. The mother was granted visiting rights. This decision was confirmed on 11 October 2016 by the TPAE – the (super)provisional measure thus became provisional. Following this decision, additional oppositions were lodged by the mother in order to extend her visiting rights (which were rejected by the TPAE) and to challenge the jurisdiction of the Swiss authorities (which was also rejected by the Swiss 'Cour de Justice'). The appeal was brought before the Federal Court. The latter concluded that the child's habitual residence was in Switzerland. Therefore, the Swiss authorities had rightly exercised international jurisdiction and applicable law, in particular in the implementation of Swiss protective measures.

187 P. 1789/18.6T8PTM-A.E1, Acórdão do Tribunal da Relação de Évora, 2019. This case concerned two children, Brazilian nationals, born in Brazil, respectively in 2011 and 2013, to a Brazilian couple. The family moved to Portugal in 2017 and they initiated proceedings over their children's parental responsibility. The father and the mother seised the Court in Portugal claiming to be granted parental responsibility, respectively. The father claimed for the residence of the two children to be established in Portugal. The mother was willing to return to Brazil after the proceedings and requested an order fixing the children's residence with her. She further contested in appeal the jurisdiction of the courts in Portugal. The Appellate Court upheld the decision in first instance according to which jurisdiction was established in Portugal by virtue of the children's and family's habitual residence established there.

place where his/ her life is better organised in terms of stability and continuity, where he or she develops his/ her actual life habitually, in sum where he or she is *effectively rooted*[188].

## § IV. Hague Convention on the International Protection of Adults

**62.** The protection of incapacitated adults is part of this study to the extent of cross-border family relations involving them. It is recalled that the Hague activities related to the international protection of children, in particular to the HC-1996, have with a large dose of complementarity inspired the parallel (Hague) activities in this area of family law[189].

**63.** The Convention (hereinafter HC-2000) deals with the international protection of adults who are affected by vulnerability – article 1 gives a brief definition of vulnerable adult[190]. Article 3 indicates the protective measures aimed to protect the child's person and property. This instrument was inspired by the HC-1996, thus providing similar rules for international jurisdiction, applicable law, recognition and enforcement as well as analogous mechanisms inherent in cross-border cooperation[191]. As for the HC-1996, the role of habitual residence is a primary one[192]. Its operation should reflect the different perspective enshrined in the scope of the HC-2000, in that its assessment should be adult-oriented – in the adult's interests (article 1).

**64.** The Convention allocates general, or 'principal', international jurisdiction to the judicial and administrative authorities of the Contracting State of the adult's habitual residence (article 5.1). The principle of *perpetuatio fori* does not apply, as in the HC-1996, except when the adult's relocation occurs in a non-Contracting State (article 5.2)[193].

**65.** In absence of habitual residence, or subject to its difficult determination, in particular regarding refugee or displaced adults, principal jurisdiction is attributed to the Contracting State of the adult's physical presence as a *jurisdiction of necessity*. The latter rule, as in the HC-1996, does not exclude the possibility of acquiring habitual residence at a later stage during the adult's

188 ATF 5A_136/2018: Based on the mentioned factors, no change of habitual residence from Switzerland to France had occurred. P. 1789/18.6T8PTM-A.E1, Acórdão do Tribunal da Relação de Évora, 2019: The Court of Appeal in Portugal assessed habitual residence for the purposes of international jurisdiction by virtue of the HC-1996, art. 5, although Brazil is not a Contracting State.

189 P. LAGARDE, Explanatory Report on the Hague Convention 2000, HccH publications, 1999, p. 41.

190 § 1: "[…] by reason of an impairment or insufficiency of their personal faculties, are not in a position to protect their interests".

191 Ibid. p. 41.

192 Ibid. p. 55: "Principal jurisdiction is attributed to the authorities of the State of the adult's habitual residence (Art. 5), but also recognised are the concurrent, albeit subsidiary".

193 Ibid. p. 56.

stay in the Contracting State of physical presence. Therefore, this jurisdiction should be temporary and cease as soon as the adult acquires habitual residence – the same rule provided in the HC-1996[194].

**66.** The Convention (article 7.1) allocates general jurisdiction to the authorities of the Contracting State of the adult's nationality whenever they are better placed to protect his/ her best interests. This is typically a case of 'concurrent jurisdiction' with the authorities of the adult's habitual residence[195]. However, it is referred to in practice as 'subsidiary jurisdiction'[196] when the authorities of the Contracting State of the adult's habitual residence (or those of articles 6 or 8) inform the authorities of the adult's Contracting State of nationality on which measures have already been taken or are pending in their jurisdiction[197]. The non-Contracting State of the adult's habitual residence is not bound by the rules on *concurrent jurisdiction*. Therefore, they may be entitled to refuse the recognition of the measures taken in the Contracting State of the adult's nationality[198].

**67.** A *transfer of jurisdiction* is possible (article 8.1)[199] upon own initiative of the authorities of the Contracting State of the adult's habitual residence or physical presence (articles 5 and 6). Furthermore, the authorities of any Contracting State may also request such a transfer[200] by virtue of appropriateness, in the adult's interests. The requested Contracting State authorities are exhaustively designated by the Convention (article 8.2), namely: a) the State of which the adult is a national; b) the State of the preceding habitual residence of the adult[201]; c) the State in which property of the adult is located; d) the State whose authorities have been chosen in writing by the adult to take measures directed to his or her protection; e) the State of the habitual residence of a person[202] close to the adult prepared to undertake his or her protection; f) the State in whose territory the adult is present.

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194 Ibid. p. 57.

195 This means that the authorities of the Contracting State of the adult's nationality are also entitled to advise the authorities of the habitual residence about the typology of protective measures that should be taken on behalf of the adult.

196 Ibid. LAGARDE p. 59.

197 Or inform them of the decision concerning the result of the measures taken previously in the Contracting State of nationality (art. 7.2 and 7.3).

198 Ibid. LAGARDE, p. 58.

199 This remains a subsidiary rule to art. 5 and 6 (ibid. p. 60).

200 Confirmation from the requested Contracting State is required (art. 8.3).

201 Ibid. LAGARDE, p. 62: "[…] these terms should be understood the State of the last habitual residence and not that of any previous habitual residence. The authorities of the present habitual residence will take into account in particular whether this last habitual residence was more or less recent and whether there are present there persons who have known the adult".

202 Ibid.: "The Commission retained the expression 'person close to the adult' in preference to the apparently more precise 'relatives of the adult' in order also to include persons such as friends or companions who are devoted to the adult though have no family connection".

**68.** The Convention allocates general *in rem jurisdiction* over the properties of the adult (article 9). The measures taken under this jurisdiction should be compatible with the ones of the Contracting State of the adult's habitual residence (or with those measures taken under articles 6 to 8). Exceptional emergency *concurrent* jurisdiction is provided by article 10 in the Contracting State of the adult's physical presence, or property *situs*[203]. The measures taken under this jurisdiction should cease as soon as the required urgency ends. The authorities of this jurisdiction should inform the ones of the adult's habitual residence, which remains primarily competent[204]. Such 'duty of information', as opposed to article 7, is not a *conditio sine qua non* for recognition in other Contracting States[205]. Another exceptional (*concurrent*) jurisdiction is the one of article 11, attributed to the Contracting State of the adult's presence, to take temporary protective measures with limited territorial effects[206].

**69.** With respect to the general rules on applicable law, as in the HC-1996[207], it is provided that the law of the State of the adult's habitual residence principally applies (article 13.1). This is unless the law of the State, which the adult has substantial connection with, is exceptionally determined (article 13.2) in his/ her best interests[208]. Measures should be recognised in all Contracting States, subject to specific grounds for refusal[209].

**70.** The Swiss Federal Court, and the lower instances, have provided specific elements for the determination of habitual residence under this Convention. The Swiss Federal Court, in the judgment 'ATF 5A_68/2017'[210], considered as

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203 Ibid. p. 64: "The States whose authorities may be addressed on the basis of urgency are the States on the territory of which the adult or property belonging to him or her is present".

204 Ibid. p. 65: "This provision once again expresses the primacy of the State of the adult's habitual residence […]".

205 Ibid. p. 66.

206 The measures taken under this jurisdiction must not be incompatible with those taken by the Contracting State of the adult's habitual residence whose authorities must imperatively be informed in advance (ibid. LAGARDE, p. 67).

207 With specific regard to the powers of representation (art. 15), the law of the unilateral act or agreement at the time of their conclusion applies, save expressed reference (choice of law) to the laws of the adult's nationality, former habitual residence, or law where the property is located. The manner of exercise of such powers is governed by the law in which they are exercised (art. 15.3). No difference is made if the law designated by these provisions is the one of a non-Contracting State (art. 18).

208 Ibid. LAGARDE, p. 70: "This paragraph constitutes an exception clause based not on the principle of proximity (the closest connection), but on the best interests of the adult".

209 One of which being the incompatibility with measures taken under chapter II, for instance the ones of the Contracting State of the adult's habitual residence; or another being the incompatibility with the measures taken in the non-Contracting State where the adult is habitually resident (art. 22.2).

210 ATF 5A_68/2017 [21 June 2017]. This case concerned an adult, Swiss national, born in 1953, who worked as a 'Fourier' (Quartermaster Sergeant) in the Swiss army. Because of fraud, his contract was terminated, as well as his marriage resulting in divorce. He found a new job as a parish secretary, although again he committed fraud causing the termination of his contract. In the frame of a criminal proceeding against fraud, he was hospitalised because of mental illness and diagnosed with bipolar disorder. The guardianship authority placed him under temporary protective supervision. He received psychiatric treatment as an outpatient, while living independently and

relevant the degree of integration reached in a new environment, corroborated by the establishment of personal relationships, interest in political and social life, living conditions and housing, family and professional ties, language skills. It looked in particular at the presence of a family, nationality and regular presence in Switzerland. The Swiss lower instances, namely the Tribunal Cantonal du Valais[211], clarified that indicators of personal integration are: circle of friends, an interest for the political life, a participation in the social life, the existence of family and professional relations, languages[212].

## § V. Some Remarks on the Lugano Convention

**71.** The Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (known as Lugano Convention 2007) is relevant to this study, to the extent of article 5(2)(a)(b)(c), applicable to matters relating to maintenance. The said provision[213] specifies that international jurisdiction is allocated to the Contracting State of the creditor's habitual residence, as an alternative connecting factor to domicile (lit. a). The

working in a sheltered workplace. His supervision order was subsequently removed. He wanted to start a new life, so he moved to Eastern Europe for around two years although there he encountered financial issues. He asked his daughter to help him, which she repeatedly did. He returned to Switzerland, but he could not afford his social and medical insurances. He again committed fraud and related financial crimes, after which he was placed under supervision and care assistance by the Swiss Guardianship Authority. He went to Odessa and then to Prague where he concluded a lease contract for an apartment, in spite of the fact that he was still renting a shared flat in Winterthur. He faced several financial issues. While in Switzerland, the guardianship authority requested his placement under long-term guardianship and care assistance. He challenged the Swiss jurisdiction on the basis of his habitual residence in Prague. The Swiss Federal Court concluded that jurisdiction had to be retained by the Swiss authorities.

211 Tribunal Cantonal du Valais, Cour civile II, décision du 7 septembre 2017, C1 17 8. This case concerned an adult, Swiss national, born in 1986 with a developmental disorder in need of special school programs, incapable of caring for herself. In 2015, a typical Swiss protective measure – '*curatelle de portée générale*' – was implemented by the Swiss competent authority – '*Autorité de protection de l'enfant et de l'adulte*'. In 2014, and in 2015, the mother, resident in France, asked the Swiss authority, as well as the guardian, to authorise the transfer of her daughter to another institution in France closer to the mother and to remove the guardianship. In 2016, after the daughter spent a weekend in France at her mother's place, she did not return to Switzerland. As a consequence, the Swiss authority, on the request of the guardian, issued an order purported to oblige the mother to accompany her daughter to the French train station and allow her return to Switzerland. The mother's requests were rejected by the same authority. The mother appealed. The Court concluded that the daughter's habitual residence was in France according to art. 5(2) – only a placement order, which was not the case in context, might have been binding for her return.

212 ATF 5A_68/2017 [21 June 2017]: The Court maintained that the Adult's actual *centre of life or focus of his social relationships* was in Switzerland. Other than the mentioned factors, it referred to the element of probable duration, a certain length of stay, as a presumption for expected integration (*not determining alone*). Tribunal Cantonal du Valais, C1 17 8: The Court confirmed that the notion of habitual residence is *not defined under the Convention* and that it must be interpreted in an *autonomous manner according to the objectives that it pursues*. It is a factual notion determined in the State of effective residence where the adult's *centre of gravity* is and his/ her attachments are. According to the Court, some duration should also occur. A six months stay may be sufficient to acquire habitual residence, the residence may become habitual also immediately after relocation, if it is expected to be durable and to replace the preceding centre of interests.

213 This is alternative to art. 2 indicating the general forum of the defendant's domicile.

competent court over divorce[214] (lit. b), or parental responsibility (lit. c), may extend such jurisdiction, according to its own law, over maintenance as an ancillary proceeding[215].

**72.** The explanatory report does not mention any indicators or contextualised reference regarding habitual residence under this Convention. The report does explain however the reason why domicile was chosen as a primary connecting factor instead of habitual residence. Such reason lies in the fact that the identification of habitual residence would have constituted a more problematic issue for commercial matters and for companies. An international uniform definition would hardly have been agreed by Contracting States (§ 24). The Swiss Federal Court, in its judgment 'ATF 5A_889/2011[216], provided an interesting analysis of habitual residence in the framework of this Convention. Accordingly, the child's habitual residence should correspond to his/ her *effective centre of life* and his/ her attachments[217].

## § VI. Hague Convention 2007

**73.** The aim of the Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance

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214 ATF 5A_801/2017, § 3.3.2: "[…] la CL prévoit que le tribunal saisi de l'action en divorce, dont la demande alimentaire constitue l'accessoire, est également compétent, sauf si cette compétence est uniquement fondée sur la nationalité d'une des parties (art. 5 ch. 2 let. b CL)".

215 Unless this is based solely on the nationality of one of the spouses.

216 ATF, 5A_889/2011 [23 April 2012]: The case concerned a Nigerian-French couple living in Switzerland (between 2006 and 2010) with two children born therein, respectively of 3 and 5 years old at the time of this judgment. The family moved to France (between 2009-2010), where the father (French) was the owner of a house, and the elder son was enrolled at school. In 2010, the father applied before the French courts (*'Tribunal de Grande Instance'*) to obtain an order to fix the habitual residence of the two children in France and to be granted joint custody (*'autorité parentale conjointe'*). In 2011, the mother moved to Switzerland with the two children and they settled temporarily in a '*Foyer*'. Four months from the relocation, the French judge issued an order approving the father's request. The order granted visiting rights to the mother and prohibited departure from both France and Switzerland without joint parental agreement. The mother challenged the judgment on the basis of unfounded jurisdiction. In between the seisin of the French court and the judgment, the mother had applied before the Geneva court (*'Tribunal de première instance'*) for the application of provisional measures for the purposes of maintenance, which was accepted. The Geneva Appeal court (*'Cour de justice du canton de Genève'*) annulled the previous order by reason of unfounded jurisdiction of the Swiss courts. The case reached the Federal Court. The latter concluded that there were no sufficient elements to show a potential social and family integration in Switzerland. Thus, they declined jurisdiction.

217 Habitual residence, according to general case law, says the Federal Court, is a factual notion which *implies physical presence* in a given State. In substance, habitual residence should not be temporary and/ or occasional, but it should show a certain degree of integration in a social family environment. *Decisive factors* are duration, regularity, conditions and reasons of the stay, child's nationality, school environment and conditions, language skills, child's social and family relations. A six-month period of time may establish habitual residence, but also a shorter duration may suffice, if taken with other factors, *replacing the previous centre of interests*.

(hereinafter Hague Convention 2007) is to reinforce[218] international cooperation towards the effective international recovery of child support. In particular, article 2(1)[219], clarifies the scope of this Convention: the applications of maintenance arising from a parent-child relationship; joint claims for spousal and child maintenance; and maintenance of spouses[220]. The Convention seeks also to make available effective measures facilitating administrative cooperation (articles 1 and 6).

**74.** For the purposes of this inquiry, only a few issues covered by this Convention will be examined. The first issue lies in article 9 concerning international administrative cooperation, representing the quantum leap of this instrument[221]. The provision indicates that to file an application before the Central Authority, the applicant must be resident. Both the provision and the explanatory report clarify that such notion specifies a 'simple' residence, representing something more than mere presence, although habitual residence is not required[222]. Without providing an interpretation of *simple residence*, the explanatory report contains a contextualised reference to the potential *place of the child's living*[223]. The second issue is contained in article 18, which expressly refers to the habitual residence of the creditor. When a decision is issued in the Contracting State of residence and in which the creditor continues to be habitually resident, the debtor will have to seise the authorities of that Contracting State for the modification of that order. This represents, the *perpetuatio fori* rule[224], which aims to avoid conflicting decisions and ensures continuing protection over the creditor's interests in his/ her Contracting State of origin, ultimately preventing denial of justice[225].

**75.** Habitual residence has been chosen as the uncontested connecting factor in the relevant chapter on recognition and enforcement by reason of continuity with the Hague Convention on Maintenance 1973. This is shown in article 20 where habitual residence appears throughout in lit. a, c, d: respectively the habitual residence of the respondent, of the creditor, or of the child. Again, with regard to article 20(d), the debtor's residence is referred to as the place of living[226] – in connection with the child's habitual residence. The explanatory report states that habitual residence, in the context of recognition and

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218 Reducing costs and length of procedures. See A. BORRAS/ J. DEGELING, Explanatory Report on the 2007 Hague Child Support Convention, HccH publications, 2013, p. 77.

219 Independently of the matrimonial situation or marital status (ibid. BORRAS/ DEGELING, p. 4-73).

220 Excluding matters falling under chapters II and III of the Convention.

221 Ibid. p. 77.

222 Ibid. p. 111.

223 Ibid.: "A child requires financial support wherever she or he may be living and should not have to satisfy a strict residency test".

224 Ibid. p. 155.

225 E. LONG, The New Hague Maintenance Convention, *ICLQ*, Vol. 57, No. 4, 2008, p. 989.

226 Ibid. BORRAS/ DEGELING, p. 163.

enforcement, should be interpreted in relation to the scope of the ('new') Convention 2007 (which is different from the other Hague Conventions 1980 and 1996). It also mentions that habitual residence allows for a *sufficient connection* between the individual and the Contracting State of origin[227].

## § VI. Hague Protocol 2007

**76.** The Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations (hereinafter Hague Protocol 2007)[228] designates the rules on applicable law over child and spousal maintenance (regardless of the marital status of the creditor and debtor parents)[229]. Article 3 provides the general principle of the applicable law of the State of the creditor's habitual residence. As soon as a change occurs, the new creditor's habitual residence applies[230]. As an exception, or subsidiary rule[231], in favour of certain creditors[232], the law of the forum governs maintenance whenever the creditor cannot obtain it in accordance with the law of his/ her habitual residence (article 4.2). The law of the forum applies principally if the creditor seised the authorities of the debtor's habitual residence (article 4.3). In the latter case, the law of the creditor's habitual residence of article 3 applies subsidiarily[233], but always when dealing with certain creditors (article 4.1). As a residual, or second subsidiary rule[234], if the creditor cannot obtain maintenance under either mentioned laws, the law of the State of common nationality will apply (article 4.4).

**77.** A derogation from the general principle is provided under article 5. This states that, in matters involving spousal support, the law of their last common habitual residence *may* apply if this has a closer connection with the marriage. The *principle of closeness* requires an assessment of the court seised to determine whether the connection between the marriage and that State is more

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227 Ibid. p. 161.

228 Art. 18: "As between the Contracting States, this Protocol replaces the Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations and the Hague Convention of 24 October 1956 on the law applicable to maintenance obligations towards children".

229 These rules apply even if the applicable law is the one of a non-Contracting State (art. 1 and 2).

230 A. BONOMI, Explanatory Report to the Protocol on Law Applicable to Maintenance Obligations 2007, HccH publications, 2013, p. 33: "[…] for instance, the creditor undergoing training in a foreign State finds a job enabling him to set up residence there on a durable basis".

231 Ibid. BONOMI, p. 23.

232 Art. 4(1): "a) parents towards their children; b) persons, other than parents, towards persons who have not attained the age of 21 years, except for obligations arising out of the relationships referred to in Article 5; and c) children towards their parents".

233 Ibid. BONOMI, p. 23.

234 Ibid. p. 41: "its 'demotion' to the rank of a second subsidiary connection (whereas in the system of the 1973 Convention, it was the first subsidiary connection, after habitual residence and ahead of *lex fori*), will greatly reduce both its practical impact and its drawbacks".

significant than the one between the creditor and his/ her current habitual residence[235]. Article 6[236] allows the opportunity for the debtor to contest a claim under the law of his/ her habitual residence or common nationality in matters falling outside articles 3 and 5. This is the situation excluding maintenance obligations arising out of a parent-child relationship and those involving spouses.

**78.** Derogation from articles 3 to 6 is possible if creditor and debtor agree to submit a choice of law in favour of either nationality[237]; or of the law of the State of habitual residence of either party at the time of designation. The same provisions contain an additional derogation in favour of the law designated to apply (or the law in fact applied)[238] over their property regime or their divorce/ legal separation (article 8)[239].

**79.** The explanatory report describes habitual residence as a connecting factor that enables determination of the legal and factual conditions of the creditor's social environment in which he or she lives (and will live) and there engages in most of his/ her activities[240]. This notion is provided in uniform law instruments (*cf.* Lugano Convention *supra*) and national law relating to maintenance. The report clarifies that habitual residence should be interpreted within the scope of the Protocol avoiding domestic interpretations or notions. It finally requires some degree of stability[241]. Occasional or mere presence, for the purpose of schooling, will not establish habitual residence.

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235 Ibid., p. 45: "This implies that the court, pursuant to such a request, will ascertain whether the marriage has closer connections with a law other than that of the creditor's habitual residence. In so doing, it shall have regard to all the connections of the marriage with the various countries concerned, such as the spouses' habitual residence and / or domicile during the marriage, their nationalities, the location where the marriage was celebrated and the location of the legal separation or divorce. In addition, it will have to assess them to determine whether they are more or less significant than the current habitual residence of the maintenance creditor"; Cour de cassation, civile, Chambre civile 1, 25 mars 2015, 13-23.377: *"la règle spéciale aux époux et aux ex-époux prévue par l'article 5 du Protocole de La Haye du 23 novembre 2007 sur la loi applicable aux obligations alimentaires ne peut conduire à déroger au rattachement à la loi de l'État de résidence habituelle du créancier d'aliments prévu par l'article 3 lorsque les époux résident habituellement dans le même État au moment de la demande d'aliments".*

236 This provision covers, for instance, maintenance between parties related collaterally or by affinity.

237 This refers to any nationality of each spouse, without being it common or most effective (BONOMI, p. 55).

238 Ibid. BONOMI, p. 41: "This solution applies not only when the maintenance claim is settled in the course of the divorce proceedings (or at the time of divorce), but also to proceedings instituted subsequently to revise or supplement the divorce decree. The reason stated for this *perpetuatio juris* is the requirement of securing continuity by preventing the change of the creditor spouse's residence from leading to a change of the applicable law".

239 Derogation is not possible with specific regard to the creditor's renunciation of his/ her right to maintenance, which is governed by the law of his/ her habitual residence at the time of the designation (art. 8.4).

240 Ibid. p. 29.

241 Ibid. p. 32-33.

## Section IV European Union Family Law Regulations

**80.** The *Hague conventional concept* of habitual residence has been transposed under the European Union (EU) private international law, or more precisely under EU family law[242]. As of today, some scholars refer to habitual residence as an EU concept[243]. This is so because the interpretation given by the Court of Justice of European Union (hereinafter CJEU) has proven extremely useful over the past years. In particular, it has provided a first *guidance*, a list of elements, some of which were already indicated in the various explanatory reports already examined[244].

**81.** As clarified in the previous section, habitual residence is an international connecting factor that was adopted prior to the Hague and the EU respective international family law policies[245]. Its operation differentiates itself from that of various national notions that may sometimes wrongfully apply in the framework of the Hague Conventions or EU Regulations[246]. Moreover, it would be more accurate to generally consider it as a cross-border notion, an *intercountry concept*[247], rather than assimilating its origins with a specific international 'policy maker', or international 'harmonisers'. Such an approach would allow better harmonisation and uniformity of its implementation within the whole area of international family law. That being said, the practical improvement of habitual residence must certainly be valued and attributed to the CJEU. This is particularly true in the context of parental responsibility involving children. Nonetheless, the initial interpretation of habitual residence was essentially enshrined in the Hague explanatory reports.

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242 P. BEAUMONT/ J. HOLLIDAY, Recent developments on the meaning of "Habitual Residence" in alleged child abduction cases, in: M. ZUPAN*, Međunarodno privatno pravo u praksi europskih sudova*, 2015, p. 37.

243 J. HILL/ M. NÍ SHÚILLEABHÁIN, Clarkson & Hill's Conflict of Laws, 5th ed., 2016, p. 348: "It was also accepted that the autonomous EU concept of habitual residence requires a single habitual residence".

244 Some guidance, or contextualised references, is nowadays also contained in the EU regulations, in particular in the Brussels IIA, although briefly (recital 12), and in the Succession Regulation, more articulated and concise (recitals 23-25). On this subject, see also A. BONOMI/ P. WAUTELET, Le droit européen des successions, Commentaire du Règlement (UE) n° 650/2012 du 4 juillet 2012, 2nd ed. (Bruylant, 2016) p. 191 ff.

245 Although in matters not directly related to family law (Prussian-French Treaty). It was also provided in the UN glossary in the related interconnected field of migration (*cf.* section II *supra*).

246 I. REIG FABADO, La Construccion Del Concepto Autonomo De Residencia Habitual Del Menor En Los Supuestos De Sustraccion Internacional De Menores, *Cuad. derecho transnac.*, Vol. 11, No. 1, 2011, p. 882: "*Razón por la que, en aras a la aplicación uniforme de la normativa de la UE debe procederse a su interpretación autónoma, sin remisión al Derecho interno de los Estados miembros. De modo que la concreción de la residencia habitual del menor en estos casos no corresponde realizarla al hilo de lo establecido en los artículos 40 y ss. del Código civil español, que resultan irrelevantes en caso de aplicación del Reglamento Bruselas II bis*".

247 *Cf.* Introduction and fn. 16.

**82.** The EU regulations applying habitual residence will be analysed under this Section. Due attention will be given to the *EU acquis* during the 20th and 21st Centuries.

## § I. Realistic Expectations from the Brussels Convention 1968 to the Brussels II Regulation

**83.** European integration was not only, but mainly, economic since the origins of the European Economic Community[248]. This was reflected in the scope and principles enshrined in the Community establishing Treaty[249]. Such principles indicated social progress, improving labour rights and working conditions, trade and fair competition, reducing economic development inequalities, common commercial policies, international trade without barriers, peace, liberty and prosperity[250].

**84.** The objectives of the Community were nevertheless founded on solidarity and cooperation starting from the establishing of a Common Market (Rome Treaty, article 1). In 1960, the need for a European integration beyond the economic perspective was affirmed for the purpose of ensuring legal (and social) protection, as well as continuity, over the multiplicity of legal relationships established between individuals[251]. Important issues of family law were raised, such as dissolution of marriages, marriage contracts, paternity, child abduction and adoption, which were considered part of European integration. The 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters marks the beginning of the EU activity in family law[252]. Before that moment, bilateral treaties were in force between the six founder States, which the Convention improved[253].

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248 Established 1 January 1957. The European Communities followed on 1 July 1967.

249 Known as Treaty of Rome, signed in 1957 and made effective in 1958 in Belgium, France, Italy, Luxembourg, the Netherlands and West Germany. The Rome Treaty originated the Treaty on the Functioning of the European Union (TFEU), which together with the Treaty on European Union (known as Treaty of Maastricht), form the constitutional basis of the European Union. The TFEU entered into force on 1 December 2009 following four main amendments to the Rome Treaty (in 1993, by the Maastricht Treaty; in 1999 by the Amsterdam Treaty; in 2003, by the Nice Treaty; in 2009, by the Lisbon Treaty).

250 Rome Treaty, Preamble.

251 In the territories of the six founder States. On this point, see A. BORRAS, Explanatory Report on the Convention, drawn up on the basis of art. K.3 of the Treaty on European Union, on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters, Official Journal of the European Communities, 1998, p. 28 ff.

252 More precisely the reinforcing of judicial cooperation to support individuals' lives and relations, including family relations.

253 The Convention's aim was finally also to enlarge the scope of legal protection, by allowing extensive harmonisation of laws, providing greater legal certainty, avoiding discrimination as well as facilitating the free movement of judgments as the ultimate objective. See P. JENARD, Report on the

**85.** In substance, family law was not yet widely included in the Convention[254]. Evidence of this was the exclusion of matters such as status, legal capacity, rights in property arising out of a matrimonial relationship, wills and succession. Nonetheless, matrimonial matters very soon represented the main reason to initiate works on a new Convention – the idea that directed Brussels II[255].

**86.** Habitual residence was not adopted in the 1968 Convention. The Committee[256], responsible for its drafting, concluded that domicile, which then replaced nationality[257], would have ensured more stability and certainty in the determination of jurisdiction[258]. The reason for this preference also lies in the fact that domicile was the principal criterion used as a basis for jurisdiction within the national legal system of the founder States (in particular under the code of civil procedure). The report to the Convention provides a comprehensive (comparative) analysis relating to that aspect[259].

**87.** With the beginning of the discussions to enlarge the scope and objectives of the 1968 Convention, the works for a new Convention were in progress. The first of the two premises was to enlarge the scope of the 1968 Convention towards matrimonial matters, in particular divorce and parental

Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, Official Journal of the European Communities, 1979, p. 7.

254 Ibid. p. 8: "However, the Committee did not feel able to adopt this approach, and limited the scope of the Convention to matters relating to property rights for reasons similar to those which prevailed when the Hague Convention on the recognition and enforcement of foreign judgments in civil and commercial matters was drafted, the main reason being the difficulties resulting from the absence of any overall solution to the problem of conflict of laws. The disparity between rules of conflict of laws is particularly apparent in respect of matters not relating to property rights, since in general the intention of the parties cannot regulate matters independently of considerations of public policy".

255 Ibid. p. 3.

256 Ibid. Preamble: "The committee was composed of governmental experts from the six Member States, representatives of the Commission, and observers. Its rapporteur, Mr P. Jenard, Directeur d' Administration in the Belgian Ministry for Foreign Affairs and External Trade, wrote the explanatory report, which was submitted to the governments at the same time as the draft prepared by the committee of experts"; p. 9: "For these reasons the Committee preferred finally to adopt only the concept of domicile".

257 Ibid. p. 7.

258 Ibid. p. 16: "The concept of domicile, while not without drawbacks, does however introduce the idea of a more fixed and stable place of establishment on the part of the defendant than does the concept of habitual residence".

259 Ibid.: "This course was similarly rejected. It was pointed out that the term 'habitual' was open to conflicting interpretations, since the laws of some of the Member States provide that an entry in the population registers is conclusive proof of habitual residence. The adoption of this course would, moreover represent a divergence from that followed under the laws of the Contracting States, the majority of which use domicile as a basis of jurisdiction".

responsibility[260]. The second was to implement new rules on jurisdiction by having recourse to modern standards, modern connecting factors[261].

**88.** Habitual residence, within the new Convention on jurisdiction and the recognition and enforcement of judgments in matrimonial matters[262], covered a primary role over nationality and domicile[263]. According to the explanatory report, habitual residence reflected the long-standing CJEU practice, which had provided an interpretation for it as '*the place where the person had established, on a fixed basis, his permanent or habitual centre of interests, with all the relevant facts being taken into account for the purpose of determining such residence*'[264]. The report also states that this notion was the unanimous compromise among different national rules on jurisdiction for matrimonial matters, representing the genuine connection between the person and a Member State[265].

**89.** The Brussels II Convention[266] will not enter into force. Nonetheless, the importance of adopting a Community instrument (mandatory, uniformly, and directly applicable)[267], aiming to strengthen judicial cooperation in civil matters (including family law matters)[268], had rapidly become the main interest of the Member States[269]. The objective is clearly set out in the preamble, recital 1, of the Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of

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260 Ibid. p. 6: "The importance of laying down rules of jurisdiction concerning parental responsibility over the children of both spouses on the occasion of such proceedings".

261 Ibid.: "The desire to introduce uniform modern standards for jurisdiction on annulment, divorce and separation and to facilitate the rapid and automatic recognition among Member States of judgments on such matters given in the Member States".

262 It is referred to as Brussels II Convention.

263 Ibid. JENARD, § 28.

264 Ibid. § 32. For further detail see *Rigsadvokaten v. Ryborg*, C-297/89 [23 April 1991] § 28: "the permanent centre of interests of the person concerned, which must be determined with the aid of all the criteria set out in that provision and all the relevant facts". The CJEU judgment was referring to the concept of 'normal residence' adopted in the Council Directive of 28 March 1983 on tax exemptions within the Community for certain means of transport temporarily imported into one Member State from another; whose interpretation was therefore adopted by analogy in the Borras Report.

265 Ibid. § 30; see also M. HARDING, Conflict of Laws, 5th ed. (Routledge, 2014) p. 28

266 The Convention was approved together with its Protocol on the interpretation of the Convention by the European Court of Justice. Protocol, drawn up on the basis of art. K.3 of the Treaty on European Union, on the interpretation by the Court of Justice of the European Communities of the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters (Text approved by the Council on 28 May 1998). In this sense, see P. MCELEAVY, The Brussels II Regulation: How the European Community Has Moved into Family Law, *ICLQ*, Vol. 51, No. 4, 2002, p. 899.

267 Ibid. p. 899; Brussels II Regulation, § 7.

268 For the purposes of an integrated Internal Market and an unlimited free movement of judgments (but also of people, capitals and goods).

269 In line with the Amsterdam Treaty 1999 amending both the Rome and the Maastricht Treaties.

both spouses (known as Brussels II Regulation), promoting a common area of freedom, security and justice[270].

**90.** As was the case for the Brussels II Convention, also within the Brussels II Regulation, habitual residence was the prevalent connecting factor[271]. Even so, neither a contextualised reference was provided by the said instrument, nor would the explanatory report to the Convention have been applicable to the Regulation. References were initially made to the notion's (in)consistent analogy by national courts (*i.e.* UK)[272]. Subject to the inevitable rejection from the CJEU, a subsequent range of factors was soon adopted by the Luxembourg Court previously employed in national case law implementing the Brussels IIA Regulation[273].

## § II. EU Family Law acquis in the 21st Century: Brussels IIA and Rome III

**91.** The 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 applies from 2005[274]. It also refers to unmarried couples and non-marital children, which were not included in the scope of the Brussels II, therefore subject to criticism[275]. The Regulation (hereinafter Brussels IIA) governs divorce, parental responsibility and international child abduction within the EU. Innovative aspects relate also to the abolishing of the exequatur (automatic recognition and enforcement of judgments) concerning right of access and return orders following abduction[276].

**92.** A Recast according to article 65 of Brussels IIA was adopted on 25 June 2019 – Brussels II-A Recast or Brussels II-ter (hereinafter Recast). This will govern the legal proceedings instituted on or after 1 August 2022. The Recast

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270 Ibid. McELEAVY, p. 901.

271 Ibid. p. 906.

272 P. STONE, Private International Law in the European Union, 4th ed., 2018, § 20-21.

273 *Marinos v. Marinos* EWHC 2047 Fam. [2007]; *Munro v. Munro* EWHC 3315 Fam. [2007].

274 Applicable to 26 Member States: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden. Not applicable to the United Kingdom since 11 pm of 31 December 2020 (end of the transition period), save ongoing proceedings prior to that date.

275 M. NÍ SHÚILLEABHÁIN, Ten Years Of European Family Law: Retrospective Reflections From A Common Law Perspective, *ICLQ*, Vol. 59, No. 4, 2010, p. 1024.

276 Ibid.

provides for important improvements[277], with no consistent changes occurring to the extent of habitual residence.

**93.** Article 3 (both of Brussels IIA and the Recast) allocates primary international jurisdiction for divorce to the Member State of the spouses' habitual residence[278]. Brussels IIA (and the Recast) does not contain rules on applicable law for divorce, which should therefore be found in the Divorce Rome III Regulation approved in 2010[279].

**94.** The 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 (hereinafter Rome III), article 8, provides that the universal rule is the law of the State of the spouses' habitual residence at the time of the seisin[280]. A derogation is available in favour of the spouses' choice of law referred to in article 5. This provision contains, as a primary alternative rule, the law of the State of the spouses' habitual residence at the time the agreement is concluded[281].

**95.** Habitual residence within the EU regulations can be interpreted through their recitals, which have the function of a preamble. Their aim is to identify the scope and the objectives of each regulation. In addition, the CJEU guidance can be obtained by the national courts in the form of preliminary ruling[282], setting the 'guidelines' for the interpretation of the provisions contained in each regulation[283]. As of today, the habitual residence determination under the Brussels IIA Regulation prevails within the *EU acquis* in family matters at the

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277 *I.e.* the extended abolishing of the exequatur for all decisions on parental responsibility; the avoidance of conflicting decisions between return and non-return orders as is the case in art. 11 of Brussels IIA; the 6-week fixed time deadline for first instance orders on abduction cases; the mandatory exercise of the child's right to be heard for children capable of forming their views in parental responsibility and abduction proceedings; the reinforcement of cross-border cooperation, adding the role of child's welfare authorities in such mechanism; more efficient processes in obtaining judicial consent in the Member State where the child is to be placed. We recommend the reading here: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019R1111&from=EN>. See also European Commission, Adoption of new rules to better protect children caught in cross-border parental disputes, 25 June 2019.

278 Followed by other alternative criteria, including the spouses' common nationality.

279 Applicable to 17 States: Austria, Belgium, Bulgaria, Estonia, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Portugal, Romania, Slovenia and Spain.

280 Other subsidiary rules, including the nationality of both spouses at the time of the seisin, or the *lex fori* are provided in the said provision.

281 Alternative rules are possible such as the spouses' nationality at the time the agreement is concluded, or the *lex fori*.

282 Art. 267 of the Treaty on the Functioning of the European Union (<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Al14552> "This procedure is considered useful when, in a case before a national court, a question of interpretation which is new and of general interest for the uniform application of EU law is raised, or where the existing case-law does not appear to give the necessary guidance to deal with a new legal situation"). See also Court of Justice of the European Union, Recommendations to national courts and tribunals, in relation to the initiation of preliminary ruling proceedings, 2016/C 439/01.

283 The CJEU preliminary ruling has proven extremely useful for the analysis of habitual residence.

time of drafting this book[284]. French and Italian case law has provided further elements of interpretation under the said Regulation[285]. The French Cour d'Appel de Toulouse[286] retained as decisive factors the duration, the American nationality, the place of marriage celebration, the school enrolment, the 'habitual' *nature* of the residence obtained with no fraud/ violation of the father's parental rights. The Italian Tribunal of Rimini[287] considered particularly relevant: the place of marriage celebration, the establishing and registration of the family residence, the 7-year period of duration of the family stay including until some months after the filing for legal separation, the place of birth of the three daughters, and the *absence of relocation during the proceedings*.

## § III. EU Parental Responsibility and the CJEU Guidance on Habitual Residence

**96.** In matters involving parental responsibility, Brussels IIA provides that the authorities of the Member State of the child's habitual residence at seisin are internationally competent (article 8.1)[288]. They retain jurisdiction for a three-month period in decisions concerning visiting rights by virtue of the continuing jurisdiction rule (article 9)[289]. Under the latter rule, the court first

284 Ibid. BONOMI/ WAUTELET, p. 192. Very recently, a judgment within the framework of the Succession Regulation was rendered which is examined in part V of this book.

285 Given the recent nature of the approval concerning the Recast (not yet applicable), the available judgments referred to the provisions of Brussels IIA.

286 Cour d'Appel de Toulouse [25 May 2008] No. 06/02241: This case involved a French-US couple (he, French, she, American) who filed a petition for divorce, before the French (Tribunal de Grande Instance de Toulouse) and US (Massachusetts) courts, respectively. The applicant, Mr. Antoine Z., applied before the French court on 11 April 2006 after which a 'non-conciliation' order was rendered (conciliation hearing under French law to find an amicable solution). A further provisional measure was implemented according to which the couple was authorised to live separately: he in France, she in the US with the children. Ms Kimberley appealed on 5 May 2005 against the French decision. On 16 August, she obtained a divorce decree from the Massachusetts Court for which she pleaded recognition in France. The Court concluded that the mother and the three children were all habitually resident in the US, at the time of both the US and French seisin. Therefore, the divorce judgment issued in the US should have been recognised in France, and any further measures concerning children should have been taken in the US.

287 Tribunale Rimini (IT) [13.04.2015], No. IT-807. This case concerned a Chinese couple living in Italy with three minor daughters. On April 2012, the mother filed an action before the Italian Tribunal of Rimini pertaining to issues of legal separation, sole custody over their youngest daughter and maintenance obligation on behalf of the father for the three daughters. On February 2013, the Court ordered an urgent and provisional measure authorising the separation of the couple, and confirmed the decree of the '*Tribunale per i Minorenni*' which established a trusteeship ('*affidamento*') over the youngest daughter in favour of the Social Services. The Italian Court concluded that both international jurisdiction and applicable law were found in Italy.

288 Art. 7 of the Recast.

289 Art. 8 of the Recast.

seised retains jurisdiction even if the child's habitual residence changes to another Member State and occurs during the proceedings[290].

**97.** A 'conditioned'[291] derogation is possible from the rule of article 8. Accordingly, the parties may expressly agree, at the time of seisin[292], to extend the jurisdiction of the State authorities, competent for the action on divorce, over custody proceedings connected to the divorce (article 12)[293]. The principle of the child's best interests[294] has proven to be a valuable element to judge whether or not the above derogation from the rule of article 8 of Brussels IIA should occur[295].

**98.** The Recast is more concise than Brussels IIA in articulating the mechanism of article 12. The Recast, article 10, provides that this rule, establishing *exclusive jurisdiction*, applies only if three conditions are satisfied, namely: a) there is a substantial connection between the Member State authorities competent for divorce and the child[296]; b) an express agreement has occurred between the parties[297]; c) the prorogation is in the child's best interests. In addition, the scope of article 12, under Brussels IIA, incorporates '*proceedings other than those mentioned in paragraph 1*', falling outside divorce interconnection. This concerns specifically the operation of substantial connection derogating from general jurisdiction. This is not any longer available in the Recast, which indicates as seen *supra* substantial connection as a general condition for prorogation.

**99.** An exceptional rule under both Brussels IIA[298] and the Recast relates to the transfer of jurisdiction in favour of the Member State's better placed authority to assess the child's best interests[299]. Within the Recast, the competent

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290 European Judicial Network in Civil and Commercial Matters, Practice Guide for the application of the Brussels II A Regulation, European Union publications, 2004, p. 27.

291 Ibid. p. 31: "[…] a limited possibility, and subject to certain specific conditions".

292 The possibility of reaching agreement also during the proceeding is now provided in the Recast, art. 10, Recital 23.

293 This rule is currently known as 'prorogation of jurisdiction'.

294 Recital 12 of Brussels IIA and 23 of the Recast.

295 CJEU, *Alessandro Saponaro v. Kalliopi-Chloi Xylina* [19 April 2018] C-565/16, § 33: "Article 12(3) of Regulation No 2201/2003 makes it clear that recourse to prorogation of jurisdiction cannot in any case be contrary to the best interests of the child and whether that condition is complied with must be examined in each individual case (see, to that effect, judgment of 12 November 2014, L, C-656/13, EU:C:2014:2364, paragraphs 49 and 58)".

296 Because (i) either one of the parental responsibility holders is habitually resident in that State; or (ii) that is the State of the child's former habitual residence; or (iii) the child is a national of that State.

297 By virtue of the formal requirements indicated in art. 10(2).

298 Ibid. Practice guide, p. 34: "The Regulation contains an innovative rule which allows by way of exception […]".

299 And with which the child has a 'particular connection' (art. 15 of Brussels IIA, and 12 of the Recast). Such transfer is possible *ex officio* or upon request of the parties (or of the courts of the particular connection with the child) in favour of the following alternatives: a) the Member State of the child's habitual residence after seisin; b) the Member State of the former child's habitual residence; c) the Member State of the child's nationality; d) the Member State of the habitual residence of one of the parental responsibility holders; e) the Member State of the location of the child's properties and the proceedings concern measures on the protection of such properties.

authorities of the prorogation under article 10 (*cf.* exclusive jurisdiction *supra*) cannot transfer their jurisdiction to another Member State[300].

**100.** A last 'conditioned derogation' is the jurisdiction of necessity set out in article 13[301]. As for the HC-1996, this rule does not exclude the possibility of establishing habitual residence (in the same or another Member State) at a later stage, which should cause the cessation of the jurisdiction of necessity[302].

**101.** International child abduction is also part of Brussels IIA (article 11). Within the Recast, it acquires more relevance by virtue of article 9 and its chapter III[303]. For the operation of habitual residence, the said provisions substantially refer to the mechanisms of the HC-1980.

**102.** The CJEU has given long-standing guidance in the interpretation of habitual residence in relation to parental responsibility matters. The following cases will illustrate habitual residence within the scope of Brussels IIA in proceedings also involving international child abduction.

**103.** The first case[304] concerns three children who settled in Sweden, in 2001, together with their mother and their stepfather. In October 2005, the family moved to Finland where it was living in a caravan in different campsites until they applied for social housing from the social services. In November 2005, the three children were placed under immediate foster care (urgent measure) on the grounds that they had been abandoned. The mother and the stepfather opposed that decision, applying for it to be quashed. Their request was rejected by the Finnish Welfare Committee. The mother filed a custody action, rejected by the Finnish court (*'Kuopion hallinto-oikeus'*). She appealed against that decision and challenged the Finnish jurisdiction[305]. The Finnish court decided to stay proceedings and to request the preliminary ruling of the CJEU.

> The Court confirmed the principle that the interpretation of habitual residence should be made in light of the provisions and the objective of the Regulation, in particular as determined by Recital 12[306]. Accordingly, the grounds of jurisdiction are shaped *in the light of the*

300 Art. 12(5) of the Recast.

301 Art. 11 of the Recast. The same provision as the HC-1996, art. 6.

302 To the extent that this jurisdiction is founded on physical presence, or 'mere presence', it is observed that the court of the State of physical presence can also be competent to rule on the application of urgent and/ or provisional measures according to art. 20 of Brussels IIA (similarly through the same modalities under the HC-1996).

303 This is a new chapter which is not provided under Brussels IIA.

304 CJEU, *A* [2 April 2009] C-523/07.

305 She argued that her children's Swedish nationality (acquired in 2007), and their permanent residence having been for a long time in Sweden, the Swedish authorities should have been competent to rule on the matter of substance.

306 Recast, recital 20.

*child's best interests,* and *on the criterion of proximity* (§ 35)[307]. Decisive factors (of the child's integration in a social and family environment) are the *duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child* (§ 39). The Court referred to the Advocate General's opinion[308], which considered additional relevant factors[309] highlighting a potential change in the child's habitual residence in circumstances whereby continuing jurisdiction does not apply[310]. One such factor is *common parental intention to settle permanently with the child* in another Member State[311]. The *notification of new life events* to the Member State authorities of the preceding child's habitual residence is an important requirement showing that the former habitual residence is at an end. Another indicator is the *application for social housing*. The Court excluded short periods of time spent due to a peripatetic life (§ 41).

**104.** The following case[312] concerns an Italian-Greek couple who married and lived in their marital home in Italy. When the spouse (Greek) was eight months pregnant, the couple relocated to Greece[313], where in February 2016 their daughter was born. The father, who was present at the birth, returned to Italy[314]. In July 2016, he initiated divorce proceedings before the Italian courts, comprehensive of obtaining exclusive custody, visiting right for the mother, return of the child to Italy and maintenance allowance in support of the child. The Court held that it had no jurisdiction on parental responsibility nor over

307 Habitual residence, according to the Court, must consider physical presence plus other factors showing that that presence is not temporary or intermittent and that the residence reveals some degree of integration in a social and family environment (§ 38).

308 Opinion of Advocate General Kokott [29 January 2009] ECLI:EU:C:2009:39.

309 § 40: "[…] may constitute an indicator of the transfer of the habitual residence […]".

310 § 44: "Article 9(1) applies only to a very specific situation, however. In other cases all the circumstances of the individual case must be taken into account where there is a change of place. An indication that the habitual residence has shifted may in particular be the corresponding common intention of the parents to settle permanently with the child in another State. The parents' intention may manifest itself, for example, in external circumstances such as the purchase or lease of a residence in the new State, notifying the authorities of the new address, establishing an employment relationship, and placing the child in a kindergarten or school. As a mirror image, abandoning the old residence and employment and notifying the authorities of departure suggest that habitual residence in the former State is at an end".

311 The intention should be manifested by certain tangible steps such as the purchase or lease of a residence in the host Member State; the establishing of an employment relationship; the placing of the child in a school.

312 CJEU, *OL v. PQ* [8 June 2017] C-111/17.

313 Specifically to receive the support of her family during the birth of the child, and return to Italy afterwards.

314 The decision states that the couple was in agreement about the mother and the child returning to Italy.

maintenance[315]. The Greek court[316] held that the child was not wrongfully removed from Italy to Greece, but she was unlawfully retained in the absence of her father's agreement or consent to her stay in Greece. The Court stayed proceedings and requested the preliminary ruling of the CJEU.

> The Court[317] confirmed that an infant's family environment is located through reference given to the person with whom the child lives, and by whom he or she is *de facto* looked after and taken care of[318]. The Court retained, as decisive, the *child's place of birth* and the *father's stay together with the mother and her family for 5 months after the birth*. In addition, the Court maintained that the *fact-based purpose* of habitual residence would hardly reconcile with the abstract element of parental intent (§ 49-51)[319]. The Court also noted that in relation to the return procedure, the objective is to ensure the *child to be back in the environment with which he or she is most familiar* (§ 61)[320].

**105.** This last case[321] involves a child born to a British-Bangladeshi couple. The father is British, the mother is Bangladeshi. The couple got married in Bangladesh, then they moved to the UK[322], and again, in February 2017, back to Bangladesh where the child was born. The child never lived in the UK. In January 2018, the father moved to the UK without his family. In March 2018, the mother commenced proceedings before the UK courts to obtain a ward to protect the child[323] under that jurisdiction. The father contested the UK jurisdiction. The Court stayed proceedings and asked the preliminary ruling of the CJEU.

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315 On the basis that the child was habitually resident elsewhere. A divorce order was issued in February 2017.

316 A parallel application for child return was filed in Greece in October 2016.

317 The CJEU confirmed that the concept of habitual residence is a key element in assessing whether an application for return is well-founded (§ 38). The Court reiterated that this is an autonomous concept of EU law which should be interpreted in light of the provisions and objectives of Brussels IIA, in particular of recital 12 – best interests and proximity. It was also added that the concept should be uniform within the Regulation, and furthermore that the interpretation reached and currently applicable by the Court to parental responsibility should be extended to issues relating to international child abduction (§ 41). The interpretation falling under the *A* (C-523/07) judgment was therefore applied to the present case.

318 See CJEU, *Mercredi v. Chaffe.*

319 "the initial intention of the parents as to the place which 'ought to have been' the place of that residence would constitute the fundamental factor, would be likely to compel the national courts either to gather a substantial quantity of evidence and testimony in order to determine with certainty that intention, which would be difficult to reconcile with the requirement that a return procedure should be expeditious, or to issue their judgments while not in possession of all the relevant information, which would result in legal uncertainty".

320 Therefore, other relevant factors to determine habitual residence should be a significant degree of familiarity, as well as continuity in the child's living conditions and the conditions for the child's development in a given State.

321 CJEU, *UD v. XB* [17 October 2018] C-393/18.

322 The mother was granted a visa.

323 By reason of alleged coercion on the part of the father against the mother.

The Court[324] clarified that the objective of the Regulation is to meet the *child's best interests through the criterion of proximity* (§ 48)[325]. It stated that such criterion refers to the *Member State authorities geographically closest* to the child[326]. The Court specified that when the 'habitual' nature of the child's residence cannot be determined, and prorogation of jurisdiction is not available, *physical presence may also reflect the criterion of proximity* (§ 51). It was thus concluded that *physical presence* is, in any of those scenarios provided within the rules of articles 8-14 of the Regulation[327], an essential 'prerequisite' to establish international jurisdiction, and to determine the stability and the degree of the child's residence.

## § IV. EU Maintenance Regulation

**106.** The results of the Convention 1968 brought about the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (known as Brussels I Regulation) which superseded the Convention. The Brussels I Regulation came into force in 2002[328] and was repealed, in 2012, by the 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 (known as Brussels I bis Regulation). This last Regulation, unlike the Lugano Convention, does not apply to maintenance obligations (recital 10). The EU rules governing jurisdiction, applicable law, recognition and enforcement of decision and cooperation on maintenance are currently provided by the 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 (hereinafter Maintenance Regulation)[329].

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[324] It was reiterated that habitual residence, as a peculiar concept of EU law, must normally be given an autonomous and uniform interpretation throughout the European Union in accordance with the principle of equality (§ 46-47).

[325] "The EU legislature considered that the court geographically close to the child's habitual residence is the court best placed to assess the measures to be adopted in the interests of the child. According to that recital, jurisdiction should lie in the first place with the Member State of the child's habitual residence, except in certain cases of a change in the child's residence or pursuant to an agreement between the holders of parental responsibility".

[326] Except in some specific circumstances dealing with a change of the child's residence or an agreement between the parental responsibility holders (see also CJEU, *W and V v. X* [15 February 2017] C-499/15, § 51).

[327] 7-14 of the Recast.

[328] Applicable to all the EU Member States except for Denmark. Brussels I presented the same maintenance provision contained within art. 5(2) of the Lugano Convention.

[329] Applicable to all the EU Member States except for Denmark.

**107.** The Maintenance Regulation allocates primary international jurisdiction[330] to the Member State of the habitual residence of the defendant, or alternatively of the creditor[331]. Maintenance obligations may be dealt with in principal proceedings relating to personal status and parental responsibility (article 3). In case an application concerning maintenance may be action-related to both contexts, such application should only be considered as ancillary to parental responsibility[332]. This Regulation also provides the parties with the possibility of concluding a choice of court (article 4)[333], which incorporates various alternatives such as firstly the habitual residence of one of the parties[334]. The relevant time for the habitual residence determination under the said alternatives, is the conclusion of the agreement or the seisin, as opposed to article 3 where the relevant time is not indicated.

**108.** Exceptional rules are set out in the Regulation (articles 5-7)[335]. Furthermore, when jurisdiction cannot be determined under articles 3-6, the Member State, which the dispute is sufficiently connected with, should exercise jurisdiction of necessity[336]. Article 8 contains the rule under which a judgment delivered in a Member State, in which the creditor still habitually resides, cannot be subject to proceedings brought by the debtor in another Member State purporting to modify such judgment[337].

**109.** Habitual residence supersedes domicile and nationality[338] as a primary connecting factor. In the Regulation an additional notion of residence is also referred to when dealing with the exercise of assistance from the Central

330 Concerning the rules governing applicable law, art. 15 makes a 'renvoi' to the provisions contained in the Hague Protocol 2007.

331 With additional alternatives provided under the domestic law of the Member State, competent over principal proceedings to which maintenance is ancillary.

332 CJEU, *A v. B* [16 July 2015] C-184/14.

333 Art. 4(4) makes reference to the interplay with the Lugano Convention. The provision clarifies that if a choice of court attributes jurisdiction to the authorities of a State that is not a Member State but it is a Contracting State to the Convention, the latter will apply. The choice of court does not apply to maintenance obligations relating to children under 18, who are excluded from the scope of this provision (art. 4.3).

334 Additional alternatives refer to: the nationality of one of the parties (art. 4.1 lit. b); in the case of maintenance obligation between spouses, the first option is their last common habitual residence where they lived for at least one year (art. 4.1 lit. c (ii)) and the second option refers to the courts competent over matrimonial matters.

335 These apply in particular whenever the defendant enters an appearance (but not for the sole purpose of contesting a jurisdiction); or when jurisdiction cannot be determined either under art. 3-5, or under the Lugano Convention. In such circumstances, the State of the parties' common nationality should be competent.

336 By reason that proceedings cannot be reasonably brought or it is impossible to do so before the courts of a third State.

337 Some exceptions are provided in art. 8.2.

338 Art. 6 refers to the international jurisdiction of the spouses' common nationality as a subsidiary rule, applicable only when the rules of art. 3 to 5, as well as the rules designated by the Lugano Convention, do not apply.

Authority. This notion does not require *habitual nature*, but it does exclude mere presence (§ 32).

**110.** The CJEU has not yet delivered judgments concerning habitual residence within this Regulation. However, it has referred to the interpretation given under Brussels IIA for proceedings relating to parental responsibility, and to which maintenance was ancillary. In the latter circumstances, that interpretation applies to both Regulations[339]. Italian case law has given us guidance concerning habitual residence under this Regulation. The Italian Tribunal of Belluno[340] looked at both parties' duration of stay, namely 2 years for the defendant and 5 years for the creditor. The *professional reasons were also relevant*. According to the Court, the couple had *effectively* established habitual residence in Italy. The *sufficient degree of stability*, the couple's habitual and permanent centre of personal interests and attachments, proved Italy to be the place of a concrete and continuous performance of their personal and professional life[341].

## § V. EU Succession Regulation

**111.** The 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 (hereinafter Succession Regulation)[342] introduces for the first time ever a uniform set of rules in matters involving succession in the

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339 CJEU, *W, V v. X* [15 February 2017] C-499/15, § 47-49: "Consequently, it must be held that, by its question, the referring court asks, in essence, whether Article 8 of Regulation No 2201/2003 and Article 3 of Regulation No 4/2009 must be interpreted as meaning that the courts of the Member State which have adopted a decision that has become final concerning parental responsibility and maintenance obligations in respect of a minor child retain jurisdiction to rule on an application for amendment of the orders made in that decision, even though the child is habitually resident in the territory of another Member State. In order to answer that question, it should be stated from the outset that, pursuant to Article 3(d) of Regulation No 4/2009, in matters relating to maintenance obligations in Member States, jurisdiction is to lie with the courts that have jurisdiction, under Regulation No 2201/2003, to entertain proceedings concerning parental responsibility if the matter relating to maintenance is ancillary to those proceedings. Next, the mechanism established by Regulation No 2201/2003 and the objectives which it pursues should be borne in mind".

340 Tribunale Belluno (IT) [12.11.2013] No. 672. This case concerned a Moroccan couple living in Italy. The mother filed an application before the Italian courts purporting to obtain maintenance from the father of their daughter. The mother argued that the father abandoned the family before their daughter's birth and supported her with an insufficient amount of money. The father opposed arguing that she alienated him and that he continued providing her with maintenance support although his financial means were limited. The Italian Court retained international jurisdiction and applied its law.

341 To determine habitual residence, the Italian Court also referred to the guidance given by the CJEU (cf. *Mercredi*), applicable to the operation of habitual residence under Brussels IIA.

342 Applicable to all the EU Member States except for Denmark and Ireland (25). UK, as a Member State, did not apply the Regulation either.

EU[343]. The importance of providing uniform rules in this field of law lies in the current issue (among others)[344] of determining international jurisdiction and applicable law according to fragmented national rules. In particular, fragmentation refers to the different national adoption and implementation of connecting factors, depending whether they apply to the determination of international jurisdiction or to that of applicable law[345].

**112.** The aim of this Regulation is also to ensure as a general principle the 'parallelism' of *forum* and *jus* (§ 27)[346]. It attributed international jurisdiction over the succession as a whole, primarily to the Member State's authorities of the deceased's habitual residence at the time of death (article 4) – save specific derogations towards other Member States (articles 5 to 9). Subsidiary jurisdiction is governed by the rule contained in article 10. Under this provision, it is stated that in absence of a last habitual residence in one of the Member States (or proved that this is situated in a third State), the Member State's authorities where the assets are located should be competent over the succession as a whole[347].

**113.** The jurisdiction on forum *necessitatis* is exercised, exceptionally[348], when the proceedings cannot reasonably be brought (or it is impossible to do so) to the third State with which the case has close connections. The authorities of the Member State must have sufficient connection with the case to be able to exercise jurisdiction of necessity (article 11). The Regulation provides an additional rule (article 13) that envisages the situation of 'concurrent' jurisdiction over the acceptance or waiver of the succession, of a legacy or of a

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343 For the purpose of determining international jurisdiction and applicable law, as well as for the facilitating of recognition and enforcement of decisions emanating from judicial authorities ("When notaries do not exercise judicial functions they are not bound by the rules of jurisdiction" (§ 22)).

344 Ibid. BONOMI/ WAUTELET, p. 31, *i.e.* determination of the beneficiaries within successions *ab intestat*, availability of specific acts such as the succession agreement *('pacte successoral')*, reserved share.

345 Some countries have preferred to concentrate jurisdiction over all the deceased's assets upon the authorities of the last domicile, nationality or habitual residence. Others have followed a dualistic approach, differentiating movables which are left under the jurisdiction of the deceased's last domicile or nationality, from immovables for which the jurisdiction in rem applies (Ibid. BONOMI/ WAUTELET).

346 "The rules of this Regulation are devised so as to ensure that the authority dealing with the succession will, in most situations, be applying its own law. This Regulation therefore provides for a series of mechanisms which would come into play where the deceased had chosen as the law to govern his succession the law of a Member State of which he was a national". Concerning the applicable law, in absence of a *professio juris*, the general rule is that the law of the State (EU member or third State) of the deceased's habitual residence at the time of death applies (art. 21).

347 However, this is possible only if such authorities are in the Member State of the deceased's nationality at the time of death; or, subsidiarily ('failing that'), if they are in the Member State of the deceased's habitual residence with proof that more than a 5-year period has not elapsed between the change of habitual residence and the seisin. In the case that neither nationality nor the 5-year preceding habitual residence apply, the authorities of the Member State seised should still be competent over the assets present therein (art. 10.2).

348 They can exercise their jurisdiction only if the other MS jurisdictions are not available (ibid. BONOMI, p. 244).

reserved share[349]. This provision applies only if there is a competent court that already exercises jurisdiction by virtue of articles 4 to 11[350]. When such jurisdiction is founded on the habitual residence of the beneficiary of the succession, and this is a minor, his/ her own habitual residence will have to be determined (and not that of his/ her representative)[351].

**114.** A specific innovation contained in the Regulation is represented by the habitual residence *contextualised guidance* (as opposed to a proper definition)[352] set out in recitals 23 to 25. This guidance, albeit innovative, may leave some legal gaps during the assessment of habitual residence (this will be duly discussed in Part V of this monograph)[353].

**115.** In the *almost* complete absence of CJEU reasoning relating to the assessment of habitual residence within this Regulation – only one decision having been issued recently (*cf.* Part V)[354] – the interpretation given within the context of Brussels IIA should provide important guidance[355]. It would be, however, advisable to consider the adult's perspective, and rely on the relevant factors shaped in light of the contextualised guidance given by the Regulation. A French case is useful in this sense. The French Supreme Court of

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349 Ibid. p. 260: "*Cette compétence n'est acquise que dès lors que les juridictions d'un Etat membre possèdent compétence, sur base des articles 4 à 11 du Règlement, pour connaitre de la succession*".

350 In the affirmative (in addition to the court jurisdictionally competent to rule on the succession pursuant to the Regulation), the court in the jurisdiction of the habitual residence of a person entitled under the applicable law to the succession to make declarations, may be competent to receive a declaration of acceptance or waiver of the succession (also of a legacy or of a reserved share); or a declaration to limit the liability of the beneficiary in respect of the liabilities present in the succession (if the law of that Member State allows such declaration to be made before a court).

351 Ibid. BONOMI, p. 261: "*Lorsque la déclaration est faite par le représentant d'un bénéficiaire, par exemple un mineur, il faudra prendre en considération la résidence habituelle du mineur et non celle du représentant*".

352 Ibid. BONOMI/ WAUTELET, p. 192: "*Pour faciliter la tâche des juridictions, certains commentateurs avaient proposé d'introduire une définition de la résidence habituelle dans le texte du futur règlement. Cette idée a finalement été abandonnée et on a laissé à la jurisprudence le soin de définir cette notion, ce qui doit être approuvé. Des précisions très utiles ont néanmoins été introduites dans le préambule du Règlement, aux considérants 23 et 24*".

353 For instance, in contexts that prove complex, the notion of 'settling permanently' may lead to different and conflicting national interpretations – the permanent intent to settle is often used, as opposed to habitual residence, to determine the domicile of a person. In this regard, see ibid. BONOMI/ WAUTELET, p. 189. See also R. VANDER ELST, La loi nationale dans les conventions de la Haye, Revue Belge de Droit International (1991) Vol. 1, p. 403-406; L. YIDENG, O Conceito de Residência Habitual no Direito Internacional Privado, Portal do Ministério Publico Portugal – Biblioteca da Procuradoria Geral da Republica, 2009, p. 8 ff; I. ROHOVÁ/ K. DRLIČKOVÁ, Habitual residence as a single connecting factor under the Succession Regulation, Scientific Cooperations, Ankara, 2015, ISBN 978-605-86637-5-6, p. 113; M. ATALLAH, The Last Habitual Residence of the Deceased as the Principal Connecting Factor in the Context of the Succession Regulation (650/2012), *Baltic Journal of European Studies*, Vol. 5, No. 2, 2015, p. 136.

354 *E.E. & K.-D. E.* [16 July 2020] C-80/19.

355 Ibid. BONOMI, p. 192: "*Cela étant, il n'est pas exclu de se référer à la jurisprudence relative à l'interprétation d'autres règles européennes : les arrets ayant trait au Règlement Bruxelles IIbis sont particulièrement instructifs*".

Cassation[356] addressed particular importance to the deceased's *actual family life*, namely by considering relevant the place of dwelling and residence of the deceased's family members in New York. The Court retained in its assessment the '*economic element*'. The Court determined as relevant factors: the deceased's place of birth (New York), his place of death (New York), his settled professional life (in New York), and the place of conclusion of his Will (New York) [357].

## § VI. Dublin III

**116.** The Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 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 (known as Dublin III Regulation) is the result of two previous instruments: the Dublin Convention 1990[358] and the Dublin II Regulation 2003[359]. The overall scope of the three instruments was and is to determine the mechanism of international responsibility towards asylum applications[360]. The Dublin framework complies with the Geneva Convention, together with its related Protocol. The material scope encounters a non-negligible difference though. The Dublin regime, or 'Dublin system'[361], does

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356 Cour de cassation, Première chambre civile, Decision No. 497 [29 mai 2019] (18-13.383), ECLI:FR:CCASS:2019:C100497. This case concerned a French-US national who died in New York. In his Will, he disinherited his daughter and left his estate to her two siblings. In her statement, the deceased's daughter argued for the French jurisdiction by virtue of her father's habitual residence in Paris. Her siblings opposed, contending that their father's habitual residence was in New York. The case reached the French Supreme Court (*'Cour de Cassation'*). The latter Court declined international jurisdiction in favour of the US authorities.

357 As *first-step analysis*, the French Court considered the deceased's regular travelling, and his life equally settled between New York and Paris. The duration of the deceased's life settlement was however disregarded because the Court concluded that a regular presence was not achieved in either State. As *second-step analysis*, the Court looked at the deceased's citizenship and the location of his main assets. In particular, the fact that the deceased owned immovables of consistent economic value, and that he, as a real estate professional, regularly targeted the New York estate, constituted, for the Court, complementary relevant assessment factors. Other than nationality, the deceased's home address in New York, his wish to be buried in New York, and his tax residency (*'domicile fiscal'*), were lastly considered.

358 Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities.

359 Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.

360 There is only one chance to get asylum, meaning that, in principle, only one decision of acceptance or refusal can be obtained, and 'asylum shopping' is not permitted. On this point, see S. PROGIN-THEUERKAUF, The «Dublin IV» Proposal: Towards more solidarity and protection of individual rights? in: Sui Generis, 2017, p. 63.

361 M. HERMANN, Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application

not apply to recognised refugees, intending those who have already obtained a refugee status. It applies to asylum seekers only prior to the refusal or acceptance of a refugee status. In addition, the rules on international protection governed by the provisions of Dublin III are also applicable over 'subsidiary protection', which comprises economic and environmental migrants, who were not contemplated by the legislator of the Geneva Convention[362].

**117.** The origins of the 1990 Dublin Convention[363] lie in the new territorial assets that have affected world areas like Yugoslavia and North Africa, which caused an increasing number of asylum applications within the EU Member States without their 'asylum laws' being guided by a common asylum policy[364]. The creation of a single market and the signing of Schengen (border-free zone) by the EU Member States[365] had begun the processing of a harmonised legal framework and a coordinated approach – the Common European Asylum System (CEAS)[366].

**118.** In 2003, the Dublin II Regulation[367] was, as for the field of family law, the '*communitarised*' consequence of a bulk of EU instruments purporting to modify national legislations through the direct applicability of EU law. That Regulation had succeeded the Convention with slight amendments known as 'cosmetic changes'[368]. Its implementation had to be conceived at that time together with the Eurodac Regulation[369]. The latter provides a database system aimed to collect the asylum seekers' fingerprints at the moment of their application. The territorial scope of the Regulation was also extended to the

lodged in one of the Member States by a third-country national in: K. HAILBRONNER, EU Immigration and Asylum Law - Commentary on EU Regulations and Directives, 2010, p. 1369.

362 H. BATTJES, European Asylum Law and International Law (Leiden/Boston, 2006), p. 385; and K. HAILBRONNER/ D. THYM, Legal Framework for EU Asylum Policy in: EU Immigration and Asylum Law: A Commentary, 2016, p. 1033.

363 Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom.

364 L. MOSES, The Deficiencies of Dublin: An Analysis of the Dublin System in the European Union, *Policy Analysis*, Vol. 6, No. 2, 2016, p. 3.

365 Excluding Ireland, Romania, Bulgaria, Croatia and Cyprus, at the time of the drafting of this monograph.

366 Ibid. HERMANN, p. 1370.

367 All the EU Member States except for Denmark. EFTA (Iceland, Liechtenstein, Norway, Switzerland), and the UK.

368 C. HRUSCHKA, From the Dublin Convention to the Dublin Regulation: The impact on EU third country cases in the UK jurisdiction, *Jahrbuch für Recht und Ethik / Annual Review of Law and Ethics*, Vol. 13, 2005, p. 478: "The most notable exceptions in this regard are, firstly, the introduction, as mentioned above, of a broader right to family reunion, secondly, a special provision for the designation of the Member State responsible for the asylum application of an unaccompanied minor (Article 6 of the Dublin Regulation), and thirdly, the changeover of the responsibility for the asylum application when Mem ber States miss the time limits for the transfer or for the action necessary with regard to Dublin requests".

369 S. FRATZKE, Not Adding Up: The Fading Promise of Europe's Dublin System, *Migration Policy Institute*, 2015, p. 3.

European Free Trade Agreement area (Iceland, Liechtenstein, Norway, Switzerland).

**119.** In 2013, the Dublin III Regulation[370] was approved again with slight changes over the previous Regulation. These aimed to render procedures and mechanisms of international protection more efficient[371]. In 2016, a proposal for a Dublin IV Regulation was submitted to enhance solidarity and cooperation among Dublin Member States, even though with no hopes for its successful approval[372].

**120.** With specific regard to the rules of 'international responsibility' provided by Dublin III, the connecting factor used to determine it is *physical presence*. The State of arrival, where the application for asylum is filed, is responsible for the asylum seeker. That holds except when some derogations apply: the transfer of responsibility (articles 18-25), the child's best interests (article 8), family reunification (articles 8-11), and the humanitarian clause (article 17). By reason of a *de facto* majority of applications arising from illegal entry, international responsibility is often attributed to the State of physical presence (article 13.1)[373]. Such physical presence should be 'mere presence' – the same concept encapsulated in the provisions of the Brussels IIA (article 13), its Recast (article 11), and the HCs-1996 and 2000 (article 6).

**121.** The following national judgments will show the practical operation of habitual residence in the international scenario, aligned with the Geneva Convention[374].

**122.** This case[375] concerned an ethnic Serb, Mr Paripovic, born in Croatia in 1964 during the period of former Yugoslavia, stateless after the collapse of Yugoslavia. Eleven months later, Mr Paripovic fled to Serbia, fearing abuse from the new 'pure Croatian' police. He and his mother were separated from his father whom they never saw again. In Serbia, he and his mother lived in a schoolhouse as part of a refugee camp, where the conditions were poor and lacking in human rights. In December 1993, Mr Paripovic left Serbia (with no

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370 The Regulation is applicable to all the EU (to Denmark through a bilateral EU-Denmark Agreement) and EFTA Member States. Not applicable to the United Kingdom since 11 pm of 31 December 2020 (end of the transition period), save ongoing proceedings prior to that date. The UK proposed to further bilateral agreements to the EU concerning family reunification of unaccompanied minors and readmission (<https://commonslibrary.parliament.uk/research-briefings/cbp-9031/>).

371 S. PEERS, The revised 'Dublin' rules on responsibility for asylum-seekers: The Council's failure to fix a broken system, *Statewatch Analysis*, 2012, p. 3, *i.e.* subsidiary protection, time limits to process the asylum request, legal safeguards for asylum (right to information, right to appeal, legal aid, etc.), strengthening the right to family life, improving the position of unaccompanied minors, addressing deficiencies in the asylum system.

372 Ibid. PROGIN-THEUERKAUF, p. 65-66.

373 Physical presence triggers responsibility also in the case of family reunification (presence of a family member) or in the case of the humanitarian clause (presence of the asylum seeker).

374 But also with the notion conceived under private international law.

375 US Court of Appeals, 3rd Cir., *Zeljko Paripovic v. Alberto R. Gonzales* [12 August 2005] No. 03-4193.

evidence about his initial destination) and in January 1994 he arrived in the US. In Puerto Rico, without encountering border controls, he filed an application for asylum. His application was denied, and an appeal followed, in 2000. The case went before the Immigration Court of New Jersey[376].

> The Court referred to the habitual residence fact-based approach used under the HC-1980 on child abduction. It also considered the US National Immigration Act (*quasi*-)definition of 'residence'[377] and the United States Code (U.S.C.) (quasi-)definition of habitual residence[378]. Particular attention was given to the duration of the stay spent in Serbia (August 1991-December 1993), as an element of the residence *habitual* nature[379]. The Court did not consider relevant the intent[380]. By determining habitual residence in Serbia, and noting that well-founded or future fear of prosecution were absent, the Court upheld that Mr Paripovic's return to Serbia.

**123.** The following case[381] involved an asylum seeker born in Bhutan, in 1972, who filed an application in Ireland because he was fearing for his person by reason of his Nepalese ethnic background. Prior to his arrival in Ireland, he got married to his wife in India, in 1995, and they had two children. Tired of an irregular situation in India, he managed to reach Ireland with a trafficker. In 2015, the Tribunal refused the applicant's appeal. One of the reasons for the refusal, among those relevant to this inquiry, was that the applicant failed to show that he would fear prosecution in both his former habitual residences (Bhutan and India)[382].

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376 The first hearing occurred in 2002, whereby the US Immigration Court had to determine Mr Paripovic's last habitual residence (Serbia or Croatia) in order to assess whether well-founded or future fear of prosecution existed; thereafter, if Mr Paripovic was entitled to asylum in the US or return procedures should have been implemented. The Immigration Court concluded that Mr Paripovic's last habitual residence had been in Serbia where no fear of prosecution existed; and that Croatia was the 'alternate' one. In 2005, an appeal was granted to Mr Paripovic before the US Court of Appeals.

377 "The place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to the intent".

378 "The place of general abode or a principal, actual dwelling place of a continuing or lasting nature".

379 "Although the IJ does not expressly define 'habitual', his reasoning makes clear that he understood this term to relate to the 'amount of time [Paripovic] spent there'. 'Habitual' may be defined as 'established by long use' or 'usual'. See *Chen v. Mayflower Transit, Inc.,* 315 F.Supp.2d 886, 911 n. 22 (N.D.Ill.2004) (citing The American Heritage College Dictionary 609 (3d ed.2000) (defining 'habitual' as, *inter alia*, '[e]stablished by long use; usual')). Thus it was permissible (if not necessary) for the IJ to consider the duration of time that Paripovic lived in Serbia".

380 S. B. FENN, Paripovic v. Gonzales: Defining Last Habitual Residence for Stateless Asylum Applicants, *University of California*, Vol. 40, 2007, p. 1548.

381 Irish High Court, *BDR v. Refugee Appeals Tribunal & Anon* [2016] 274.

382 See *Thabet v. Canada (Minister of Citizenship and Immigration)* [1998] 4 F.C.21.: "[155] Fourth, where a stateless person has habitually resided in more than one country, in order to be found to be a Convention refugee, such person must show that he or she has a well-founded fear of being persecuted for a Convention reason in at least one country of former habitual residence, and that he or she is unable or, owing to such fear, is unwilling to return to each of his or her other countries of former habitual residence. In short, the well-founded fear of being persecuted for a Convention

Judicial review was granted on certiorari by the High Court. In particular, it was stated by the Court that in those cases involving more than one, or multiple, habitual residence(s), it is sufficient to show that prosecution could be feared in one of them, and that the authorities of the others are unable or unwilling to protect the applicant (but also the applicant is unable or unwilling to return)[383]. The Tribunal had failed to consider the intent of the applicant[384], which instead for the High Court was relevant.

## § VII. EU Property Regimes' Regulations 2016

**124.** These represent the most recent Regulations[385] endorsed in the field examined here. The provisions are *almost* the same in both Regulations[386], respectively, therefore reference to them is made interchangeably as Property regimes' Regulations, or simply Regulations[387].

**125.** The Regulations provide extended, *concentrate,* jurisdiction in the context of succession (article 4)[388] and divorce (article 5) involving the determination and liquidation of property regimes[389]. The Regulation on Registered Partnerships does not refer to Brussels IIA, as the latter is not applicable

reason must be established in relation to each and every country of former habitual residence before a State party to the Convention has obligations to the stateless person".

383 "Likewise, where a claimant has been resident in more than one country it is not necessary to prove that there was persecution at the hands of all those countries. But it is necessary to demonstrate that one country was guilty of persecution, and that the claimant is unable or unwilling to return to any of the states where he or she formerly habitually resided".

384 "[…] the applicant testified that he feared being returned to Bhutan by the Indian authorities. That assertion was required to be weighed by the decision-maker in the context of assessing India's willingness or ability to protect the applicant".

385 Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes; Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships.

386 Applicable to 18 EU Member States: Belgium, Bulgaria, Cyprus, Czech Republic, Germany, Greece, Spain, France, Croatia, Italy, Luxembourg, Malta, Netherlands, Austria, Portugal, Slovenia, Finland and Sweden.

387 However, when these should differ, reference to each Regulation will be made. Whenever the provisions specify the same rules for both Regulations, reference is made unilaterally to spouses or partners, though incorporating both terms.

388 Art. 13 says that if the deceased's estate comprises assets in a third State that may not recognise the decision of a Member State, one of the parties has the right to request that the jurisdiction of such State will not be exercised over those assets.

389 This means that one will have to look at the jurisdictional provisions of the Succession Regulation and Brussels IIA for those proceedings to which property regimes are ancillary.

towards registered partnerships, which explains the slight difference envisaged in the implementation of article 5[390].

**126.** In absence of concentration, jurisdiction is attributed primarily to the Member State of the spouses' habitual residence at the time of seisin (article 6)[391]. Within article 6, the spouses may agree, based on article 7, to conclude a choice of court in favour of the authorities of the Member State whose law is applicable (article 22 or 26), or those of the Member State where the marriage was concluded. Jurisdiction on appearance is also available, by exception[392], before the courts of the Member State of the applicable law (article 8)[393].

**127.** With regard to the rules on applicable law[394], the Matrimonial property Regulation provides that the law of the spouses' first habitual residence after conclusion of their marriage applies primarily[395]. The Matrimonial property Regulation (article 26.3) contains an exception known as 'escape rule', upon application by either spouse, that the law of the competent court should apply[396].

**128.** A choice of applicable law is available in favour of the law of the State of habitual residence of the spouses or future spouses, or either of their habitual residence at the conclusion of the agreement. Alternatively ('or'), the law of the

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390 In particular, spouses will have to agree only in the specific circumstances provided under art. 5.2; while registered partners will have to agree in any circumstances falling under art. 5.

391 Other subsidiary grounds are provided including the spouses' common nationality at the time of seisin.

392 Art. 8(1). This rule does not apply if the parties enter appearance to contest jurisdiction, or in those scenarios falling under art. 4 and 5.

393 'Alternative jurisdiction' (art. 9), by exception, is provided in case all the competent courts under art. 4 to 6 decline jurisdiction, by reason that the marriage is not recognised under their national PIL rules relating to marriages. In such circumstances, where a choice-of-court agreement was concluded by the parties (art. 7), jurisdiction should be exercised by the elected courts. In absence of choice-of-court agreement, jurisdiction should be exercised by the competent courts under art. 6 to 8 (or alternatively by the courts of the Member State of the conclusion of the marriage). 'Subsidiary jurisdiction' may be exercised by the Member State courts of the immovables' *situs*, only for the immovable located in their territory (art. 10), if art. 4 to 9 do not apply. 'Jurisdiction of necessity' (art. 11) is available, on an exceptional basis, in the Member State of 'sufficient connection', if art. 4 to 10 do not apply. Art. 11 should apply, exclusively, in case proceedings cannot reasonably be brought (or it is impossible to do so) to the third State with which the case has close connection. The competent courts under art. 4 to 11, in which proceedings are still pending, should exercise international jurisdiction for counterclaims falling within the scope of the Regulations (art. 12).

394 This study advocates for the modification of this 'formula' of implementation of habitual residence with the following alternative ground applicable in specific circumstances envisaged in this monograph: *last common habitual residence* (*cf. infra* part II, chapter II).

395 And subsidiarily ('or failing that'), the law of their common nationality at the time of conclusion of the marriage (which does not apply in contexts involving dual nationals at the time of conclusion), and in absence of such, the law of the closest connection at the time of conclusion of the marriage (art. 26.1).

396 If the applicant demonstrates that the spouses lived in their last common habitual residence for a significantly longer period of time than in their first common habitual residence; and that their property relations were arranged according to the law of their last common habitual residence. Conversely, the Registered partnerships' Regulation refers exclusively to the law of the registration (art. 26.1) – indicating the same 'escape rule' (art. 26.2).

State of nationality of either spouse or future spouse at the conclusion of the agreement may be elected (article 22)[397].

**129.** There are hardly any national judgments available, and indeed none from the CJEU, given that the Regulation entered into force very recently at the time of this drafting. However, Spanish case law gives some important elements for the determination of habitual residence in this field. The Spanish Court of Appeal of Palma de Mallorca[398] considered as relevant factors the effectiveness and habituality of the stay corroborated by *life roots, economic and family aspects*. In this sense, habitual residence is the place where the couple has developed its *family life by virtue also of its professional and economic life*. Such is shown by the (couple's) will to stay in a certain place (the Court referred to 'domicilio real') [399].

## Section V Habitual Residence in the Policies of the Council of Europe

**130.** The European Convention No. 105 on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children 1980 (known as Luxembourg Convention) encompasses the notion of habitual residence[400]. The Convention provides that in the case of 'improper

397 The Registered partnerships' Regulation adds the availability of the law of the registration (art. 22.1 lit. c).

398 Court of Appeal of Palma de Mallorca [13 February 2019] No. 59/2019. The case concerned a German-Russian couple who got married in Russia in 2003. The couple seised the Spanish courts with regard to liquidation of their matrimonial regime. The courts had already been competent for the delivering of a divorce judgment and for the implementation of provisional measures. The present action dealt specifically with the applicable law over such liquidation. The wife, Russian, argued that the liquidation of the matrimonial regime should be governed by the Russian applicable law (community of property), being the place of marriage. The husband, German, argued that the Spanish law instead would apply, being the State of the court seised, and previously competent over their divorce. The claim was rejected in first instance, and the wife appealed. The Court concluded that, since the couple had fixed its residence in Spain one month after the marriage (precisely four months after in Mallorca) where they settled and continued to live with their child; and because the wife had finally acquired Spanish nationality, these were factors conducive to determining that the couple's stay was permanent. Thus, the Spanish law had to apply. By reason of art. 69 of the Regulations, which states that its rules apply only to legal proceedings instituted on or after 29 January 2019, the Court had to look at the Spanish law. However, given the fact that the rules on applicable law provided in the Regulation, which are *erga omnes* (art. 20), would have indeed applied to this case, the Court referred to art. 22 and 26 of the Regulation. The Spanish law contemplate similar rules (on applicable law) as those of the Regulation. Relevant is the Spanish provision indicating the 'law of common habitual residence immediately after the marriage', which is not that far from "first common habitual residence after the conclusion of the marriage" (art. 26 of the Regulation).

399 To determine the spouses' habitual residence according to art. 9(2) of the Spanish Civil code and art. 26 of the Regulation, the Court looked at national case law. The Court clarified that habitual residence corresponds generally to permanent and intentional residence.

400 Art. 8.

removal'[401], the custody of the child should be restored in the (Contracting) State of the child and parents' sole nationality and child's habitual residence where the custody decision was taken (article 8.1 lit. a). Child custody decisions taken in the said State should be recognised in all the other Contracting States save grounds for refusal contained in article 9.

**131.** The Convention specifically refers to habitual residence in two relevant situations falling under article 9, dealing with the refusal of recognition and enforcement. The first concerns a custody decision[402] made by an authority whose jurisdiction was neither founded on the defendant's habitual residence, nor on the last common parents' habitual residence (and one of them still resides there), nor on the child's habitual residence (article 9.1 lit. b). An additional situation relates to a custody decision taken in a State not being that of the child's ultra-annual habitual residence prior to the 'improper removal' (article 9.1. lit. c). Refusal may occur if the decision is incompatible with one already enforceable in the requested State prior to the removal. Other grounds for refusal, specifically related to habitual residence, are set out in article 10(1)(c). For instance, they provide for cases when a custody decision was taken in the child's State of origin but the child did not have relevant connections (nationality or habitual residence) with it[403].

**132.** In the context of this Convention, the Council of Europe's Committee of Ministers issued a guide for the 'standardisation' in the Member States[404] of the concepts of domicile and residence contained in the Resolution No. 72 of 18 January 1972. According to the resolution, "the residence of a person (adult or child) is determined solely by *factual criteria*. It does not depend upon the legal entitlement to reside. A person has a residence in a country governed by a particular system of law or in a place within such a country *if he dwells there for a certain period of time*. That stay does not need necessarily to be continuous. In determining whether a residence is habitual, account is to be taken of the *duration and the continuity* of the residence *as well as of other facts of a personal or professional nature which point to durable ties between a person and his residence.* The voluntary establishment of a residence and a person's intention to maintain it are not conditions of the existence of a residence or a habitual residence. *But a person's intentions may be taken into account in determining whether he possesses a residence or the character of that residence*. A person's

401 Art. 1 (d): "the removal of a child across an international frontier in breach of a decision relating to his custody […]".

402 Falling outside the context of art. 8.

403 Art. 10 also covers circumstances where the child has not been 'improperly removed'.

404 "Convinced that it is highly desirable to proceed as of now with a progressive standardisation of the legal concepts of "domicile" and of "residence", Recommends to governments of Member States: […] to be guided, with regard to their respective laws by the Rules contained in the Annex relating to the concepts of domicile and residence, at least in their applications in the international field, without prejudice, however, to any special meaning which may be attributed to these concepts for particular purposes […]".

residence or habitual residence does not depend upon that of another person"[405].

**133.** This short analysis of the Convention concludes this and the previous sections concerning the international and regional origins of the concept of habitual residence. In spite of the important reference duly made to the COE's resolution, it will not be dealt with the detailed application of the Convention, by now superseded by the HC-1980. The next section will deal with the national operation of habitual residence.

# Chapter II: Comparative Perspective: National Operation of Habitual Residence

**134.** Both single State ratification of the Hague conventions in the international scenario, and the application of the Brussels regulations within the EU, have triggered a profound harmonisation of national policies in the whole area of international family law. The concept of habitual residence has been a clear 'victim' of such harmonisation, giving rise to important case law, particularly from the CJEU as a regional court, which has been transposed and referred to within national judgments.

**135.** The results of such practice have led to important consequences in the determination of international jurisdiction and applicable law. Consequentially, States that were applying typical 'national' connecting factors such as domicile and nationality faced deep changes related to the application of an inter-country fact-based concept[406].

**136.** In this sense, national legal orders adopted the concept of habitual residence during the 20th Century. Some States, already experienced with it, incorporated the interpretation of the *inter-country concept*[407] into their national concept[408]. Others, not used to the notion, transposed the inter-country concept directly as a new connecting factor. In some legal contexts, the meaning of domicile was replaced by, or adapted to, the one of habitual residence[409].

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405 Such contextualised reference, which may not be glossed with a legal definition, indicates some important 'standardised', uniform, elements that should be considered to determine the habitual residence of both children and adults.

406 Switzerland is a clear example where habitual residence has been incorporated under the Swiss private international law rules following the implementation of the Hague Conventions. On this subject, see B. DUTOIT, Droit International Privé, Commentaire de la loi fédérale du 18 décembre 1987, 5th ed., Basle, 2016, art. 20.

407 Reference is made to the Introduction and fn. 16.

408 Through the treaty ratification or EU regulation implementation.

409 Either *de jure* or *de facto*, through pertinent provisions within domestic laws, or the interpretation given by national case law.

## Section I Common Law Legal Systems

**137.** In common law jurisdictions[410], firstly UK family law will be taken into account. The Law Commission[411] made an important study report (Working Paper No. 88) focused on the reform concerning the law of domicile. In the report, domicile was considered in comparison with the notion of habitual residence[412]. The Law Commission had considered replacing domicile with habitual residence. Habitual residence was considered as the place reflecting closest connection, in particular when involving matters relating to children. However, the fact that the concept was left without clear meaning at the international level would have brought about legal uncertainty. In addition, although habitual residence was meant to avoid the ascertaining of intent (subjective element), this would have in some circumstances been inevitable[413]. Thus, despite the reference to the inter-country concept[414], the Commission advised that the idea of replacing domicile with habitual residence be abandoned[415]. In practice, at that time, UK statutory law (*i.e.* Recognition of Divorces and Legal Separations Act 1971[416], the Domicile and Matrimonial Proceedings Act 1973[417] and the Family Law Act 1986[418]) had already made use of the concept of habitual residence[419].

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410 This analysis considers common law, civil law and mixed legal systems, with a separate focus on Shari'a Law and Asian practices. For more information on common and civil law legal systems, please refer to <http://www.juriglobe.ca/eng/sys-juri/class-poli/droit-civil.php>.

411 Law Commission, <https://www.gov.uk/government/organisations/law-commission>. The Law Commission acts under its function of non-departmental body sponsored by the UK Ministry of Justice to provide or recommend reforms of laws.

412 Her Majesty's Stationery Office, 'The Law Commission, working paper No 88, and the Scottish Law Commission, consultative memorandum No 063, Private International law, the Law of Domicile', *Government Publications,* London, 1985.

413 J. J. FAWCETT, Law Commission Working Paper No. 88: The Law of Domicile, *The Modern Law Review*, Vol. 49, No. 2, 1986, p. 231.

414 Scottish authors, in analysing habitual residence, clarify that "ordinarily, *one recent anchor of clear connection* is all that is required [for the establishing of habitual residence] and from there the consequences of subsequent moves can be evaluated until the period of time under consideration is reached". See P. R. BEAUMONT/ P. E. MCELEAVY, Private International Law A. E. Anton, 3rd (Scottish Universities Law Institute, 2011) p. 178.

415 Sec. 2(4): "[…] it might well be regarded as undesirable to substitute habitual residence for domicile unless special statutory provision were made to clarify the part played by intention and length of residence in establishing whether a residence was habitual and to cover cases where in fact a person might have no habitual residence or have more than one".

416 UK Government, UK Visas and Immigration, 'Guidance: Overseas Divorces', <www.gov.uk /government/publications/overseas-divorces-set13/overseas-divorces-set13>.
Succeeded by the Family Law Act 1986.

417 UK Government, legislation, 'Domicile and Matrimonial Proceedings Act 1973', Part II, <www.legislation.gov.uk/ukpga/1973/45/enacted?view=extent>.

418 UK Government, legislation, 'Family Law Act 1986', chapter II, <http://www.legislation.gov.uk/ukpga/1986/55/contents>.

419 Ibid. BEAUMONT/ MCELEAVY, p. 754 ff.

**138.** The following very old cases[420], both concerning international successions, illustrate the interplay between the interpretations of domicile and habitual residence within the UK.

**139.** The first one involved a German national, Mr Fuld, having international life attachments across Canada, UK and Germany. The UK Chancery Division[421] made a very first *life backwards analysis* leading to the interpretation of Mr Fuld's domicile of choice. For the Court, domicile of choice is acquired when a person voluntarily establishes his *sole or chief residence* in a particular place with an *intention of continuing to reside* there for an unlimited time. The Court concluded that Mr Fuld had acquired his domicile of choice in Germany and referred to relevant 'objective' elements[422] such as: his marriage with a German citizen; the presence of his mother in Frankfurt[423]; his links with the family business present in Germany – all of which were perfectly consistent with the other attachments with Canada and the UK[424].

**140.** The second case is about a Scottish citizen who moved to England where he remained until death. The House of Lords maintained that, again in the determination of a domicile of choice, it is important to provide a *quantitative and qualitative residence test*[425].

**141.** On the intersection of habitual residence and domicile of choice, scholars do not agree on the use of the 'residence test' to determine the latter. The two notions should not be glossed, in order to better favour an independent analysis of (habitual) residence[426].

**142.** The Nauru Conflict of Laws Act 1974[427], which relies on the private international law of England[428], designates the rules on applicable law in all

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420 UK Chancery Division, *Re Fuld's Estate* (No 3) [1968] P 675, 682; and *Ramsay v. Liverpool Royal Infirmary* [1930] SC (HL) 8.

421 Belonging to the High Court.

422 Similar to the current habitual residence 'fact-based' analysis.

423 The Court refers to the maternal influence over the son as 'strain on their relationship'.

424 Ibid. *Fuld*: "For him Canada would always remain the land of romance of his salad days. He would always feel its pull, especially as in December, 1960, during periods of unhappiness. London was the haven of his later years, where he could choose his own friends, live his own life, pleasantly removed from the influence of the jealous and possessive mother, yet near enough to Frankfurt, which remained the key to his fortunes, the foundation upon which the structure of his life, wherever it was spent, was necessarily based".

425 Prolonged actual residence must be accompanied with other factors indicative of intention.

426 L. TRAKMAN, Domicile of Choice in English Law: An Achilles Heel, *J. Priv. Int. Law*, Vol. 11, No. 2, 2015, p. 26.

427 Ministry of Justice and Border Control of Nauru, Conflict of Laws Act 1974, Sec. 3: "Where the proper law to which effect would have to be given under the provisions of section 2 for the purpose of deciding any question would be the law of the country of any person's domicile, the proper law to which effect is to be given for the purpose of deciding that question is the law of the country in which that person habitually resides".

428 Sec. 2: "[…] the proper law to which effect is to be given for the purpose of deciding that question is to be ascertained in accordance with the rules of private international law in force in England on the thirty-first day of January, 1968 […]".

relevant contexts and replaces domicile with habitual residence: "*habitual residence to take the place of domicile*" (section 3).

**143.** In the Family Law Act 1975, Australia provides the applicability of different connecting factors to determine international jurisdiction, if either party has a 'specified personal connection' with the Australian jurisdiction at the time of the filing of the application[429]. 'Ordinary residence' seems to find primary application, at least when dealing with family law issues. The Family Law Act clarifies (in the interpretation of section 4, Part I) that ordinary residence includes habitual residence[430]. Other connecting factors are domicile, which is widely approved in common law jurisdictions, and mere presence employed in matrimonial causes other than dissolution[431]. With specific regard to applicable law, this is often the law of the competent court. It should be noted, that Australia and New Zealand have chosen to adopt the criterion of habitual residence applicable to matters of child support[432]. In the context of international child abduction, the Australian courts maintained that the shared parental intent should not be given '*controlling weight*' in particular as it might prove ambiguous and discordant. This is unless such intent shows a settled purpose revealed from the child's factual connection with a particular state through a sufficient degree of continuity[433].

## Section II Civil Law Legal Systems

**144.** In civil law jurisdictions, firstly Swiss law will be considered. The Swiss Federal Act on Private International Law contains a specific provision on habitual residence[434]. For some authors[435], the notion of habitual residence

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429 Although citizenship (nationality) is primarily mentioned in the said domestic law, this is infrequently applied in practice in international litigation.

430 *I.e.* Part V, sec. 39 of the Family Law Act: "Proceedings for a divorce order may be instituted under this Act if, at the date on which the application for the order is filed in a court, either party to the marriages *is ordinarily resident in Australia and has been so resident for 1 year immediately preceding that date".* Ordinary residence incorporates habitual residence (and is alternative to domicile or nationality).

431 Ibid. KEYES.

432 Australian Government, Child Support Guide, 1.6 Residence, 1.6.4 Habitual Residency under the Australian-New Zealand Agreement. Available at: <http://guides.dss.gov.au/child-support-guide/1/6/4>. "Habitual residence is a term used in many international instruments and is used specifically in the Australia and New Zealand agreement to define each country's jurisdiction. It is intended to be a simple non-technical term, applied to the facts of each case. A person's country of habitual residence is the country in which a person usually lives. 'Residence' means more than presence, as it refers to a place where a person resides or lives for a settled period. 'Habitual' indicates that something more than occasional or short-term residence is required, but continuous presence is not required. A person who is present in a country as a tourist or in transit is not habitually resident in that country".

433 *LK v. Director-General, Department of Community Services*, HCA 9, 2009.

434 Switzerland, PILA, 1987, art. 20(1)(b): "Within the meaning of this Act, an individual: has his or her habitual residence in the state where he or she lives during a certain period of time, even if this period initially appears to be of limited duration".

under Swiss Law does not entail substantial differences in practice from the notion of domicile. A similar interpretation may therefore be considered for both concepts, namely with regard to the *qualitative element* as the place where a person is socially integrated. The great difference, instead, lies in the *quantitative element* with reference to the duration of the stay. The latter means that domicile requires, subjectively and objectively, permanent attachments with that given place, as opposed to habitual residence which is acquired through physical presence of a certain duration. This was confirmed by Swiss case law at the beginning of the 21st Century[436].

**145.** In Italy, various case law has referred to the concept of habitual residence[437], although criticism has been expressed due to fragmentation and lack of analogy among judicial decisions[438]. The influence of the EU regulations is clear, in particular from the interpretation of habitual residence given by the CJEU[439]. In this respect, the conclusion seems to be that in the EU Member States, habitual residence represents a notion of '*droit communautaire*', meaning that national courts would be guided by its (harmonised) CJEU interpretation. Accordingly, habitual residence should correspond to the person's main centre of interests[440]. A more detailed analysis in relation to the notion of *effective residence*, in line with the CJEU reasoning, has been transposed within the Italian legal system. Particularly concerning divorce, effective residence is considered as the place of permanent, habitual interests and relations, stable in nature. Such elements should reflect (through a

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435 Ibid. DUTOIT, art. 20. D. MASMEJAN, La localisation des personnes physiques en droit international privé : étude comparée des notions de domicile, de résidence habituelle et d'établissement, en droit suisse, français, allemand, anglais, américain et dans les Conventions de La Haye, Thèse de droit, Lausanne, 1993, p. 137 ff.

436 IIe Cour Civile [12 janvier 2001] 5P.416/2000.

437 N. DI LORENZO, Università di Catania & Centro di documentazione Europea, La Nozione di Residenza Abituale del minore vittima di sottrazione internazionale: Breve analisi della prassi giurisprudenziale nell'Unione Europea, *I quaderni Europei, 2013*, p. 9 ff: *"In tal senso, i giudici di legittimità chiariscono come occorre interpretare la residenza abituale come il luogo in cui il minore, in virtù di una durevole e stabile permanenza, anche di fatto, ha il centro dei propri legami affettivi, non solo parentali, derivanti dallo svolgimento in detta località della sua quotidiana vita di relazione".*

438 Ibid.

439 M. RAITERI, La cittadinanza quale criterio di collegamento nel diritto internazionale privato della famiglia, *Archivio Istituzionale Open Access dell'Università di Torino*, 2012. Available at: <http://hdl.handle.net/2318/141678>, p. 2: "*Il concetto comunitario di residenza abituale si differenzia da quello di residenza definito dal II comma dell'art. 43 del codice civile italiano – che la colloca 'nel luogo in cui la persona ha dimora abituale' – e si avvicina, in sostanza, alla nozione di domicilio, che il I comma dello stesso art. 43 colloca là dove la persona 'ha stabilito la sede principale dei suoi affari e interessi'. Insomma, a livello nazionale, un aggiornamento della nostra normativa di diritto internazionale privato potrebbe utilmente portare alla sostituzione del criterio di collegamento della cittadinanza con quello della residenza abituale, in linea alle politiche dell'Unione Europea*".

440 A. CARRATTA, Verso un procedimento ingiuntivo europeo, 2007, p. 221 ff.

substantial and not merely bureaucratic analysis)[441] the place of concrete and continuing progress of life and work, at the time of the petition for divorce[442].

**146.** In France, case law introduced the concept of habitual residence for the first time in 1955[443] and the Civil code has made a specific contextualised legislative reference[444]. As mentioned in relation to the Italian legislation, also French courts have interpreted habitual residence, according to the '*droit communautaire*', as the place where the person has intentionally fixed his/ her stable and permanent, or habitual, centre of interests[445].

**147.** In Spain, the Civil code (articles 9 and 40)[446] refers to habitual residence[447]. This is the case, for instance, in matters of marriage effects which, in absence of choice of applicable law, are principally governed by the law of the spouses' common habitual residence after the ceremony (article 9). Some scholars agree that habitual residence corresponds to the effective abode ('*domus colere'*) determined through legal hypothesis or assumptions without considering intention ('*animus manendi'*)[448]. The implementation of the Hague conventions and EU regulations in Spain has inevitably led to an increasing use of habitual residence, almost discarding the use of nationality, as a prevailing connecting factor in the field of family law, following the tendency of the '*droit communautaire*'[449].

**148.** In Germany, habitual residence, known as '*gewöhnlicher Aufenthalt'*, has become a prevalent family law concept in determining international jurisdiction and applicable law, also as a consequence of the Hague conventions ratification[450]. The German ('*Abgabenordnung*') Tax code (§ 9) contains a contextualised reference[451]. The latter interprets habitual residence

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441 Ordinary residence used for taxation purposes (tax residency).

442 S. PATTI/ M. G. CUBEDDU, Diritto della famiglia, 2011, p. 459.

443 S. MASSICOT, La nationalité française. Attribution et acquisition, Persée, Vol. 42, No. 2, 1986, p. 362.

444 France, Loi n° 93-22 du 8 janvier 1993 modifiant le code civil relative à l'état civil, à la famille et aux droits de l'enfant et instituant le juge aux affaires familiales, art. 21: *"Résider habituellement en France c'est-à-dire selon la jurisprudence de la Cour de Cassation (1955 la première) y avoir une résidence effective présentant un caractère stable et permanent et coïncidant avec le centre des attaches et des occupations".*

445 Ibid. CARRATTA, p. 227.

446 Ministerio de Justicia, Real Decreto de 24 de julio de 1889 por el que se publica el Código Civil.

447 A. PEREZ CEDILLO/ P. PIQUER RUZ, Family Law in Spain: overview, *Family Law Global Guide*, 2015/2016: "In most cases involving a dispute about habitual residence relating to article 40 of the Civil Code, the two key questions are has the individual: moved to a country for a settle purpose; lived in that country for an appreciable period".

448 A. R. BENOT, El criterio de conexiÓn para determinar la ley personal: un renovado debate en derecho internacional provado, *Cuad. derecho transnac.*, Vol. 2, No. 1, 2010, p. 188

449 Ibid. p. 194 ff.

450 D. KREIDLER-PLEUS, Family Law in Germany: Overview, *Family Law Global Guide,* 2015/2016. Even though the term 'gewöhnlicher Aufenthalt' was presumably already in place before within the German practice on civil procedure (ibid. DE WINTER, p. 423).

451 AO, § 9: "*Den gewöhnlichen Aufenthalt hat jemand dort, wo er sich unter Umständen aufhält, die erkennen lassen, dass er an diesem Ort oder in diesem Gebiet nicht nur*

as the place of living, not temporarily, indicating a durable (continuous) stay of at least six months during which short-term absences are not taken into consideration[452].

**149.** In Serbia, specific reference is given in article 6 of the Private International Law Act 1983[453].

**150.** In Russia[454], reference is given under article 20(1) of the Civil code 1996[455]. In addition, the Russian Tax Code gives guidance in relation to the *time-based factor*[456]. The Russian Civil Procedure Code, chapter 44, article 402, adopts residence[457] as a primary connecting factor in determining jurisdiction over divorce and alimony proceedings. The plaintiff's residence in Russia freezes jurisdiction over the said matters[458]. The general forum of the place of the defendant's residence remains available under articles 28 and 29 of the Civil procedure code[459]. 'Place of residence' under Russian law refers to the

*vorübergehend verweilt. Als gewöhnlicher Aufenthalt im Geltungsbereich dieses Gesetzes ist stets und von Beginn an ein zeitlich zusammenhängender Aufenthalt von mehr als sechs Monaten Dauer anzusehen; kurzfristige Unterbrechungen bleiben unberücksichtigt. 3Satz 2 gilt nicht, wenn der Aufenthalt ausschließlich zu Besuchs-, Erholungs-, Kur- oder ähnlichen privaten Zwecken genommen wird und nicht länger als ein Jahr dauert*".

452 For the establishing of habitual residence, visiting, recreational, spa or similar private purposes not lasting longer than one year are not considered.

453 "The habitual residence of a natural person is deemed to be the place in the State where that person has the centre of his/her vital interests and where that person habitually resides […] In order to determine habitual residence within the meaning of paragraph 1 of this Article, 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".

454 The current analysis is illustrated in detail as the Russian jurisdiction will not be considered in all the corresponding parts of this monograph, although its case law proves very useful, in addition to the potential ongoing reform covering habitual residence. Currently under review, the notion of residence might be subject to major amendments under Russian domestic law, including the Russian Family Code 223-ФЗ (1996, last amended 2021). The Russian Ministry of Finance recently submitted a legislative proposal before the Duma to amend the concept of tax residency, to the extent of reducing the required duration of 'stay', from the current 183 to 90 days; alternatively, to provide a specific contextualised reference in that habitual residence is where the centre of vital interests is, regardless of the duration. According to the proposal, the interpretation of centre of vital interests should rely on determining factors such as the place of primary family residence, of main business activity, and of main assets. The understanding of such proposal is that there is a common wish under Russian legislation to introduce a somewhat harmonised concept of habitual residence applicable to both tax and civil purposes. This proposal followed Shakira's alleged tax evasion accusation by the Spanish authorities who argued that, even though the international singer was tax resident in the Bahamas, she was *de facto* living in Spain.

455 "The place, where the citizen resides permanently or most of the time, shall be recognized as the place of his residence".

456 Russian Tax code, Part II, 2000, art. 207: "There shall be recognised as tax residents physical persons who are actually in the Russian Federation for not less than 183 calendar days over 12 consecutive months"**.**

457 The same notion under art. 20 of the Civil code.

458 Industrial District Court (Stavropol Territory), case No. 2-7124 / 2014.

459 Additionally, exclusive jurisdiction is established over divorce proceedings when both parties are resident therein and one is a Russian citizen. W. BURNHAM/ P. B. MAGGS/ G. M. DANILENKO, Law and Legal System of the Russian Federation (Juris Publishing, New York, 2009) p. 460.

'national implementation' of the inter-country concept of habitual residence[460]. Under domestic law, the notion denotes a stronger nature of a person's stay than for habitual residence as an inter-country concept. In substance, habitual residence under Russian law indicates a predominance or permanence of stay[461]. The habitual residence of infants or children under fourteen[462] is supposed to be at their legal representative's place of permanent residence[463]. For instance, concerning custody and child abduction, Russian case law shows that the child's habitual residence is often associated with the primary carer's one. Namely, the child's habitual residence would often coincide with his/ her mother's one in Russia[464]. In determining the child's residence, the Russian courts have provided further important key elements[465].

**151.** In Argentina, the concept of habitual residence is referred to in the Civil and Commercial code (*Código Civil y Comercial de la Nación*) which contains a specific part dedicated to the Private International Law of Argentina (Title 4, Book six)[466]. According to article 2613(b) an individual's habitual residence is located in the place of living where durable links are established for an extended period of time[467]. In matters involving children, court guidance has indicated that habitual residence corresponds to the place where the child has

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460 Kursk Regional Court (Kursk Oblast), case No. 33-830 / 2017.

461 Which is in line with the contextualised references of the Civil code and the Russian practice. See O. KHAZOVA, Russia's Accession to the Hague Convention on Civil Aspects of International Child Abduction 1980: New Challenges for Family Law and Practice, *Family Law Quarterly*, Vol. 48, No. 2, 2014, p. 258-259: "Therefore, bearing in mind this terminological inaccuracy, we will have to use the words 'permanently' and 'habitually' (in Russian respectively *'postoyanno'* and *'obychno'*) as synonyms when we speak about Russian regulation of international child abduction, or rather, understand 'permanent residence' in a sense of habitual residence".

462 Age when Russian citizens receive passports.

463 Ibid. KHAZOVA, p. 259.

464 *Key elements* in this sense are the child's best interests, the child's opinion, the parental agreement, the Russian nationality of the child, the address registration in Russia (and other documents such as the birth certificate showing the address at the parental house), the evidence that the child and the family are living in Russia through the presence at the apartment of personal belongings, electricity bills and regular expenses to maintain their principal house (Magaramkent District Court (Republic of Dagestan), case No. 2-683 / 2015; Moscow Regional Court (Moscow Region), case No. 9-77 / 2017; Buturlinsky District Court (Nizhny Novgorod Region), case No. 2-93 / 2018).

465 *Inter alia*: primary carer's care and attention to the child; parents' social behaviour; the moral and psychological situation that developed in each of the parents' place of residence; the possibility of timely medical care; the presence or absence of grandparents; the child's usual social circle (friends, educators, teachers); the child's affection not only to parents, and siblings, but also to grandparents living with the same family; the convenience of the location of schools, sports clubs and institutions of additional education that the child attends; the child's age (Leninsky District Court (Krasnodar Territory), case No. 2-11195 / 2018).

466 U. BASSET, Private International Law, Chapter 12, Introduction to the Law of Argentina, 2018.

467 "*A los fines del derecho internacional privado la persona humana tiene: residencia habitual, en el Estado en que vive y establece vínculos durables por un tiempo prolongado*". Based on the same provision, when an individual's domicile is unknown, this is presumably established in the place of habitual residence or, failing that, in the place of simple residence.

his/ her *permanent centre of living* or '*centro de vida*', showing that he or she has lawfully spent most of his/ her life existence there[468].

**152.** In the Dominican Republic, the notion of habitual residence is provided in its domestic law[469]. A specific provision is contained in the Private International Law Act of 15 October 2014, article 5. The latter provision locates both domicile and habitual residence at the place where a person has established them, principally taking into account personal and professional circumstances which should reflect a durable nature of the link with that place. The concept has been transposed into the national legal system also following the ratification of the HC-1996 – this is mentioned in the PILA, article 12[470]. Although the HC-2000 has not yet been ratified, the concept of habitual residence has been extended to incapacitated adults according to the same article 12 (ii).

## Section III Mixed Legal Systems

**153.** Canadian law[471], within some specific provinces (*i.e.* Manitoba[472] and Ontario[473]), endorses habitual residence[474]. For matters involving family law, the use of habitual residence is a direct consequence of the Canadian ratification of the Hague conventions and their transposition by provinces. In

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468 Corte Suprema de Justicia de la Nacion, *Wilner Eduardo Mario c. Osswald María Gabriela* [14/06/95] No. 318:1269, sec. 12.

469 E. PEDERSINI/ J. M. SUERO, Family Law in Dominican Republic: overview, *Family Law Global Guide* 2015/2016.

470 § 3 of this article specifies also that in matters dealing with divorce, separation, and matrimonial regimes, the courts of the common spouses' habitual residence at the time of the application will be primarily competent. In issues involving maintenance, the creditor's habitual residence applies primarily for the determination of the competent forum. The spouses may choose, before or during the marriage, the law of their common habitual residence at the time the agreement is concluded as applicable to their divorce (art. 31).

471 G. B. ROBERTSON, The Law of Domicile: Re Foote Estate, *Alberta Law Review*, Vol. 48, No. 1, 2010, p. 189-194.

472 Manitoba, The Domicile and Habitual Residence Act, No. C.C.S.M. c. D96, Section 4, 1987: "habitual residence of each person is in the state and a subdivision thereof in which that person's principal home is situated and in which that person intends to reside […] a person is presumed to intend to reside indefinitely in the state and subdivision thereof in which that person's principal home is situated […] The habitual residence of a child is the state and subdivision thereof where the child normally and usually resides".

473 Ontario, Children's Law Reform Act, No R.S.O. c. C.12, Section 22, 1990: "A child is habitually resident in the place where he or she resided: (a) with both parents; (b) where the parents are living separate and apart, with one parent under a custody agreement or order or with the consent, implied consent or acquiescence of the other; or (c) with a person other than a parent on a permanent basis for a significant period of time; […] Where the child's habitual residence cannot be determined pursuant to clause (2)(a), (b) or (c), the child is to be considered as habitually resident in the jurisdiction with which the child has the closest connection".

474 Manitoba provides the same contextualised reference to domicile and habitual residence, abolishing the common law concept of domicile (The Domicile and Habitual Residence Act, sec. 2 and 3).

this sense, Manitoba and Ontario have decided to apply habitual residence to determine jurisdiction and applicable law in both inter-country and inter-provincial family cases.

**154.** In South Africa[475], habitual residence does not seem yet to be perfectly enshrined in its legal system. The reason lies in the fact that some domestic laws endorse *ordinary residence* as an internal (jurisdictional) connecting factor and *habitual residence*[476] as a conflict-of-law-rule[477].

## Section IV Focus on Shari'a Law

**155.** As of today, the vast majority[478] of those Islamic countries applying the Shari'a Law are not signatories of the Hague conventions[479]. With reference to family law matters, the main reason lies in the substantial differences between the conception of children's rights. In particular, these regard values, upbringing and parental responsibilities[480].

**156.** For instance, many Islamic countries[481] provide that parents should raise their children under Muslim principles, not authorising child relocation abroad without the specific permission of the father[482]. In addition, the majority of these countries would retain jurisdiction rather than allowing foreign authorities to be competent under the criterion of habitual residence[483]. The allocation of jurisdiction in Islamic States in favour of 'religious courts', applying religious law, is not intended to satisfy the 'personal status', or the implementation of international connecting factors such as habitual residence.

**157.** Same States like Lebanon or Egypt, for instance, have designated nationality as the sole rule attributing jurisdiction. Reference to nationality, still prevailing in some Arabic States, is not meant to apply as a connecting

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475 In South Africa, civil, common and customary law rules exist due to the past Dutch, British and African indigenous presence. Family law is generally referred to as a civil law system.

476 High Court of South Africa, North Gauteng High Court, *Central Authority of Republic of South Africa v. LG* [2010] No. 32652/2009: "it is clear that habitual residence must be determined by reference to the circumstances of each case; that 'the word 'habitual' implied a stable territorial link; this may be achieved either through length of stay or through a particular close tie between the person and the place and connoted something which will not be temporary".

477 E. SCHOEMAN, Domicile and Jurisdiction as criteria in external conflict of laws with particular reference to aspects of the South African law of persons (South Africa, 1997) p. 252.

478 Morocco ratified both HC-1980 and HC-1996.

479 Z. M. HIGHTOWER, Caught in the middle: the need of uniformity in International child custody dispute cases, *Michigan State International Law Review*, Vol. 22, 2013, p. 652.

480 Ibid.

481 Egypt, Iran, Jordan, Lebanon, Pakistan, Saudi Arabia, the United Arab Emirates, and Yemen.

482 Ibid. HIGHTOWER, p. 653 ff.

483 Ibid. p. 655.

factor[484]. The rationale of employing nationality indicates more a religious principle rather than a rule of law, precisely of private international law[485]. Thus, religion becomes a connecting factor itself[486].

**158.** In Turkey, to cite an exception, different connecting factors (*i.e.* nationality, domicile and habitual residence) are employed for the determination of international jurisdiction and applicable law. The Act on Private International and Procedural Law states that, regarding children or adults involved in parental disputes with a foreign element[487], the law of habitual residence[488] should apply[489]. With regard to international jurisdiction concerning the personal status of a Turkish, or foreign, citizen, this is attributed to the courts of the citizen's or foreigner's habitual residence (in absence of domicile)[490]. Thus, reference to habitual residence is often residual, after nationality and domicile respectively[491]. In issues related to matrimonial property, the PILA contains the possibility to primarily designate the law of the spouses' common habitual residence at the time of marriage, in addition to the one of their common nationality (article 15). With regard to maintenance, the law of the creditor's habitual residence is referred to primarily (article 19)[492].

## Section V Asian Practice

**159.** Habitual residence has increasingly gained success in some Asian national conflict-of-law rules, namely in China[493] and South Korea[494]. In the

484 A. M. EL-HAWARY, Regulation of Conflict of Laws in the United Arab Emirates, *Arab Law Quarterly*, Vol. 27, No. 1, 2013, p. 15.

485 A. V. M. STRUYCKEN, State Nationality and Religious Family Law: Some Notes, *Neth. Int. Law Rev.*, Vol. 65, 2018, p. 487.

486 M. S. BERGER, Conflicts of Law and Public Policy in Egyptian Family Law: Islamic Law Through the Backdoor, *The American Journal of Comparative Law*, Vol. 50, No. 3, 2002, p. 560 ff.

487 For instance, in relation to tutelage, marriage, divorce as well as to the establishment and effects of parentage.

488 Of the child, of the parents or of the common family habitual residence.

489 Turkey, Act on Private International and Procedural Law, No 5718, 2007, art. 4, 10, 13, 14, 16, 17. See also Z. D. TARMAN, The International Jurisdiction of the Turkish Courts on Personal Status of Turkish Nationals, in: Yearbook of Private International Law, Vol. 14, 2012/2013, p. 487.

490 Art. 41-42.

491 M. YALÇIN, Family Law in Turkey: Overview, *Family Law Global Guide,* 2015/2017*:* "Under Turkish Law, the habitual residence test will determine the applicable law".

492 Habitual residence is also mentioned throughout the PILA in contexts involving insurance, employment and consumer contracts as well as in issues related to intellectual property.

493 Many judgments rendered by the Chinese courts have determined habitual residence as a primary connecting factor, in line with the Chinese conflict-of-law rules (<https://www.chinacourt.org/article/detail/2012/12/id/803895.shtml>). This is the case in issues contemplating divorce (Intermediate People's Court of Beijing, 2015, no. 8343), custody (2016粤01民再131号), maintenance (Appeal Court of Zhongshan City, Guangdong Province, 2011, no. 776). In the mentioned decisions, habitual residence was interpreted through the *temporal factor* (one consecutive year) and the *fact-based location* of the centre of interests (life integration, intention and property interests).

Philippines, South Korea, Singapore and Japan, habitual residence applies through the HC-1980 on civil abduction. An attempt at regional harmonisation is found in the Asian Principles of Private International Law (APPIL)[495], which also refer to habitual residence as a preferred connecting factor[496].

**160.** In South Korea, habitual residence has become a subsidiary connecting factor to the *lex patriae* (nationality) for the determination of applicable law towards divorce, maintenance and property regimes. In relation to child support, habitual residence is employed primarily for the determination of the applicable law. With regard to succession, particularly to the extent of the formal validity of the Will, habitual residence applies as an alternative connecting factor[497]. Concerning the determination of (general) international jurisdiction over a legal relationship which has a foreign element, South Korean law adopts the rule of *substantial connection*, which may in practice also refer to habitual residence[498].

**161**. In other Asian countries, such as Taiwan, nationality represents the main connecting factor[499]. According to the Japanese conflict-of-law rules, the law of

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494 Under Korean law, habitual residence is generally understood as *the centre of a person's life*, with no relevance given to the subjective element. In this regard, see K. H. SUK, The New Conflict of Laws Act of the Republic of Korea, in: Yearbook of Private International Law, Vol. 5, 2003, p. 110.

495 W. CHEN/ G. GOLDSTEIN, The Asian Principles of Private International Law: objectives, contents, structure and selected topics on choice of law, *J. Priv. Int. Law*, Vol. 13, 2017, p. 433: "The APPIL are a regional instrument jointly drafted by the representative private international law scholars of the 10 participating APPIL-Jurisdictions of East and Southeast Asia to harmonize the region's private international law. They constitute neither an official legislative instrument nor a regional convention on uniform private international law – thus they lack legally binding force. They are "soft law" in essence […]". The jurisdictions to which such principles should apply are Japan, the Republic of Korea, Mainland China, the Hong Kong Special Administrative Region, Taiwan, Vietnam, Indonesia, the Philippines, Thailand and Singapore.

496 Ibid. p. 422 (art. 3, 'General Rules of Choice of Law'): "In defining the habitual residence of a natural person, regards may be given to the place where he/she has his/her centre of life". Concerning the preferable implementation of habitual residence for the purposes of 'private international law harmonisation and unification', in particular over domicile and nationality, see p. 423.

497 K. H. SUK, New Conflict of Laws Act of the Republic of Korea, *Journal of Korean Law*, Vol. 1, No. 2, 2001.

498 Ibid.

499 Although habitual residence may apply in specific family contexts as a subsidiary connecting factor. For instance, art. 53 of the (Taiwanese) Republic of China's Code of Family Matters of 2012 states that if neither spouse is citizen of Taiwan, the courts therein may still exercise international jurisdiction over marriage matters based on the spouses' common ultra-annual residence or either of their habitual residence. An additional case relates to the determination of applicable law based on either party's residence (including habitual residence), in absence of nationality or domicile, according to art. 4 of the Taiwanese PIL Act 2010. In this sense, see R.-C. CHEN, Jurisdiction, Choice of Law and the Recognition of Foreign Judgments in Taiwan, in: J. BASEDOW/ K. B. PISSLER, Private International Law in Mainland China, Taiwan and Europe, 2014, p. 24-25, 69. It is further and contextually clarified that, for instance, in matters involving international divorce, the sole connecting factors applicable to determine international jurisdiction should be the common domicile, the common habitual residence and either nationality of the spouses (H.-K. TSAI, Personal Status in Taiwan, in: BASEDOW/ PISSLER, p. 286).

nationality would apply to govern the succession of Chinese and Korean individuals, as well as any foreigner, permanently domiciled in Japan[500].

**162.** Lastly, the Supreme Court of Singapore gave an important interpretation of habitual residence in the field of international child abduction. Accordingly, joint parental intention to relocate and the length of duration of the child's stay, were considered key elements for the child's habitual residence[501]. It was also said that habitual residence is the sole criterion in determining the court that should decide on the '*child's substantive welfare*'. Ultimately, habitual residence should correspond to the '*place to which the child is closely connected, having lived in it for some time and integrated into its community and culture*'. Its determination requires a holistic assessment[502].

## Section VI Directions for Inter-country Habitual Residence

**163.** The previous section indicates that habitual residence is commonly present across the globe. Its *national* operation is the result of the Hague Conference and EU *trans-national* activities. Habitual residence is factual in nature and requires a holistic approach based on a circumstantial anamnesis. Such anamnesis, according to the legal orders examined, should determine a qualified (vital, life, social, professional) degree of proximity, closeness, for a specific settled period.

**164.** Reference has not been made to habitual residence per family context. Though, the assessment of national case law and legislation has highlighted that habitual residence, relating to both international jurisdiction and/ or applicable law over family matters, should focus on the individual's personal (social, cultural) integration, denoting a stable (central, principal, effective) life routine within a local community. To identify such integration, the anamnesis would sometimes require a conjugal- or a family- based perspective approach. In particular, when involving children, a best interests assessment should occur to determine the appropriateness of habitual residence. Conversely, duration, intent and tax residency may not always be synonym of integration, therefore not act as determining elements in the anamnesis. That said, they might still be useful complementary indicators.

**165.** Last, but not less importantly, habitual residence still operates on an interplay with other connecting factors, considered traditional or modern, depending on the national legal system. The next chapter will deal with such an interplay.

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500 Ibid. CHEN/ GOLDSTEIN, p. 411.

501 *TUC v. TUD*, Supreme Court (SGHCF) 12, 2017.

502 *TDX v. TDY*, SGHCF 4, 2015.

# Chapter III: Habitual Residence Interplay

**166.** In light of what was discussed in the previous chapter, traditional connecting factors, such as domicile and nationality, still play a significant role in both Hague and EU legal instruments. In some issues of family law, more than others, also depending whether party autonomy applies, the traces of the interplay of domicile and nationality are strongly remarkable. It is necessary then to focus on the analysis of domicile and nationality. Such analysis should also emphasise the current evolution affecting legal society, namely by considering the presence of new connecting factors facing topical family issues. The latter refers to physical presence, particularly in contexts involving asylum migration.

## Section I Nationality

**167.** Nationality[503] is absolutely one of the first traditional connecting factors used in private international law. Its origins lie in Mancini's rule according to which nationality should govern status, capacity, family relations and succession[504]. This rule influenced civil law legal systems. In addition, the connecting factor itself was adopted in some of the international family law legal instruments and, still, finds application as seen in the previous chapters. Three practical issues related to the operation of nationality are dealt with in this Section: statelessness; bi-national individuals; and the intersection of nationality and proximity.

### § I. Conflicts of Nationalities

**168.** The use of habitual residence in the Nordic countries[505] represents an important example of its increasing application over the preferred traditional one of nationality[506]. To such an extent, the bulk of EU regulations and the

[503] The concept of nationality refers here to those individuals who hold the citizenship of a State, but might not live in that State. It excludes from the analysis any other interpretations, for instance, involving jurisdictions that may consider as citizens also foreigners who are domiciled in that jurisdiction. As an example, please refer to US law (P. HAY/ P. J. BORCHERS/ S. C. SYMEONIDES, Conflict of Laws, 5th ed., 2010, p. 398).

[504] Ibid. DE WINTER, p. 371. See also K. H. NADELMANN, Mancini's Nationality Rule and Non-Unified Legal Systems Nationality versus Domicile, The American Journal of Comparative Law, Vol. 17, 1969, p. 418.

[505] Denmark, Iceland, Norway, Finland and Sweden.

[506] M. JÄNTERÄ-JAREBORG, The Nordic Input on the EU's Cooperation in Family and Succession Law: Exporting Union Law Through 'Nordic Exceptions', in: B. HESS/ M. BERGSTROM/ E. STORSKRUBB, EU Civil Justice: Current Issues and Future Outlook, Vol. 7, 2016, fn. 28. Although it was limited and not yet

Hague conventions, particularly in some of these countries, have played an important role.

**169.** On the operation of nationality under international law, the ICJ has construed and developed the concept of 'effective nationality'. The following decision[507] is unique and it highlights the historical roots of nationality, as well as the issues in its application[508].

**170.** This case concerned a dual citizen of Germany and Liechtenstein, Mr Nottebohm, who resided[509] in Guatemala (1905-1943). During WWII, Mr Nottebohm moved to Liechtenstein (1939-1940), where he was granted nationality. He went back to Guatemala where he was obliged to resume his business activity due to strict measures taken therein[510]. Liechtenstein seised the ICJ in order to claim restitution and compensation for the measures taken by the authorities of Guatemala against Mr Nottebohm. Guatemala opposed it.

> The ICJ clarified that in matters involving bi-nationals, precisely the exercise of protection by more than one State, such situation may legally lead to a conflict of 'contradictory' assertions before international arbitrators, or State courts, which would result in the failure of justice. The Court meant that conflict would not be resolved and international protection could not be guaranteed[511]. Legal evolution has considered important factors, a tendency, to determine in such scenario one 'real' and 'effective' nationality among others. Such factors were listed in the present decision, namely: *the habitual residence of the individual concerned is an important factor, but there are other factors such as the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children*. The Court concluded that actual connections with Liechtenstein were extremely tenuous. In

perceived at the beginning of the 20th Century (see in this sense, M. BOGDAN, Les aperçus de l'évolution des règles de conflits de lois dans les pays nordiques in: Travaux du Comité français de droit international privé, 2004, p. 200 ff).

507 *Nottebohm case*, Liechtenstein v. Guatemala [6 April 1955].

508 The meaning of international jurisdiction in this study refers exclusively to the prerogatives, powers, and obligations, allocated to national authorities, in particular to courts, for the exercise of international jurisdiction towards the determination of the applicable law, the protection of people's private rights and interests, and the emanating of civil judgments and measures, over family matters involved in this inquiry (note 3, MICHAELS). However, in relation to the ICJ's judgment, the meaning of international jurisdiction refers more substantially to a broader range of powers, obligations and rights upon States and non-state actors (public and private parties), beyond the sole jurisdiction of national authorities over specific family law issues. For more details on this point, we refer to A. MILLS, Rethinking jurisdiction in international law, *The British Yearbook of International Law*, Vol. 84, 2014, p. 195 ff. See also C. RYNGAERT, Jurisdiction in international law, 2015; and L. HESCHL, Protecting the Rights of Refugees Beyond European Borders – Establishing Extraterritorial Legal Responsibilities, 2018.

509 In determining residence, reference was also made to 'fixed abode', 'centre of his interests', 'business activities', and 'habitually resident' (p. 13, 19 and 25 of the judgment).

510 Arrest, detention, expulsion, refusal to readmit as well as retention of properties.

511 A 'genuine connection' between an individual and a given State must exist in order to seek international protection.

particular, the connection lacked of factual elements, as those mentioned above, as well as of the subjective element[512]. Thus, no international protection could have been accessed in Liechtenstein by Mr Nottebohm.

**171.** The ICJ judgment shows how the plurality of nationalities may lead to consequent issues of international protection[513]. The question of effective nationality requires a factual anamnesis similar to the one of habitual residence. As a consequence, they may overlap if their joint recourse were allowed[514]. In addition, the purpose of determining the 'genuine connection' elucidated by the ICJ, represents the main objective of habitual residence, irrespective of the citizenship requirement[515].

**172.** The Swiss Federal Court[516] has clarified that both domicile and habitual residence under the Swiss PILA may play a pivotal, but not decisive, role in the determination of 'effective nationality'. The Swiss Court has also recalled the importance of taking into account additional elements such as *the centre of family and professional life, the place of birth and education, the language, the cultural links, the religion and the exercise of political rights*. The elements provided by the Federal Court appear similar to those concerning the current case law, in particular of the CJEU, in relation to habitual residence[517].

**173.** In our view, habitual residence overcomes the issues related to dual nationality by focusing directly on the determination of the *realistic and effective personal link*[518], rather than on the 'exercise of State sovereignty' through the

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512 "No settled abode, no prolonged residence in that country at the time of his application for naturalization: the application indicates that he was paying a visit there and confirms the transient character of this visit by its request that the naturalization proceedings should be initiated and concluded without delay. No intention of settling there was shown at that time or realized in the ensuing weeks, months or years […]".

513 Other scholars have agreed with this view (ibid. DE WINTER, p. 381).

514 Advocate General's opinion Kokott, *Iaszlo Hadadi (Hadady) v. Csilla Marta Mesko, épouse Hadadi (Hadady)* [12 March 2009] C-168/08, § 59.

515 S. DE VIDO, The Relevance of Double Nationality to Conflict-of-Laws Issues Relating to Divorce and Legal Separation in Europe, *Cuad. derecho transnac.,* Vol. 4, 2012, p. 231: "By the way, some of these «codified» connecting factors may well correspond to the standards according to which the «effective» or «more significant» nationality would normally be identified: this would possibly overcome the difficulties inherent to situations where the spouses have more than one common nationality, without the possible ambiguities of the largely discretionary notion of «effective» nationality". See also K. SIEHR, General Problems of Private International Law in Modern Codifications, in: Yearbook of Private International Law, Vol. 7, 2005, p. 33.

516 5C.86/2004 [18 August 2004].

517 K. MOJAK, Le critère de la nationalité en droit international privé. Ses perspectives, Zeszyty Naukowe WSEI seria: *Administracja*, 2(1), 2012, p. 78: "*L'attachement à la nationalité effective semble a priori constituer la meilleure solution. Toutefois, celle-ci conduit le plus souvent à retenir celle des nationalités qui coïncide avec la résidence habituelle. Or, au sein des règles de conflit européennes en matière de divorce et de régimes matrimoniaux, la nationalité coexiste avec le critère de la résidence habituelle. Les deux critères risquent donc souvent de se confondre pour les doubles nationaux, comme l'a expressément souligné la Cour de justice dans l'arrêt Hadadi*".

518 Between the individual and the State.

(citizenship) legal requirement[519]. For instance, an individual may live in State A for professional reasons, as opposed to his/ her family who lives in State B. He or she is a national of both countries and studied in both countries (*i.e.* high school in State A and university in State B). It may prove difficult to assess which nationality is more effective. However, if he or she regularly returns to visit his/ her family, State B may likely be his/ her habitual residence, independently of his/ her citizenship. On a last point, in issues related to divorce, the CJEU has clarified that the notion of 'common nationality'[520] is preferable to the one of 'effective nationality' whose interpretation may result in two nationalities (or more) each of which deemed effective[521].

## § II. Nationality and Proximity

**174.** It is said that nationality refers to the principle of proximity, a real link[522]. The operation of nationality is supported due to its easy applicability, in that the majority of people hold at least one nationality with no equivocal difficulties arising from its determination[523].

**175.** The question of differentiating the degree of proximity, determined through habitual residence and nationality, respectively, is intrinsically important for the overall analysis. We argue that habitual residence should determine a qualified degree of proximity, resulting from the closeness between the individual's personal integration and the State in which jurisdiction, and perhaps applicable law, are located. The determination of, and reference to, a realistic and actual nexus is necessary to support the argument that habitual residence follows the individual's place of living[524], in which access to justice and protection of the individual's interests should be more efficient and effective[525].

**176.** Conversely, nationality would not always follow the above reasoning, in particular in a context of increasing cross-border movements whereby

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519 On this subject, ibid. MILLS; and A. BUCHER, La famille en droit international privé, *Cours de l'Académie de Droit International de La Haye,* 2000.

520 Regardless of which nationality should be more effective, spouses should hold the right to choose in which State of common connection to file for divorce (note 514, § 66).

521 Ibid. § 62-66; and DE VIDO, p. 230.

522 Note 514, § 60. See also CJEU, *OE v. VY,* [10.02.2022] C-522-20, § 31.

523 Ibid. DE WINTER, p. 404; and HAY *et al.*, p. 295.

524 Ibid. p. 430: "I have substituted the word "home" for the term "habitual residence", because I consider these to be synonymous".

525 Y. NISHITANI, Global Citizens and Family Relations, *Erasmus Law Review*, 2014, p. 139, specifically in relation to the link between personal integration and individual identity. See also DE WINTER, p. 472, concerning child's interests, child protection and their closeness with the living place and the local community.

individuals tend to live in a State other than the one of their nationality[526]. In addition, the State of nationality, when involving individuals with multiple nationalities, may also represent a place in which an individual may have never lived[527]. It might be said that on some occasions, particularly those where individuals would establish habitual residence in the place of nationality, the link may be equal to that denoting habitual residence. Actually, in many other situations, currently on the increase, the place of nationality would not determine a qualified degree of proximity, nor a real link as indicated *supra*[528].

## § III. Statelessness

**177.** The 1954 Convention relating to stateless persons mentions that personal status is governed by the law of an individual's domicile or, in its absence, his/ her residence[529]. A pertinent provision, article 16[530], clarifies that access to court for stateless persons should be guaranteed in their country of habitual residence. The latter connecting factor has therefore been considered, together with domicile, the solution to the impossibility of applying nationality in the context of statelessness[531]. In this regard, habitual residence seems to apply

526 Ibid. NISHITANI, p. 141: "Conversely, even if nationality is the primary objective connecting factor, the parties can refer to the law of habitual residence instead when they are integrated in the host society where they reside […]. Today, second- and third-generation Korean immigrants regularly uphold family ties in North or South Korea but are socially integrated into and culturally adapted to Japan due to their permanent centre of life in that recipient country. The optional application of the law of habitual residence instead of that of nationality enables them to constitute their family relations in conformity with their primary identity".

527 A colleague of mine, of Argentine origins and nationality, was naturalised Italian, without having ever been to Italy. Another friend of mine, Colombian, said that he held the Italian citizenship due to his grandfather who migrated to Colombia, but he himself has never been to Italy. In such circumstances, and in those where individuals live in a State other than the one of their nationality, it could also be said that diplomatic and consular authorities would suit proximity with the individual in his/ her State of residence, through the individual's nationality, even though such an affirmation appears to us artificial. In particular, residence would still be the factor triggering the individual's personal connection to the authorities – as opposed to nationality which, in such circumstances, would just represent the exercise of State sovereignty (ibid. DE WINTER, p. 402).

528 Ibid. DE WINTER, p. 471. This may be very true also in relation to the English domicile of origin, which will be touched upon in the next section.

529 Similarly, the 1951 Geneva Convention and its related 1967 Protocol (*cf.* chapter I, section II above).

530 The same as provided in the Geneva Convention and its Protocol.

531 Including the one involving asylum seekers, recognised refugees and nomads. The Council of Europe's Committee of Ministers adopted the Recommendation No. 83 of 1983 'On Stateless Nomads and Nomads of Undetermined Nationality'. This recommendation provides that one of the links between a nomad and a State, based on which COE Member States should implement measures directed to, *inter alia*, protect nomads from non-discrimination, and ensure a legal status, is habitual residence (principle 2).

generally more often than domicile, given its more realistic and pragmatic operation in guaranteeing access to justice[532].

**178.** A national example of the implementation and transposal of the 1954 Convention into domestic law is found in the Law of Georgia on Private International Law 1998. This law makes no reference to domicile[533] and applies habitual residence as a primary connecting factor. For instance, article 12 provides that marriage-related cases for stateless persons who have their habitual residence in Georgia fall under that jurisdiction[534]. Articles 22[535] and 55[536] indicate that personal status and inheritance relations, in contexts involving stateless persons, are governed by the law of the person's habitual residence.

**179.** An important decision[537] for the interpretation of habitual residence in contexts involving stateless persons was delivered by the German Federal Administrative Court. This case involved a mother, who was born in Azerbaijan, and her son, who was born in Russia during the Soviet Union, both of Armenian ethnicity and stateless. They moved to Germany where they applied for asylum. The German Court had to adjudicate upon the applicants' statelessness and their impossibility to apply for protection before the authorities of their last habitual residence.

> The Court concluded that the term habitual residence[538] – (under the German Asylum Procedure Act, implementing the 1961 Convention on the reduction of statelessness, but whose terminology is referred to also

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532 Ibid. DE WINTER, p. 384-388, 423: "As we have seen, legal questions regarding personal status nearly always arise in the country where the people concerned are living. Consequently—and this is the other side of the picture—for the courts, the lawyers, barristers and solicitors in the countries where these questions have to be solved, it is a great advantage if they can do this in accordance with their own law. It simplifies their work as well as the administration of justice".

533 And only very brief reference to citizenship. Art. 22 states that in case of multiple citizenship, "the law of a country to which he/she is the most closely related, in which he/she has a habitual residence or in which he/she carries out basic activities shall be applied to him/her".

534 The habitual residence of either of the spouse is a general ground for international jurisdiction (in alternative to nationality). With regard to stateless persons, habitual residence is the one of either of the stateless spouses.

535 In matters of personal status, habitual residence is a general connecting factor for the determination of the applicable law, and operates on a subsidiary basis in contexts involving individuals with multiple citizenship (as an alternative to the place where the person carries out 'basic activities'). In relation to stateless persons, habitual residence applies as a primary connecting factor (alternative to the place where the person carries out 'basic activities' and to the law of Georgia as *lex fori*).

536 Concerning the determination of the applicable law governing the inheritance of stateless persons, the last habitual residence of the deceased applies as a primary connecting factor (the law of Georgia as *lex fori* applies in a subsidiary manner).

537 BVerwG 10 C 50.07 [26 February 2009], ECLI:DE:BVerwG:2009:260209U10C50.07.0.

538 § 36: "[…] For stateless persons, the state of nationality is replaced by the state of their last habitual residence […]".

in the Stateless 1954 Convention)[539] – should correspond to the place where the stateless person focused his/ her life, where he or she did not spend time merely transiently, and the authorities of that place have not initiated measures to terminate his/ her residence (§ 31).

## § IV. Bottomline on the Interplay of Habitual Residence with Nationality

**180.** Habitual residence seems to supply a concrete answer to the issues mentioned in this Section. It does so by ensuring access to justice to stateless persons (*de jure* or *de facto*)[540], children or adults, including asylum seekers, and those who encounter the impossibility of returning to their country of origin and nationality[541]. It also reduces potential State conflicts arising out of multiple nationalities[542]. Lastly, it aims to satisfy proximity in a modern context subject to a spread of life bonds where other connecting factors may not do better[543]. This last point is true, if 'qualified proximity' is considered a fundamental principle for the determination of jurisdiction and applicable law as advocated in this study.

**181.** As the evolution of today's modern society shows[544], the (inter-country) concept of habitual residence becomes a general rule that better suits the current societal changes, without necessary recourse to the citizenship

539 § 32: "[…] The Federal Administrative Court ruled that the term 'lasting residence' in the Act Implementing the Convention on the Reduction of Statelessness represents substantially the same meaning as the term 'habitual residence' in the Convention Relating to the Status of Stateless Persons and the Geneva Convention Relating to the Status of Refugees (the 'Geneva Convention on Refugees')".

540 According to the UNHCR ('Prato Conclusions', May 2010, <http://www.refworld.org/docid/4ca1ae002.html>), *de facto statelessness* refers to those individuals falling into situations of 'ineffective' nationality. This means, with reference to a definition given by the Study of Statelessness endorsed by the UN Secretary General in 1949 (reedited by UNHCR in 1955), that individuals may "no longer enjoy the protection and assistance of their national authorities (including through diplomatic or consular means), either because these authorities refuse to grant them assistance and protection, or because they themselves renounce the assistance and protection of the countries of which they are nationals". On this subject, see UNHCR, Handbook on Protection of Stateless Persons, Geneva, 2014, p. 5, 44. See also C. SAWYER, Stateless in Europe: legal aspects of *de jure* and *de facto* statelessness in the European Union, in: Statelessness in the European Union, 2011. In relation to the issue of stateless children, see V. Bumbaca, No child should be stateless: A crucial issue to be addressed. in: *Monthly Review / International Reference Center for the Rights of Children Deprived of their Family*, 2016, n° 203, p. 7-8.

541 In this regard, some legislative texts such as Dublin III have already moved forward towards physical presence.

542 Ibid. DE VIDO. Although, in this sense, some issues may still be encountered in so far as the threshold of habitual residence(s) determination has not improved towards achieving a clear-cut anamnesis.

543 O. W. VONK, Dual Nationality in the European Union: A Study on Changing Norms in Public and Private International Law and in the Municipal Laws of Four EU Member States (Nijhoff, Leiden Boston, 2012) p. 118 ff.

544 Meaning that human beings live and work in places that may not so often correspond to their State of nationality.

requirement[545]. Albeit, in no way does this exclude the alternative operation of nationality for jurisdiction, or applicable law, as provided by the relevant treaties[546], namely when nationality and habitual residence are located respectively in two different States.

## Section II Domicile

**182.** Domicile is, equally as nationality, a traditional connecting factor whose applicability was primarily common during the 19th and the beginning of the 20th Centuries. One of the first concrete conceptualisations of domicile relies on Savigny's initial theory, which envisaged it as a determining factor to judge everyone's personal status[547]. For Savigny, the notion of domicile meant the place that an individual freely chose as his/ her permanent abode and his/ her centre of relations and affairs[548].

**183.** In relation to the above initial guidance, mention should be made of the notion of domicile under both civil and common law, in particular by referring to its national operation and legalistic approach[549].

### § I. Characteristics of Domicile

**184.** Domicile denotes the permanent intention (or the intent to establish permanently) consisting in the individual's prospective settlement – *the choice of a permanent abode*. This interpretation of domicile is found in different

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545 Ibid. DE WINTER, p. 386: "This concept of effective nationality which should be understood to mean the nationality of the country with which the life of the person concerned has the most real connection, necessarily leads to the conclusion that in most cases the location of that person's actual residence will be decisive". In addition, it would not be unconceivable that many individuals who established their habitual residence in one State, would enjoy the right to hold the citizenship of that State, which would actually bring many other advantages in terms of civil and political rights, therefore resulting in being closer than other nationalities previously held (again, DE WINTER, p. 471).

546 This is particularly the case under *i.e.* Brussels II A, art. 3, Succession Regulation, art. 22, Property Regimes' Regulations, art. 22.

547 Ibid. DE WINTER, p. 371. See also, S. PEARI, Savigny's theory of choice-of-law as a principle of 'voluntary submission', *The University of Toronto Law Journal*, Vol. 64, 2014.

548 Hague Academy of International Law, *Recueil Des Cours*, Collected Courses 1996, Vol. 23, p. 39. See also Société des Nations, Comité d'Experts pour la Codification progressive du Droit international (C. 343. M. 101. 1928. V), June 1928.

549 Some authors referred to domicile as "[…] *la conception légale de la résidence* […]" (WESTLAKE), as opposed to "*le domicile volontaire*", or as "[…] primarily legal concept […] legalistic framework […]"(MCELEAVY). The same reference to "legalistic concept" was endorsed in a recent judgment of the US Supreme Court (*Monasky v. Taglieri*, US Supreme Court, 18-935, 2019). Reference here is made to the *legal interpretation* of domicile, which differentiates it from the *factual interpretation* of habitual residence.

national legal systems, no matter whether common or civil law culture[550]. One may admit that the *permanent nature* of the settlement, the strong impact of this terminology, may render it difficult in terms of predictability and certainty for an individual with multiple attachments, and for the authorities competent over such attachments, to certify that these are 'for life'[551].

**185.** With specific regard to permanent intention, or '*settled intention*' (the subjective element), this may truly be similar to the one identified in the current interpretation of habitual residence[552]. Albeit, in the case of habitual residence, the intent should not denote an eternal, even prospective, link with, or stay in, a given State as it may presumably occur with the establishing of domicile[553]. In particular, such characteristics may prove unrealistic in the current international family setting.

**186.** To the extent of the (non-)use of intent for the assessment of domicile, it should be added that in the past Swiss and French legislations had made use of the notion of '*domicile de fait*', whose objective evaluation may be similar to the current one applicable to the intercountry notion of habitual residence. Interestingly, it appears that such a notion was abandoned given the controversial results arising out of its fragmented interpretation[554].

**187.** As a last note, domicile requires physical presence – *the centre of relations and affairs*[555]. That said, the degree and the immediateness of such presence relate to the national perspective. Essentially, an individual is not always required to reside in the place of domicile within an appreciable period. This means that, although a person may live in one State, his/ her domicile may

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550 Ireland, Law Reform Commission, Report on Domicile and Habitual Residence, Law Reform Commission official publications, 1983; Hong Kong, Law Reform Commission, Rules for determining domicile, 2005; Swiss PILA, art. 20(1)(a); German BGB, § 7. See also the US notion of domicile. For a general comparative use of the intention in determining domicile, ibid. DE WINTER, in particular p. 419 ff.

551 Ibid. DE WINTER, p. 419.

552 Ibid. p. 471. See also ibid. ROGERSON, p. 100: "The focus in domicile tends to be placed upon the intention to remain permanently or indefinitely and, as we have seen, the settled intention to reside is also a consideration in establishing habitual residence"; and CJEU, *Mercredi v. Chaffe*, § 51: "[…] it is of paramount importance that the person concerned has it in mind to establish there the permanent or habitual centre of his interests […]".

553 In the determination of habitual residence, the subjective element should be compatible with the material and actual character of the individual's physical presence (the objective or factual element), and its recourse should merely be to accompany the objective assessment, which could materialise also in absence of the subjective assessment.

554 According to the French practice, the notion of '*domicile de fait*', which was also used in matters involving cross-border succession and commercial relations, alternatively referred to habitual residence, simple residence and domicile of choice ('*domicile de choix*'). The Swiss practice has indicated it as the place where the centre of personal relations is located. On this subject see A. RICHEZ-PONS, La Résidence en Droit International Privé, Université Jean Moulin Lyon III, 2014, p. 37; ibid. DE WINTER, p. 429 (to which we also refer for comparative aspects of domicile); and BGE 99 II 363 S. 365 for Swiss law.

555 A proposal of a common (conventional) notion was made in the 20th Century: "*le domicile d'une personne se trouve au lieu où, avec l'intention de permanence, elle a sa résidence et le centre de ses affaires*" (ibid. Comité d'Experts pour la Codification progressive du Droit international).

still remain as acquired elsewhere based on a previous physical presence, temporary or permanent, for purposes other than family relations (*i.e.* professional relations, place of birth). Again, such an interpretation would be strongly influenced by the common or civil law interpretation of domicile. This leads us to consider domicile as an *intra-country notion*[556], as opposed to habitual residence which was defined, based on its origins and current operation, as *inter-country*.

## § II. Civil Law Notion of Domicile in its Interplay with Habitual Residence

**188.** A slight distinction between the different civil law and common law approaches to domicile[557] should be underlined here. Such distinction is necessary in order to highlight an additional separation between domicile and habitual residence: precisely, that the fragmentation associated with the international operation of domicile is not only linked to an issue of *factual* interpretation (which, reversely, could be attributed to habitual residence), but to a conflicting legal terminology leading to its national foundations.

**189.** An example of domicile's intra-country approach, in a transnational dimension, is its operation under the Brussels I Recast (for physical persons), Brussels IIA concerning divorce, and the Succession Regulation. In the named Regulations, the *legal* interpretation of domicile[558] should be found in the internal law of each national legal order[559]. This is confirmed also by the fact that the CJEU has not been seised by the Member States to provide guidance on the interpretation of domicile under the said Regulations[560].

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556 The term 'intra-country', as opposed to 'inter-country' (*Introduction and fn. 16*), refers to the national rooting of domicile, almost since its origins, in both international and national conflict-of-law rules. The interpretation of domicile is essentially adapted to each own national legal order in which it operates, with its consequent extension towards the cross-border setting. Domicile remains fundamentally a legal concept associated with a national reality that applies to a transnational dimension.

557 P. SCHLOSSER, Report on the Convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice, Official Journal of the European Communities, 1979, § 72.

558 Art. 62 Brussels I Recast: "In order to determine whether a party is domiciled in the Member State whose courts are seized of a matter, the court shall apply its internal law". The same is provided in art. 44 of the Succession Regulation.

559 Ibid. HILL, p. 101. See also F. POCAR, Report on the Lugano Convention, Official Journal of the European Union, 2009, § 26. This is additionally the case under Swiss law (ibid. DUTOIT, art. 20: *"Pareille définition du domicile correspond exactement à celle qui a cours en droit interne (art. 23 CCS.) de telle sorte que l'on pourra se référer à la doctrine et à la jurisprudence qui se sont développées à propose de l'art. 23 CCS* (Swiss civil code)".

560 For the notion of domicile under the Brussels I Recast and the absence of CJEU intervention, see M. GEORGE, The Concept of Domicile, in: A. DICKINSON/ E. LEIN (eds.), The Brussels I Regulation Recast, 2015, p. 543.

**190.** The interplay between the civil law notion of domicile and habitual residence under Swiss law is primarily considered, as their interpretation may often be subtle. The Swiss PILA differentiates domicile and habitual residence in that domicile requires a permanent intent, as opposed to habitual residence whose duration can be limited from the outset. This first reading would determine that the duration of the individual's physical presence differs in the operation of the two notions, being of stronger degree in relation to domicile, and that the intent should be primarily relevant for the assessment of domicile only.

**191.** Thus, under Swiss law, domicile should not be acquired in absence of intent. This conclusion would appear *de facto* unrealistic, as the Federal Court has indicated in one of its judgments[561], namely in arguing that one may abandon his/ her domicile in absence of the subjective element, while still settled with the *required degree* of permanence. In substance, an individual would surely keep his/ her domicile under Swiss law even if according to his/ her intent he or she were willing to live elsewhere – as what would count is the perception of the intent based on factual elements[562].

**192.** However, it is notable that the required degree of settlement is not the same for habitual residence. In fact, according to Swiss law, for the establishing of habitual residence, the *objective element* should suffice. In particular, under Swiss law, an individual may establish his/ her habitual residence in a State based on his/ her physical presence, more or less temporary[563], and he or she may abandon it only in the event of his/ her

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561 ATF 5A_270/2012, § 4.2.2: *"Pour déterminer si une personne réside dans un lieu déterminé avec l'intention de s'y établir durablement (élément subjectif du domicile), la jurisprudence ne se fonde pas sur la volonté interne de l'intéressé; seules sont décisives les circonstances objectives, reconnaissables pour les tiers, permettant de déduire une telle intention".*

562 Ibid.: *"Un endroit peut (encore) constituer le domicile d'une personne qui a manifesté son intention de transférer par la suite son domicile dans un autre pays, si elle n'a pas encore mis son intention à exécution* […] *Pour qu'une personne soit domiciliée à un endroit donné, il faut donc que des circonstances de fait objectives manifestent de manière reconnaissable pour les tiers que cette personne a fait de cet endroit, ou qu'elle a l'intention d'en faire, le centre de ses intérêts personnels, sociaux et professionnels".*

563 In the case 'ATF 5C.28/2004, 26.03.2004', concerning an action establishing a parent-child relationship under art. 66 of the SPILA, the Swiss Federal Court held that a short stay would not trigger the establishing of habitual residence, as opposed to a regular physical presence of some months (§ 3: "*De plus, si un séjour de courte durée ne permet pas de créer une résidence habituelle, une présence [régulière] de quelques mois suffit*"). This conclusion may be misleading in that the regular character of the individual's presence would principally depend on the duration of his/ her stay ("*le séjour n'a pas besoin d'être durable. Il peut être limité d'emblée, pourvu qu'il soit suffisamment long*"), rather than personal factors, typically important in the field of family law, such as the family environment, the principal family home, the social integration (5C.139/2002, 26.09.2002, § 2.2.: "*Das bedeutet, dass der Beschwerdeführer in X._____ nicht nur seinen Wohnsitz, sondern auch seinen gewöhnlichen Aufenthalt hat, denn die regelmässige Rückkehr (an den Wochenenden) zu seiner Mutter bewirkt, dass er dort auch äusserlich den Schwerpunkt seiner Lebensverhältnisse hat und nicht etwa nur nach Massgabe seines Willens. Dabei darf die Frage des Schwerpunktes der Lebensverhältnisse auch bei der Auslegung von Art. 20 IPRG*"). In addition, a stay of some months may also be considered a short stay. In this regard, we recall that the case in question concerned an applicant child who had lived in Switzerland for seven years at the time of

relocation to another State, irrespective of, or little attention be given to, the subjective element[564]. Thus, under Swiss law, physical presence is necessary for the establishing of habitual residence at a relevant time[565]. Conversely, and this is the paradox of domicile under Swiss law, physical presence *at the relevant time* is not a prerequisite for domicile[566], although a permanent degree of settlement is required for the intent.

**193.** This conclusion leads to the distinction that was made in the previous subsection in relation to the *prospective* permanence attributed to domicile[567], confirmed under Swiss law, but also under Luxembourg law[568] and French law[569]. Under these legislations, an individual may establish domicile, even in absence of a physical presence at the immediate relevant time[570]. Fundamentally, the establishing of domicile would be based on the recognisable perception that one individual will (re-)settle, or had settled in the past, even temporarily, with a permanent or continuing appreciable intention to maintain it[571].

**194.** In relation to domicile, it should also be said that the degree of residence – different from the degree of permanence attributed to the individual's intent – is not the one required for the establishing of habitual residence. In particular, a 'simple residence'[572], without habitual character, should be sufficient for the

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the action – a situation that may not actually be considered as an example falling under the above interpretation given by the Court.

564 Ibid. DUTOIT, art. 20: "[…] *on peut dire d'une façon générale que l' 'aspect objectif rendant la résidence habituelle reconnaissable pour les tiers revêt une importance plus grande que pour le domicile, alors que l'élément subjectif reste en retrait".*

565 The question of the *relevant time* is an important one and will be duly discussed in this and other parts of this book.

566 Ibid.: "[…] *ce qui ne présuppose pas nécessairement une présence régulière de la personne* […]". Of the same opinion is A. BUCHER, *Commentaire romand*, Loi sur le droit international privé - Convention de Lugano, Bale, 2011, art. 20.

567 ATF 5A_659/2011, § 2.3: "[…] *en d'autres termes, pour déterminer si l'intéressé s'y est créé un domicile, ce n'est pas la durée de sa présence à cet endroit qui est décisive, mais bien la perspective d'une telle durée* […]*".*

568 Cass., civ. [4.04.2019] no. 65 / 2019 "[…] *étant entendu qu'il faut prouver tant la matérialité de la résidence effective et du domicile légal, que l'intention de s'établir définitivement au pays* […] *La preuve de la matérialité de la résidence au Luxembourg et surtout de l'intention d'y rester* […]*".*

569 Ph. FRANCESCAKIS, Les avatars du concept de domicile dans le droit international privé actuel, in: Travaux du Comité français de droit international privé, Vol. 23-25, 1965, p. 313.

570 Ibid.: *"Il est vrai que l'élément objectif du domicile (i.e. la présence physique en un endroit donné) ne suppose pas nécessairement que le séjour ait déjà duré un certain temps; si la condition subjective (i.e. l'intention de rester durablement en ce lieu) est par ailleurs remplie* […]*".*

571 5A_270/2012, § 4.3: "*Il ne s'est ainsi jamais rendu en Suisse pour y résider et n'y a par conséquent jamais constitué sa résidence, même sur une très courte période".* See also ATF 5A_812/2015, § 5.1.2: *"les saisonniers, les étudiants étrangers ou encore les expatriés résident en effet habituellement en Suisse tout en conservant leur centre de vie et donc leur domicile dans l'Etat ou leur famille vit* […]*";* and ibid. DUTOIT, art. 20

572 The notion of residence will be discussed in the next section.

establishing of domicile under Swiss law[573]. This would also be the case under Italian law[574].

**195.** Still, the Swiss national dimension of domicile and habitual residence differs from the transnational dimension of habitual residence in relation to the intent. In particular, in child protection matters, the subjective element has been retained by the CJEU as decisively relevant[575], as opposed to the notion of habitual residence under Swiss law[576] – even though this aspect is controversial within the CJEU practice[577].

**196.** The Swiss doctrine seems to acknowledge that, under Swiss law, domicile and habitual residence would be substantially coincident[578]. Albeit this could be true according to the above interpretation of the Swiss notion of domicile and habitual residence, Swiss law has excluded the possibility for an individual to establish a '*domicile de circonstance*'[579]. Specifically, as opposed to the intercountry operation of habitual residence[580], under Swiss law, an

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573 5A_659/2011, § 4.3: "[…] *la constitution d'un domicile peut se produire dès l'arrivée dans le nouveau pays".*

574 Cass., sez. VI, 2 luglio 2018, No. 17249, § 2: "[…] *nel caso del domicilio, occorre infatti, oltre all'effettiva identificazione di un determinato luogo come centro di riferimento del complesso dei rapporti della persona (da intendersi non solo in senso economico e patrimoniale, ma anche morale, sociale e familiare), l'effettiva volontà di collocarvelo, indipendentemente dalla dimora o dalla concreta presenza in quel determinato luogo (cfr. Cass., Sez. VI, 15/10/2011, n. 21370; Cass., Sez. III, 8/03/2005, n. 5006)* […]".

575 CJEU, *Mercredi v. Chaffe,* § 50-51: "In that context, the Court has stated that *the intention of the person with parental responsibility to settle permanently* with the child in another Member State, manifested by certain tangible steps such as the purchase or rental of accommodation in the host Member State, may constitute an indicator of the transfer of the habitual residence […] Before habitual residence can be transferred to the host State, it is *of paramount importance* that the person concerned *has it in mind to establish* there the permanent or habitual centre of his interests, with *the intention that it should be of a lasting character*".

576 ATF, 5A_812/2015 [6 September 2016]: "*Selon la jurisprudence, elle correspond à l'endroit où la personne intéressée a le centre de ses relations personnelles et se déduit, non de sa volonté subjective, mais de circonstances de fait* […]".

577 *OL v. PQ*, § 70: "[…] the *initial intention* of the parents with respect to the return of the mother, together with the child, to the latter Member State *cannot allow the conclusion that that child was 'habitually resident' there* […]". HR, § 64: "[…] in any event, as the determination of the child's place of habitual residence for the purpose of Regulation No 2201/2003 is essentially based on objective circumstances, the intention of the parents is not, in principle, decisive in itself in that regard […]".

578 S. OTHENIN-GIRARD, *Divorce International – For du domicile du demandeur de nationalité suisse (art. 59 lit.b LDIP), analyse de l'arrêt du Tribunal fédéral* 5A_659/2011, 2012, p. 4; University of St. Gallen, Expert group meeting to which the author has participated on behalf of the Department of Private International Law - UNIGE, *'Update zu den drei Revisionen des IPRG: Schiedsgerichtsbarkeit, Insolvenzrecht, Erbrecht',* 17 November 2017; Swiss Confederation, Modification de la loi fédérale sur le droit international privé (Successions), Rapport explicatif relatif à l'avant-projet, January 2018, p. 5; ibid. DUTOIT, art. 20

579 5A_659/2011, § 2.1: *"S'il convient de ne pas encourager la création soudaine d'un «domicile de circonstance» en cas de brusque départ du domicile conjugal, il faut se montrer prudent «en présence de la création soudaine d'un nouveau domicile à la veille du dépôt d'une demande, alors que jusqu'alors et depuis longtemps existait ailleurs un domicile réel".*

580 But not the Swiss notion of habitual residence, which in principle, as for the Swiss notion of domicile, may not be established soon after relocation (ibid. DUTOIT, art. 20) – in absence of previous subjective-objective actions.

individual should not be able to acquire or lose a domicile in a short time. This is true unless the relocation to a given State is considered permanent according to the intent and the appreciable facts[581] occurring before the relocation. On the contrary, the intercountry operation of habitual residence may possibly be established or lost[582], even in very rapid circumstances, without prior attachments or recognisable actions by an individual[583].

**197.** For instance, an individual is working in State A, in a non-governmental organisation specialised in the humanitarian field. He or she purchased a house in State A with his/ her spouse who is a national of that country. During a temporary mission in State B, he or she falls in love with that country where, together with his/ her colleague who is a national of that country, he or she would like to open his/ her own NGO. He or she would like to continue living in State B, although the extension of his/ her visa application is still ongoing. While in State B, he or she would also like to file for divorce. According to Swiss law, and the Swiss notion of domicile, he or she may still be considered to be domiciled in State A, as opposed to the intercountry notion of habitual residence which may be considered established in State B. Thereafter, he or she lives in State B with his/ her new family, and moves to State C where he or she works. According to Swiss law, and the Swiss notion of habitual residence, he or she may be habitually resident (Swiss notion) in State C, but (internationally) habitually resident in State B.

**198.** The national notions of domicile and habitual residence may differ from the intercountry operation of habitual residence by reason of diverging national practices. Even if, under Swiss law, but not under EU law, the notions of domicile and habitual residence may coincide, this would not often be the case in cross-border relations involving international instruments to which Switzerland is bound, whereby the only intercountry notion of habitual residence should be relevant[584].

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581 For instance, job research, or the registration of a society, and with minor importance the submission of administrative documents (5A_659/2011, § 2.3).

582 In this regard, our inquiry shows that an individual may also lose his/ her habitual residence without acquiring a new one, and he or she may establish two alternate or concurrent habitual residences (*cf.* thematic parts II to V). On this point, see also ibid. BEAUMONT/ MCELEAVY, p. 158, 183-184.

583 Ibid. BEAUMONT/ MCELEAVY, p. 179-180.: "[…] since length of residence was not to be regarded as being an intrinsic element of the concept". Under Swiss law, see ATF 5A_21/2019, § 6.

584 In some circumstances, the operation of the intercountry notion of habitual residence would be extended to cross-border relations falling outside the direct applicability of specific Conventions, which have been transposed into Swiss domestic law. This is the case of art. 85 of the SPILA, which extends the applicability of the HCs-1996 and 2000 to any cross-border child or adult protection cases involving both Contracting and non-Contracting States. In such circumstances, it is recommended that reference be made to the intercountry (or conventional) notion of habitual residence rather than to that under art. 20 of the SPILA.

## § III. Common Law Notion of Domicile in its Interplay with Habitual Residence

**199.** The notion of domicile under English law, or more precisely conceived in the common law tradition[585], is clearer on the practical distances and differences from habitual residence[586]. It refers to three typologies of domicile: domicile of origin, domicile of choice, and domicile of dependence, as opposed to the intercountry notion of habitual residence which does not incorporate any of them[587].

**200.** With regard to the manner of acquisition, at least one and not more than one domicile is ascribed by law[588]. Domicile of origin is acquired at birth and it would be lost only when a domicile of choice or a domicile of dependence occurs. In case domicile of choice or dependence are lost, domicile of origin revives[589]. This differs intrinsically from the notion of domicile under civil law, particularly in relation to Swiss law, which can be lost without acquiring a new one (SPILA article 20.2)[590].

**201.** Domicile of dependence ascribes the domicile of a child to the one of either or both of his/ her parents[591], and it requires parental intention for their child to settle in given place. This domicile is typical in situations involving children under 16 who are not married[592].

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585 Maltese law also refers to the English notion of domicile. In this sense, see N. CARUANA DE BRINCAT, Private International Law of Employment: The Connecting Factor, *Online Law Journal*, 2018.

586 L. D'AVOUT/ P. KINSCH/ J-S. QUÉGUINER/ S. SANCHEZ LORENZO/ M-P. WELLER/ M. WILDERSPIN, Droit international privé de l'Union européenne, *Journal du droit international*, 2016, p. 480: "*En effet, les arguments de la demande quant à l'élément intentionnel rappelaient clairement la doctrine du domicile en droit anglais, qui n'a rien à voir avec la résidence habituelle. Le domicile est un point de rattachement très important en matière de famille et de successions, que la doctrine anglaise ne confond jamais avec la résidence habituelle, même très longue, car il exige une intention de ne pas retourner et un certain degré d'intégration personnelle. La résidence habituelle, tel que le juge anglais l'a bien compris, est plutôt une notion objective : la permanence et la stabilité sont les facteurs déterminants, et non pas la simple intention*".

587 *Cf. supra* UK national perspective. Ibid. BEAUMONT/ MCELEAVY, p. 178; and HAY *et al.*, p. 300.

588 Ibid. BEAUMONT/ MCELEAVY, p. 158; and HAY *et al.*, p. 302. On the contrary, an individual may be domiciled in two or more places under the civil law notion of domicile (ibid. GEORGE, The Concept of Domicile, p. 544). Under Swiss law, the possibility to acquire a dual domicile in private international law did not receive a clear-cut answer (A. BUCHER, La résidence habituelle – pivot de la procédure internationale relative aux droits de l'enfant, in: C. FOUNTOULAKIS/ A. JUNGO, La procédure en droit de la famille, 2020, p. 63) ; even though the establishing of two concurrent domiciles should be in principle excluded (art. 20.2 SPILA).

589 Y-L. SAGE, La mise en œuvre de la notion de domicile dans le droit international privé néozélandais, *RJP* (1999) No. 5, p. 77-80.

590 A. BUCHER, L'enfant en droit international privé (Basel, 2003), ch. 678. See also A. LEUBA, Le partage de la prévoyance professionnelle dans le cadre d'un divorce comportant des éléments d'extranéité, in: M. BADDELEY/ B. Foëx/ A. LEUBA/ M-L. PAPAUX VAN DELDEN. Le droit civil dans le contexte international : Journée de droit civil 2011, 2012, p. 111; and Arrêt de la Cour de Justice de Genève du 1 septembre 2020 DAS/139/2020, § 3.3.1.

591 Ibid. p. 79.

592 Ibid. BEAUMONT/ MCELEAVY, p. 164.

**202.** Domicile of choice requires the permanent intent of the individual concerned to settle indefinitely (and to indefinitely abandon his/ her previous domicile, no matter which type). The intent plays a central role here[593]. Nonetheless, as under the civil law notion of domicile, including to the Swiss law extent, a domicile of choice can only be acquired if a person's local connection is established[594]. Such connection does not essentially refer to habitual residence[595]. The professional reasons and the place of living are not necessarily sufficient to establish domicile of choice under UK law[596]. It is interesting to add that an important difference between habitual residence and domicile of choice refers to the 'capacity' of an individual to establish them. Under UK law, a domicile of choice cannot be acquired by individuals lacking mental capacity, as opposed to the intercountry notion of habitual residence[597].

**203.** On a last note, it appears that under US law a slight distinction applies for the establishing, and abandoning, of domicile of choice. In particular, under US law, it is said that the central role of the intent for the establishing of domicile of choice should be mainly determined through the individual's physical presence during the whole time in which the intent persists[598]. Reference is not made to the regular physical presence typically attributed to habitual residence. However, it is clear that an individual would establish a domicile of choice, or abandon it, based on his/ her physical presence, which should coincide in time with his/ her intent to live there[599]. This is unless other

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593 Ibid. SAGE, p. 80: "[…] *dès lors qu'elle traduit plus précisément la prééminence de la place accordée à la volonté par rapport à la simple notion de durée qui doit rester sans influence sur la décision du propositus*". HAY *et al.*, p. 305.

594 Ibid. BEAUMONT/ MCELEAVY, p. 166-167.

595 Ibid. p. 167: "[…] when intention is absolutely clear, a minimum of residence in the ordinary case at any rate is enough […] residence for a short period in leased premises, the occupation of a room in a hotel or boarding-house and residence even in a military camp have been considered sufficient […]".

596 BEAUMONT/ MCELEAVY, p. 168. This was the case of a British Cypriot who worked and lived for 43 years with his Polish wife in England where he died. Finally, he was considered as (originally) domiciled in Cyprus, country with which the deceased had maintained contacts during his settling in England (Agulian and Another v. Cyganik [2006] EWCA Civ 129: "domicile of origin can only be replaced by clear, cogent and compelling evidence that the relevant person intended to settle permanently and indefinitely in the alleged domicile of choice […]. The question was not so much whether Andreas had intended eventually to return to live permanently in Cyprus, but whether it had been shown that, by the date of his death, he had formed the intention to live permanently in England; the crucial point was that Andreas had a domicile of origin in Cyprus until it was proved that he intended to reside permanently or indefinitely in England. In view of the court's declaration that Andreas was domiciled in Cyprus […] (§ 47-53-54)".

597 Ibid. BEAUMONT/ MCELEAVY, p. 166. In relation to the habitual residence of incapacitated adults, we refer to part IV *infra*.

598 Ibid. HAY *et al.*, p. 307: "[…] a person who is to acquire a domicile of choice at a place *must actually be present at that place during the time in which the intention to make it his home exists* […] On the other hand, if domicile is largely a matter of intent, then *physical presence may be only an evidentiary requirement to confirm intent*. If there is other evidence, equally conclusive of intent, it may well be appropriate for a court *to dispense with the requirement of physical presence* […]".

599 For instance, an individual lives for professional reasons in State A. However, he or she holds a home in State B, country of his/ her nationality, where he or she spent his/ her entire childhood.

factual elements exist, which leads us to conclude that, unlike habitual residence, physical presence is not a decisive element for the determination of the domicile of choice.

## § IV. Suitable International Approach Differentiating Domicile from Habitual Residence

**204.** The English notion of *domicile of choice* and the Swiss civil law notion of domicile[600] would be the only typologies of domicile 'similarly', not equally, fulfilling the objective and operation of habitual residence. Their similar operation may be the subject of a future international legal instrument for the sake of finally clarifying their interplay within a transnational dimension. Reference in an international guide would support a better harmonisation of connecting factors among national legal orders[601]. A parallel intervention required of the CJEU[602], advising through a preliminary ruling the extent of such an interplay under EU law, would also be valuable[603]. Actually, this may be achieved only if Member States would agree in attributing a 'cross-border' perspective to the operation of domicile, which is currently excluded[604].

**205.** On the above lines, the current treaty-based approach is supported in that it favours a uniform recourse to habitual residence in the whole international family law area[605], with some specific exceptions[606]. Furthermore, the essential role played by the regular physical presence within an appreciable settled period, renders this connecting factor more pragmatic and efficient in determining a realistic and actual nexus within cross-border family relations[607].

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According to US law, as opposed to UK law, his or her domicile of choice may be in State A, in presence of a persistent physical presence.

600 In this sense, the notion of '*domicile de fait*', abandoned under French law, may nevertheless be considered as a comparable connecting factor to be further explored, as in accordance with the Swiss case law (BGE 99 II 363 S. 365).

601 For instance, an example to refer to is the Domicile and Habitual Residence Act of Manitoba which provides the same contextualised reference to domicile and habitual residence.

602 Namely in the framework of Brussels IIA or the Succession Regulation.

603 In particular clarifying whether under EU law habitual residence and domicile may *de facto* coincide.

604 On this point, *a contrario*, DUTOIT, art. 20, where reference is made to the autonomous interpretation of domicile in the framework of the *sole* HC-1954 on civil procedures. Under UK law, the internationalisation of domicile appears a somewhat complex matter (ibid. BEAUMONT/ MCELEAVY, p. 174).

605 Within the EU, harmonisation is increased through the potential preliminary ruling of the CJEU.

606 *Simple residence* is sometimes used in some Hague and EU legal instruments that will be examined in this study (*cf.* part III in relation to maintenance).

607 P. STONE/ Y. FARAH, Research Handbook on EU Private International Law, 2015, p. 26 ff; G. VAN CALSTER, European Private International Law, ed. 2nd, 2016, p. 60 ff.

## Section III Residence

**206.** The term 'residence' is employed in various legislative texts. The manner in which it operates depends on the field of law. Different meanings have been associated with this notion. It may refer to the place where a person ordinarily resides[608]; to the place with some degree of continuity, apart from accidental or temporary absence[609]. It may mean habitual residence[610]. The operation of residence may therefore refer to the use of habitual residence, but also of ordinary residence and permanent residence. One should therefore focus on the different degree of stability attributed to this notion. We will first examine residence specifically in the field of civil law and taxation law.

### § I. Residence Simpliciter

**207.** Residence denotes two elements: physical presence and a durable[611] stay as opposed to a transitory one. The *subjective element* seems to be excluded from its anamnesis, or at least priority is left to the *factual evidence*. Intention to settle may be relevant only to exclude mere presence[612], which does not correspond to residence[613].

**208.** English law may give us further guidance[614]. It is said that within the notion of residence, physical presence might show some *degree of permanence*. Importantly, it is noticed that this should mean no more than 'not transitory' as opposed to 'for ever'. A fixed period of time is not necessary before

608 G. GOLDSTEIN, The Concepts of Habitual Residence and Ordinary Residence in Light of Quebec Civil Law, the 1985 Divorce Act and the Hague Conventions of 1980 and 1996, Family, Children and Youth section research report, September, 2006, p. 4.

609 P. ROGERSON, Conflict of Laws, 4th ed., 2013, p. 31.

610 J. WOUTERS, Residence of Individuals in EU law, Publications of Instituut voor Internationaal Recht, K.U. Leuven, *Series 2001*, No. 148, 2010, p. 5.

611 Durable does not essentially mean regular, or continuous. It may refer to a short or long period of time (ibid. BEAUMONT/ MCELEAVY, p. 191-192). Under US law, a residence of six months may also mean domicile, but "'*occupants of abutting property*' in charge of snow removal from sidewalks" may mean residence, and not domicile, in absence of the durable element (ibid. HAY *et al.,* p. 299). Under French law, residence requires stability, effectiveness and daily life ("*il faut être présent en un lieu depuis un laps de temps suffisant*"), but what differentiates it from habitual residence is the lack of integration (social, personal). On the notion of residence under French law, see ibid. RICHEZ-PONS, p. 19. In the Hague practice relating to maintenance, some authors have interpreted (simple) residence as the individual's place of living (ibid. BORRAS/ DEGELING).

612 Mere presence might mean short holiday or business trips with no settled purpose.

613 A. BUCHER, Personnes physiques et protection de la personnalité, 4th ed. (Helbing & Lichtenhahn, 1999).

614 J. D. MCCLEAN, The Meaning of Residence, *ICLQ*, Vol. 11, No. 4, 1962. See also C. HALL, Cruse v. Chittum: Habitual Residence Judicially Explored, *ICLQ,* Vol. 24, No. 1, 1975; and EWHC, *Marinos v. Marinos*, *Munro v. Munro*.

residence is established[615]. It seems that a person cannot be deemed resident concurrently in different States, but certainly this point remains debatable.

**209.** The distinction that plays a pivotal role in determining residence differently from habitual residence, lies in the following indicators: the degree of settlement (stay or dwelling) and of conduct (occasional or regular); the role of the intention (irrelevant or relevant[616]). Residence is something more than physical presence only, or mere presence, but less than habitual residence, ordinary residence, or permanent residence. It is the factual, or circumstantial, contextualised[617] analysis that renders habitual residence and residence (*simpliciter*) substantially different. The regular, stable[618], physical presence and the personal integration, assessed within an appreciable period[619], as well as the settled purpose, should be more inherent in habitual residence.

## § II. Tax Residency

**210.** The notion of residence also applies for tax purposes. Some elements determining tax residency[620] may be useful for the improvement of habitual residence. A view from the 2003 OECD Model Convention with respect to taxes on income and on capital shows that this notion might lie in between

615 On the contrary, ibid. RICHEZ-PONS.

616 Relevance here means a complementary, as opposed to a decisive, use of the intent for the habitual residence assessment, as this study will show. Intent is also employed on a complementary basis to accompany the fact-based evidence of the individual's settled purpose (ibid. BEAUMONT/ MCELEAVY, p. 192), which plays a decisive role in the habitual residence determination.

617 The context is very relevant. An example of a different context between residence and habitual residence is that of an individual who may be considered resident in State A for tax purposes, being habitually resident in State B (G. MELIS, Residenza persone fisiche, in: Diritto on line, *Istituto della Enciclopedia Italiana*, 2018: "La *residenza anagrafica* è fattispecie formale, perché le indicazioni nel registro potrebbero non corrispondere *alla realtà fattuale*"; and Cass., sez. un., civ., 17 February 2010, no. 3680).

618 In our view, despite the different meaning attributed to the term 'stability', this is more compatible with the notion of habitual residence (BONOMI seems to be of the same opinion, note 230, p. 31). A person may live in one place, without being personally integrated, which would not entirely exclude stability for the determination of residence, but would not determine the qualified stability for habitual residence (this is the case of expats *i.e.* international civil servants). A person may live in one place, in a precarious manner, being habitually resident there (this is the case of homeless people). Alternatively, a person may live in one place for a one-month internship or for studies, and be considered as resident, without settling in a stable manner, excluding habitual residence (*i.e.* CJEC, *Benzler v. Commission of the European Communities*, 10 July 1992, T-63/91). Lastly, a person may live in State A but have a home located in State B where he or she regularly returns, thus acquiring habitual residence in State B. Stability refers to the regular physical presence of an individual during an appreciable period, as opposed to a peripatetic move or stay, with no specific reference to his/ her status. Homeless people, job seekers, asylum seekers, prisoners may all acquire habitual residence.

619 B. AUDIT, note Cass. civ., 1er ch., 16 décembre 1975, *Landauer c. dame Dortu*, civ., 1975, I, p. 309, Revue critique 1976, p. 558.

620 Under French law it is more appropriately referred to as '*domicile fiscal*' (see M. CHRETIEN, Le fisc en face du droit international privé, in: Travaux du Comité français de droit international privé, 1955, p. 108; ibid. RICHEZ-PONS).

*residence simpliciter* and habitual residence. The Convention provides, in article 4, a guide (tie-breaker rules)[621] on subsidiary rules that should be considered to determine residence. In particular, article 4(2) says that in matters involving an individual's tax residency, which is contended between two States, residence should be interpreted, subsidiarily, as: (i) the place corresponding to a permanent home; (ii) the place of permanent home plus closer personal and economic relations[622]; (iii) the place of habitual abode[623].

**211.** Tax residency here means something that could be similar to *residence simpliciter* or even to domicile. The key element to determine such similarity lies in the degree of duration[624] (different from the regularity, stability, indicated in subsection I). In any case, one may assume that 'tax residency' implies a more regular stay rather than an occasional one[625].

**212.** The inter-country concept of habitual residence incorporates both the *centre of vital interests* and *habitual abode.* For instance, the Canadian practice has confirmed the compatibility between habitual abode and habitual residence[626]. Canadian case law appears useful to support such compatibility, and it clarifies that both notions – habitual abode and habitual residence – encounter the same related issues, precisely dealing with the unclear weight attributed to each of their elements[627]. In addition, a detailed reading of the CJEU and Swiss reasoning applicable to international family law should help to affirm that habitual residence indicates family and social relationships as a form and degree of integration[628]. These elements are close to the interpretation given by the OECD with regard to the notion of *centre of vital interests*[629].

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621 This term does not relate to the use made in this study of 'tie-breaker' rules aimed to face and solve conflicts of habitual residence determination, although the scope and methodology are similar. On the tie-breaker rules under taxation law, see T. B. OLIVIER, Developments in the Analysis of the Tie-Breaker Rules for Individuals Under Article 4 (1) OECD, Intertax, Vol. 45, 2017.

622 Also referred to as centre of vital interests.

623 In case none of the above references applies, therefore nationality, or subsidiarily, a settlement through the mechanism of mutual agreement should apply. This mechanism proves intriguing for the sake of determining international jurisdiction and applicable law over family matters through a 'collaborative approach'.

624 K. BROOKS, Individuals and private (international) law, in: G. MAISTO, Residence of Individuals Under Tax Treaties and EC Law, EC and International Tax Law Series, Vol. 6, 2010, p. 306-323: "In giving meaning to the phrase 'habitual abode' the court looked at the New Shorter Oxford English Dictionary which defines 'abode' as 'a habitual residence'. The court concluded that the taxpayer's habitual abode was in the United States on the basis that her lifestyle and activities were predominantly in that country and because she spent about 265 days a year in the United States and only about 100 days a year in Canada".

625 Typical of residence simpliciter (*cf.* subsection I *supra*).

626 Ibid. BROOKS.

627 Ibid. p. 306.

628 CJEU, *Mercredi v. Chaffe*, § 47; and 5A_68/2017, § 2.3, for Swiss law.

629 'Permanent home' plus 'closer personal relations', if the reference to 'personal relations' also indicates 'family and social relations', which we believe it does.

**213.** Canadian precedents[630], and the Canada Revenue Agency, elucidate an important (taxation) test, which divides into three categories the elements determining residence depending on their weight[631].

- Primary ties: *the place of dwelling, spouse and dependents*;
- Secondary ties: *personal property (furniture, clothing, automobiles, recreational vehicles), social ties, economic ties (employment, bank accounts, retirement saving plans, etc.), immigrant status (including an appropriate working permit), medical care insurance, driving licence, vehicle registered therein, seasonal dwelling place, passport, membership of unions or professional organisations;*
- Residual category of other ties: *mailing address, safety deposit box, personal stationery with an address, telephone listing, local newspaper or magazine subscriptions*.

**214.** A time-based factor proves to be an intrinsic element of tax residency under Canadian law and elsewhere[632]. In fact, the 183 day-factor becomes a bright-line rule to determine whether an individual is economically linked with one State more than with others. Despite the practical debate that it has triggered, practice shows that courts are attentive to this 183 day-rule in ascertaining both tax residency and habitual residence[633].

**215.** The conclusion arising from this analysis is that tax residency generally indicates something more than *residence simpliciter*. It might also mean something more than habitual residence. All the same, it is suggested that both tax residency and habitual residence may appear compatible in terms of elements, even though used for different purposes. The three-category test and the 183 day-rule, or a time-based factor generally, may be considered helpful approaches to improve the habitual residence anamnesis. Lastly, for tax purposes, it is said that a person may at all times have a residence[634], unlike habitual residence which in some circumstances may not be, or to the sole extent of an appreciable period, established[635].

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630 *Thomson v. Minister of National Revenue*, [1946] SCC 209.

631 Ibid. BROOKS, p. 307.

632 Ibid. p. 308.

633 Ibid. p. 324. See also Tribunal de Grande Instance de Nanterre, Ordonnance de Mise en Etat [28 Mai 2019], N° RG18/01502-, Laura Smet et David Michael Benjamin Smet v. Laeticia Marie Christine Boudou veuve Smet et Jade Smet et Joy Smet et Bank of America.

634 Ibid. BROOKS, p. 308. See also *Thomson*, p. 224.

635 Tax residency, as for domicile, does not require a regular physical presence at a specific point in time. It may be acquired or maintained even if an individual is not regularly physically present in a given State during the time for which recourse to tax residency is required (this is the case of many people being tax residents of Switzerland, for the purposes of their annual taxation, without being regularly physically present at the relevant time). This is also why the duration (as opposed to a regular settlement) within a whole year (as opposed to an appreciable period, for instance the seisin or the celebration of marriage) plays a decisive role for the assessment of residence in taxation matters, and not for habitual residence in family issues. This does not exclude that a time-based

## § III. Ordinary Residence

**216.** This term means '*according to the way in which a man's life is usually ordered*'[636]. This ground of residence must not be casual nor uncertain. It has to correspond to the course of the regular normal and usual routine, or customary mode, of an individual's life[637]. Here again, as for *residence simpliciter*, intention plays a minimal role.

**217.** The question to be dealt with in this subsection is whether the terms 'ordinary' and 'habitual' have the same meaning? The answer should be in the negative[638]. Habitual, as already mentioned, reflects the stability and the regularity of a *dwelling* or *abode* that are located during an appreciable period required to establish the realistic nexus, also supported by the intent of the individual. Ordinary refers to the 'usual' dwelling or abode, with less relevance given to the appreciable period and the intent[639]. Despite this slight difference, the operation of ordinary residence and habitual residence may lead to the same results[640]. Both require a factual analysis, which might refer to the same elements that centre of vital interests or habitual abode incorporate. The near absence of intent, which even in habitual residence would not be decisive, does not prevent the analysis from remaining purely factual, realistic and effective. The result would essentially be the same, insofar as the realistic nexus is created.

**218.** The question of appreciable period is today controversial and debated. It is not clear whether it should be related to the 183-day rule, or similarly six

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factor, an appreciable period prior to its determination, would be helpful for the habitual residence anamnesis.

636 Ibid. McCLEAN, p. 1161. For a broader notion, ibid. BEAUMONT/ McELEAVY, p. 181: "a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of long or short duration".

637 See *Thomson*, p. 217.

638 Ibid. HALL, p. 28: "Taking their lives as a continuum, however, they would be said to be ordinarily resident and habitually resident in the place where they normally have a stable home. This is far from saying that the two expressions mean the same thing". On the contrary a divergent and debated opinion is found under Canadian law, see J. G. McLEOD, The Meaning of Ordinary Residence and Habitual Residence in the Common Law Provinces in a Family Law Context, Minister of Justice and Attorney General of Canada, 2006, p. 51: "Quebec courts routinely decided jurisdiction […] according to habitual residence but used the early cases from the common law provinces that purported to decide the issue on the basis of ordinary residence. On the other hand, if civil lawyers were asked whether the traditional definition of 'ordinary residence' meant the same as their definition of 'habitual residence' they *would probably answer in the negative*".

639 Ibid. McLEOD, p. 25: "[…] ordinary residence does not require continuing physical presence in a place *during the currency of the period of ordinary residency* […] as *more intention* driven than ordinary residence".

640 Some authors referred to them as being practically identical, according to the UK practice. See P. McELEAVY, La résidence habituelle, un critère de rattachement en quête de son identité : perspectives de common law, in: Travaux du Comité français de droit international privé, 2011, p. 128.

months[641], or one day[642]. Certainly, this time element should again be strictly interdependent on the factual anamnesis, for instance at the time of the commencement of the proceedings, or at the time of the deceased's death, which should show that by that time a person has become *habitually* resident.

**219.** Lastly, according to the common law doctrine, a person may be ordinarily resident in two or more places[643]. This leads to the complex question whether, contrary to *Marinos*[644], a person may be considered as habitually resident in two places? The answer should consider the context and the appreciable period. The principle should be that generally, according to relevant practice[645], a person may not have two habitual residences at the same point in time, a concurrent habitual residence. A person may instead have two habitual residences at two different, although close, points in time, an alternate habitual residence. Furthermore, it might be possible for a person to be ordinarily resident in one place and habitually resident in another[646]. It is instead accepted that a person may not have an ordinary residence[647], which is similarly possible in relation to habitual residence.

## § IV. Permanent Residence

**220.** The concept of permanent residence is the last concerned by this analysis. Its operation appears to incorporate the one of habitual residence, at least under EU law[648]. Both seem to be very similar under UK law[649] as the following decision will show.

**221.** This case[650] involved a Saudi business man, Mr Al-Juffaly. As international civil servant working for the International Maritime Organisation (IMO), he was appointed as permanent representative of St. Lucia in one of the IMO headquarters in London. He could not avail himself of the right to

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641 See *Munro v. Munro*, § 53.

642 See *Marinos v. Marinos*, § 87; and *JO v. GO and Others* [2013] EWHC 3932, § 17.

643 Ibid. McCLEAN, p. 1162.

644 EWHC 2047 Fam. [2007].

645 See US Court of Appeals, 3rd cir., *Didon v. Castillo* [26 September 2016] Nos. 15-3350 & 15-3579; and Swiss Federal Court, 5A_1021/2017 [8.03.2018]; and CJEU, *E.E. & K.-D. E.* [16 July 2020] C-80/19.

646 Ibid. HALL, p. 21-22.

647 Ibid. McLEOD, p. 12.

648 The CJEU has repeatedly referred to the *permanent character* of the individual's centre of interests, in various contexts (ibid. BEAUMONT/ McELEAVY, p. 198-199).

649 However, it is also noticed that, under UK law, permanent residence is also referred to as 'domicile of choice'. In this sense, see Th. M. DE BOER, Jurisdiction and Enforcement in International Family Law: A Labyrinth of European and International Legislation, *Neth. Int. Law Rev.*, Vol. 49, 2002, fn. 18.

650 *Estrada v. Al-Juffaly (Secretary of State for Foreign and Commonwealth Affairs Intervening)* [2016] EWCA Civ 176.

immunity against a petition for financial remedy filed in the UK by his wife, American former super model. Prior to his wife's request to obtain a maintenance order in the UK, Mr Al-Juffaly had filed petition for divorce in Saudi Arabia – *Talaq* – which was approved and recognised in the UK. The Court stated that due to the evidence of Mr Al-Juffaly's permanent residence[651] in England (for many years holding a visa enabling him to live in the UK for up to 180 days per year)[652], he was ultimately not entitled to immunity (§ 57).

> In assessing *permanent residence*, the Court referred to the following elements (§ 61): the individual's intention, particularly whether this is to settle in the Destination State or to return to the Home State; the individual's career prospects, whether he or she will be posted elsewhere; the individual's local recruitment; and his/ her marital status. Overall, the Court identified, as a principal element, the continued establishing ('*over a period of in excess of 35 years and three marriages*') of a *family base* in the UK (§ 91).

**222.** The analysis of the UK courts[653] is helpful towards the interpretation of *permanent residence*. Its assessment appears *de facto* similar, albeit not equal[654],

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651 § 61: "When determining whether or not a particular member of your staff should be regarded as a permanent resident of the United Kingdom the test should normally be whether or not he would be in the United Kingdom but for the requirements of the sending State. In applying this test, we suggest that you should be guided by the following considerations: (i) The intention of the individual: a person should be regarded as permanently resident in the United Kingdom unless he is going to return to his own country as soon as his appointment in the United Kingdom ends. It is suggested that points which may be relevant to this question include the links of the individual with the State which he claims as his home, e.g. payment of taxes, participation in social security schemes, ownership of immovable property, payment of return passage by the sending State. (ii) The prospect of the individual being posted elsewhere as a career member of the service: he should be regarded as permanently resident in the United Kingdom if his appointment in the United Kingdom is likely to continue or has continued for more than five years, unless the Head of Mission states that the longer stay in the United Kingdom is a requirement of the sending State and not a result of personal considerations. (iii) Local recruitment of the individual: a person who is locally engaged is presumed to be permanently resident in the United Kingdom unless the Head of Mission concerned shows that he is going to return to his own country or to proceed to a third country immediately on the termination of his appointment in the United Kingdom; and (iv) Marital status of the individual: a woman member of the Mission who is married to a permanent resident of the United Kingdom is presumed to be herself permanently resident in the United Kingdom from the time of her marriage unless the Head of Mission shows that in addition to her satisfying the other criteria, there remains a real prospect in view of the special circumstances of her case that she will be posted as a normal career member of the service".

652 As well as the family claim involving financial relief falling outside his professional behaviour.

653 This guidance provides useful factors when determining the competent forum, and indirectly the applicable law, over matters involving international civil servants.

654 The judgment under analysis here refers to: "This required a degree of permanence […] to find that H intended to reside in the UK for an unlimited period (§ 67, 89)". The (prospective) 'degree of permanence', both referring to the subjective and objective elements, cannot be compatible with the *intercountry* notion of habitual residence. The latter requires an immediate, regular and stable settlement, at a relevant time, coinciding with a realistic and actual nexus, despite this being of short duration. Other authors have also indicated that the (permanent) manner of stability would not be compatible with the contemporary cross-border movements (ibid. McEleavy: "*Mais un tel degré de stabilité est de moins en moins courant dans la vie contemporaine* […]".)

to the one of 'habitual residence' – to which separate reference is also made in the UK reasoning (§ 86)[655].

## § V. Prospective Use of the Different Grounds of Residence

**223.** In the international family law arena, residence leads to fewer issues than domicile, in relation to its grounds essentially corresponding to gradual degrees of stability. A residence of habitual character should focus primarily on the context and the appreciable period for its determination.

**224.** Personal integration, settled purpose and regular physical presence are primary elements assessing habitual residence. For instance, an expat who lives for professional reasons in State A, who every weekend meets his/ her family in State B may be resident[656] in State A but habitually resident in State B. The family and social environment is presumably the place of qualified proximity, which should take precedence over the professional environment where a person may also not be personally integrated. The regular visit/ return to State B, is a key element in determining that physical presence is more regular in State B than in State A, with less relevance given to the number of days (duration) per week spent in both States. All the elements should be contextualised in the family sphere.

**225.** Depending on the context, an individual may also be ordinarily resident in a State other than that in which he or she is habitually resident. Again, an expat who is resident in State A for professional reasons, where he or she rented an apartment and established a personal routine (*i.e.* through leisure and cultural activities), could be considered ordinarily resident in that State. However, if he or she regularly returns to State B where his/ her family lives and where he or she is personally integrated (*i.e.* through studies, childhood spent there), he or she may be considered habitually resident in State B in relation to family contexts. Permanent residence should also be located in State B, by virtue of the individual's family base.

**226.** It is therefore concluded that under treaty-based law, with a few exceptions[657], residence should generally mean of habitual character. It would be certainly valuable if the intercountry and national operation of habitual residence in family contexts were uniform in the future[658].

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655 "W is 53, she has lived permanently in the UK since 1989, including throughout the marriage to H i.e. since 2001. There is no dispute that she is 'habitually resident' in this jurisdiction. She has been granted indefinite leave to remain".

656 Tax residency is likely to be located in State A by reason of work and the 183-day rule.

657 In particular concerning maintenance (*cf.* part III *infra*).

658 An example among national legal orders is Australia which provides that habitual residence means ordinary residence (Family Law Act 1975).

# Section IV Physical Presence and Prospective Acclimatization

## § I. Physical Presence

**227.** *Physical presence* is a modern connecting factor currently utilised in the field of migration, which is strictly related to private international law. It is also a central notion in the contexts of child and Adult protection under private international law. In all the mentioned fields, the common elements are the status of the person involved – an asylum seeker or a recognised refugee – and the impossibility to locate habitual residence.

**228.** Importantly, physical presence acquires a central role in determining the *international responsibility* of the EU/ EFTA States under Dublin III, directly applicable to asylum seekers. It plays a subsidiary role in private international law instruments such as HCs-1996 and 2000, in the absence of habitual residence. With particular regard to direct remedies of private international law, its legal framework (HCs 1996, 2000) is extended towards anyone whose habitual residence cannot be determined.

**229.** Physical presence does not provide the same degree of proximity that habitual residence does. The realistic nexus does not respond to the closeness satisfied under habitual residence. It might not even be close at all – this is typically the case of 'mere presence'. However, physical presence is an essential prerequisite of habitual residence, as mentioned in the previous sections. Its role is pivotal in specific circumstances[659].

## § II. Prospective Acclimatization

**230.** Physical presence may also trigger a situation in which a '*quasi*-habitual residence' or a 'prospective habitual residence' is established, if other factors show that acclimatization is possible in the future[660] – *prospective acclimatization*[661]. In this situation, it would be preferable to find consensus in

[659] This is specifically the case of 'continuing physical presence' utilised as a tie-breaker rule.

[660] S. CORNELOUP, Children on the Move: A Private International Law Perspective, Parlement Européen, 2017, p. 15: "Jurisdiction based on the child's presence implies full jurisdiction, as opposed to the competence aimed at issuing provisional and protective measures provided by Article 20 of the Brussels IIa Regulation. It should however be noticed that such jurisdiction is nonetheless temporary, as it will cease as soon as a stable solution for the child is arranged and he/she settles down and acquires a habitual residence somewhere".

[661] Prospective acclimatization should not be glossed with the notion of provisional habitual residence which is a different legal situation where an individual is temporarily habitually resident – often by virtue of a provisional measure within a judicial proceeding pertaining to the determination of international jurisdiction – and therefore concerning an 'actual durable stay' rather than a 'prospective one'.

interpreting the notions of 'temporary residence', 'quasi-habitual residence', 'prospective acclimatization', or 'prospective habitual residence' in the same manner, with some preference given to the term *prospective acclimatization*. This would enable the uniform operation of one single notion, founded on a stronger degree of proximity than mere presence.

**231.** The notion of *prospective acclimatization*, with the support of specific factors that will be contextualised and suggested in this study, should essentially determine a 'closest connection' to be applied in the absence of habitual residence, or indicate some less degree of proximity than habitual residence[662]. This clarification lies also in the principle that habitual residence, which is already synonym of a qualified proximity, should not overlap with the notion of closest connection, which is widely used[663], but currently subject to absence of uniformity[664].

**232.** *Prospective acclimatization* operates in complex scenarios where the forum in the State of habitual residence is unavailable immediately[665], for instance in matters involving asylum seekers. In addition, it would apply in those situations where habitual residence cannot be determined yet but some factors may indicate that a State is closer than another to adjudicate upon that individual's rights and interests. Prospective acclimatization would also entail a decrease in conflicts of jurisdiction, potentially founded on mere presence in different States, which may lead to irreconcilable judgments and measures of protection[666].

**233.** A pertinent example might involve an unaccompanied minor whose State of habitual residence (or of nationality) cannot protect his/ her interests and who has been illegally physically present in three or more EU and non-EU

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662 Ultimately, the interpretation of closest connection may refer to habitual residence or nationality under EU law. For instance, the EU Succession Regulation refers to, *inter alia*, nationality under the meaning of closest connection for the determination of the applicable law (ibid. BONOMI/ WAUTELET, p. 315). Furthermore, habitual residence may always mean closest connection within Brussels IIA (R. LAMONT, Care proceedings with a European dimension under Brussels IIa: jurisdiction, mutual trust and the best interests of the child, *Child and Family Law Quarterly*, Vol. 28, 2016, p. 70: "Habitual residence is a factual connection between a person and a country, and is intended to be flexible and responsive to changes in circumstances, so that the *court with the current closest connection* to the parties hears any family law dispute").

663 For instance, closest connection applies as a subsidiary connecting factor in the EU Regulations applicable to matters of succession and property regimes, but it appears less relevant in the Hague Conventions on family law.

664 This study will examine 'significant connection', which is instead assessed through specific factors under US law, precisely in the context of child and adult protection. We will also deal with the notion of 'particular connection' under Brussels IIA; and 'substantial connection' in the fields of child and Adult protection.

665 See *AG and AB (Children)* [2018] EWHC 381 (Fam).

666 Among the remedies of private international law, *lis pendens* should possibly apply for matters of international jurisdiction. However, *lis pendens* does not involve, at least not directly, the determination of the applicable law. In addition, *lis pendens* is not a public international law remedy, therefore falling outside the legal framework of the Geneva Convention and the Dublin III Regulation (ibid. CORNELOUP, p. 20).

countries. Which of them should be responsible over his/ her asylum request, or for the implementation of protective measures (*i.e.* guardianship, placement)? The degree of the stay remains an important aspect to determine whether that minor has established more significant attachments in one State in the name of personal integration[667]. The child's best interests should also play a fundamental role in such determination[668]. For instance, the child in this hypothetical case may have started a language course in State A, where he or she had established a close relationship with his/ her teacher who was also willing to be his/ her foster parent; and he or she may have afterwards moved to State B where a friend of his/ hers lives.

**234.** Dublin III would answer the above question, according to the current case law[669], by allocating international responsibility over asylum in the State of actual physical presence (State B)[670]. HCs-1996 and 2000 provide the same solution over guardianship or placement. In practice, this is found not to be always in line with legal predictability and certainty, given that the child in the above hypothetical may travel through many Dublin Member States, and HC contracting States, in search of 'asylum shopping'[671], without being able to effectively access justice in any of them[672].

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667 S. H. LEGOMSKY, Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: the Meaning of Effective Protection, *International Journal of Refugee Law*, Vol. 15, 2003, p. 675: "The applicant should not be returned to a third country with which he or she lacks meaningful links, even if that third country is otherwise willing and able to provide effective protection. Mere transit or other momentary physical presence in the third country should not be deemed sufficient. Examples of meaningful links include family connections, cultural ties, knowledge of the language, the possession of a residence permit, the applicant's previous period of residence in the other State, and any other connections that would expedite or enhance the prospects of integration". These elements may be valid indicators, applicable or not in a cumulative manner, and even with some little degree, for the assessment of 'prospective acclimatization' advised in this study.

668 N. SU, The International Custody Battle: Conflict of Law Between The Hague Abduction Convention and U.S. Asylum Law, *Houston Journal of International Law*, Vol. 39, 2017. See also, ibid. CORNELOUP.

669 CJEU, *MA and others v. Secretary of State for the Home Department* [6 June 2013] C-648/11, § 66. Some authors have supported the CJEU dictum on 'actual physical presence', as opposed to the 'first physical presence at the time of the arrival' (ibid. CORNELOUP, p. 20).

670 Not applicable to adults for which the general rule is that, in case of illegal entry, responsibility is asserted in the State of first arrival where the application has been lodged. This mechanism is criticised because it may imply huge efforts for States that are close to borders subject to heavy migration fluxes. See L. ROOTS, Burden Sharing and Dublin Rules – Challenges of Relocation of Asylum Seekers, *Athens Journal of Law*, Vol. 3, Issue 1, 2017, p. 10.

671 Ibid. LEGOMSKY, p. 606: "Refugees who discern those patterns might tend to seek temporary asylum in whichever countries appear to offer the best hope for eventual transfer to permanent resettlement countries."; and CORNELOUP.

672 Ibid. LEGOMSKY, p. 568.

# Chapter IV: Basis for a Two-fold Test Approach

**235.** This study adopts a methodology that is similar to the OECD Model Convention[673]. In particular, habitual residence should be primarily assessed through decisive and non-decisive elements. Only in the absence, or complex determination, of habitual residence, should replacing rules operate[674]. This is typically the mechanism to which this study refers as 'two-fold test approach'.

**236.** In the following sections, reference will be made to the operation of habitual residence in different contexts, including outside family law. A first guiding proposal for the uniform application of habitual residence will be provided. In addition, the issues which require the employment of replacing rules are introduced in this Chapter.

## Section I Habitual Residence Uniform Application

### § I. Harmonised Terminology

**237.** Modern family issues required a connecting factor that is more flexible and adaptable. Such request has been satisfied with the increasing employment of habitual residence. This notion refers to a regular and stable abode as opposed to 'permanent' or 'occasional' stay, which is in its essence not synonym of actual stability. Its aim is to trace a realistic and actual nexus purporting to guarantee access to justice[675].

**238.** The CJEU has interpreted habitual residence[676] as a *permanent settlement*, also indicating a 'permanent intent to settle' or a 'permanent presence', which was maintained in its recent judgments[677]. This study argues that the term 'permanent' should be avoided in the interpretation of habitual residence and replaced with the term 'continuous'[678].

**239.** Another issue concerning the formula utilised by the CJEU, and transposed into national decisions, is encountered in the term 'stay'. The latter

673 *Cf.* chapter III, section III above.

674 The replacing rules will be examined in parts II to V. Their operation is principally founded on physical presence and prospective acclimatization.

675 For the protection of the beneficiary's interests and rights.

676 See CJEU, *A*; *Mercredi v. Chaffe*.

677 See *OL v. PQ*; *HR*; *UD v. XB*.

678 The use of the terminology 'continuous' and 'regular' may be interchangeable.

may not be synonym of *dwelling* or *abode*, both reflecting regularity and stability. It is therefore argued that 'stay' be replaced with 'abode'[679].

**240.** The formula of interpretation with the new adjustments should follow:

> '[…] the parents' intention to settle ~~permanently~~ *continuously* with the child in another Member State, manifested by certain tangible steps […]'.
>
> '[…] it is of paramount importance that the person concerned has it in mind to establish there the ~~permanent~~ *continuous* ~~or habitual~~ centre of his interests […]'.
>
> '[…] the parents are ~~permanently~~ *continuously* present and are integrated […]'.
>
> '[…] particular mention should be made of the conditions and reasons for the child's ~~stay~~ *abode* on the territory of a Member State […]'.
>
> '[…] the factors to be taken into consideration include, first, the duration, regularity, conditions and reasons for the mother's ~~stay~~ *abode* in the territory of the former Member State […]'.
>
> '[…] in view of the duration, regularity, conditions and reasons for that ~~stay~~ *abode*, such an ~~stay~~ *abode*, in principle, reflects a ~~some~~ *qualified* degree of integration of the parent in question into a social environment shared by the child'.

**241.** The Borras contextualised reference[680] to habitual residence should also be adjusted as follows:

> '[…] the place where the person had established, on a ~~fixed~~ *regular* basis, his ~~permanent~~ *continuous* ~~or habitual~~ centre of interests, with all the relevant facts being taken into account for the purpose of determining such habitual residence'.

**242.** With particular regard to the *subjective element*, this does apply to habitual residence. However, its weight should be purely dependent on the *objective element.* It should not apply alone. Intent, in our opinion, cannot be decisive. The prospective intent without tangible steps should be considered as not relevant. This is in line with the conclusion achieved by the CJEU in a recent judgment[681].

**243.** A last clarification in the formula leads to the use of the word *residence*. This should be preceded by the word *habitual.* One example is contained in Brussels IIA, article 3, as follows:

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679 The use of the terminology 'abode' and 'dwelling' may be interchangeable.

680 Ibid. BORRAS, Explanatory Report.

681 *HR* [28 June 2018] C-512/17.

'the spouses were last habitually resident, insofar as one of them still *habitually* resides there' (and later in the fifth and sixth indents).

**244.** This is a slight modification which allows an accentuation of meaning on the continuous abode. In any case, when 'residence' is used in international family law instruments, this should mean *habitual residence* unless otherwise clarified in the scope of the relevant instrument.

## § II. Initial Uniform Reference

**245.** 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*'.

**246.** Relying on the foregoing analysis, the term 'habitual residence' should refer to a *regular place of settled and stable dwelling*. Therefore, a first attempt of uniform reference[682] may be indicated as follows:

> Habitual residence of a natural person is '*a regular place of settled and stable dwelling*'[683].

**247.** The factual anamnesis aimed at determining the *two-fold test approach*, which will be construed throughout the forthcoming parts of this monograph, should elucidate practically the above reference.

## § III. A proposed Handbook and/ or Protocol as an International Guide

**248.** This study supports a practical and harmonised use of its two-fold test approach assessing habitual residence. An international guide would ensure wider acceptance of habitual residence among States. In the author's experience at the International Social Service, in particular concerning joint activities with other NGOs and institutions such as the HccH Permanent

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682 This refers, principally but not only, to a possible Handbook or Protocol drafted under the auspices of the Hague Conference on Private International Law and the European Commission.

683 La résidence habituelle de la personne physique est '*le lieu régulier de vie (ou demeure) établie et stable*'. La residenza abituale della persona fisica è '*la regolare dimora continua e stabile*'. Der gewöhnlicher Aufenthalt der natürlichen Person ist der '*reguläre Ort der besiedelte werden und der stabilen Behausungen*'.

Bureau, a handbook[684] on the practical operation of habitual residence would be a valuable solution[685].

**249.** The proposed handbook should specify for each family context: (i) the decisive and non-decisive elements that should determine habitual residence based on a child- , adult- , family- centred approach; (ii) the issue of alternate and concurrent habitual residence[686]; (iii) the recourse to tie-breaker rules such as continuing physical presence and principal/ family habitual residence[687]; (iv) the employment of replacing rules such as mere presence and prospective acclimatization in the absence of habitual residence[688]; (v) the use of *lis pendens* and transfer of jurisdiction[689]. It should provide practical cases, available for the States' authorities, field actors[690] and families. Its conception should envisage a joint endorsement with the European Commission, DG Justice, in order to ensure a uniform operation of habitual residence within the EU-Hague family law area.

**250.** An additional instrument that would prove useful in achieving a harmonised operation of habitual residence refers to the adoption of an international protocol[691]. This is a *tool* that helps the well-functioning of other legal instruments, namely the conventions. It aims to better explain, sometimes in detail, also notions and concepts[692]. The proposed protocol should be

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684 An interview was carried out before the Permanent Bureau. In order to adopt a handbook and/ or a protocol, States should mandate this activity to the Permanent Bureau within the framework of the Special Commission (<https://www.hcch.net/en/governance/rules-of-procedure>). While a handbook, similar to the explanatory intercountry adoption note, could be a possible subject for discussion at the next Special Commission on the operation of the 1996 and 1980 Hague Conventions, expected to take place in 2023, the difficulty in endorsing an intradisciplinary protocol was highlighted. We clarify that neither solutions are currently considered within the activities of the Permanent Bureau.

685 The drafting of a handbook is inspired by the 'Hague Conference note on habitual residence for matters of intercountry adoption', as well as on the 'guidelines for the Alternative Care of Children', which may contemplate specific scenarios, case-studies, within each field of family law where habitual residence is applicable. Another example, although in the ambit of a different context, refers to the 'Guidelines on jurisdiction' endorsed in 2016 by the European Union Agency for Criminal Justice Cooperation (EUROJUST). These guidelines provide key guiding principles determining jurisdiction over criminal matters in respect of the EU Area of Freedom, Security and Justice, to which EU family instruments also refer. Please refer to <https://www.eurojust.europa.eu/judicial-cooperation/eurojust-role-facilitating-judicial-cooperation-instruments/conflicts-of-jurisdiction/guidelines>.

686 *Cf.* section III *infra*.

687 *Cf.* section III *infra*.

688 *Cf.* section IV *infra*.

689 *Cf.* section V *infra*.

690 *I.e.* child professionals, intermediaries, notaries.

691 The idea of a Protocol is inspired by the 2007 Protocol on Applicable law to Maintenance. Its reference is not new in itself. Some scholars have already pointed out the possibility of endorsing a Protocol to the HC-1980. See A.C. ALFIERI, Enlèvement international d'enfants, Une perspective suisse, 2016; and W. DUNCAN, Keeping the 1980 Hague Child Abduction Convention up to Speed. Is it time for a Protocol?, *Journal of Family Law and Practice*, Vol. 1, 2010, p. 5: "The challenge as regards consistent interpretation is of particular importance. A Protocol could be useful in this regard but it would undoubtedly be a challenge to achieve consensus on a definition of core concepts such as rights of custody or habitual residence".

692 See M. ZUPAN, Innovations of the 2007 Hague Maintenance Protocol, in: P. BEAUMONT/ B. HESS/ L. WALKER/ S. SPANCKEN, The Recovery of Maintenance in the EU and Worldwide, 2014, p. 314.

applicable to all the HC's Family Law Conventions[693]. It should contain a preamble describing the intradisciplinary aim of habitual residence and its perspective assessment (*i.e.* child, adult, family). Specific provisions would indicate the habitual residence general reference[694], the family context of implementation[695], the related decisive and non-decisive assessment elements, the recourse to tie-breaker rules in complex determinations, the employment of replacing rules in the absence of habitual residence, the use of *lis pendens* and transfer of jurisdiction.

## Section II Habitual Residence under Social Security Law

**251.** This serves as a brief illustrative reminder that habitual residence applies in other areas of law. Ultimately, the uniform implementation of habitual residence in principle could not be excluded. In particular, the habitual residence test under social security law might be helpful for the anamnesis of habitual residence under family law. It also appears to satisfy the harmonisation wished for by the CJEU in considering habitual residence as an autonomous concept under EU law[696].

**252.** For instance, the European Commission released a guide which elucidates the habitual residence test implemented under social security law. The guide clarifies the distinction made by the Regulation 883/2004 on the coordination of social security systems between the notion of 'residence', corresponding to habitual residence, and the notion of 'stay', meaning temporary residence. In sum, the main difference is that *residence*, under EU law (for social security only), refers to the habitual centre of interests. *Stay,* reversely, is characterised by a temporary nature and the intention to return to the place of residence[697]. The guide affirms that a person may have only, and at least, one residence because otherwise provided would cause negative conflicts[698].

**253.** A last relevant aspect is that the guide lists the elements to determine the '*habitual centre of interests*' encapsulated in the CJEU reasoning under social security[699]. These are:

- family situation (family status and family ties);
- duration and continuity of presence in the Member State concerned;

693 It would be useful, also in this case, to coordinate the activity with the European Commission.

694 *Cf.* subsection II above.

695 *I.e.* Child protection, Intercountry Adoption, International protection of Adults, Maintenance.

696 CJEU, *A,* C-523/07.

697 European Commission, Practical guide on the applicable legislation in the European Union, the European Economic Area (EEA) and in Switzerland, 2013, p. 42.

698 Ibid.

699 *Swaddling* [25 February 1999] C-90/97, § 26-28-29-33.

- employment situation (nature and specific characteristics of any activity pursued, in particular the place where such activity is habitually pursued, the stability of the activity, and the duration of the work contract);
- exercise of a non-remunerated activity;
- in the case of students, the source of their income;
- housing situation, in particular how permanent it is;
- the Member State in which the person is deemed to reside for taxation purposes;
- reasons for the move;
- the intention as it appears from all the circumstances.

**254.** The guide explains that the elements are neither exhaustive nor hierarchical. Additionally, the place where a person has declared to hold his or her home address is not a decisive element in indicating that place as of residence[700]. Lastly, the guide provides important examples of cross-border scenarios that illustrate the practical operation of habitual residence[701].

## Section III Alternate Habitual Residence or Concurrent Habitual Residence

### § I. Alternate Habitual Residence or Résidence Alternée

**255.** Alternate habitual residence or '*résidence alternée*' are terms used to indicate that a person, usually a child, lives alternately in two or more States, those of each parent respectively, potentially acquiring two habitual residences[702].

**256.** In the child protection context, alternate habitual residence may be interpreted together with 'shuttle custody' or '*garde alternée*'[703]. The latter contemplates that scenario in which a judicial order[704] is issued to arrange the child's living conditions at the separate domicile each of his/ her parents, who

700 Ibid. Practical guide, p. 44.

701 Ibid. p. 47 ff.

702 US Court of Appeals, 9th cir., *Blanca Elisa Reyes Valenzuela v. Steve Louis Michel* [15 November 2013] No. 12-17205; EWCA, *In the Matter of L (A Child)* [2012] Civ 1157.

703 Some countries such as France no longer recognise the term 'garde' (alternée), which is therefore referred to as 'résidence' (alternée). On this subject, see A. BUCHER, Jurisprudence suisse en matière de droit international privé de la famille, *SRIEL*, Vol. 28, 2018, p. 251.

704 Alternatively, a parental agreement usually homologated by a judicial order.

live in different countries. In common law jurisdictions, shuttle custody is often dealt together with alternate habitual residence[705].

**257.** Under Swiss law, it has been said that the notion of '*résidence alternée*' was causing negative impacts on legal certainty for jurisdictional purposes, as well as on the child's life. An interdisciplinary study of 2017[706] reported the difficulty arising out of national practices to assess such a residence[707]. The conclusions of the said study stated that the determination of custody and the child's residence should both occur in his/ her best interests[708].

**258.** That said, what is relevant is more the general situation of a cross-border scenario, in which an individual may establish personal attachments with two States. On the other hand, a person may only have one habitual residence at any given time[709]. The question of an alternating habitual residence is not a very common scenario[710]. In Switzerland, precisely in Geneva, it may be more frequently encountered. This is due to its closeness to the State borders of Austria, France, Germany and Italy, where it is easier for individuals to move daily across borders. A similar context may be found in the United Kingdom[711]. This study essentially advocates for the assessment[712] of a principal habitual residence[713], or else, the use of continuing physical presence as a 'tie-breaker' rule.

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705 *Elisa Reyes Valenzuela v. Steve Louis Michel*: "[…] courts in other jurisdictions have held that the shuttle custody cases before them reflect serial, or alternating, habitual residence […]".

706 This study was carried out by the University of Geneva. Reference is made in the '*Rapport du Conseil fédéral - Garde alternée, 8 décembre 2017,* No référence: COO.2180.109.7.233832 / 232.01/2017/00006.

707 Ibid. Rapport du Conseil fédéral, p. 22. The report refers to the assessment of the child's domicile under Swiss domestic law, although the issue is the same in cross-border contexts where habitual residence applies (*cf.* part III).

708 Ibid. p. 9-16: "*Un autre facteur à évaluer avec attention est celui des déplacements d'un lieu de vie à l'autre. Pour les enfants, les transitions d'une résidence à l'autre, d'un quartier à l'autre ou d'une région à l'autre constituent des ruptures dans la vie quotidienne (école, amis, et activités extra-scolaires) et impliquent de transférer à chaque fois les affaires (valises). Ces transitions requièrent de la part des enfants et de leurs parents une organisation qui peut s'avérer fort pesante pour certains enfants* […] *une telle présomption risque de subordonner l'intérêt supérieur de l'enfant aux attentes des parents en matière d'égalité de droits*".

709 *In the Matter of L (A Child)*, § 75. This point is however debated as to whether the scenario falls under EU law or national law (ibid. BEAUMONT/ MCELEAVY, p. 183, 204).

710 *In the Matter of L (A Child)*, § 74: "[…] The family that spends 6 continuous months in one home and 6 continuous months in another will be rare […]". See also J. ATKINSON, The meaning of habitual residence under the Hague Convention on the Civil Aspects of International Child Abduction and the Hague Convention on the Protection of Children', *Oklahoma Law Review*, Vol. 63, No. 4, 2011, p. 650.

711 *In re C.L. (a minor); J.S. v. C.L* (<https://www.incadat.com/en/case/390>).

712 This study explores the recourse to an 'intercountry assessment' over matters involving both children and adults. This typology of assessment is based on a collaborative, multidisciplinary, approach between different actors, typically social work forces, for the evaluation of the child's best interests, including in cross-border custody disputes (part III).

713 Ibid. Rapport du Conseil fédéral, p. 22.

**259.** Concerning principal habitual residence, we will determine the importance of focussing on the individual's or couple's family interests, both personal and proprietary. It will be shown the relevancy of the (best) interests, relating to contexts involving children and incapacitated adults. Such interests should allow for the determination of one residence that is more habitual than another relying on the family context[714]. In relation to continuing physical presence, its operation would follow a rule, similar to the scope attributed to *lis pendens*[715]. Accordingly, physical presence at a specific point in time should freeze international jurisdiction and/ or applicable law in one of the two places where regular connection is established. Again, this would depend on the family context[716].

## § II. Concurrent Habitual Residence

**260.** The possibility for a person to acquire concurrent habitual residence is generally excluded[717]. The use of the two-fold test approach should considerably reduce conflicting situations arising from alternate or concurrent habitual residence. However, the possibility for two persons to acquire a separate habitual residence remains possible. In specific family contexts, the determination of international jurisdiction and applicable law relies on a 'separate formula' of habitual residence. For instance, this refers to two spouses each of whom acclimatized in two different States[718].

**261.** In such circumstances, this study advocates for a judicial and/ or *quasi*-judicial, as well as non-judicial, method aimed at solving conflicting situations arising out of two habitual residences. The suggested judicial method refers to

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714 This solution follows a past and current debate on whether one person may hold two residences, one of which habitual and the other of lesser quality (ibid. BEAUMONT/ MCELEAVY, p. 204)

715 This study supports the use of *lis pendens* in conflicts of jurisdiction arising out of the conflict of habitual residences (*cf.* section V *infra*). In reference to *lis pendens*, consideration will be given to a 'two-step process' founded on the first-in-time rule. In particular, under this rule, the court first seised should assess habitual residence based on decisive and non-decisive elements, or continuing physical presence at a relevant time (depending on the family context), and proceed with a transfer of jurisdiction (*cf.* section V *infra*), should habitual residence or continuing physical presence be located in another State.

716 This solution lies in the two-fold importance of physical presence, under both the EU and Hague legal instruments, as an essential prerequisite for the determination of habitual residence and as a subsidiary rule in absence of habitual residence. This is typically the operation of physical presence in child protection matters, whose rationale will be extended to the whole area of international family law.

717 EWCA, *In the Matter of L (A Child)*, § 80: "In V v V (Divorce: Jurisdiction) [2011] EWHC 1190 (Fam), [2011] 2 FLR 778, a case under Article 3, Peter Jackson J was pressed with the argument that although it is possible to have more than one residence between which one alternates, one cannot have more than one residence simultaneously". Ibid. BUCHER, p. 60: *"En revanche, l'enfant ne peut résider habituellement dans deux pays, même limitrophes, en même temps".*

718 For instance, this is the case under the Property Regimes' Regulations to the extent of the applicable law determination (*cf.* part II).

a *super partes* entity[719] whose mandate should enable its intervention upon request of the parties[720] or of the national courts. As for the quasi-judicial, as well as non-judicial, method, this contemplates either arbitration schemes[721], through the role of the Hague International Network of Judges[722], or the institution of a quasi-judicial instance at the UN Committee on the Rights of the Child[723] and the UN Committee on the Rights of Persons with Disabilities[724].

## Section IV Absence of Habitual Residence

**262.** Issues where habitual residence cannot be established are rare[725]. However, what happens if it cannot be determined for any reason? In this

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719 This study refers in particular to the role of the CJEU within the EU family *acquis*.

720 Including their representatives and/ or other authorities such as the Central Authorities competent under the EU and Hague legal instruments.

721 This would imply the potential recourse of arbitration in matters of family law, which is currently the case, for instance, in Australia, Ontario, British Columbia and more recently in the UK. On this subject, see W. KENNET, It's Arbitration, But Not As We Know It: Reflections on Family Law Dispute Resolution, *International Journal of Law, Policy and The Family,* Vol. 30, 2016.

722 This reasoning is extended to the European Network of Councils for the Judiciary (ENCJ) and the European Judicial Network (EJN-civil). With regard to the IHNJ, it is "a global network of sitting judges specialised in family matters, currently comprised of 124 judges from 81 countries […] for the resolution of practical matters in individual cross-border cases involving children by judges engaging in 'direct judicial communications' across national boundaries" (M. GROFF, The Hague Conventions: Giving Effect to Human Rights through Instruments of Private International Law, in: J. HANDMAKER/ K. ARTS (eds.), Mobilising International Law for 'Global Justice', 2018). The idea supported here is that, in addition to the valued direct judicial communication, the IHNJ's members would also intervene, upon request of the parties, as an arbitral body, given their long-standing experience. The list of available judges may be indicated through the Hague website, and the principles, procedures and safeguards governing their intervention would potentially rely on the current "Emerging Guidance for the development of the IHNJ and General Principles for Direct Judicial Communications including commonly accepted safeguards for Direct Judicial Communications in specific cases within the context of the IHNJ" (*i.e.* principle no. 6: rule of law, judicial independence, due process safeguards). Further proposals and procedural requirements may indeed be adopted through the Hague Special Commissions. Meanwhile, the possibility to resolve conflicts of habitual residences through direct cross-border communication, namely through a 'mono-national' judgment supported by a pre-communication process between two judges, ensuring a consistent approach towards both the objectives of the legal instrument in question and the individual's interests (child or adult, or families), would already allow greater justice through a fair degree of efficiency, effectiveness and impartiality.

723 Ibid. ROMANO, fn. 64: "*A l'échelle multilatérale, un nouveau protocole à la Convention des Nations Unies de 1989 pourrait constituer le siège naturel pour créer ces tribunaux à composition multi-nationale et en organiser la procédure. Il s'agirait de réaliser un pas de plus sur le chemin entrepris par les Nations Unies avec le troisième «protocole optionnel» qui vient d'être cité. Le Comité des Nations Unies pour les droits de l'enfant — auquel le protocole assigne déjà une mission quasi-juridictionnelle — pourrait fonctionner en tant que «comité d'appel» («appellate commitee») en deuxième instance*".

724 *Cf.* part IV.

725 Ibid. BUCHER, p. 59: "*L'absence d'une résidence habituelle étant rare* […]". Ibid. BEAUMONT/ MCELEAVY, p. 204.

case[726], two alternatives should be envisaged: the implementation of the notion of *prospective acclimatization* and, subsidiarily, the recourse to mere presence. The latter is largely adopted in relation to asylum migration, as well as child and adult protection[727].

# Section V Forum (Non)Conveniens or Transfer of Jurisdiction

## § I. Common Law Forum Conveniens

**263.** *Forum conveniens*[728] is a rule that plays a pivotal role in common law jurisdictions[729]. A court may (discretionally) grant a stay relying on the character of appropriateness[730]. Another court could be better placed, more appropriate, to determine jurisdiction over a particular case pending before the courts of a common law legal system.

**264.** Appropriateness should reveal a more real and substantial connection in terms of convenience, expense and availability of witnesses. The English courts gave guidance[731], clarifying that the following elements, together with the child's welfare which is '*possibly primary*' (not paramount)[732], should be relevant in determining the convenience of the forum (§ 48)[733]:

- the desirability of deciding questions as to a child's future upbringing in the state of his/ her habitual residence, as well as the child's and parties' connections with the competing forums;

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726 The reasons causing the absence of habitual residence may be asylum migration, expats with no family, newborns in situation of parental separation and situations involving peripatetic life. Each scenario must be studied in context and in relation to a given appreciable period. We examine these causes in the following parts of this monograph.

727 *Cf.* chapter III, section IV above.

728 *Forum conveniens* is to be determined through the principles set out in the case *Spiliada Maritime Corporation v. Cansulex* [1987] AC 460 (under UK law) and in the case *Gulf Oil Corp v. Gilbert* 330 U.S. SC 501 1947 (under US law).

729 US law (28 U.S.C.A. § 1404(a)) contains a similar rule known as 'federal transfers', which applies to domestic cases. This rule indicates that the court seised of the matter may transfer, instead of dismissing, any civil action to the venue where it should have originally been brought. It does not clarify the factors according to which such a transfer should take place, other than considering the convenience of the parties/ witnesses in the interests of justice (HAY *et al*, p. 562).

730 Ibid. HAY *et al.,* p. 549: "Further, even though a court may have jurisdiction over the parties to a lawsuit on a transitory cause of action, considerations of justice and convenience to all concerned may lead to the court in its discretion to refuse to exercise its jurisdiction and to force the plaintiff to sue the defendant in a more appropriately available forum".

731 EWHC *V v. M.* [2019] 466 (Fam).

732 EWHC *W v. L* [2019] 1995 (Fam), § 31.

733 We will not replicate all the elements provided by the English courts. Their meaning is not modified though.

- the ability of each forum to determine specific issues, including the availability of investigating and reporting[734];
- the convenience and expense to the parties[735] of attending and participating in the hearing;
- the availability of legal representation;
- any earlier agreement as to where disputes should be litigated;
- the stage any proceedings have reached in either jurisdiction and the likely date of the substantive hearing;
- principles of international comity, insofar as they are relevant to the particular situation[736];
- the prospects of success of the applications.

**265.** The Uniform Child Custody Jurisdiction and Enforcement Act 1997 (UCCJEA) provides the same principle[737]. Section 207 indicates the factors that might convince the original home-state court, which may (with discretion)[738] decline jurisdiction. Such factors are:

- domestic violence expected to continue in the future;
- length of time of the child's residence outside its original home state;
- distances between the two courts;
- financial circumstances of the parties/ parents;
- parental agreement or between the parties about jurisdiction;
- nature and location of the evidence, and of the child's testimony;
- capacity of the courts to decide expeditiously, and to present evidence;
- the familiarity of the court.

734 In practice, judges will be reluctant to assume that facilities for a fair trial are not available in the court of another jurisdiction but this may have to give way to the evidence.

735 Including the availability of witnesses.

736 Recalling that public interest or public policy considerations not related to the private interests of the parties and the ends of justice in the particular case, have no bearing on the decision which the court has to make.

737 The child's best interests are not included in this provision. L.E. LITTLE, Conflict of Laws: Cases, Materials, and Problems, 2013.

738 Such discretion is extended to the transfer of the civil action to the district or division where it might have been brought, rather than dismissing the case (HAY *et al.,* p. 562).

## § II. Similarity with the Civil Law Transfer of Jurisdiction

**266.** *Forum conveniens* is a 'common law exception' to the rule of habitual residence (or home state) that should be interpreted rather strictly[739]. *Transfer of jurisdiction* enshrined in the Brussels IIA Regulation, in favour of a better placed court, exceptionally allows the common law doctrine of the *forum conveniens* to extend its effects in intra-EU family relations[740].

**267.** In this regard, the two rules present a main similarity in that the court seised of the matter holds large discretion over the exercise or transfer of jurisdiction based on appropriateness[741]. That said, the EU law rule differs from the common law one. In particular, under Brussels IIA[742], the discretion of the court seised of the matter should be limited by the exceptional grounds indicated in the relevant provision (article 15)[743]. Some of these grounds are once again founded on the qualified proximity of habitual residence in the child's best interests[744]. The two principles of proximity and best interests substantially limit the power of the court, which will have to identify specific and gradual degrees[745] of closeness between the child and the case.

**268.** Transfer of jurisdiction lies in the principle of international cooperation, which is a fundamental pillar of EU law[746]. Thus, the assessment of, and derogation from, habitual residence should be the result of a collaborative approach between courts within a transnational dimension, rather than on a simple 'own' interpretation and implementation of the rule by the court first seised[747].

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739 US Supreme Court, *Valerie M. (McAndrew) Hogan v. Philip A. McAndrew* [12 February 2016] No. 2014-255, p. 10.

740 EWCA *Mittal v. Mittal* [2013] Civ 1255, § 44.

741 F. FALCONI, Il trasferimento di competenza nell'interesse del minore alla luce dell'interpretazione della Corte di Giustizia, *Rivista di Diritto Internazionale Privato e Processuale*, Vol. 3, 2017, p. 667.

742 This is currently the only Regulation in which the EU legislator has decided to adopt this rule.

743 Ibid. FALCONI, p. 672.

744 *Child and Family Agency v. J.D.* [27 October 2016] C-428/15, § 54: "[…] the court having jurisdiction must compare the extent and degree of the relation of 'general' proximity that links it to the child concerned, under Article 8(1) of that regulation, with the extent and degree of the relation of 'particular' proximity demonstrated by one or more of the factors set out in Article 15(3) of that regulation that exists, in the particular case, between that child and certain other Member States".

745 We will discuss this rule in detail under part III. The 'gradual degrees' contemplate habitual residence, nationality and the property location of the child (including the habitual residence of the parental responsibility holder).

746 Ibid. BEAUMONT/ MCELEAVY, p 798: "[…] courts must regulate their own jurisdiction and respect the Regulation's harmonised framework and ethos in accordance with the principle of mutual trust".

747 Ibid.: *"Qualora i presupposti contemplati dall'art. 15 risultino soddisfatti, il trasferimento di competenza avviene non già sulla base di una determinazione unilaterale del giudice adito, ma per effetto della virtuosa collaborazione che si instaura tra quest'ultimo e l'autorità giurisdizionale dello Stato membro ad quem, la quale, come meglio si dirà in seguito, è chiamata a valutare su un piano di parità , e sempre attraverso la lente dell'interesse superiore del minore, l'opportunita ` di accettare o meno il trasferimento di competenza".* See also ibid. BEAUMONT/ MCELEAVY, p. 797.

## § III. Lis Pendens Rule and the Consistent Transfer of Jurisdiction

**269.** This study advocates for the consistent recourse to the transfer of jurisdiction[748] in the whole area of international family law, including in situations involving adults. Its operation to determine, or derogate from, habitual residence, based on the (best) interests determination[749], or on the principle of better appropriateness, is supported as a modern collaborative approach between authorities.

**270.** Transfer of jurisdiction should act complementarily with the *lis pendens* rule[750] in order to further avoid parallel jurisdictions or denial of justice[751]. For instance, the court in State A, first seised of divorce (or of custody)[752], should primarily assess habitual residence (presumably applicable)[753] based on the first-in-time rule[754]. Should appropriateness require it, State A may transfer[755] jurisdiction to State B[756]. This 'two-step process' should aim to ensure legal certainty based on the initial fact-based determination of habitual residence, derogating from it in specific circumstances only[757].

**271.** The complementary operation of *lis pendens* and transfer of jurisdiction should enable a more efficient and consistent coordination for the location of habitual residence. This is particularly useful in those situations where the court in State A, even though first seised, may judge that habitual residence should be located in State B. Such a collaborative approach proves supportive since it would potentially prevent conflicts of jurisdiction arising from conflicts of habitual residence determinations. *Lis pendens* helps in freezing[758] the

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748 This is preferred to the common law rule of *forum conveniens* and to the US rule on intra-country federal transfers.

749 In parts III and IV, the relevance of extending this fundamental principle towards adults is examined, particularly when they are incapacitated.

750 For instance, this rule is provided under art. 19 of Brussels IIA (applicable to both divorce and child custody proceedings) and art. 9 of the SPILA (as a general rule).

751 Namely caused by negative conflicts of international jurisdiction (or of habitual residence), whereby the courts in States A and B may be seised in parallel, and both decide in favour of a transfer of jurisdiction. The rule of *lis pendens* should aim at overcoming this possible impasse.

752 Currently, art. 15 of Brussels IIA applies to proceedings involving parental responsibility only.

753 Reference should be made to Brussels IIA, art. 8.

754 "*Prior in tempore, potior in iure*" means in context that the determination of international jurisdiction is based on a chronological precedence. On this subject see U. MAGNUS/ P. MANKOWSKI, Brussels IIbis - Commentary, 2017, art. 19.

755 Beyond the collaborative determination of habitual residence, the transfer should take place upon a party's request or *ex officio*.

756 In circumstances other than the collaborative determination of habitual residence, the courts in State B should also be entitled to request the transfer upon a party's request or *ex officio*.

757 Ibid. BEAUMONT/ MCELEAVY, p. 799.

758 Ibid. p. 798: "In this way the court first seised should ordinarily retain control of its own jurisdiction, whatever the merits might be of its claim to jurisdiction".

triggering of this process in the State of the court first seised, avoiding parallel proceedings covering the same subject matter and parties[759].

**272.** It is notable that *lis pendens* and transfer of jurisdiction do not apply to the question of applicable law. In practice, consistency in the determination of international jurisdiction should entail indirect positive effects towards the applicable law too[760].

## Section VI Forum Shopping

**273.** The issue of forum shopping is dealt with briefly. This phenomenon relates to the scenario of an individual who would apply before a court that is more favourable to his/ her own interests.

**274.** The operation of connecting factors should mitigate forum shopping from materializing. Habitual residence, whose target aims at the effective and realistic nexus, should be an obstacle to forum shopping. However, in absence of harmonised elements of interpretation, as well as of guidance in their implementation, the lack of habitual residence uniformity may clearly favour forum shopping[761]. This may occur, for instance, whenever the location of habitual residence is unclear as to the current guidance. Such a situation would potentially lead the seised court to apply a national interpretation of habitual residence, possibly in conflict with that of another court judging itself competent. Furthermore, forum shopping may also arise when a 'separate' habitual residence, for instance of a spouse, is sufficient to freeze international jurisdiction over two parties[762]. Therefore, the 'formula' employed in the implementation of habitual residence is also subject to improvement.

**275.** It follows from this that further guidance in the operation of habitual residence, generally, would be useful to reduce forum shopping in

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759 P. ROGERSON/ M. LEHMANN/ F. GARCIMARTIN, Lis pendens and Related actions (ibid. Dickinson/ Lein), p. 328. In divorce proceedings, the CJEU has clarified that the 'identity of the cause of action', which completes the 'triple identity' rule in commercial law, is not required (Opinion of Advocate General Cruz Villalón, *A v. B*, 8.09.2015, C-489/14, § 76).

760 The transfer of jurisdiction from the court in State A to the court in State B based on the collaborative assessment of habitual residence should allow a more efficient determination, including of the applicable law, when habitual residence is the connecting factor. A remaining issue is that of the transfer of jurisdiction aimed at derogating from, or solving the impossible determination of, habitual residence. In both scenarios, the implementation of specific 'tie-breaker' rules would ensure continuity in the determination of both jurisdiction and applicable law based on the principle of appropriateness. For instance, in the scenario where habitual residence is established but another jurisdiction is more appropriate, the child's best interests, or the principal place of family interests, would trigger the transfer of jurisdiction. In absence of habitual residence in State A, where the individual is present, but in presence of prospective acclimatization in State B, the latter would be entitled to obtain or request the transfer.

761 Ibid. Ní SHÚILLEABHÁIN, p. 1033.

762 *Cf.* section III *supra*.

international family law. Transfer of jurisdiction and *lis pendens*, if complementarily applied[763], would also deter forum shopping[764].

# Conclusions

**276. Summary.** This Part has highlighted the historical roots of habitual residence in international treaties. Its operation was further examined within national legal orders. Habitual residence applies globally, although the interplay with other connecting factors such as nationality, domicile and physical presence is usefully observed. Habitual residence responds to a greater closeness, qualified proximity, that mostly fits the effective and realistic nexus between jurisdiction, law, and the beneficiary's interests. This nexus aims to guarantee access to justice. That said, currently, the fragmented sets of elements assessing habitual residence may lead to unpredictable and incoherent results of justice. Individuals, administrative and judicial authorities may encounter legal uncertainty arising out of the discontinuity attributed to the habitual residence interpretation. Increasing international mobility requires a modern flexible and adaptable connecting factor, which should be contextually uniform in its scope and operation.

**277. Proposal I**[765]**.** A two-fold test approach shall determine habitual residence. It should be founded on decisive and non-decisive elements[766]. Tie-breaker rules such as continuing physical presence and family interests shall apply in complex habitual residence determinations[767]. Replacing rules such as prospective acclimatization and mere presence shall operate in the absence of habitual residence.

**278. Proposal II.** Physical presence shall be a prerequisite of habitual residence.

**279. Proposal III**[768]**.** Habitual residence shall generally correspond to 'a regular place of settled and stable dwelling' within an appreciable period. The concept shall be inter-country, reflecting the cross-border dimension at stake and the

[763] Meaning that the court first seised should, in complex circumstances, consistently perform a collaborative factual analysis of habitual residence and, possibly, transfer the case whenever found to be appropriate.

[764] Ibid. Ní SHÚILLEABHÁIN, p. 1031.

[765] This proposal applies principally, but not exclusively, to the inter-country notion of habitual residence under the treaty rules examined in this part.

[766] Specific elements shall be contextually excluded in the habitual residence assessment.

[767] In the context of alternate habitual residence.

[768] This proposal applies principally, but not exclusively, to the treaty rules examined in this part.

realistic nexus intended as qualified degree of proximity. It shall operate in a uniform manner based on the individual's perspective[769].

**280. Proposal IV.** Concurrent habitual residence shall be generally excluded[770]. Alternate habitual residence and absence of habitual residence shall be rarely possible[771].

**281. Proposal V.** The inter-country notion of habitual residence and the intra-country notion of domicile shall generally be considered intrinsically different[772].

**282. Proposal VI.** A collaborative approach shall guide the determination of, and derogation from, habitual residence[773]. In this regard, transfer of jurisdiction shall operate in the whole area of international family law[774].

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769 This study argues for an intradisciplinary operation of habitual residence. An international guide shall support such operation (*cf.* chapter IV, section I above).

770 With some contextualised exceptions examined in this study and for which specific methods shall apply (*cf.* chapter IV, section III).

771 The general rule should be that habitual residence follows factual acclimatization entailing a change, or consecutive change, of habitual residence.

772 Habitual residence is founded primarily on the regular objective element. Domicile relies primarily on the permanent subjective element. Habitual residence operates within a transnational dimension. Domicile is nationally rooted. Habitual residence is functional to the context so that family interests prevail over professional/ economic interests for its determination. Domicile is legally acquired. Habitual residence requires physical presence in the immediate appreciable period. Domicile revives.

773 An example of derogation rule refers to the individual's (best) interests.

774 The transfer shall occur upon a party's request or *ex officio.*

# PART II: Marriages, Registered Partnerships and Property Regimes

**283.** The analysis concerning marriages and registered partnerships[775] involves the determination of jurisdiction and applicable law when dealing with their celebration or registration, validity and recognition. The term 'jurisdiction' concerning marriages and registered partnerships refers to the power of the administrative authorities. In reference to property regimes, the analysis will present a dual focus: (i) on administrative procedures[776], when spouses or partners come to predict which court and law will be competent and apply for the determination of their properties; and (ii) on judicial procedures triggering the commencement of proceedings over determination and liquidation of the property regime.

**284.** This Part is composed of two chapters. *Chapter I* deals with the celebration or registration, validity and recognition of marriages and registered partnerships. *Chapter II* tackles the issue of property regimes, in particular within the EU Regulations 1103 and 1104[777], given their recent application[778]. The *Conclusion* refers to a short list of proposals relating to this Part.

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[775] With regard to the registration of partnerships in this part and elsewhere in this study, we will broadly examine them as a meaning of formal same-sex and opposite-sex non-marital relationships, without referring into the detail of each national institution of partnership. For a more detailed analysis of the meaning of registered partnerships, please refer to J. M. SCHERPE/ A. HAYWARD, The Future of Registered Partnerships: Family Recognition Beyond Marriage?, 2017, p. 3. See also the 1104 Registered Partnerships' Regulation, § 16.

[776] For instance, through recourse to a notary for the conclusion of a pre-nuptial or post-nuptial agreement.

[777] The main issues embraced when dealing with the EU Regulations are the absence of either legislative or CJEU guidance on habitual residence. The Regulations entered into force in 2019, therefore the absence of case law by the CJEU does not constitute a real anomaly. The reference to the absence of guidance is purposely meant to highlight that the CJEU has principally interpreted habitual residence in proceedings involving children and only recently involving adults in the context of succession (CJEU, C-80/19, ECLI:EU:C:2020:569).

[778] More precisely, when dealing with these Regulations, this Chapter focuses on habitual residence in proceedings involving property regimes, without yet providing an in-depth study on the interconnection with divorce (or legal annulment) proceedings, or with succession proceedings, which will be discussed in the later relevant parts III and V. Specific examples of interconnection are instead mentioned in the analysis of national legal orders (*i.e.* US, UK, Turkey and Switzerland). The choice of analysing issues of property regimes within different parts of this book finds its rationale in their multiple involvement in both principal proceedings as a matter of substance, and in related proceedings, as an ancillary matter to divorce and succession.

# Chapter I: Marriages and Registered Partnerships

**285.** This Chapter is composed of three sections. *Section I* deals with the comparative analysis on the conflict-of-law rules with reference to the celebration of marriages and registration of partnerships. *Section II* tackles the aspects related to jurisdiction and applicable law over the effects of marriages and partnerships. *Section III* makes a final point on habitual residence.

## Section I National Conflict-of-law Rules

**286.** A greater role was given to habitual residence after WWII, of which mention was made in the 1978 Hague Marriage Convention[779]. The Convention, however, entered into force only in Australia, Luxembourg and the Netherlands. Therefore, the operation of habitual residence within this treaty[780] is not relied on significantly.

**287.** Reference should also be made to the 1993 Convention on Legal Aid and Legal Relations in Civil, Family and Criminal Cases, also known as the Minsk Convention[781]. This Convention adopts the notion of 'permanent residence' and 'residence' in establishing jurisdiction (*i.e.* articles 20 and 29) and applicable law to various civil matters, namely marriage (article 26), personal and property legal relations (article 27), legal relations between parents and children (article 32), and inheritance rights (article 45). *Permanent residence*, within the Convention, can be interpreted as 'habitual residence'[782], unlike *residence* which means 'simple residence'.

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779 Part I, chapter I, section II.

780 An interesting element of analysis, nonetheless, is the operation of art. 3(1) of the said Convention. The personal link of one of the prospective spouses to the place of celebration based on either nationality or habitual residence, determining both the jurisdiction of the administrative authorities and the law applicable to the substantive requirements, is suitable with the current cross-border movements and related 'internationalisation' of marriages (ibid. MALMSTRÖM, p. 295).

781 The Convention initially applied between the Commonwealth of Independent States/ CIS (Armenia, Belarus, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan), save for Azerbaijan and Georgia: The former acceded the Convention later and the latter acceded, but withdrew from, it in 2008. A new edition of the Minsk Convention of 1993 was adopted in Chisinau (Chisinau Convention, 2002, not applicable to the Russian Federation, which will continue applying the Minsk Convention). Concerning child protection in Armenia, the Russian Federation and Ukraine, the Minsk Convention has been superseded by the HC-1996. See also I. RUSTAMBEKOV, Some Aspects of Development of Private International Law in the CIS Countries, *Lexonomica*, Vol. 12, No. 1, 2020.

782 Economic Court of the Commonwealth of Independent States (established in Minsk in 1992, which has jurisdiction over CIS) [January 15, 2002] Decision No. 01-1 / 3-2001: "National legislation does not define what is meant by a place of permanent residence. In the doctrine of private international law, it is understood as 'the place of the focus of a person's life ties, the centre of his existence'. Consequently, whether the spouse's place of residence in the state of which he is not a citizen is the place of his permanent residence, is decided by the court on the basis of clarifying all the

**288.** Given the limited geographical scope of both Conventions, we will essentially focus on the analysis of national legal orders.

## § I. Jurisdiction of the Administrative Authorities for the Celebration or Registration

**289.** Some States expressly refer in their domestic laws (and related private international acts) to the jurisdiction of the administrative authorities of the State of habitual residence concerning the celebration of marriages. This is the case of Belgium, Germany, Switzerland and the Netherlands – although habitual residence essentially indicates an alternative, or even a subsidiary, connecting factor with respect to nationality or domicile[783]. In matters involving the registration of partnerships, the Belgian legislation applies the rule of habitual residence to determine the place of registration, on an exclusive basis, therefore in a different manner than for the marriage celebration – the Swiss and Dutch approaches are more uniform in this sense.

**290.** By virtue of article 1:43 of the Dutch Civil code (Book 1, Title 1.5), the national territorial jurisdiction[784] of the Dutch authorities for the celebration of marriages is established in the domicile of one of the prospective spouses[785]. In practice, it is believed that either prospective spouse's habitual residence or nationality should determine the international jurisdiction[786] of the Dutch authorities based on article 3 of the HC-1978, which is applicable to the Netherlands through the Act Conflict of Law Rules for Marriages 1989[787]. With regard to same-sex and opposite-sex partnerships, the jurisdiction over the registration in the Netherlands is vested upon the authorities of a partner's

circumstances that characterize it as the place of '*the focus of his life ties'* (place of living with children, permanent work, duration of residence, availability of a residence permit, etc.)". The latter is an unofficial translation.

783 Habitual residence operates alternatively in Belgium, Germany and the Netherlands; subsidiarily in Switzerland.

784 The term jurisdiction or forum in this Chapter refers to administrative authorities (including any of those indicated as competent under national law, *i.e.* civil registrars, notaries, consulates, embassies). On this subject, see G. P. ROMANO, La bilatéralité éclipsée par l'autorité : développements récents en matière d'état des personnes, *Revue critique de droit international privé*, 2006, p. 462.

785 Book 1, Title 1.3, art. 1:10.1: "The domicile of a natural person is located at his habitual residence and, in the absence of a habitual residence, at the place where he actually stays".

786 The convention does not deal directly with jurisdiction. However, art. 3 suggests that jurisdiction and applicable law should both be established based on the provided connecting factors (Ibid. MALMSTRÖM).

787 K. BOELE-WOELKI/ C. JOUSTRA/ G. STEENHOFF, Dutch Private International Law at the End of the 20th Century: Pluralism of Methods, in: G. STEENHOFF (ed) Netherlands reports to the 15th international congress of comparative law, 1998, p. 219. In relation to the applicable law over substantive validity, reference is made to the *lex fori* based on one of the prospective spouses' nationality or habitual residence, which therefore confirms that international jurisdiction may be frozen at the place of nationality or habitual residence – in line with art. 3 of the HC-1978.

domicile/ habitual residence[788] according to the Act Conflict of Law Rules for Registered Partnerships 2004, article 1 ('renvoi' to the Civil code, Title 1.5A, article 1:80a). Under Dutch law, domicile and habitual residence are regarded as synonyms for the determination of territorial jurisdiction. It is therefore assumed that habitual residence applies alternatively to matters of partnerships[789].

**291.** According to French law, both same-sex and opposite-sex couples are allowed to marry in France based on a 'simple connection', which principally refers to the French national rules of territorial jurisdiction. Such connection is in principle founded on the French nationality, or either prospective spouse's habitual residence/ domicile established in France[790]. Furthermore, a 'simple residence' may also suffice if one of the spouses lived for a continued period of time (*i.e.* one month) prior to the '*publication des bans*', and at least 10 days before the celebration[791]. In this regard, the French domestic rule of 'residence', for the purposes of jurisdiction, incorporates both habitual and simple residence[792]. Same-sex and opposite-sex partners can register their partnership ('*pacte civil de solidarité*') in France, at the place of their common residence, or only exceptionally ('*en cas d'empêchement grave*'), if one of them is French, at either of their separate residence at the time of registration (article 515-3). It is therefore correct to say that the French national rules governing territorial jurisdiction, and indirectly governing international jurisdiction, are founded on an interplay between connecting factors. Though, the degree of proximity that they aim for may also be minimal[793], save in the case of registered partnerships between two foreigners[794].

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788 I. SUMNER, Registered Partnerships in the Netherlands (ibid. in: SCHERPE/ HAYWARD) p. 127. Dutch nationality applies on an alternative basis.

789 Civil code, Book 1, Title 1.3, art. 1:10.

790 Including domicile or principal residence of either of their respective parents.

791 Civil code, art. 74, 165-166. The French rules also provide that a French citizen can celebrate his/ her marriage with a foreigner or another French citizen at a French Embassy or Consulate abroad, with some exceptions (art. 170-3) – this rule should also be applicable registered partnerships.

792 <https://etat-civil.legibase.fr/actualites/veille-juridique/lieu-de-celebration-dun-mariage-de-la-notion-de-64372> "[…] *le mariage peut être célébré dans une commune avec laquelle au moins l'un des deux époux a des liens durables, de façon directe (commune du domicile ou de résidence de l'un des futurs époux) ou indirecte (commune du domicile ou de résidence de l'un des parents*".

793 G. ESCUDEY, Le couple en droit international privé : contribution à l'adaptation méthodologique du droit international privé du couple, Thèse, Université de Bordeaux, 2016, p. 312. According to ESCUDEY, the jurisdiction of the French authorities would not be founded on proximity. In his view, such a rule may entail risks of '*fraude* or *tourisme conjugal*'.

794 The common residence in France required under French law indicates a principal residence, which should incorporate habitual residence. In this regard, two foreigners, who are principally resident abroad, should not be able to register their partnership in France (<http://www.justice.gouv.fr/art_pix/01-11-2017-Transfert_du_PACS.pdf> "*La « résidence commune » doit s'entendre comme étant la résidence principale des intéressé.e.s quel que soit leur mode d'habitation (propriété, location, hébergement par un tiers). La résidence désignée par les partenaires ne peut donc correspondre à une résidence secondaire. En particulier, deux ressortissant.e.s étranger.ère.s résidant principalement à l'étranger ne peuvent conclure un PACS*".

**292.** In Italy, the rules governing national territorial jurisdiction[795] determine international jurisdiction. Under Italian law, similarly to French law, only a minimal degree of proximity is required to govern the national territorial jurisdiction over the celebration of marriages or registration of partnerships. Reference is made to the Italian nationality[796], or to one of the spouses' domicile/ residence[797]. The Italian Constitutional Court[798] has stated that for those people, non-resident and non-domiciliary of Italy, required to provide a proof of 'stay' ('*regolarità del soggiorno*') in Italy[799], such a condition is not in conformity with the Italian Constitution. Thus, in some circumstances, no qualified degree of proximity is required to celebrate marriages in Italy. This reasoning also applies towards same-sex civil unions[800] – same-sex marriages not being allowed.

**293.** In Belgium, the authorities are competent for the marriage celebration of both same-sex and opposite-sex couples, if either of the prospective spouses has established his/ her habitual residence in Belgium for three months at the time of celebration – habitual residence is alternative to nationality and domicile[801]. Same-sex and opposite-sex partnerships, called legal cohabitations/ '*cohabitation légale*'[802], are registered at the place of the partners' common habitual residence at the time of the conclusion (CPIL, article 59).

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795 Namely, *'Regolamento dello Stato Civile (D.P.R. 3/11/2000, n.396)'*; art. 94, 106, 116 Civil code.

796 This connecting factor is the result of the possibility for two Italian citizens, or an Italian citizen and a foreign citizen, who reside in a foreign State, willing to marry in Italy through consular means – in addition to the possibility to do that before the Italian Embassy or Consulate in a foreign State, if the latter State allows it, in principle where the couple or either of them resides (D.P.R. 3 novembre 2000, n. 396, art. 16 and 53.3). That said, the applicability of the foreign spouse's personal law (*cf.* subsection II *infra*) and the conditions provided under the Italian domestic rules may be an obstacle to the couple's right to marry. On this subject, see G. P. ROMANO, Is Traditional Multilateral Rule Relating to Capacity to Marry in Line with the Constitution?, in: Yearbook of Private International Law, 2005, p. 225. In this same respect, a decision of the '*Tribunale di Castrovillari*' (Tribunale di Castrovillari, sez. civile, decr. n. 328 del 23 febbraio 2016) reversed the administrative decision of the *'Comune di Tarsia'*, which had refused the celebration of a marriage involving two Egyptians who had not fulfilled a specific condition ('*nulla osta al matrimonio*') provided under art. 116 of the Italian Civil code. The Italian Tribunal allowed the marriage based on art. 8 and 29 of the Italian Constitution (in this sense, see also Tribunale di Ferrara, 19 marzo 2019, n. 1530).

797 Residence should indicate both simple and habitual residence (Cass. Sentenza 4 novembre 2011, 15 marzo 2012, n. 4184: *"[…] hanno contratto matrimonio nel Regno dei Paesi Bassi e si sono poi stabiliti in Italia nel Comune di Latina".*

798 Sentenza no. 245 del 25 luglio 2011.

799 Civil code, art. 116.

800 Art. 3 of the Law '*20 maggio 2016, No. 76. Regolamentazione delle unioni civili tra persone dello stesso sesso e disciplina delle convivenze'* makes analogy with the Italian Civil code, including the mentioned art. 116, with some derogations not pertinent here (G. BIAGIONI, Unioni Same-Sex e Diritto Internazionale Privato, *Rivista di Diritto Internazionale*, 2017).

801 Art. 44, Code of Private International Law. Under art. 42, the Belgian courts are competent to hear actions related to marriage by virtue of the spouses' common habitual residence at the time of the application (joint application); or one of the spouses' yearly habitual residence at the time of the application (separate application). This rule is extended to actions related to partnerships (art. 59).

802 Excluding here 'informal cohabitations'.

**294.** In Switzerland, the authorities are competent for the marriage celebration if one of the future spouses is a Swiss national or is domiciled therein (SPILA, article 43) – this rule also applies to (same-sex) registered partnerships (article 65a). The Swiss authorities of either spouse's habitual residence (in absence of domicile, and alternative to nationality) are competent over the marriage celebration or partnership creation. Under the SPILA, habitual residence is not expressly mentioned in the relevant provisions but it applies, subsidiarily in absence of domicile, through the cumulative interpretation of articles 20(1)(b) and 20(2)[803]. Interestingly, prospective spouses who have established neither domicile nor residence in Switzerland at the time of celebration, are entitled to marry there if the marriage is recognised in the State of their respective domicile or nationality (43.2). Specifically, for marriages involving asylum seekers, the celebration should in principle be allowed in conformity with articles 24 of the SPILA and 12 of the European Convention on Human Rights. In practice, in absence of residency proof ('*légalité du séjour*'), the Swiss authorities may refuse the celebration giving due consideration to the proportionality of their decision with article 12 ECHR[804].

**295.** According to the Personal Status Act ('*Personenstandsgesetz*') 2007, opposite-sex or same-sex marriages can be celebrated in Germany if one of the spouses has established simple or habitual residence in Germany (§ 12). Accordingly, in some occasions the degree of proximity can even be minimal[805]. Same-sex 'registered life partnerships' are no longer allowed in Germany as of 2017[806].

**296.** In the UK, prospective spouses should fulfill the conditions under the 1949 Marriage Act (amended 1994) and 2014 Marriage (Same Sex Couples) Act[807]. A residency requirement is provided under UK law, save for those couples willing to marry in Scotland and Northern Ireland where such requirement does not apply. UK law states that prospective spouses should reside in England and Wales at least seven days prior to the marriage notice[808]. A UK citizen may be able to marry or register a partnership with a foreigner, or another UK citizen, before the British Embassy or Consulate located in

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803 It is our opinion that habitual residence should be expressly referred to when pertinent in each provision of the SPILA. The general reference made through art. 20 may lead to ambiguous results with respect to predictability and legal certainty.

804 Art. 24 of the SPILA implements domicile in place of nationality. BGE 138 I 41 S. 48.

805 K. SIEHR, Private International Law, Chapter 12, in: J. ZEKOLL/ G. WAGNER, Introduction to German Law, 3rd ed., 2019, p. 445. For instance, in absence of habitual or simple residence, the registry office where the marriage is to be celebrated is competent (§ 11-12). These are German national rules governing territorial jurisdiction.

806 Date of entry into force of the same-sex marriage law.

807 The Consular Marriages and Marriages under Foreign Law Order 2014 is also applicable to consular marriages.

808 Taking place 28 to 70 days before the expected date of celebration.

another State[809], if it is allowed under the law of the latter State. Citizens and residents from non-EU/ EEA countries, non-Swiss, are subject to visa. Since 2019[810], civil partnerships are also available for opposite-sex couples. These can be registered in England and Wales as long as the partners lived in the same area for seven days[811].

**297.** Before 1 April 2019, foreign opposite-sex prospective spouses or couples involving foreigners were entitled to marry in China. They had to be resident and hold specific entry or residency permits. Residence is intended as long-term residence, therefore incorporating habitual residence[812]. As of 1 April 2019, registration of foreign marriages involving two non-Chinese citizens is no longer possible. Accordingly, two foreigners are not allowed to marry in China. Civil unions are prohibited under the Chinese legislation.

**298.** This first '*tour d'horizon*' shows that, for administrative jurisdiction over marriage celebration, habitual residence operates alternatively in Belgium and the Netherlands. It is a residual connecting factor in France, Germany, Italy, Scotland, and Northern Ireland where no qualified degree of proximity is required. In England and Wales, simple residence is sufficient. Habitual residence does not apply any longer under Chinese law, whereby nationality is the prevailing connecting factor. In Switzerland, habitual residence applies on a subsidiary basis. Concerning registered partnerships, habitual residence is employed primarily under the Belgian legislation. Under French law, it operates exceptionally in the case of partnerships between two foreigners. Habitual residence is again a subsidiary connecting factor under Swiss law and a residual one in Italy and the UK. It applies on an alternative basis under Dutch law.

## § II. Formal and Substantive Validity

**299.** The Munich Convention 1980[813] on the issue of a certificate of legal capacity to marry enables nationals of Contracting States to obtain a legal capacity certificate with a view to marrying in another Contracting State

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809 The Foreign Marriage Acts 1892 to 1998, and The Foreign Marriage Order 1970 for the residence and notice.

810 Civil Partnerships, Marriages and Deaths (Registration etc.) Act 2019.

811 The notice of partnership and the visa rules apply in the same way as for marriages.

812 Y. GUO, Personal Status in China, (in: BASEDOW/ PISSLER), p. 269: "In accordance with article 15 (of Interpretation I on the Act of the People's Republic of China on the Application of Laws in Civil Law Relations with a Foreign Element, enacted 7 January 2013), a place where a natural person has continuously or consecutively lived for more than one year as his life centre at the time of the establishment, alternation or termination of any foreign-related civil relation 'may' be determined as the habitual residence embodied in the Chinese PIL Act 2010, with the exception of a place where the relevant party lived for the purpose of medical treatment, labour dispatch or official duty".

813 Austria, Belgium, Greece, Germany, Italy, Luxembourg, Portugal, Spain, Switzerland, the Netherlands, Turkey.

(article 1). This certificate is used as evidence to show that the couple satisfies to the marriage conditions in the Contracting State of origin in order to marry in another Contracting State. However, the Contracting State in which the marriage celebration is sought is not *prima facie* obliged to perform it on the sole basis of that certificate. Actually, the competent authorities may require additional documents. The Convention clarifies that refugees and stateless persons, whose personal status is governed by the law of domicile or residence[814] of a Contracting State, are entitled to request the said certificate in order to marry in another Contracting State (article 2).

**300.** Habitual residence may apply to both substantive[815] and formal requirements[816] for the marriage validity. That said, these requirements are generally governed by the law of the place of celebration, particularly concerning the formal procedures[817], at least in the EU[818], Connecticut[819] and Quebec[820]. With regard to the marriage substantive validity, national laws prove highly fragmented among the States touched upon. In matters involving registered partnerships, national laws essentially differ over substantive, but not formal, requirements.

**301.** Under the Italian legislation, the law of the prospective spouses' common habitual residence[821] at the time of celebration is applicable to the marriage formal validity[822]. The substantive validity is subject to the law of each spouse's nationality[823]. With respect to civil unions, the substantive validity is

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814 This indicates both simple and habitual residence. Analogy is made with the 1951 Geneva Convention (chapter I).

815 For instance, the legal capacity, consent to marry.

816 L. SILBERMAN, Same-sex marriage: refining the conflict of law analysis, *University of Pennsylvania Law Review*, Vol. 153, 2005, p. 2202; and G. CUNIBERTI, Conflict of Laws: A Comparative Approach: Text and Cases, 2017, p. 443.

817 These generally include: formalities of the ceremony itself, as well as the preparatory requirements such as licenses, publication and the registration of the marriage act, all regarded as formal issues. See D. COESTER-WALTJEN, Marriage, in: Encyclopedia of Private International Law, Vol. 2, 2017, p. 1229.

818 M. ASUNCIÓN CEBRIÁN SALVAT, Ley aplicable a la celebración del matrimonio en la Unión europea, *InDret*, Vol. 4, 2017, p. 9.

819 Supreme Court of Connecticut, *Elizabeth Kerrigan v. Commissioner of Public Health* [28 October 2008] No. 17716.

820 C. HARNOIS/ J. HIRSCH, Note on developments in international law and private international law concerning cohabitation outside marriage, including registered partnerships, HccH publications, 2008, p. 54.

821 BIAGIONI (ibid. p. 506) seems to suggest that the common residence indicated under art. 28 of the Italian PIL (L. 31 maggio 1995, n. 218) did not include habitual, but simple, residence. In practice, habitual residence is nowadays incorporated in the Italian notion of residence. This is the consequence of: the EU family law regulations, to which Italy is bound; and the current reference made to it under the current Italian law on civil unions (D. DAMASCELLI, La Legge Applicabile ai Rapporti Patrimoniali tra Coniugi, Uniti Civilmente e Conviventi di Fatto nel Diritto Internazionale ed Europeo, *RDI*, 2017, p. 1126, and fn. 84).

822 Reference is alternatively made to either the *lex loci celebrationis* or the law of at least one of the spouses' nationality.

823 Art. 27 and 28, Italian PIL.

governed by each partner's national law. However, if that law does not allow the registration, the Italian *lex loci celebrationis* would apply. The formal requirements are controlled by the same rules applicable to the marriage formal validity[824].

**302.** Swiss law (SPILA, article 44.1) refers to the *lex loci celebrationis* for the marriage substantive and formal requirements. Before 2013, in the event that the conditions under Swiss law were not met, these were governed under either prospective spouse's national law[825]. Since July 2013, the *lex loci celebrationis* is the sole rule, with the aim to avoid 'forced marriages' and the recourse to more favourable rules[826]. The same rules are applicable to same-sex registered partnerships[827].

**303.** According to the Dutch Act Conflict of Law Rules for Marriages, the substantive validity of opposite-sex and same-sex marriages is governed by the law of either prospective spouse's habitual residence. The latter connecting factor is alternative to nationality[828]. In case of multiple nationalities, the prospective spouse's nationality which he or she is more closely connected with would apply. The marriage formal validity is subject to the Dutch *lex loci celebrationis*[829]. The substantive and formal requirements of same-sex and opposite-sex partnerships registered in the Netherlands, are controlled by the Dutch *lex loci registrationis*[830].

**304.** In Germany, it is each future spouse's personal law (nationality) that governs the marriage substantive validity. When the national law[831] prohibits the marriage, or it indicates German law[832], the latter would apply as *lex loci celebrationis*. In practice, the applicability of German law is subject to specific conditions, namely if: either of the spouses holds German nationality or has established habitual residence in Germany; all the requirements provided under German law are satisfied; and it would be contrary to the fundamental right to marriage to exclude the celebration[833]. The formal requirements of a marriage celebrated in Germany are governed by German law. In case of a marriage involving two foreigners, one of the spouses' personal law may also

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824 Reform '*Decreto legislativo 19 gennaio 2017, n. 7*', art. 1, 'renvoi' to PIL, article 32-ter.

825 Former art. 44(2).

826 A. BUCHER, L'accueil des mariages forcés, AJP/PJA 8/2013.

827 Art. 65 lit. c, 1.

828 Dutch nationality. Alternatively, if each prospective spouse fulfils the marriage requirements under the law of each respective nationality, that law may apply (Ibid. BOELE-WOELKI et. al., p. 219).

829 Act Conflict of Law Rules for Marriages, art. 2 and 4. See also I. CURRY-SUMNER, Private International Law Aspects of Homosexual Couples, in: J. H. M. VAN HERP/ L. P. W. VAN VLIET, Netherlands Reports to the Seventeenth International Congress of Comparative Law, 2006, p. 154.

830 Act Conflict of Law Rules for Registered Partnerships 2004, art. 1.

831 Alternatively, the law that is applicable by virtue of the 'renvoi' to domicile or habitual residence.

832 Through domicile or habitual residence.

833 EGBGB, art. 13. See also Constitutional Court decision of 4 May 1971 '*Spanierbeschluss*'.

apply in place of German law[834]. In the case of multiple nationalities, the law applicable to the 'personal status'[835] is the one of the State which the spouse has the *closest connection* with, for instance through habitual residence. In circumstances involving stateless persons, the law applicable to the personal status relies on the prospective spouse's habitual residence or, failing that, on his/ her residence (EGBGB, article 5).

**305.** In France, the *lex loci celebrationis* is applicable to the marriage formal validity of both same-sex and opposite-sex couples. In the latter case, the marriage substantive validity is governed by each future spouse's personal law (nationality), respectively[836]. Same-sex couples are entitled to marry in France under the law of the spouse's French nationality, residence[837] or domicile[838], which will govern the marriage substantive validity. The formal and substantive requirements of same-sex and opposite-sex registered partnerships are subject to the French *lex loci registrationis*[839].

**306.** In Belgium, similarly to France, it is each prospective spouse's national law that governs the substantive validity of opposite-sex marriages. The law of either prospective spouse's habitual residence, which is an alternative to nationality, governs the substantive validity of same-sex marriages[840]. The marriage formal requirements are controlled by the Belgian *lex loci celebrationis*[841]. Concerning same-sex and opposite-sex legal cohabitations, Belgian *lex loci registrationis* would in principle apply to both substantive and formal requirements[842].

**307.** UK legislation provides that the marriage formal validity is governed by the law of its place of celebration[843]. The marriage substantive validity, in particular the marriage capacity, is governed by the law of the prospective spouses' common, or each respective, domicile at the time immediately before the marriage. England and Wales, and other common law legal systems, have

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834 Ibid. SIEHR, p. 446.

835 This incorporates, *inter alia*, issues relating to marriage and to the change of name.

836 Civil code, art. 202(1) and (2).

837 This is presumably the habitual residence. See H. FULCHIRON, Le « mariage pour tous » en droit international privé : le législateur français à la peine..., *Droit de la famille*, No. 1, 2013.

838 Civil code, art. 202.

839 Civil code, art. 515-7-1.

840 CPIL, art. 46(2). This provision is an exception to the general rule of art. 46(1), which indicates the law of either prospective spouse's nationality.

841 CPIL, art. 47.

842 CPIL, art. 60; Civil code, art. 1475 to 1479.

843 UK Field House Tribunal Hearing Centre (UKAIT), *CB (Validity of marriage: proxy marriage) Brazil* [2008] No. 00080, § 3, 14, 24, 25: "*In my view the position is clear; the validity of a marriage is governed in this jurisdiction by the lex loci celebrationis and not the domicile of the parties*". For England, see also *Scrimshire v. Scrimshire* (1752) 2 Hag. Con. 395, 161 E.R. 782; *Sottomayor v. De Barros* (No. 1) (1877) 3 P.D. 1, 5; *Berthiaume v. Dastous* [1930] A.C. 79, 83; *Starkowsky v. A-G.* [1954] A.C. 155. For Scotland, *Johnstone v. Godet* (1813) Fergusson's Consistorial Law, App. of Reports, p. 8; *Bliersbach v. MacEwen* 1959 S.C. 43.

relied on the notions of *intended matrimonial home* and *habitual residence* for the determination of the law applicable to the marriage capacity[844]. The formal and substantive requirements of same-sex and opposite-sex civil partnerships are controlled, precisely in England and Wales, by the law of registration (Civil Partnership Act 2004, sections 212 and 215)[845].

**308.** Chinese law provides that the marriage substantive conditions should be governed by the law of the future spouses' common habitual residence[846]. The formal conditions are subject in principle to the *lex loci celebrationis*. The law of a party's habitual residence or nationality may alternatively apply (article 22)[847]. That said, given the new law of 2019, these rules may currently prove obsolete.

**309.** In summary, the rules governing the formal and substantive requirements for opposite-sex marriages are also applicable to same-sex marriages, where specified in the national legislations touched upon[848]. The Italian approach on marriage and civil unions formal requirements deserves particular and positive attention while contemplating the interplay of alternative connecting factors based on, *inter alia*, the prospective spouses' common habitual residence. However, such an approach should also be extended towards the marriage substantive requirements. This is the example provided under the Chinese legislation, with specific reserves concerning the new law of 2019. Clearly, the Swiss approach of the *lex loci celebrationis* is, in our view, the most suitable, favouring the parallelism between forum and *jus*. The German approach is valuable with respect to marriages involving couples with no connection with the place of celebration.

## § III. Rules on Recognition

**310.** In practice, many requested States allow recognition founded on the marriage and partnership validity according to the *lex loci celebrationis* and *lex loci registrationis*, respectively. By contrast, other requested States indicate complementary rules for the refusal or acceptance of recognition.

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844 U. TANDON, Validity of Marriage under International Private Law with Special Reference to 1978 Hague Marriage Convention: Towards Harmonization and Unification of the Rules of International Private Law Relating to Marriage, *JCLC*, 2013. Scottish law seems to largely apply the 'dual domicile theory' based on the personal law of the domicile of each of the prospective spouses (ibid. BEAUMONT/ MCELEAVY, p. 733).

845 K. MCK. NORRIE, Recognition of Foreign Relationships under the Civil Partnership Act 2004, *J. Priv. Int. Law*, Vol. 2, 2006, p. 143.

846 This is an alternative to the law of the common nationality, or to the law of the place of celebration in which a party holds his/ her habitual residence or nationality (Law of 28 October 2010, art. 21). If none of the preceding connecting factors apply, closest connection should apply (art. 2).

847 Ibid. GUO, p. 274.

848 W. PINTENS/ J. M. SCHERPE, Same-sex Marriages, in: Encyclopedia of Private International Law, Vol. 2, 2018, p. 1607.

**311.** In Switzerland, a marriage that is valid under the *lex loci celebrationis*, should be recognised under Swiss law. That said, when both future spouses are domiciled in Switzerland, or one of them is a Swiss national, a marriage celebrated abroad is recognised in the Swiss legal order provided that its celebration was not intended to avoid the grounds of nullity in accordance with Swiss law. Same-sex marriages are recognised as registered partnerships (SPILA, article 45).

**312.** In Italy, consistent case law[849] shows that a valid form of marriage, according to the *lex loci celebrationis*[850], should be recognised unless contrary to the Italian public policy[851]. Same-sex marriages are recognised as civil unions – also known as 'downgrading'[852]. Accordingly, at least one spouse/ partner must hold the Italian citizenship[853]. It excludes same-sex marriages occurring between two foreigners[854]. Civil unions of same-sex couples[855] celebrated abroad are recognised in Italy[856] when the couple is habitually resident[857] there and both are Italian citizens[858]. In absence of these two connecting factors, they may still produce effects within the Italian legal order[859].

**313.** In Germany, no additional procedure is required in order to recognise foreign opposite and same-sex marriages that are considered formally valid under the *lex loci celebrationis* and 'essentially' valid according to the spouses' common or separate nationality. An assessment regarding the violation of the

849 Cass., n. 10351 del 1998; n. 9578 del 1993; n. 3599 del 1990; n. 569 del 1975; n. 1298 del 1971; n. 1719 del 1967.

850 Or alternatively to the law of one of the spouses' nationality or common residence at the time of celebration.

851 Italian PIL, art. 16, 65, 66.

852 According to the new art. 32-bis of the 2017 reform of the Italian PIL (Cass. civ., sez. I, sentenza 14/05/2018, no. 11696 concerning an Italian-Brazilian couple).

853 M. M. WINKLER, A Case with Peculiarities': Mixed Same-Sex Marriages Before the Supreme Court, *The Italian Law Journal*, 2018, p. 285.

854 O. LOPES PEGNA, Effetti dei matrimoni same-sex contratti all'estero dopo il "riordino" delle norme italiane di diritto internazionale privato, *RDI*, 2017, p. 536. In case of same-sex marriage occurring between two foreigners, the official transcription of the spouses' civil status in Italy should be requested before the Italian authorities, without going through the 'downgrading' recognition. This rule has received important critcism (R. CALVIGIONI, Gli effetti dell'unione civile nel matrimonio same-sex celebrato all'estero, *Famiglia e diritto*, 2019).

855 Issues may instead arise from opposite-sex couples, falling outside the scope of the Italian reform (D. ZANNONI, Gli effetti nell'ordinamento italiano delle unioni civili e dei matrimoni same-sex conclusi all'estero, *DPCE online*, 2020, p. 253).

856 Art. 32-quinquies of the 2017 reform.

857 The partners' common habitual residence can also be established in Italy after the marriage celebration abroad (ibid. DAMASCELLI; *a contrario*, C. CAMPIGLIO, La Disciplina delle Unioni Civili Transnazionali e dei Matrimoni Esteri tra Persone dello Stesso Sesso, *RDIPP*, 2017 p. 49)

858 In case of citizens holding multiple nationalities, one of which is more effective than the Italian one, art. 32- bis and quinquies may be ineffective (ibid. LOPES PEGNA, p. 538; DAMASCELLI, p. 1125).

859 Art. 32- ter and -quater (Ibid. ZANNONI, p. 251; and CAMPIGLIO, p. 50).

basic principles of German law may apply (article 6), namely concerning marriages involving minors[860].

**314.** In Belgium, recognition of foreign opposite-sex marriages is allowed if the substantive conditions are fulfilled under the law of each spouse's nationality, and the formal requirements are met according to the *lex loci celebrationis*. Same-sex marriages are also recognised if the marriage is essentially valid by the law of at least one spouse's habitual residence or nationality (CPIL, article 46), when otherwise provided the substantive conditions would prohibit it. Partnerships should be valid under the *lex loci registrationis* to be recognised in the Belgian legal order (CPIL, article 60).

**315.** In France, similarly to Belgium, recognition of foreign opposite and same-sex marriages is allowed if the formal and the substantive requirements are fulfilled, respectively, under the *lex loci celebrationis* and each spouse's personal law of nationality. Under French law, partnerships are recognised if they are valid under the *lex loci registrationis* (Civil code, articles 515-7-1 and 515-2).

**316.** In the Netherlands, a valid form of marriage under the *lex loci celebrationis* is recognised under Dutch law[861] unless it takes place in violation with the Dutch public policy[862]. Dutch law recognises a valid form of partnership entered into under the law of registration[863].

**317.** Under UK law, a valid form of marriage according to the *lex loci celebrationis* should be recognised '*anywhere else*', provided that the parties had the legal capacity under the law of their respective domicile[864]. In Australia, recognition should be allowed based on the marriage validity under the *lex loci celebrationis*[865]. The same rule would in principle apply in the US[866]. The recognition of civil partnerships relies on their validity under the *lex loci registrationis*[867].

**318.** Chinese law provides that a valid form of marriage under the *lex loci celebrationis* should generally be recognised. Same-sex unions would not be recognised in Mainland China, as opposed to Macao, Hong Kong and

860 Ibid. SIEHR, p. 446.

861 Act Conflict of Law Rules for Marriages, art. 5.

862 Ibid. art. 6.

863 Act Conflict of Law Rules for Registered Partnerships, art. 2 and 3.

864 Ibid. MCK. NORRIE, p. 142. For Scotland, see ibid. BEAUMONT/ MCELEAVY, p. 737.

865 Ibid. MCK. NORRIE. For Australia, see Marriage Act 1961 (applicable also to same sex marriages by virtue of the Marriage Amendment (Definition and Religious Freedoms) Act 2017) and the Civil Unions Act 2012 (for the recognition of civil unions). Recognition of valid marriages between Australia, India, New Zealand, and the UK is governed by specific bilateral agreements.

866 Ibid. HAY *et al.,* p. 621: "[…] a marriage is valid everywhere if valid under the law of the state where the marriage takes place […] Even if a marriage may not satisfy all the requirements of the place where celebrated, the validation policy may well lead to its being sustained if the state with the significant personal law contact (*i.e.* domicile) would sustain it".

867 Civil Partnership Act 2004, s. 212 and 215; schedule 20 to the Act (Ibid. MCK. NORRIE).

Taiwan[868]. Actually, same-sex unions are allowed in Taiwan according to the Same-Sex Marriage Law on May 17, 2019.

**319.** Generally, as indicated in the HC-1978[869], recognition is allowed whenever a valid form of marriage or registered partnership is concerned. That said, they should not be contrary to the public policy of the State in which recognition is sought[870]. Ultimately, out of those jurisdictions specifically examined, recognition would still remain a challenge for foreigners or bi-national couples wishing to celebrate or have their marriages recognised in specific countries[871]. In particular, when dealing with same-sex marriages, or partnerships, recognition may still prove difficult, given that many jurisdictions do not provide rules for, or prohibit, it[872]. This result would certainly affect the couple's right of residency and free movement[873].

## Section II Effects of Marriages: in particular the Name

**320.** Habitual residence also operates with regard to the conflict-of-law rules governing the marriage effects, namely to the legal consequences related to the spouses' name[874]. Maintenance, which is also considered within such effects, will be duly discussed in part III. Property relations[875] are in principle not considered as part of marriage effects (*i.e.* under Swiss law), but their interconnection with matrimonial affairs is indeed noticed and will be examined in the next chapter[876]. Reference to the partnership effects will only be made in the subsection concerning international instruments[877].

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868 On this subject, we refer to Y. LIU, China's Non-Recognition of Foreign Same-Sex Unions, *Int J Law Policy Family*, Vol. 34, 2020. Some authors suggest that these unions should be recognised in China based on the common habitual residence rule or on the *lex loci celebrationis/ registrationis* (in this sense, P. XIAO, Same-Sex Marriage and Civil Union in Same-Sex Relationships, *US-China Law Review*, Vol. 16, No. 6, 2019).

869 Art. 9 and 14.

870 Although the national interpretation of public policy may remain vague in practice.

871 L. ABOU-HABIB, Gender, citizenship, and nationality in the Arab region, *Gender and Development*, Vol. 11, 2003, p. 74.

872 Ibid. PINTENS/ SCHERPE, p. 1608.

873 Regarding Romania and the EU, right of residence and free movement for same-sex couples, involving one EU citizen and a citizen of a third-Country, should be fully recognised. See CJEU, *Coman and others* [5 June 2018] C-673/16, § 51.

874 In this Chapter, the child's name is not analysed in detail.

875 Some national legal systems, especially of common law, do not contemplate the continental notion of 'property regime', we therefore refer to 'property relations'.

876 We will not specifically analyse national conflict-of-law rules governing recognition in relation to the effects of marriage and related international instruments such as the 1958 Istanbul Convention on the changes of name; nor will we examine national conflict-of-law rules applicable to the effects of partnerships.

877 This would have required further analysis, not advisable here. That said, in some legal orders the conflict-of-law rules applicable to the legal consequences of marriages similarly govern partnerships,

## § I. International Instruments

**321.** The Munich Convention on the law applicable to surnames and forenames 1980[878] primarily relies on nationality. Habitual residence applies upon State reservation. The explanatory report to this Convention includes the initial discussions, during the drafting, over the interplay between nationality, domicile and habitual residence. Doubts were expressed for the replacing of nationality with habitual residence[879].

**322.** The '*Convention de Munich sur la reconnaissance des partenariats enregistrés*' 2007 (CIEC)[880], provides that[881] a partners' declaration[882] concerning the common name[883] that they will bear from that moment onwards, is recognised if such declaration was made in the Contracting State of the spouses' common habitual residence[884] at the time of the declaration[885].

**323.** The *CIEC* clarifies that the partnership recognition may be refused if, among other conditions, at the time of the declaration of intent there was no link by virtue of habitual residence (or nationality) between either partner and the State of registration[886]. The Convention also sets out the rules for cooperation, including a duty of information[887] among the authorities of the State/s of nationality/ies and those of the State/s of habitual residence[888]. It further provides that a State may make a reservation, specifying that the declaration affecting the partners' name will be recognised if issued by the

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in particular the name (*i.e.* England and Wales, France, Switzerland, the Netherlands). This is also the case in the field of property regimes within some of the EU Member States (*cf.* chapter II *infra*). For more details on this subject: K. BOELE- WOELKI, Private International Law Aspects of Registered Partnerships and Other Forms of Non-Marital Cohabitation in Europe, *Louisiana Law Review*, Vol. 60, 2000; ibid. SUMNER; R. LAMONT, Registered Partnerships in European Union Law (in: SCHERPE/ HAYWARD); A. HAYWARD, Registered Partnerships in England and Wales (in: SCHERPE/ HAYWARD); '*Mémento sur le nom porté après l'enregistrement du partenariat*' (Office fédéral de la justice OFJ, 2013); M. MIGNOT, Le partenariat enregistré en droit international privé, *Revue internationale de droit comparé*, 2001.

878 Italy, Portugal, Spain, the Netherlands.

879 The idea behind which habitual residence should be more strictly defined in this field, as mentioned in the report, in order to guarantee "continuity, stability and permanence" is not convincing. The rationale behind adopting habitual residence as an inter-country notion is exactly to avoid rigid definitions. Ultimately, the question of dual citizens is not considered under this Convention, an issue that is also highlighted in the report and which habitual residence aims to avoid.

880 The Convention has not yet entered into force. It deals only with the civil status of the partners and that the effects such as on properties and social security are excluded from its material scope.

881 In the event of a partnership formed between persons at least one of whom is a national of a Contracting State.

882 Same-sex or not (ibid. HARNOIS) p. 55.

883 This rule should also apply when the change affects the single partner's name only.

884 This is an alternative to the nationality of one of the partners.

885 Art. 5(1).

886 Art. 7(5).

887 For instance concerning the certificate of partnership registration or dissolution.

888 And those of the partnership registration, if not located in either of the mentioned States (art. 10.1).

Contracting State of the partners' common habitual residence plus either nationality[889].

**324.** Habitual residence plays an important role in the matters contemplated by the *CIEC*. That said, the interplay with nationality on a cumulative basis is acknowledged. In this regard, when dealing with the recognition of name declarations[890], such an interplay may raise obstacles to couples. An approach founded on the partner's habitual residence and nationality, on an alternative basis, would be more appropriate.

## § II. Jurisdiction and Applicable Law

**325.** A first national example of habitual residence is found under German law. This provides that the applicant spouse willing to change his/ her name, should submit a request before the administrative authorities of his/ her simple or habitual residence[891]. This is an alternative to the last residence[892]. In absence of choice of applicable law[893], the spouses' common habitual residence, or last common habitual residence during the marriage where one of them still resides, would determine the law applicable to the general effects of marriage[894]. Specifically concerning the name, spouses may choose, at or after the conclusion of their marriage, the name that they will use by virtue of the law of either spouse's nationality[895], or according to the German law if either spouse's habitual residence is established there[896].

**326.** In Switzerland, conflicts relating to the effects of marriage fall under the jurisdiction of the authorities of either spouse's habitual residence. This is a subsidiary rule to the forum based on domicile[897]. The applicable law is

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889 Art. 20(1).

890 Upon reservation of the Contracting State.

891 Habitual residence should be of 'a certain duration which led to a degree of social integration'. On this point, see CJEU, *Nabiel Peter Bogendorff von Wolffersdorff v. Standesamt der Stadt Karlsruhe, Zentraler Juristischer Dienst der Stadt Karlsruhe* [2 June 2016] C-438/14, § 53. Stateless, homeless foreigners and asylum seekers/ refugees may also submit a request (European Parliament, Life in cross-border situations in the EU, Germany, 2013, PE 474.395, p. 50).

892 In practice, for couples who celebrated their marriage in Germany, the civil registry at the place of marriage celebration should be competent over a name declaration following marriage (Personal Status Act, s. 41).

893 Following the amendments occurred to the EGBGB of 29.01.2019, the connecting factor that applies primarily, in matters falling outside the scope of the Property Regimes' Regulations applicable to Germany, is habitual residence in absence of a *professio juris*. When the latter is concluded, habitual residence applies as a primary alternative to nationality (EGBGB, art. 14).

894 The spouses' common nationality or, faling that, their common closest connection apply on a subsidiary basis.

895 In case of multiple nationalities, reference is made to the most effective one (art. 5.1 EGBGB).

896 EGBGB, art. 10.

897 SPILA, art. 46. The Swiss forum remains available, under specific conditions (art. 47), to Swiss citizens living abroad.

determined, in absence of domicile[898], based on the spouses' common habitual residence[899]. Swiss law provides specific provisions governing the acquisition or change of name. Accordingly, jurisdiction is allocated to the administrative authorities of the applicant's domicile[900]. The Swiss *lex fori* applies based on the applicant's domicile[901]. Alternatively, the applicant's personal law (domicile, or nationality upon request) is also available[902].

**327.** Under Belgian law, the jurisdiction over the name acquisition is vested upon the authorities of the Belgian nationality or, alternatively, habitual residence of the natural person at the time the action is introduced. In relation to the actions on changes affecting the name, jurisdiction is based on the person's Belgian nationality. The marriage effects are governed by the law of the State of the spouses' common habitual residence at the time when such effects are invoked or the legal act took place[903]. The law governing the name acquisition is founded on the person's nationality. The law applicable to the change of name is the one of the spouses' nationality at the time the change is made[904].

**328.** In France, the change of name can be asked based on the applicant's French nationality. This includes applicants holding multiple nationalities, including the French one[905]. Foreigners domiciled in France are also entitled to request a change of name that is ancillary to related civil status proceedings[906]; or in circumstances following the transcription of the name in the French civil status registry[907]. The marriage effects and the change of name are governed by the spouses' or the applicant's personal law (nationality)[908], respectively[909].

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898 SPILA, art. 48, which provides additional laws.

899 SPILA, art. 20(1)(b) and 20(2).

900 SPILA, art. 38. Habitual residence still applies on a subsidiary basis according to art. 20.

901 Or, subsidiarily, the applicant's habitual residence through art. 20.

902 SPILA, art. 37.

903 CPIL, art. 48. The spouses' common nationality or the Belgian *lex fori* may apply on a subsidiary basis.

904 CPIL, art. 36 to 38.

905 Civil code, art. 61; '*Décret n°94-52 du 20 janvier 1994 relatif à la procédure de changement de nom*'; Cour de cassation, Chambre civile 1, 08 juillet 2015, 13-50062. Instruction générale relative à l'état civil (IGEC), Titre III, Chapitre III, art. 527-1: "*Toutefois, ceux-ci n'ont compétence que pour recevoir les actes qualifiés « d'actes de l'état civil » par la loi française*". French citizens are likewise entitled to submit a request for a change of name before the French authorities, including Embassies and Consulates, in the place of their residence, by virtue of their nationality (IGEC, art. 556).

906 With regard to the French debate, occurred in the past, concerning the conflict-of-law rules governing the acquisition or change of name as an ancillary or principal matter, see M. SCHERER, Le nom en droit international privé : étude de droit comparé français et allemand, *L.G.D.J*, 2004.

907 Ibid. SCHERER, p. 72.

908 This includes the scenario of applicants holding other nationalities, in addition to the French one. In practice, French law remains subsidiarily applicable (M. F. MONEGER, Actualité du nom de famille en droit international privé, in: Travaux du Comité français de droit international privé, 2008, p. 10).

909 Ibid. IGEC, Titre III, Chapitre III, art. 531; Ibid. SCHERER, p. 45 and 81.

It is further observed that for French citizens residing in another State, French law is always available[910]. The law of '*domicile matrimonial*' would apply[911] in the case of principal proceedings involving, *inter alia*, the change of name[912]. The interpretation given to the notion of '*domicile matrimonial*' incorporates habitual residence[913].

**329.** In the Netherlands, applicants are entitled to acquire or change their name by virtue of the Dutch nationality. Foreigners domiciled[914] in the Netherlands may still request a change of name in specific circumstances[915]. Dutch law provides that the conflict-of-law rules of the foreign applicant's nationality should apply towards changes affecting his/ her name[916]. In the event of multiple nationalities, the law of the nationality which the spouse is most closely connected with shall govern his/ her change of name. In circumstances involving applicants holding multiple nationalities, including Dutch law, the latter would prevail[917].

**330.** In Italy, the change of name, concerning Italian or foreign[918] citizens, is generally requested before the Italian territorial authorities ('*Prefetto*') at the place of domicile or residence[919]. The request may also be made if the name was registered in the Italian civil status registry. Italian citizens who were born and/ or are resident in a foreign State may ask the change of name through the Italian Embassy or Consulate in their State of residence. The Munich Convention is applicable to Italy, similarly to the Netherlands, therefore the law of the applicant's nationality governs the changes of his/ her name[920]. The Italian PIL also provides that the law applicable to family relations is extended to the rights deriving as a consequence of such relations[921]. Given that the

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910 Civil code, art. 3.

911 In addition to the *lex fori* (Cour de Cassation, Chambre Civile 1, du 15 mai 1961, *Tarwid*).

912 This is the example of divorce (ibid. *Tarwid*).

913 S. GUILLAUD-BATAILLE, Droit International Privé : mariage et divorce, les enjeux internationaux, in: La Semaine Juridique Notariale et Immobilière, No. 18, 2014, p. 77: "*établissement effectif et stable dans le même pays*".

914 Civil code, Book 1, Title 1.3, art. 1:10.1: "The domicile of a natural person is located at his habitual residence and, in the absence of a habitual residence, at the place where he actually stays".

915 In particular, when the change of name is ancillary to a principal proceeding, or the name has been registered within the Dutch civil status registry (European Parliament, Life in cross-border situations in the EU, The Netherlands, 2013, PE 474.395, p. 27).

916 Act Conflict of Law Rules for Names, art. 1, in connection with the ratification of the Munich Convention *supra*.

917 Art. 2.

918 In practice, foreigners are intended as those holding one or more nationalities, including the Italian one as an effect of naturalisation. Italian Regional Administrative Tribunal (T.A.R.) Torino, (Piemonte) sez. I, 06/08/2019, n. 925; T.A.R. Milano, (Lombardia) sez. I, 13/03/2013, n. 676.

919 This should also incorporate habitual residence according to the EU *acquis* (A. COACCIOLI, Manuale di diritto internazionale privato e processuale, 2011, p. 215).

920 This principle is enshrined in the Italian PIL, art. 24.

921 Art. 24(1).

Munich Convention prevails over the Italian PIL, nationality should determine the applicable law on a primary basis[922].

**331.** In the UK and other common law countries such as US[923] and Australia, the change of a spouse's name is in principle '*at will*'. Accordingly, an official change of name is not required[924]. In the UK, the '*at will*' rule applies only to UK citizens and residents who married in the UK[925]. Under UK law, it is established that when changes affect the foreign spouse's name, the updating of his/ her documents issued in the State of origin is governed by that law, and in some circumstances by the law of domicile of origin. Such changes should be requested before the authorities of the State of origin[926]. By contrast, the UK authorities can exercise jurisdiction over such changes when the applicant is a British citizen and a resident, or when he or she is a British citizen and his/ her residence abroad is not permanent[927]. In this scenario, UK law should apply[928].

**332.** Under Chinese law, personal legal effects of marriage, including the name, are governed by the law of the spouses' common habitual residence or, failing that, the law of the spouses' common nationality. The principle of closest connection is applicable in absence of habitual residence and nationality[929].

**333.** In cases where a child's name may also be affected, the EU Member State of the child's nationality cannot refuse to recognise a child's name that was determined and registered in the Member State of his/ her habitual residence – *the place where the child was born and has been resident since birth*[930]. The same

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922 C. HONORATI, La legge applicabile al nome tra diritto internazionale privato e diritto comunitario nelle conclusioni degli avvocati generali, in: G. VENTURINI/ S. BARIATTI (eds.) 2009. Nuovi strumenti del diritto internazionale privato, Liber Fausto Pocar. See also S. TONOLO, L'Italia e il Resto del Mondo nel Pensiero di Pasquale Stanislao Mancini, *Cuad. derecho transnac.*, Vol. 3, 2011; and F. POCAR, *RDIPP*, 4/2016, p. 1108.

923 R. GOODMAN DAUM, The Right of Married Women to Assert Their Own Surnames, *Journal of Law Reform*, 1974, p. 101.

924 In Australia, for instance, couples who married there, may use the marriage certificate and foreign passport as evidence (if born overseas) to request a change of name. By contrast, for spouses who married overseas, an official change of name should take place before the competent territorial authorities in order to obtain an official document (deed poll).

925 In practice, when involving foreigners, it is advised to establish contacts with the embassies of their State of origin in the UK, in order to ensure that such a change is accepted in that State.

926 If they are denied under the law of the State of origin, it might be difficult to apply for a change of name in the UK.

927 The Enrolment of Deeds (Change of Name) Regulations 1994, art. 5.

928 UK authorities may also exercise jurisdiction and apply their law towards asylum seekers and stateless people present in the UK.

929 Ibid. GUO, p. 274. For issues related to the jurisdiction of the Chinese authorities, we refer to the rules of jurisdiction over marriage (*cf. supra* jurisdiction of the administrative authorities).

930 CJEU, *Grunkin and Paul v. Grunkin-Paul and Niebüll* [14 October 2008] C-353/06, § 39. See also § 34, which refers to the notion of habitual residence under German law. In relation to the issue of the name continuity as personal identity right, please refer to G. ROSSOLILLO, Personal Identity At A

connecting factors previously examined also govern the child's name in some legal orders[931]. Nonetheless, the law governing the child's name may depend on his/ her parent(s) nationality or habitual residence[932].

**334.** To conclude, distinction should be made between the general effects of marriage and the legal consequences towards the name. In relation to the former, German and Belgian conflict-of-law rules primarily apply habitual residence concerning the applicable law. Swiss law relies subsidiarily on habitual residence for both jurisdiction and applicable law. France, Italy and the UK do not contemplate within their domestic legislation habitual residence[933]. With regard to the name, the Chinese legislation primarily employs habitual residence for the applicable law. In this same respect, German conflict-of-law rules adopt it on an alternative basis[934]. Swiss law implements habitual residence on a subsidiary basis for both jurisdiction and applicable law. Alternative reference to habitual residence is made under the Dutch and Belgian legislations for the purposes of jurisdiction[935]. The French, Italian and UK legal orders do not rely on habitual residence.

## Section III Habitual Residence and its Interplay with other Connecting Factors

### § I. Celebration of Marriages and Partnerships: Key Points

**335.** In relation to the celebration of marriages and partnerships, habitual residence mainly operates on an alternative or subsidiary basis. Depending on the legal order, its interplay concerns both traditional[936] and modern connecting factors[937]. The current societal evolution facing international marriages or partnerships require such an interplay. In particular, its implementation would cover a broader range of situations, from the most qualified to the nearly absent[938] degree of

Crossroad Between Private International Law, International Protection of Human Rights and EU Law, in: Yearbook of Private International Law, Vol. 11, 2009.

931 *I.e.* Switzerland, Germany and Belgium.

932 An example is the German legislation (EBGB, art. 10).

933 Under French law, habitual residence would apply for the purposes of applicable law in ancillary claims only. The Italian legislation nowadays adopts the inter-country notion of habitual residence, albeit in this specific scenario it is linked to the applicant's nationality.

934 German also employs habitual residence towards jurisdiction, in particular concerning marriages celebrated abroad.

935 Belgian law refers to the name determination only.

936 Nationality and domicile.

937 Simple residence (*i.e.* Germany, the Netherlands).

938 The importance of such an approach is also highlighted in complex matters involving asylum seekers, recognised refugees and stateless persons, for whom the refusal to right to marry is still a reality. The Swiss approach under art. 43(2) SPILA seems to provide a valid solution based on the recognition of the marriage in the State of the common domicile or of respective nationality.

proximity. It would support better uniformity of connecting factors among the legislations examined in this Chapter, including those this study had no time to analyse, in the event of a future multilateral instrument covering altogether or separately marriages and partnerships.

**336.** This study strongly supports the parallelism between (administrative) forum and *jus*, which is the solution contemplated by the Swiss legislation. It is suggested to primarily concentrate jurisdiction and the applicable law at the spouses' common habitual residence linked to the place of celebration[939]. This proposal would guarantee the evoked parallelism, in an increasing number of cases[940] involving bi-national[941] and mono-national[942] couples living abroad, respectively, by fulfilling predictability and legal certainty principally based on a qualified degree of proximity[943]. For instance, a Belgian-Moroccan opposite-sex couple, she Moroccan, he Belgian, who live in France, would be

However, it should be noticed that in some circumstances any cooperation or preliminary administrative procedures aiming to acknowledge such recognition may be complex. See as an example <www.eda.admin.ch/countries/morocco/en/home/services/civil-status.html> "*In countries prone to civil status fraud such documents often require verification by a law firm approved by the competent Swiss representation. This can require a certain amount of time and effort on the part of those concerned, who must also bear the costs*". The same conditions are applicable to citizens from Kenya willing to marry in Switzerland.

939 Recourse to habitual residence linked to the place of celebration, or to the place of registration, would allow couples to easily fulfil, in terms of costs and length, the formal and substantive requirements for the validity of their marriage (or of their partnership), without further procedures imposed in the State of celebration – for instance, when the latter is unlinked to personal connecting factors (a situation falling under art. 4 of the HC-1978). A solution would be the one inspired by art. 3 of the HC-1978, further extended to the formal requirements. On the relevance of employing the place of marriage celebration as a modern connecting factor under Swiss private international law, please refer to F. GUILLAUME, The Connecting Factor of the Place of Celebration of Marriage in Swiss Private International Law, in: Yearbook of Private International Law, Vol. 21, 2019/2020. The place of marriage celebration is exceptionally relevant here as, in this context, the spouses' or partners' habitual residence assessment is pertinent to this moment in time only.

940 E. SOWA-BEHTANE, Binational Marriages in Europe, *Akademia Ignatianum w Krakowie*, 2017; <https://ec.europa.eu/commission/presscorner/detail/sk/MEMO_11_175>; G. LANZIERI, Mixed Marriages in Europe, 1990-2010, in: K. DOO-SUB, Cross-Border Marriage: Global Trends and Diversity, 2012, p. 108: "As migration is the driver of population change in several European countries, the share of foreigners is expected to increase, so the crude mixed marriage rate will be more influenced by the group-specific rate for foreigners".

941 Two persons of different nationalities.

942 Two persons of same nationality.

943 Reference is principally made to the legal status, rather than to the religious or analogous ceremony. For the purposes of recognition, couples would be sure that the State often closer connected to the couple's interests (A. BONOMI, The Hague Protocol of 23 November 2007 On The Law Applicable To Maintenance Obligations, in: Yearbook of Private International Law, Vol. 10, 2008, p. 349), will not raise issues of public policy. This might also help to reduce, although not entirely avoid, 'marriage/ partnership shopping' in one, and recognition in another, State for the sole purpose to circumvent the validity requirements (<www.nytimes.com/2018/07/18/world/middleeast/israel-lebanon-cyprus-marriages.html>. See also G. BIAGIONI, On Recognition of Foreign Same-Sex Marriages and Partnerships, in: D. GALLO/ L. PALADINI/ P. PUSTORINO, Same-Sex Couples before National, Supranational and International Jurisdictions, 2014, p. 364). In relation to marriage shopping, this can also be referred to as 'sham marriage', which the UK Home Office 2015 identified as that particular situation: "*where the relationship is not genuine but one party hopes to gain an immigration advantage from it. There is no subsisting relationship, dependency, or intent to live as husband and wife or civil partners*". In relation to registered partnerships, see G. KESSLER, Partenariat enregistré, Dalloz, 2012.

entitled to marry in France if the substantive conditions under their respective national law are met[944]. In practice, the Moroccan legislation prohibits such a marriage. Clearly, the substantive requirement is not fulfilled, therefore the celebration by the French authorities would only take place upon discretion based on the French public policy[945].

**337.** Where a reversed scenario under which the determination of jurisdiction and applicable law in the State of the common habitual residence may raise problems towards the validity of the marriage, or of the partnership, the State of separate habitual residence or nationality would be a valid alternative – in addition to the law of registration for partnerships. For instance, in the case of an Indian national and a Swiss national (with Indian origins) who virtually met through the arranging of their families, the establishing of a common habitual residence at the time of celebration may be difficult, and either of their habitual residence or nationality would be a more appropriate connecting factor[946].

**338.** A subsidiary approach should be found in situations where habitual residence may not be determined, or the right to marry (or to register a partnership) may be impaired in both the State of habitual residence and nationality[947]. In such circumstances, the use of prospective acclimatization and, subsidiarily, of physical presence[948] is suggested. More specifically, the future spouses' common or separate prospective acclimatization or, failing that, their common or separate physical presence, would support the celebration of marriages of asylum seekers, recognised refugees and stateless persons[949]. In this same respect, the place of registration[950] should suffice for

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944 This same rule would apply according to Belgian, Chinese and Italian law; but not under the Dutch, German, Swiss and UK legislation where habitual residence, domicile and the *lex loci celebrationis*, respectively, apply depending on the legal order (*cf.* section I *supra*).

945 E. GIUNCHI, Muslim Family Law in Western Courts (Routledge, 2014) p. 118-120. Even if the marriage were celebrated in France, perhaps following a judicial proceeding (ibid. FULCHIRON, p. 183), it would not be recognised in Morocco. It may be recognised in Belgium by virtue of the Belgian public policy, again potentially requiring a judicial intervention (Tribunal de la famille Liège, jugement du 25 mai 2018).

946 Another example is that of a Pakistani marriage celebrated via Skype which the Italian Court of Cassation had to deal with in matters of validity (Cass., sez. I civ., n. 15343 del 25 luglio 2016). In its judgment, the Court maintained that, even though contrary to the Italian public policy, the marriage had to be retained as valid under Italian law based on the *lex loci celebrationis* (art. 28 of the Italian PIL).

947 The German approach, especially concerning the applicable law, proves innovative in facing international marriages and partnerships involving couples that do not establish specific attachments with the place of celebration, or of registration, and that are found to be in the impossibility of celebrating their marriage or registering their partnership in their respective State of origin (either of nationality or domicile). For instance, this includes stateless people, asylum seekers, and recognised refugees, as well as individuals who simply cannot establish habitual residence (*i.e.* nomads).

948 Part I, chapter III, section IV.

949 For more details on the issues relating to statelessness (*de jure* and *de facto*), see part I, chapter III, section I. See also S. NONNENMACHER/ R. CHOLEWINSKI, The nexus between statelessness and migration, in: A. EDWARDS/ L. VAN WAAS, Nationality and Statelessness under International Law, 2014; and ECtHR, Hasani v. the former Yugoslav Republic of Macedonia (Application no. 4558/17).

partners without habitual residence, or being in the impossibility to return to their place of nationality/ residence. For instance, a refugee and an asylum seeker, of Kurdish ethnicity, temporarily living in Italy, would want to marry in the latter State. In practice, the substantive conditions would not be satisfied[951]. The celebration may be refused and subject to judicial proceedings before the Italian authorities[952].

**339.** In sum, it is maintained that habitual residence should be expressly mentioned under the relevant domestic provisions. Its use would additionally reduce conflicts of jurisdictions and/ or applicable laws involving dual citizens or further assessments on which nationality should be considered the most effective. Its fact-based determination would essentially be supportive in place of domicile[953]. That said, national and potentially future international laws should rely on the habitual residence's interplay with traditional and modern connecting factors, namely nationality, prospective acclimatization and physical presence.

## § II. Effects of Marriage to the Name: Key Points

**340.** Concerning international jurisdiction over the change of name, it is advocated that the applicant's habitual residence[954] at the time the change is invoked should apply on an alternative basis with nationality[955]. This is the current approach under the Dutch and German legislation, which is also

With regard to statistics relating to statelessness in the EU, please refer to <https://ec.europa.eu/home-affairs/pages/page/platform-statelessness_en>: "*At the end of 2018, UNHCR estimated the total number of stateless persons in the European Union plus Norway at 399 283 individuals*".

950 This would likely coincide with the place of spouses' common or separate physical presence.

951 This result would be similar under Belgian, Dutch and French law.

952 For instance, the Tribunal of Bari held that the marriage between a refugee and an asylum seeker could still take place, notwithstanding the substantive requirements were not met (Tribunale di Bari, sez. II, civ., 27 gennaio 2012, no. 1836). Of the same view was the judgment of the Tribunal of Genova (Tribunale di Genova, sez. IV, civ., 22 maggio 2018, no. 473). The same procedure should occur concerning a marriage between (*de jure* and *de facto*) stateless individuals. We recall, however, that the approval or refusal of the celebration is currently upon discretion of the courts (R. CALVIGIONI, Il Regolamento dello Stato Civile, 2018, p. 189).

953 An example is the reference made under Dutch law for the determination of territorial jurisdiction. In addition, we refer to the Irish Law Reform Commission of 1985, which made an important study on habitual residence for the purpose of replacing domicile in the context of international marriages. In matters of validity, the Commission stated: "In favour of the law of the parties' habitual residence it may be argued that it is the most appropriate to determine the issue. Unlike the *lex loci celebrationis*, which may have only a contingent, passing connection with the parties, and the *lex fori*, which may have no connection with them whatsoever, the law of the parties' habitual residence at the time of the marriage is one that is clearly relevant to the parties. […] As we have mentioned, we have already recommended that habitual residence should replace domicile as a connecting factor in private international law in general". This study is available at <https://www.lawreform.ie/_fileupload/Reports/rPrivateNullityofMarriage.htm>.

954 The term 'applicant(s)' refer(s) principally to the spouse or the adult child. When reference is made to the minor child, it refers to his/ her parents or primary carer.

955 In absence of habitual residence, the current proposal concerning prospective acclimatization and mere presence should also apply (*cf.* subsection I *supra*).

supported in this study. The German[956], and similarly the Swiss[957] and Belgian[958], approach enabling the election of the law applicable to the legal consequences affecting the name is taken as reference. In this regard, party autonomy also proves to be supported by the CJEU practice[959]. Thus, an approach founded on the applicant's freedom of choice as to which law would apply to his/ her name is encouraged and should possibly be harmonised within an international legal instrument.

**341.** In this regard, the applicant's habitual residence[960] or nationality[961] at the time of the choice of applicable law should be valid alternatives. Habitual residence may indicate both the applicant's separate and common one with his/ her spouse, irrespective of its State of location[962]. In absence of party autonomy, the *lex fori* should primarily apply. Ultimately, the use of similar connecting factors for the concentration of the forum and *jus* in one place, would ensure legal certainty and continuity in the change of name, and avoid issues arising out of its recognition and transcription[963].

**342.** Although the child's name has not been dealt comprehensively with, and a specific proposal will not follow, distinction should be made with the applicant's name above. With regard to the minor child[964], the above analysis concerning jurisdiction should be applicable. In reference to the applicable law, German law indicates, *inter alia*, the parent(s) nationality or habitual residence as main connecting factors[965]. The law of the parents' common

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956 We recall that the German legislation opts for the applicant's nationality or habitual residence in Germany (EGBGB, art. 10).

957 As a reminder, the Swiss choice of applicable law indicates the applicant's nationality only (SPILA, art. 37.2).

958 As mentioned *supra*, the Belgian legislation provides that the applicant's nationality can be elected (CPIL, art. 37.2).

959 Reference is especially made to *Grunkin-Paul* (J-J. KUIPERS, Cartesio and Grunkin-Paul: Mutual Recognition as a Vested Rights Theory Based on Party Autonomy in Private Law, *European Journal of Legal Studies*, 2009, p. 84).

960 In absence of habitual residence, the proposal concerning prospective acclimatization and mere presence should also apply (*cf.* subsection I *supra*).

961 When the applicant holds multiple nationalities, he or she should be allowed to choose freely one of them, without being subject to the 'most effective assessment' for the reasons we raised (*cf.* part I, chapter III).

962 As opposed to the German approach, where reference is made to the applicant's German habitual residence only, the Swiss one indicates the applicant's habitual residence in Switzerland and abroad.

963 This situation has required the reiterated intervention of the CJEU (*i.e.* ibid. *Nabiel Peter Bogendorff von Wolffersdorff v. Standesamt der Stadt Karlsruhe, Zentraler Juristischer Dienst der Stadt Karlsruhe*; *Grunkin and Paul v. Grunkin-Paul and Niebüll*; and *Freitag*, 8 June 2017, C-541/15, § 38: "For a national of two Member States, such as the applicant in the main proceedings, there is a real risk — because he bears two different surnames, namely Pavel and Freitag — of being obliged to dispel doubts as to his identity and the authenticity of the documents submitted, or the veracity of their content, which, as the Court has ruled, is such as to hinder the exercise of the right which flows from Article 21 TFEU").

964 For the adult child, reference shall be made to the preceding analysis.

965 EGBGB, art. 10(1) and (3).

habitual residence[966] or nationality[967] may be good options of party autonomy. That said, it may also be that the child is habitually resident with his/ her primary carer and the other parent is living in another State at the time of the election. In this sense, the law of the child's habitual residence at the relevant time would perhaps be a valid alternative. In absence of choice of applicable law, the child's name may be governed by the common parents' habitual residence or, failing that, the child's habitual residence at the relevant time[968].

## § III. Interpretation of Habitual Residence

**343.** The celebration of marriages and registration of partnerships relate more to an administrative procedure. In this regard, few case law examples were found to deal with habitual residence. The compatibility between the intercountry notion of habitual residence and the common law notion of intended matrimonial home[969] should not *a priori* be excluded[970]. In practice, they may substantially refer to the same objective: the determination of '*a close and real connection to the marriage at a relevant time*'[971] – or to the partnership[972].

**344.** The couple's common physical presence at a relevant time, the presence of a couple's home and family life at the time of marriage celebration (or of the partnership registration)[973], the period of time before the marriage celebration[974], should be determining. The intent to live in the place of marriage or of union[975],

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966 Concerning this specific scenario, in absence of habitual residence, only the common prospective acclimatization or the common mere presence should be relevant (ibid.).

967 The free choice of nationality, *supra*, should also apply here.

968 This is especially the approach under Swiss law (art. 37, 38), even though reference is principally made to domicile (*cf. supra;* and Swiss Federal Court, BGE 116 II 504).

969 Ibid. COESTER-WALTJEN, p. 1232.

970 Distinction should nevertheless be made between the intent, as used under the notion of domicile, and the fact-based settled purpose implemented under the notion of habitual residence (*cf.* part I, chapter III).

971 Additional factors should be found in other fields of family law (Ibid. COESTER-WALTJEN).

972 For instance, some legal orders have opted in referring to the '*conjugal home*', '*the place of indisputable common residence of the spouses*', for the determination of jurisdiction and applicable law over the personal effects of marriage (ibid. BASSET, p. 14).

973 Showed through the couple's social integration in the local community and the occupation of a principal home.

974 *I.e.* six months. In this sense see UKHL, *Mark (Respondent) v. Mark (Appellant)* [2005] 42: "*This was ultimately a question of fact, depending more upon* […] *the fact of continued residence over the prescribed period*".

975 BGE 142 III 609 S. 611-612: "[…] *à faire obstacle d'emblée, à savoir à titre préventif, à une union dont les partenaires ont l'intention de s'établir en Suisse après la célébration; le droit suisse intervient dès lors en tant que 'rattachement anticipé au domicile imminent', solution que le Tribunal fédéral a consacrée dans d'autres situations (cf. pour le nom de la fiancée domiciliée à l'étranger jusqu'au mariage: ATF 116 II 202; idem pour celui de l'enfant adopté à l'étranger: arrêt 5A.34/2004 du 22 avril 2005 consid. 3.1, commenté par Carranza et Micotti, Revue de l'avocat 2005 p. 398). Encore faut-il qu'une pareille intention soit dûment avérée* […]".

and place of work, should also be complementary, non-decisive[976], elements for the anamnesis[977].

**345.** Some important guidance was given in relation to the effects of marriage and partnership. In this regard, habitual residence was referred to as '*an effective and stable settlement*'[978] and as '*a place with a certain degree of social integration*'[979]. With regard to children's change of name, reference was made to '*the place where the child was born and has been resident since birth*'[980]. Further elements should be found in other fields of family law[981].

## § IV. Summary of Recommendations

**346.** This Chapter accentuates the analysis from the viewpoint of the method of the conflict of laws ('*méthode conflictuelle*') rather than from the method of recognition ('*méthode de la reconnaissanc*e')[982]. Actually, it was said that the majority of the legal orders touched upon allow recognition of marriages and partnerships that are valid under the *lex celebrationis* or *registrationis*.

**347.** It is supported here that some precautions applicable to the interplay of habitual residence with other connecting factors at the time of the celebration would ensure better legal certainty and predictability for both authorities and couples. In particular, recognition may not always be allowed, precisely when encountering public policy restrictions whose national implementation remains fragmented and vague in practice. This might be a true issue outside the EU legal order[983]. Furthermore, recognition of marriages or partnerships in a given State, valid under the *lex loci celebrationis* or *registrationis*, does not essentially mean that the effects of such marriage or registration will also be

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976 In the other thematic parts, it will be shown that the intent and the place of work, alone, would not be synonyms of stability. The former shall systematically be coincident with tangible steps; the latter may not always determine the personal integration of an individual (*i.e.* expats). See in particular parts II and V.

977 The same factors should also apply for the assessment of one of the future spouses' separate habitual residence. These would primarily be the prospective spouse's or partner's physical presence at the relevant time, the social integration in the local community, the principal occupied home, the pre-determination period of time (*i.e.* six months); and, complementarily, the intent and the professional settlement.

978 Ibid. GUILLAUD-BATAILLE.

979 Ibid. CJEU, *Nabiel Peter Bogendorff von Wolffersdorff v. Standesamt der Stadt Karlsruhe, Zentraler Juristischer Dienst der Stadt Karlsruhe*.

980 Ibid. CJEU, *Grunkin and Paul v. Grunkin-Paul and Niebüll.*

981 *I.e.* property relations and divorce (for spouses); and child custody. See in this sense, parts II and III *infra*.

982 P. LAGARDE, La méthode de la reconnaissance est-elle l'avenir du droit international privé ? Conférence inaugurale, *session de droit international privé*, Vol. 371, 2014.

983 With regard to the notion of the EU legal order or European legal order, please refer to S. BESSON, How international is the European legal order?, *NoFo* 5, 2008, p. 51.

internationally recognised[984]. Below, some salient recommendations are provided[985]:

(i) The future spouses' or partners' common habitual residence, and, subsidiarily, either future spouse's or partner's separate habitual residence, connecting them to the place of celebration, or of registration[986], should be expressly referred to within domestic legislations[987].

(ii) Parallelism between forum and *jus* proves to be a more efficient rule in order to avoid issues of public policy, and/ or lengthy administrative processes, possibly affecting couple's free movement[988].

(iii) A relevant point in time, such as the time of celebration or registration, and a six-month appreciable period before the celebration or registration, should be indicated in support of a more efficient assessment of habitual residence.

(iv) The 'anchored reference' to the law of registration should always be available for the registration of partnerships[989].

(v) The issue concerning the absence of habitual residence should be resolved by recourse to the physical presence and prospective acclimatization[990].

# Chapter II: Property Relations

**348.** Property relations involve the exclusive rights that beneficiaries, couples, exercise[991] towards movables and immovables[992] according to national law[993].

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984 G. FLORIMOND, Le droit international privé face à la diversité des couples, *Revue Juridique de l'Ouest*, 2016, p. 37.

985 For the marriage effects, we refer to subsection II.

986 The time of determination should be the celebration or registration.

987 Together with the common or separate nationality, as an alternative connecting factor, which plays a significant role in circumstances involving mono-national couples living in a State other than that of origin.

988 Just in my entourage, two Russian citizens opted for their marriage celebration in Switzerland, being the place of their common habitual residence, in particular in order to avoid issues related to the delivery of specific documents in Russia for the later marriage recognition in Switzerland through consular means (*i.e.* marriage certificate, residency certificate, civil status certificate and legal translation). An Indian-Moroccan couple and an Indian-German couple decided to marry in Paris and in Geneva, respectively, considering them their respective place of common habitual residence, ultimately avoiding issues relating to their families' conflicting religion. A Russian-Portuguese couple, a Portuguese couple, and a Portuguese-Brazilian couple decided to marry in Geneva, respectively, simply because they considered it as their home(place) and life(place).

989 Given the specific vacuum present under national legislations *i.e. within the EU*: Bulgaria, Latvia, Lithuania, Poland, Romania, Slovakia; *outside the EU*: Armenia, China, Russia, Ukraine.

990 The formula of implementation is indicated in subsection I and II concerning the celebration of marriage and its effects, respectively.

991 Commonly or separately depending on the national regime.

992 Real property.

It will not be dealt with the latter specifically, since this inquiry focuses on conflict-of-law rules governing international jurisdiction and applicable law over cross-border matrimonial or partnership proceedings[994]. Important legal questions arise as a consequence of matrimonial/ partnership property relations, namely which regime should apply[995] and the liquidation of properties[996].

**349.** This Chapter is therefore composed of seven sections. *Section I* refers to examples of property regimes offered by national legal orders. *Section II* deals with the EU Regulations. *Section III* focuses on the case law arising out of the Hague Convention 1978. *Section IV* involves matters of national conflict-of-law rules[997]. *Sections V* and *VI* identify issues of alternate, concurrent, and absence of habitual residence. *Section VII* suggests the rule on transfer of jurisdiction in this field.

## Section I Property Regimes within National Legal Orders

**350.** Matrimonial or partnership regimes refer to the set of national rules governing the ownership and management of properties between spouses/ partners[998]. The regimes are either statutory (*ex lege*) or, when available, upon election by the parties. In some States, typically of continental Europe, regimes include primary and secondary ones. Some other national legislations (*i.e.* Australia, England) do not contemplate the concept of matrimonial property regime[999].

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993 Related issues such as transactions, including capacity, formalities and material validity are part of such relations.

994 As well as pre-nuptial, post-nuptial, pre-partnership or post-partnership agreements. In many European jurisdictions there are no private international law rules specifically concerning the law applicable to the validity of such agreements. Thus, they are considered as valid and binding (save public policy restrictions) if so adjudged according to the law of the States where they are concluded. See D. COESTER-WALTJEN/ W. PINTENS/ J. M. SCHERPE, Matrimonial Property, in: Encyclopedia of Private International Law, Vol. 2, 2017, p. 1244.

995 For instance at the time of concluding a marriage or a partnership.

996 At the time of legal separation or divorce, and succession. Dealing with such questions is the prerogative, and the objective, of the EU property regimes' Regulations that have recently entered into force. The Regulations aim to facilitate the free movement of persons in the Union and the arranging of life property relations (§ 72).

997 Turkey, Switzerland, UK and US and the interrelation of their national laws with the rules of the EU Regulations.

998 And between spouses/ partners and third persons, which are excluded from this analysis.

999 This is an aspect that has not been dealt with in the Regulations, nor will be done here. On this point, see note 27, ROMANO, p. 73.

**351.** Three differences between States are encountered within such regimes: a) States that provide either a separate or a community property[1000]; b) States that contemplate a proper matrimonial regime and those that do not, meaning that the marriage does not affect spouses' or partners' properties[1001]; c) States that allow an election of regime, and those that do not[1002]. It will briefly be dealt with differences *(a)* and *(c)*.

(a) Different statutory, or 'default', regimes[1003] apply per country[1004], namely:

- *Separate property*: Germany[1005], India, most of the US, Switzerland[1006], United Emirates[1007];
- *Community property*: Cuba, France[1008], Italy, Japan[1009], most of the Canadian Provinces[1010], Russia, some of the US (*i.e.* Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington and Wisconsin), South Africa[1011].

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1000 Sometimes depending on the typology of properties (*i.e.* life insurance policies, bank accounts, retirement benefits).

1001 This distinction will not be dealt with as the consequences are not relevant for this analysis.

1002 This is the case when only a statutory regime exists or no regime exists at all.

1003 Australia, New Zealand, England and Wales do not provide specific property regimes. In England and Wales, marriage does not affect the organisation of the couple's properties. For instance, in case of divorce, the English judge may decide on an equal redistribution. This may also be encountered in Australia and the US. On this subject, see R. SCHUZ, Choice of law in relation to matrimonial property in the 21st century, *J. Priv. Int. Law*, Vol. 15, 2019, p. 4.

1004 The US (depending on the states, *i.e.* Colorado, New Jersey), Canada (depending on the province, *i.e.* British Columbia, Manitoba and Quebec), South Africa and Italy provide the same property regime for both spouses and partners (civil unions). French and Swiss law contemplate the separation of property for registered partnerships ('*PACS*' and 'partenariat enregistré', respectively). Swiss and German laws present a hybrid system composed of separation of properties and community of gains, with some differences that will not be discussed (see F. STURM, Les régimes matrimoniaux en droit compare et en droit international privé, Droz, Genève, 2006, p. 80-85). For more details concerning the partnerships' regimes, please refer to (ibid.) SCHERPE/ HAYWARD.

1005 '*Zugewinngemeinschaft*'.

1006 '*Participation aux acquêts*'.

1007 In practice, when involving marriages between Emirati nationals, a 'dowry' payment is attributed to the wife. This should be provided in an agreement, sometimes referred to as '*Mahr* agreement' (see D. HAMADÉ AL GHURAIR, Family law in the United Arab Emirates: overview, *Thomson Reuters*, 2020; C. ALLEN, Mahr Provisions and the Case for Shari'a Arbitration, *Washington University Law Review*, Vol. 96, 2018). Civil partnership does not exist under the UAE law.

1008 '*Communauté réduite aux acquêts*'.

1009 In Japan, a husband and wife are jointly liable for any daily household matters including purchase of everyday goods, contracts for medical treatment, and domestic rent. See T. TAMAKI, Distribution of "Matrimonial" Property of Married, Cohabiting and Same-sex Couples in Japan, *Housei Riron*, Vol. 42, 2009.

1010 Some exceptions or differences may exist among Provinces, *i.e.* Quebec provides for the community property only for couples who entered into marriage before 1970. Since 1970, the '*partnership of acquests*' applies through the same rules governing the community of gains, and extended to partnerships (legalised in 2002).

1011 F. OSMAN, The Million Rand Question: Does a Civil Marriage Automatically Dissolve the Parties' Customary Marriage?, *PER / PEL,* Vol. 22, 2019.

(c) Distinction shall be made whether an election of regime is, or not, possible:

- *Non-statutory regime available*: Canada, Germany, Italy, France, Japan, Russia, South Africa, Switzerland, US[1012];
- *Statutory only*: Cuba[1013], India[1014], United Emirates.

**352.** It should be noted that the above *differences* refer to the statutory regime only. Such reference aims to gather information about the various national legal orders, as they may influence the establishing of habitual residence at the time of marriage or partnership[1015]. The choice of the regime may also direct the conclusion of a *professio fori*, or more importantly a *professio juris*, through the operation of other connecting factors when allowed. No reference in the above analysis is made either to which possibilities are available for couples in terms of elected regime; or to which moment should be considered as relevant (*i.e.* divorce or succession) to trigger the legal effects of the regime. Although very interesting[1016], these points are not pertinent to the operation of habitual residence.

## Section II EU Regulations

**353.** It should be recalled that only 18 Member States apply these Regulations, excluding the UK and many of the States that were considered in the previous analysis on national property regimes.

### § I. Jurisdiction and Applicable Law

**354.** The context under analysis, for the purposes of international jurisdiction, is principally the one of article 6 involving property regimes' proceedings

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1012 Ibid. HAY *et al.,* p. 683.

1013 C. FAJARDO MONTOYA, El régimen económico como efecto patrimonial del matrimonio mixto entre cubanos y extranjeros, *Ars boni et aequi*, Vol. 12, 2016, p. 113.

1014 In India, marriage does not affect the property regime, and discrimination against women appears to be an important issue. For instance at the time of divorce, women may not have access to matrimonial properties. See I. KABRA, Matrimonial Property Laws in India: Need Of The Hour, *Nirma University Law Journal*, Vol. 5, 2015.

1015 The property regime typology offered by each national legal order is important for international couples to plan their conjugal life, including the administration and organisation of their respective or common assets. The choice of property regime made by spouses or partners may also constitute a relevant element in their decision to settle in a given State. See generally G. A. L. DROZ, Regards sur le droit international privé comparé, Hague Academy of International Law, 1991, p. 200.

1016 For further information, see N. VERMEIR, Tableau comparatif des régimes matrimoniaux légaux de différents pays, *Commentaires juridiques*, 1, 2015.

only[1017]. Reference is also made to the choice-of-court agreements within article 7 in favour of the authorities of the State whose law has been chosen under article 22 or in absence of choice by the parties pursuant to article 26[1018]. For the purposes of applicable law, it is dealt with articles 22 and 26.

**355.** The Regulations do not offer any guidance about the elements determining habitual residence under article 6[1019]. The latter provision envisages three subsidiary contexts, which allocate primary relevance to habitual residence[1020]: a) the actual common habitual residence; b) the cumulative last common habitual residence, and current habitual residence of one of the parties[1021]; c) the habitual residence of the respondent[1022]. The relevant time specified for the habitual residence determination is the seisin.

**356.** Concerning the applicable law, article 26 confirms the primacy of habitual residence in the context of matrimonial regimes[1023]. This time, the chosen approach is the *first common habitual residence at/ after the conclusion of the marriage*, and *the place of creation of the partnership*, not corresponding to the grounds of general jurisdiction. Therefore, the aim of these Regulations does not seem to primarily provide a coincidence, or parallelism, between forum and *jus*[1024]. Unlike articles 6 and 26, party autonomy should fully satisfy parallelism in both Regulations[1025]. The parties may decide to conclude a *professio fori* in favour of the authorities of article 22[1026] or 26(1)(a) or (b)[1027].

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1017 For the issue of concentration of jurisdiction under the Property Regimes' Regulations, please refer to part III for divorce and property regimes, and part V for succession and property regimes.

1018 The third alternative envisaged by art. 7(1) is the place of conclusion of the marriage, which will not be dealt with. However, it is observed that there may often be coincidence between such place and the 'first common habitual residence after the conclusion of the marriage' envisaged by art. 26 (C. KOHLER, Choice of the Applicable Law, in: I. VIARENGO/ P. FRANZINA, The EU regulations on the property regimes of international couples, 2020, p. 205)

1019 An important indication, however, is given in § 49 of the 1103 Regulation: "Where no applicable law is chosen, and with a view to reconciling predictability and legal certainty with consideration of the *life actually lived by the couple*, this Regulation should introduce harmonised conflict-of-law rules to determine the law applicable to all the spouses' property on the basis of a scale of connecting factors", similarly in § 48 of the 1104 Regulation (subsection V *infra*).

1020 The mention of 'or failing that' does not lead to any confusion: habitual residence is the undisputable rule for general jurisdiction.

1021 Reference is made to 'parties' or 'couple' as this terminology incorporates both spouses and partners.

1022 The last subsidiary reference of art. 6 is made to the parties' common nationality.

1023 Art. 26 of the EU Regulation 1104/2016, refers primarily to the law concerning the place of creation of the partnership.

1024 C. GRIECO, The role of party autonomy under the regulations on Matrimonial Property Regimes and Property consequences of Registered Partnerships. Some remarks on the coordination between the role of the legal regime established by the new regulations and other relevant instruments of European Private International Law, *Cuad. derecho transnac.*, Vol. 10, 2018, p. 455.

1025 P. FRANZINA, Choice of Court (ibid. VIARENGO/ FRANZINA), p. 89.

1026 The choice of applicable law can be concluded before and after marriage, as well as at the moment of divorce, or at liquidation of the regime (note 27, ROMANO, p. 73).

1027 Lit. (a) and (b) do not apply under the 1104. The courts of the place of conclusion of the marriage are also contemplated by art. 7(1).

**357.** The 1103 Regulation adopts nationality and closest connection on a subsidiary basis. It is not a simple matter to conclude for the absence of an established habitual residence and, as a consequence, to apply the law of the State of the couple's common nationality under article 26(1)(b). In particular, the ambit of the Regulations favours a qualified degree of proximity: the competent jurisdiction must be precisely the one '*facing the increasing mobility of citizens*' and, in particular, to '*ensure that a genuine connecting factor exists between* the parties (the spouses and partners) *and the Member State in which jurisdiction is exercised*' (§ 35). As opposed to closest connection pursuant to article 26(1)(c), the spouses' common nationality would not so often be compatible with the objectives pursued by the Regulations[1028].

**358.** Finally, article 26(3) provides an important exception. This is the case when the competent courts, for instance under article 6, decide that the law of the couple's *last* common habitual residence should apply relying on the couple's demonstration of a '*significantly longer period of time*' spent in that State. As a cumulative condition, the couple should show evidence about the arranging of their property relations according to the law of that State.

## § II. Practical Implementation

**359.** The absence of a habitual residence guiding assessment set out in Regulation 1103/2016 requires important interpretative efforts. National courts may be tempted by such vacuum to determine the *intercountry concept*[1029] of habitual residence through the use of their *national notion* of habitual residence[1030] or discretional factors used in different contexts[1031].

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[1028] Even in cases involving mono-national couples living in a State other than the one of their common nationality, habitual residence has increasingly overtaken nationality as a primary connecting factor – at least in absence of party autonomy (ibid. COESTER-WALTJEN *et al.,* p. 1236).

[1029] Ibid.: "Habitual residence has been essentially adopted since its origins as a conventional, *quasi*-standardised, connecting factor whose factual operation has been generally linked to treaty-based objectives (*i.e.* Hague Conventions, EU Regulations). Its implementation within national legal orders should therefore be compatible with the binding treaty objectives. The aim and operation of habitual residence have been adapted to the transnational setting, in that a national or international definition is systematically avoided. Thus, habitual residence does not relate to a single national interpretation, although over the years the domestic legislative efforts in conceptualising it within national legal orders have affected its foundations. This study argues that habitual residence should operate as an inter-country concept, fundamentally by endorsing it in a uniform manner, and avoid domestic 'free-standing' legislative adaptations". In this regard, see also J. CARRUTHERS, Discerning the meaning of habitual residence of the child in UK courts, in: Yearbook of Private International Law, Vol. 21, 2019/2020, p. 15, where reference is made to an 'international concept of habitual residence'.

[1030] It is said that the interpretation of habitual residence under EU law should be independent from national concepts (K. HILBIG-LUGANI, Habitual Residence in European Family Law, in: (ed. 4) K. BOELE-WOELKI/ N. DETHLOFF/ W. GEPHART, Family Law and Culture in Europe, 2014, p. 252; and P. HAMMJE, Definitions, in: S. CORNELOUP, The Rome III Regulation A Commentary on the Law Applicable to Divorce and Legal Separation, 2020, § 3.27). However, courts have experienced some difficulties in subtracting themselves from referring to national interpretations, both within and outside the EU (ibid. CARRUTHERS, p. 14, 34; note 6, LIMANTE, p. 164; P. EASTEAL/ J. FAVALORO/ F.

Thus, it leaves us the hard task, while waiting for the CJEU enlightenment, to formulate a proposal for indicative factors in this specific context.

**360.** An example dealing with matrimonial regimes illustrates some practical issues[1032]: A Luxembourger-Swiss couple, he, Luxembourger, she, Swiss, celebrates their marriage in Luxembourg. The wife is unemployed. The husband works as legal counsel for *Litasco*, some of whose affiliates are in Switzerland, on 50% remote work. The couple lives in Luxembourg for 6 months and in Switzerland for the rest of the year. They own a marital home in Luxembourg, which they occupy during their stay. In Switzerland, they live at the wife's parents' house. After two years, the couple settles in Berlin due to a new employment offer accepted by the husband. After six years, following divorce, the wife moves to Austria where she receives an employment offer.

**361.** In relation to a separate proceeding concerning the couple's property relations[1033], the husband would be entitled to seise the German courts pursuant to article 6(b)[1034], articles 1 and 70 for the geographical and material scope. In absence of choice of applicable law, the German courts would apply Swiss[1035] or Luxembourg law, by virtue of article 26(1)(a), based on the couple's first habitual residence after the conclusion of their marriage. The

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THORNTON, Hague Convention on the Civil Aspects of International Child Abduction: The consideration of habitual residence in Australian courts, *Fam L Rev*, 2016, p. 196; Swiss Federal Court [23 May 2018] 5A_121/2018, § 3.1: "*La notion de résidence habituelle, qui n'est pas définie dans la CLaH80, doit être déterminée de manière autonome et uniforme dans le cadre des Conventions de La Haye relatives aux enfants (singulièrement la Convention conclue à La Haye le 19 octobre 1996 concernant la compétence, la loi applicable, la reconnaissance, l'exécution et la coopération en matière de responsabilité parentale et de mesures de protection des enfants [CLaH96, RS 0.211.231.011]), notamment par rapport à l'art. 20 LDIP*").

1031 A uniform interpretation of habitual residence within the family law area is innovative and valued, albeit specific guidance on this subject is missing (ibid. HILBIG-LUGANI, p. 253: "So there is a great deal of interaction between the different branches – which is a good thing. But it is not always completely transparent how the actual pragmatic approach goes together with the theoretical approach on uniform interpretation"). The current situation leaves large discretion upon national courts in relation to which other family context(s) should be taken into account for the habitual residence assessment in situations involving property regimes. In some circumstances, reference has been made to the child protection scenario within the CJEU ruling '*Mercredi v. Chaffe* [2011] C-497/10', without specifying why child's habitual residence factors should also apply to the context of property regimes principally involving adults (D. MARTINY, Applicable Law in the Absence of Choice by the Parties (ibid. VIARENGO/ FRANZINA) p. 248-249). A further analysis concerning this point is provided in part III, chapter I of this monograph.

1032 The case scenario could not apply under Regulation 1104/2016, at least not for the purposes of applicable law (except in the case of art. 26(3)) since the law that applies without *professio juris* refers is the one of the place of creation, which is perfectly understandable. Reversely, the issues related to international jurisdiction are the same.

1033 This refers to a separate action filed after a concluded divorce proceeding (I. VIARENGO, Jurisdiction in Cases of Divorce, Legal Separation or Marriage Annulment, ibid. VIARENGO/ FRANZINA, p. 70).

1034 The scenario is the same under lit. a and c of both Regulations; as well as under art. 5(1) of the 1103 Regulation, which refers to, *inter alia*, the spouses' last common habitual residence where one of them still resides there (Brussels IIA Regulation, art. 3.1 lit. a, second indent). We will specifically deal with this scenario, falling under concentration of divorce and property regimes' jurisdiction, in part III.

1035 The rules on applicable law are *erga omnes*, therefore the law designated by the Regulations applies even though this is the law of a non-EU State (art. 20).

couple does not hold the same nationality, therefore excluding that option under article 26(1)(b). With regard to closest connection[1036], this is subsidiary to habitual residence, therefore it should not apply when the latter is established[1037]. Thus, the issue for the German court, in the current hypothetical, would be to firstly locate the habitual residence of article 26(1)(a)[1038] and, subsidiarily, to provide an interpretation of the terms *significant* and *longer* period of time[1039].

**362.** The couple may want to conclude a choice of court by virtue of article 7(1) in favour of their first common habitual residence under article 26(1)(a). This, admittedly, could very well be Luxembourg *where they had their marital home*[1040], where they *decided to celebrate their marriage*[1041]. In this case, the Luxembourg courts should exercise international jurisdiction and apply their own law to the property relations as a whole (article 21).

**363.** With regard to party autonomy, it is submitted that an issue, even though rare, should require further analysis. Let us imagine that, instead of Switzerland, Spain is the second concerned State where the wife's parents live[1042]. The couple would prefer to choose[1043] the courts in Spain through article 7(1)[1044], relying on article 22(1)(a), supposing, for instance, that a choice of applicable law was concluded at the time of the couple's marriage celebration. Could the choice of court be considered as a *forum shopping* agreement?

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1036 On this point, we believe that a slight amendment providing that 'closest connection' (with current no guidance under the Regulations) should be intended as that generally between the law and the marriage/ family property interests (without necessarily freezing it at the time of the conclusion of the marriage), would be more appropriate and compatible with the settling of the couple's marital life over the years (ibid. MARTINY, p. 253: "The place of the formation of marriage, which concededly may not have a real significance for the actual life of the couple").

1037 Ibid. MARTINY, p. 254: "If neither of the criteria in paragraph 1(a) and (b) apply, or, failing a first common habitual residence, in cases where the spouses have dual common nationalities at the time of the conclusion of the marriage, the third criterion is the law of the State with which the spouses have the closest links".

1038 A set of specific factors is necessary for the habitual residence determination, even more under this provision, given that an appreciable assessment period is not specified (ibid. MARTINY, p. 248).

1039 This interpretation does not prove to be an easy task as in the event of two habitual residences, one more habitual than the other (ibid. ROMANO, p. 78). In addition, the Regulation 1103 does not provide any guidance in that regard (ibid. MARTINY, p. 257).

1040 Administrative evidence, *i.e.* shared correspondence, bills and bank accounts mentioning the couple's common address, may support the location of the marital home, therefore of a common habitual residence (*cf.* section II *infra*).

1041 The husband's professional activity should not be taken into account since it is divided equally between Luxembourg and Switzerland.

1042 The reason of this variation is that the agreement in favour of the Swiss courts would not be possible under the Regulation as Switzerland is not an EU Member State.

1043 The Regulation being silent on this point, the moment of the choice-of-court agreement can take place any time before or after marriage, hypothetically even at the seisin (ibid. GRIECO, p. 466; and FRANZINA, p. 86).

1044 Even if the German courts may still be competent for the matter according to art. 6(b).

**364.** The question in our preceding variation relates to which factors the Spanish judge should consider in order to determine that its jurisdiction is internationally competent by virtue of the connecting factor indicated under article 22(1)(a)[1045]. Given that at the time of the marriage celebration the marital home as well as a non-negligible part of the couple's life were in Luxembourg, the *professio fori* established at a later stage[1046] may be used to circumvent the legal order. In our view, the Spanish courts would retain jurisdiction by simply implementing the decision of the parties, without assessing[1047] whether, at the time of the marriage celebration, their habitual residence was in Spain or, as it is argued, in Luxembourg.

## § III. Adapting Habitual Residence to Different Contexts

**365.** The conclusion to the previous subsection reflects two main points challenged by this analysis:

- There is a legislative vacuum, which may appear as an obstacle to the uniform operation of habitual residence within the Regulations. In absence of a contextualised reference[1048], the habitual residence assessment may prove lengthy and not always in conformity with the objectives of the EU Property Regimes' Regulations. In this regard, each national court of the *EU18* may replace such a vacuum by looking at its own national notion of habitual residence or at different family contexts with no harmonised guidance, fuelling fragmented interpretations contrary to an EU uniform notion[1049]. Article 26 of the 1103 Regulation[1050] also concerns the couple's assessment, allowing them to predict which law should govern their property regime. In absence of specific guidance, predictability may be complex to achieve.

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[1045] It is submitted that public authorities, especially notaries, should be attentive in ascertaining, at the time of the choice of applicable law, that the party/ies is/are habitually resident in a given State at a particular point in time (on this point, see also ibid. KOHLER, p. 203).

[1046] Corresponding to the seisin in the current hypothetical.

[1047] Ibid. FRANZINA, p. 89: "As a matter of fact, choice-of-court agreements, though confined within the narrow ambit of the 'cases covered by Article 6', may at the outset avoid any uncertainty that might arise with the identification of the habitual residence of each of the spouses or partners".

[1048] Currently, multiple factors from different contexts may apply for the habitual residence of an international couple with various family and property ramifications across the globe, a scenario that is becoming more and more common.

[1049] Namely, in relation to recital 49 of the 1103 Regulation, which aims for "harmonised conflict-of-law rules […] habitual residence as the first criterion" (ibid. MARTINY, p. 247; and A. BONOMI, The Proposal for a Regulation on Matrimonial Property (ibid. BOELE-WOELKI *et al.*) p. 234).

[1050] Art. 26(1) of the 1104 is more coherent: The law of the registration applies to the partners' property relations, avoiding obstacles from the law of the State of their common habitual residence or nationality, which may not recognise their status with consequent negative effects over their regime (ibid. MARTINY, p. 255).

- There is a practical incoherence related to the ambit of the Regulation 1103. The exclusion of parallelism[1051] may not always satisfy the reconciling of predictability and certainty[1052]. The authorities of the last common habitual residence may have been potentially more appropriate in specific circumstances, as those in the hypothetical in subsection II[1053], in respect of the above principles[1054]. Reference to the first common habitual residence may be conflicting with the actual qualified proximity of habitual residence, in absence of a realistic (genuine) nexus[1055] between both spouses[1056] and the applicable law[1057].

**366.** For instance, in the case of article 26, an additional provision (i) to paragraph 1(a) may be introduced: '*the law of the State in which the parties have their last common habitual residence should subsidiarily apply in place of the law previously applicable*'. In the replacing provision, § 49, 1103[1058] should provide an additional paragraph and read: '*The lex fori corresponding to the last common habitual residence of the spouses should constitute the first criterion when the effects of such law are considered more reasonable for the property interests of the parties and the proper administration of justice*'.

**367.** According to this study proposal (1)(a)(i), applied to the hypothetical in subsection II[1059], the German judge should be allowed to apply German law if the circumstances show that it would be more reasonable, and better fulfilling justice, to apply the law of the 'last common habitual residence'. *In concreto*, this is what the German judge 'may' do within the current version of article 26(3), only upon an articulated assessment and a spouse's initiative.

## § IV. Pros and Cons of the Proposal

**368.** The proposal set out in subsection III, together with an appreciable assessment period[1060], should aim to better face the couple's international

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1051 Especially in the absence of choices of court and applicable law.

1052 § 49 of the 1103 Regulation and § 48 of the 1104 Regulation.

1053 Luxembourger-Swiss case.

1054 The rule under the HC-1978, art. 7(2), is valuable in that, in absence of choice of applicable law, a change of habitual residence *may* entail a change of applicable law in favour of the 'actual' habitual residence. However, the 10-year period condition is contrary instead to the conditions of proximity, flexibility and adaptability required by habitual residence.

1055 Ibid. MARTINY, p. 246.

1056 Ibid. BONOMI, p. 235.

1057 A specific factual guidance provided within the Regulations, together with a reference to an appreciable assessment period, would also allow to better identify the effective change in the habitual residence of the spouses, or partners, at the relevant time (ibid. MARTINY, p. 250).

1058 In 1104, the provision is different as already mentioned.

1059 Luxembourger-Swiss case.

1060 An appreciable period, other than that proposed in art. 6, should also be introduced for the assessment of the 'first common habitual residence after the conclusion of the marriage' under art.

movements, essentially with no, or a little degree of, proximity regarding the law of their first common habitual residence.

**369.** Such proposal should provide the parties with better coherence between their 'actual' property relations[1061] and the property regime of the State where the couple last settled[1062]. It would neither exclude the recourse to party autonomy nor the use of article 26(1)(c). It should, nevertheless, obviate the meaning of article 26(3), which might otherwise find similar implementation. In this regard, the aim of this proposal is also to avoid the residual nature currently attributed to article 26(3) ('by way of exception') and the aleatory requirements that the parties are asked to demonstrate and the courts to assess. The endorsement of such proposal should ultimately avoid the recourse to article 26(3) only upon the initiative of one of the spouses[1063].

**370.** Indeed, one main objection that might be raised refers to the principle of mutability[1064], which does not apply under the Regulations. This principle is avoided by freezing applicable law[1065] at one single point in time[1066]. It is agreed that the law of the spouses' last common habitual residence at the seisin might be considered to some extent unpredictable, for instance, as it would be applicable retroactively to the properties acquired in the course of marriage – unless one spouse objects. However, admittedly, issues related to the absence of mutability do not much depend on the 'formula' of habitual residence – at least not directly. In fact, a couple who established habitual residence three or six months (or one year) after marriage may relocate to a new habitual residence where they would remain settled for several years[1067]. In this case, it may prove unfair to apply the law of the State in which they lived for such a short time to their total assets acquired during their whole marital life. The use of the *professio juris* would still remain a valid option in both scenarios.

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26(1)(a). Such period of time may indicate six months or one year after the celebration of the marriage. Other authors refer to five years or less based on the national naturalisation time requirements (ibid. SCHUZ, p. 33).

1061 Ibid. MARTINY, p. 246.

1062 For the couple in the hypothetical of subsection II (Luxembourger-Swiss case), the law of the internationally competent courts in Germany, seised of the matter, representing the place where the couple was last jointly settled, should better express coherence, as a synonym of legal certainty, rather than the courts in Luxembourg or in Switzerland, which the couple abandoned some years before.

1063 In this regard, one may also argue if it would not be more appropriate, in the framework of art. 22(1)(a), to primarily refer to the common habitual residence of the spouses and partners, and 'by way of exception' to their separate habitual residence, provided that their consent is voluntary and informed.

1064 This principle refers to change of applicable law, and potentially also to the legal effects, over the property relations, based on the change of personal law (*i.e.* habitual residence) during the course of the marriage (ibid. ROMANO, p. 77; MARTINY, p. 245).

1065 In absence of *professio juris* and the other conditions provided under art. 26(3).

1066 The first common habitual residence after the conclusion of the marriage.

1067 Ibid. SCHUZ, p. 10 (at fn. 72).

**371.** Lastly, we should spend a few words on the *reasonable* and *proper administration of justice* referred to in the second part of the proposal in subsection III. The term 'reasonable' or concept of reasonableness may prove aleatory, but it is often used in the EU regulations on family law[1068]. It is also employed in common law legal systems[1069]. It denotes a judicial interpretation of the couple's respective needs for the redistribution of properties and financial related aspects in a manner that should be considered *fair* or *just*[1070]. The term 'proper administration of justice' is an important legal principle well enshrined in EU law. Concretely, it refers to the 'correct' exercise of justice for people, while also limiting in some circumstances their access to it by way of specific restrictions[1071] – an example is forum shopping.

**372.** The subsidiary character of the proposal advanced here, rather than an alternative one, should reduce potential flexible and incoherent justice towards the couple's expectations[1072]. The competent judge would have to firstly assess the spouses' common habitual residence after the conclusion of the marriage and – only if resulting in a non-reasonable and unjust determination for one of the parties – proceed with a later assessment of the last common habitual residence at the seisin[1073].

## § V. Some Remarks on the Guiding Operation of Habitual Residence

**373.** Although there are no guiding factors, the Regulations try to delimit the role and weight of habitual residence in property relations. Habitual residence should be the initial connecting factor at the time the court is seised for the purposes of international jurisdiction[1074] – mention has already been made of the 'genuine' nature that habitual residence aims to satisfy. A choice of applicable law in favour of habitual residence should reflect a close link[1075]. In

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1068 1103, § 41, art. 11, in particular in relation to forum *necessitatis*; Succession Regulation, § 31, art. 11; Maintenance Regulation, § 16, art. 7.

1069 See the reference to 'reasonable needs' and 'reasonable requirements' in *Z v. Z* (Divorce: Jurisdiction) [2009] EWHC 2626 (Fam); and in *Granatino v. Radmacher* [2010] UKSC 42. See also the principles of 'fairness, justice, reasonableness, proportionality, comity, conformity and solidarity' in High Court of Malawi, *Kishindo v. Kishindo* [2013] No. 397.

1070 Ibid. SCHUZ, p. 27.

1071 See FRA, Handbook on European law relating to access to justice, European Union Publications, 2016, p. 113.

1072 In terms of predictable laws applicable to their international movements.

1073 The subsidiary character of the suggested proposal also respects the novelty of the current Regulations that have not yet been sufficiently implemented. Nonetheless, the subsidiary character should not be interpreted as a synonym of the term 'or failing that'. Rather, the scope of this proposal is to allow recourse to the last common habitual residence despite the well-established first common habitual residence after the conclusion of the marriage.

1074 § 35 of both Regulations.

1075 § 45, 1103; § 44, 1104.

absence of choice of applicable law, habitual residence should be the first criterion to apply, showing the couple's actual place of living[1076].

## § VI. (Minimal) Operation of Habitual Residence on the Validity of Agreements

**374.** The notion of agreement under the Regulations refers to matrimonial or partnership property agreements, as well as to choice-of-court[1077] or applicable law agreements. Habitual residence plays a minimal role in relation to their validity and recognition.

**375.** In reference to the choice of applicable law, the general rule is that material and formal validity is governed by the law of the State where the agreement is concluded, which should be expressed in writing, dated and signed[1078]. The law of the State of the common habitual residence, at the time the agreement is concluded, may require additional formal conditions for matrimonial or partnership property agreements that should be complied with by the parties. If the parties are habitually resident in different Member States[1079], which request additional formal conditions for property agreements, only those specified in one of their laws should be complied with. If only one of the two laws involve additional formal conditions, these should be observed[1080].

**376.** In respect of the matrimonial or partnership agreement, the set of requirements is similar to the previous ones. This time, additional formal conditions may be required by the law applicable to the matrimonial or partnership property regime, as determined by the Regulations[1081]. In addition, the Regulations establish which law should govern the material validity of such agreement. With regard to the law applicable to existence and validity of the agreement, the law is the same chosen under article 22. If the effects of the elected law under that provision were not reasonable in relation to one of the parties' consent, according to article 24 the law of the party's actual habitual residence at the time of seisin may be relied upon.

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1076 § 49, 1103.

1077 The Regulations set out the minimal conditions for the choice-of-court agreements. In absence of specific provisions, it should be said that, generally, the law of the country of the chosen court should apply over the validity of the agreement; part of the doctrine refers to the *lex fori* (Ibid. GRIECO, p. 467).

1078 Without going into detail, electronic communications are also possible (art. 23 of both Regulations). The same format applies for choice-of-court agreements, which are required to be in writing, dated and signed. It is stated that a 'simple exchange of e-mails' is not sufficient; a 'certified one', reversely, is allowed (Ibid. GRIECO).

1079 At the time the agreement is concluded.

1080 § 47, 1103; § 46, 1104; art. 23 of both Regulations.

1081 § 48, 1103; § 47, 1104, article 25 of both Regulations.

**377.** The law applicable to the matrimonial or partnership property regime should apply[1082] to transactions with third parties only if they should have known about the applicability of that law under due diligence or actually knew it. Due diligence is required when, among other laws, the applicable law is both the contracting spouse's/ partner's and the third party's habitual residence[1083].

## Section III Hague Convention 1978 and Related Practice

**378.** After 2019[1084], a huge legislative effort has been made in matters involving property relations linked to other family proceedings (*i.e.* divorce and succession)[1085]. This is complementary to the EU legislative progress over the whole sphere of cross-border family relations[1086]. The following study should help to identify specific elements for the anamnesis of habitual residence.

**379.** The HC-1978, *erga omnes*[1087], entered into force only in France, Luxembourg and the Netherlands[1088]. This analysis will focus on articles 3, 4, 6 and 7 of the Convention, which refer to the alternative (articles 3, 6) and primary implementation of habitual residence (articles 4, 7)[1089].

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1082 Upon request of one of them in a dispute between one or both spouses or partners and a third party.

1083 Art. 28.2 lit. a (ii). Reference to habitual residence in relation to the due diligence requirement is also made when either spouse or partner had complied with the requirements for disclosure or registration of the matrimonial/ partnership property regime specified by the law of the contracting spouse's/ partner's and the third party's habitual residence (art. 28.2 lit. b (ii)).

1084 We will not discuss some issues that may arise from the 'transitional provisions', in particular the one contained in art. 69(3). In this regard, B. BOURDELOIS, Feu la convention de La Haye du 14 mars 1978, vive le règlement de l'Union européenne Régimes matrimoniaux du 24 juin 2016 : de quoi se réjouir? in: B. ANCEL/ M-E Ancel, Le droit à l'épreuve des siècles et des frontières, LGDJ, 2018, p. 287.

1085 See also parts III and V.

1086 Some of the positive effects are certainly seen in the increasing EU cross-border (judicial and administrative) cooperation, facilitating the free movement of people (§72, 1103; § 70, 1104). With reference to family property regimes, such cooperation is present at least within the 18 EU Member States. Nonetheless, it is undoubted that conceiving an international instrument would help to extend such cooperation efforts beyond the EU borders. Therefore, given the small number of EU States applying the Regulations, a potential wish to conceive a Convention in the near future, precisely at the Hague, may be revived (Ibid. BOURDELOIS).

1087 Art. 2: "The Convention applies even if the nationality or the habitual residence of the spouses or the law to be applied by virtue of the following Articles is not that of a Contracting State".

1088 One of the reasons for such little implementation has been the absence of rules concerning international jurisdiction.

1089 The following are, instead, excluded from the scope of this study: issues of State (declaration) reservation according to which another connecting factor may apply (art. 5); the exceptions where the matrimonial property regime is governed by the internal law of the State of common nationality (art. 4.2); or the relations between 'contracting spouses' and third parties (art. 9).

## § I. Case Law Analysis

**380.** In a case[1090] involving a Moroccan couple who entered into marriage in Morocco (2001), and divorced in France (2007), the former wife filed for liquidation before the French courts. The question of habitual residence is topical here, in particular under article 4(1) which states that in absence of *professio juris*, the applicable law is the one of the *first (common) habitual residence after the conclusion of the marriage* (save exceptions provided in articles 4.2 and 4.3).

> The Appeal Court judged that the first common habitual residence of the spouses was in France after the conclusion of their marriage in Morocco. The Court considered as relevant 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)[1091]; and the request and the granting of a residency permit for both spouses. The Court excluded temporary holiday absences; absences during the 'request for permit'; temporary working activities in Morocco; the existence of a 'conjugal domicile' intended as an apartment next to the wife's family in Morocco before their departure to France; the place of marriage celebration or divorce; and their nationality (in particular in absence of declaration under article 5). The Cassation Court reversed the appeal judgment. The Court considered as relevant the following elements: the period between the marriage and the departure from Morocco to France (10 months); the absence of both spouses' immediate establishing (settlement) in France; the husband's regular return to Morocco during his wife's 'stay' there; the lack of the wife's intention to establish habitual residence in France (in particular revealed from a divorce judgment rendered in Morocco before the French one, and her 'new' marriage concluded there). In presence of a separate habitual residence, French law could not apply. Moroccan law had to apply by virtue of article 4(2).

**381.** In the present case[1092], a French couple got married in New York (29 July 1999), where they lived one year before returning to France. The husband filed for divorce, as well as for the determination of their property regime before the French courts (2007). The question of habitual residence is again central with regard to articles 4(1) and 7(2): namely, the first common habitual residence in absence of choice of applicable law, and the applicable law of the spouses' current habitual residence relying on the conditions of article 7(2).

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1090 Cour de cassation, civile, Chambre civile 1, 14 mai 2014, 12-29.922.

1091 "*Inès née en mai 2003 et décédée quelques jours plus tard à Bordeaux, mais aussi des attestations de la famille de Madame Y..., que l'intention des époux était de s'établir en France*".

1092 Cour de cassation, civile, Chambre civile 1, 12 avril 2012, 10-27.016.

To determine the habitual residence in France for the property relations established there, the Cassation Court considered as relevant: proof of address for both spouses, by virtue of bills and correspondence received at the Paris (owned) apartment in both names; proof of a bank account in both names where the common address is mentioned; two '*mains courantes*' submitted by the wife against her husband; and the husband's regular weekly return from Luxembourg to France to the same common apartment. In parallel, to determine the habitual residence in New York for the property relations established in the US, the Court retained: the period of time spent in New York before returning to France (May 2000), and the place of marriage celebration. The court did not give importance to the husband's professional activity in Luxembourg. The Court determined[1093] that the New York law was applicable under article 7(1), by virtue of the 'first habitual residence after the marriage' under article 4(1) for the property relations established in New York only.

**382.** This last case[1094] concerns a tri-national couple, both Syrian-Greek-French, who celebrated their union in Syria according to the Greek orthodox rite (1995). The husband filed for divorce and for the determination of their property regime before the French courts. Habitual residence applies again here, in absence of choice of applicable law, by virtue of article 4(1).

The Cassation Court considered as relevant: the period spent between the marriage and the relocation of the wife to France (where the husband had already lived for about 20 years) amounting to 7 days; their common French nationality[1095]; the wife's testimony admitting the couple's wish to settle in France[1096]; their child's place of birth in France; and their common (rented) apartment in France. The Court did not consider relevant: the existence of an apartment in Syria (lack of evidence such as lease contract, bills)[1097], nor the husband's expressed intention that their 'stay' in France was only temporary and they wanted to return to Syria (not proven by tangible evidence)[1098]. The

[1093] The decision also concerned the effects of the French law over the couple's future properties, but not in respect of the properties that they owned during their habitual residence in the US, by virtue of art. 8.

[1094] Cour de cassation, civile, Chambre civile 1, 19 décembre 2012, 12-16.633.

[1095] In this case, the common nationality did not apply because the couple held multiple nationalities (see art. 15.2 of the Convention). Art. 26(2) of the 1103 Regulation envisages the same solution.

[1096] "*le couple s'installe en 1995 à Vichy*".

[1097] "*qu'ultérieurement il affirmera qu'il a existé une première résidence en Syrie mais n'en a ni précisé la localisation ni justifié la réalité par la production d'une pièce telle qu'un bail ou la réception de courriers à cette adresse*".

[1098] "*mais argue de ce que cette installation, dans un appartement loué, avait un caractère provisoire et devait être suivie d'une installation en Syrie dès qu'il aurait obtenu les spécialisations qu'il comptait, situation qui ne s'est pas réalisée*".

Court confirmed that French law applied by virtue of their first common habitual residence after their marriage (article 4.1).

**383.** These cases show that there are specific elements used to determine habitual residence in the context of property regimes. The fact that the Convention was referring to habitual residence for the sole purposes of applicable law, compared to the Regulations, does not prevent us from applying a similar factual analysis. An example is found in the use of habitual residence under article 4(1), often cited in the decisions, that is the same under article 26(1)(a). Significant elements, often recalled in the French cases, are:

- the *appreciable period* to determine where the first habitual residence immediately after the marriage is established. On this element, discrepancy is noticed in relation to the amount of sufficient time allowed to determine the couple's, or family, settling;
- the existence of a *family home* (rented or owned), in which the couple, and possibly, the children live. Such existence is also supported by *administrative evidence* such as correspondence, bills, bank accounts, containing reference to the couple's or family's address;
- the *regular resettling*, in cases where one of the spouses or partners lives for some periods of time separately due to different reasons (*i.e.* work, visa, permit request).
- the *child's place of birth and place of living*;
- the *intention* which must be proven by tangible elements such as the ones mentioned here;
- the *common nationality*;
- the *place of celebration of marriage*.

## § II. Two-fold Test Approach Applied in Context

**384.** According to the *two-fold test approach* used in this study, the decisive elements, summarised in subsection II, should be: the family home supported by administrative evidence; the regular resettling; the child's place of birth and place of living. The intention and the common nationality should be complementary, non-decisive, elements.

**385.** The appreciable period related to the assessment shows fragmentation following judicial discretion. In this sense, some clarity should be legislatively provided. Such period may refer to six months before the commencement of proceedings. In practice, this would be unrealistically applied if reference were made to the '*first habitual residence after the marriage*' (1103 Regulation, article

26.1)[1099]. In the framework of article 6(a) of the Regulations, the seisin is indicated as a freezing time for the *habitual residence determination*. In this regard, the six-month period rule[1100] would serve to additionally specify the period for *the habitual residence assessment*.

**386.** There is still one further element that should be considered for the anamnesis: the *place of celebration of marriage* as highlighted by the Court of Appeal in the first and second decisions examined in subsection II[1101]. The place of marriage celebration should often be a complementary, non-decisive[1102], element and only in specific circumstances it may be considered determining[1103].

## Section IV National Perspectives

### § I. Property Relations in the Context of Nordic Situations

**387.** The Nordic Convention on Marriage (Adoption and Guardianship) 1931[1104] refers in its article 3 to the Law (2019: 234) on the property relations of spouses and cohabitants in Nordic situations. This Law applies only in situations involving Nordic marriages falling outside the EU Regulation 1103/2016[1105]. The Nordic Law does not cover property relations arising out of the registration of partnerships. In this regard, this subsection will not deal with hypothetical cases involving the intersection of the Regulation-Nordic

[1099] Unless intended as habitual residence should be established and assessed within six months *after* the conclusion of the marriage (section III *supra*).

[1100] This rule would also reduce jurisdictional gaps in those situations envisaged in article 6(b) and (c). This would be the case if a bi-national couple's last common habitual residence were in a Member State (A) before the seisin; and the couple separated and left the country without establishing (yet) a new common habitual residence in Member State (B). If one of them later decides to return to Member State A and seises the courts therein by virtue of article 6(b), the judge of Member State A would have to determine if during the timeframe, between the departure and the return, both the applicant's and respondent's habitual residence has been lost. Furthermore, it should determine if the respondent has not yet established a new habitual residence in Member State B or that has established it in a third State C. In the affirmative, lit. b and c will remain ineffective (lit. d would not apply). Reference to an appreciable period would be important to assess the regular physical presence and the settled purpose, differentiating them from temporary absences, and to reduce the lengthiness of the judicial anamnesis.

[1101] 12-29.922; 10-27.016.

[1102] As the decisions in subsection I have shown, a couple who entered into marriage in State A, before settling therein (so no habitual residence is established), may move straight after to State B and finally settle in this last State. In this scenario, the place of marriage celebration would certainly be non-decisive.

[1103] In particular, in presence of other factors, it may be used as a 'tie-breaker' rule. This would be the case in presence of regular cross-border movements, where the place of marriage celebration might indicate a family base at a relevant time (*cf. infra* section V in relation to concurrent habitual residence).

[1104] Norway, Denmark, Finland, Iceland and Sweden.

[1105] According to art. 62(3) of the Regulation and chapter 3 (section 1) of the Nordic Law 2019.

conflict-of-law rules, precisely because in situations involving cross-border marriages in the *EU18*, the Regulation takes precedence.

**388.** The Nordic Law provides that the law of the spouses' habitual residence[1106] at the time of marriage governs property relations (chapter 3, section 9). Alternatively, it refers to the law of the spouses' habitual residence[1107] if they have lived in one Contracting State for two years (section 9). The two-year period does not apply if they are nationals of that State, or if they had already lived there before settling (section 9). A choice of applicable law is possible on an alternative basis in favour of: one of the spouses' habitual residence; one of their respective nationality at the time the agreement is concluded[1108] (section 8); their last common habitual residence where one of them continued to reside (section 8). The law applicable to succession should be extended towards the division of properties arising out of matrimonial regimes (section 5).

**389.** Jurisdiction is in principle vested in the authorities of the common habitual residence[1109] unless the proceeding is ancillary to divorce, marriage, adoption or guardianship involving division of properties, which may lead to conflicting decisions (sections 3-4)[1110].

## § II. Turkey-EU

**390.** In Turkey, the rules on domestic jurisdiction determine international jurisdiction over citizens and foreigners[1111]. The assumption is that civil partnerships are not allowed under Turkish law.

**391.** For the purposes of international jurisdiction over family matters, the respondent's habitual residence[1112] applies subsidiarily to his/ her domicile

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1106 Spouses should both be nationals of one of the Contracting States.

1107 Spouses should live in a Contracting State of which they are not nationals.

1108 Before or after the marriage.

1109 M. JÄNTERÄ-JAREBORG, The Nordic Input on the EU's Cooperation in Family and Succession Law: Exporting Union Law Through 'Nordic Exceptions', in: B. HESS/ M. BERGSTROM/ E. STORSKRUBB, EU Civil Justice: Current Issues and Future Outlook, Vol. 7, 2016, p. 150 ff.

1110 In this regard, we find very interesting the interconnection rule adopted by the Nordic Convention concerning property regimes and custody proceedings. An intradisciplinary operation of habitual residence, in that a 'family analysis' would be required in order to locate the parental and child's habitual residence in one State, could be helpful to avoid, or reduce, lengthy and expensive proceedings in two States. It will also be beneficial to the judicial perspective over property regimes in order to enlarge the horizon towards including child's interests – family interests. Child's proprietary rights are indeed comprised in the notion of child's best interests (S. BERKMAN, Children in Relationship Property Proceedings: Are they getting a fair share?, Bachelor dissertation, University of Otago, 2017). This was the subject of analysis in one of my papers 'Human rights of children within property regimes' accepted by the International Society of Family Law (World Conference 2020).

1111 PIL 'code', art. 40: "The international jurisdiction of the Turkish courts shall be determined by the domestic jurisdiction rules". The provisions are already translated into English.

(known as legal domicile). The court at the place where the assets are located is also an available forum in presence of bank accounts and real estate in Turkey. In applications involving property regimes together with divorce, domicile and habitual residence apply alternatively. Reference is made to either of the spouses' domicile, and to the *common habitual residence of the spouses for the last six months before the proceedings*. If Turkish nationals cannot bring proceedings on their personal status in their place of (foreign) domicile, Turkish courts may retain jurisdiction relying on one of the spouses' nationality. Furthermore, they could also exercise jurisdiction on a subsidiary basis, by virtue of: a) a spouse's habitual residence; b) a spouse's last domicile; c) simply before the courts of Istanbul, Ankara or Izmir[1113]. Choice-of-court agreements in favour of Turkish courts are not allowed under Turkish law. By contrast, they are applicable in favour of foreign courts for disputes involving a foreign element. Turkish courts may retain jurisdiction in case foreign courts decline, or if no objections against the jurisdiction of Turkish courts are raised before them[1114].

**392.** Concerning the applicable law, reference is made to the spouses' common nationality at the time of marriage or, failing that[1115], to their common habitual residence or, again subsidiarily, Turkish law[1116]. Choice-of-applicable law agreements can be concluded, designating the law of the couple's common habitual residence or nationality at the time of marriage[1117]. The following case may illustrate the interaction between Turkish-EU rules on matrimonial regimes:

> A Turkish-French couple, he Turkish, she French, celebrate their wedding in Germany where they live and work. They own properties

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[1112] The concept of habitual residence (*mutad mesken*), under Turkish law, should reveal a realistic and actual life relationship (see *i.e.* G. ÖZTEKIN GELGEL, Devletler özler hukukunda velayet, çocuk kaçirmalari, evlat edinmeye iliskin problemler, *İstanbul Ticaret Üniversitesi Sosyal Bilimler Dergisi*, 2, 2005).

[1113] Art. 41: "(1) If lawsuits concerning the personal status of Turkish citizens who do not have a domicile in Turkey are not or cannot be filed in the foreign state where they have their domicile and if there is no competent court in Turkey, the lawsuit shall be filed at the place of such citizen's habitual residence; or if the person does not have a habitual residence in Turkey, it shall be filed at his/her last domicile in Turkey. In the absence of a last domicile in Turkey, it shall be filed with the courts of Istanbul, Ankara, or Izmir*"*.

[1114] Art. 47(1): "(1) Except in cases where the jurisdiction of a court is determined according to exclusive jurisdiction of specific court principles, the parties may agree on jurisdiction of a court of foreign state in a dispute that contains a foreign element and arises from obligatory relations. The agreement is invalid unless it is proved by written evidence. The competent Turkish court shall have jurisdiction only if the foreign court decides that it has no jurisdiction or if a plea as to jurisdiction is not presented in Turkish courts".

[1115] Common nationality may apply if acquired at a later stage (see art. 15(3)).

[1116] Immovables are governed by the law of the *situs*. Art. 15(2): "In case of liquidation of property, the immovables are governed by the state law which they are located in*"*.

[1117] Art. 15(1): 'Spouses may clearly designate either the internal law of their habitual residence or national law at the time of marriage to govern their matrimonial property. Where no such choice has been made, the common national law of the spouses at the time of marriage, or in the absence of common law, the internal law of their habitual residence at the time of marriage shall govern or in the absence thereof, the Turkish law shall govern".

in Turkey, France and Germany. During a separate holiday in Turkey, the husband would like to seise the Turkish courts for divorce and the determination of the couple's property regimes. Aware of that, the wife is opting to file before the German courts for the enforcement of the spouses' prenuptial agreement.

**393.** There is no treaty in place between Turkey and Germany neither for international jurisdiction nor for applicable law concerning property regimes. For the purposes of international jurisdiction, the courts in Germany would have to primarily determine the habitual residence of the spouses (or one of them depending on the subsidiary implementation)[1118] under article 6 of the 1103 Regulation. Concerning applicable law, the courts in Germany would have to look at the first common habitual residence after the marriage by virtue of article 26(1)(a)[1119].

**394.** Turkish courts, in principle, would not retain jurisdiction[1120]. Actually, they should rely on the respondent's legal domicile or habitual residence, which is in Germany under the present hypothetical. With regard to applicable law, the courts in Turkey should look at the habitual residence at the time of marriage[1121]. Still, Turkish courts 'may' retain jurisdiction and apply their own law over the immovables located in Turkey.

**395.** One should conclude that the German courts (whether first or second seised)[1122] should exercise jurisdiction and apply their own law, considering that the couple's habitual residence was established in Germany at the seisin (jurisdiction), and after the conclusion of the marriage (applicable law). German law should apply over 'the whole of the assets', including those in Turkey (article 21)[1123].

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1118 Art. 6(d) cannot apply.

1119 They might implement subsidiarily art. 26(1)(c), or exceptionally art. 26(3).

1120 This is so even if the petition is related to personal status, given that the Turkish citizen could indeed bring proceedings before the German courts of his domicile.

1121 In absence of common nationality.

1122 *Lis pendens*, or possibly related actions, for instance in accordance with art. 17 or 18 of the Regulation, should not apply between Turkey and Germany. The German and Turkish courts would refer to their own respective private international law rules.

1123 That said, the effects of the Turkish statutory regime over the couple's property relations should not be different from the German one, under the current Turkish law. The latter, after the enactment of the Civil code of 2002, provides that the legal regime is community of gains. However, for couples that entered into marriage before 2002 (Civil code of 1926 in force), the legal regime would be separation of property.

## § III. US-EU

**396.** In the US, international jurisdiction and applicable law[1124] over properties are principally attributed in accordance with two connecting factors: the *situs* and the parties' domicile, both of which should reveal *the most significant relationship*. Such relationship should connect the jurisdiction and the law with the parties'[1125] assets[1126]. This analysis focuses exclusively on the interplay between *situs* and domicile, and examines the potential operation of additional connecting factors[1127].

**397.** The instrument that is primarily taken as a reference is the 'Restatement' (Restatement Second of Conflict of Laws)[1128]. In absence of statutes in this field of family law, the implementation of the principles contained in the Restatement is entirely discretional on behalf of the judge[1129]. The initial distinction made under the Restatement refers to the one between movables and immovables[1130]. In matrimonial proceedings involving the determination and liquidation of immovables, the applicable law is the one of the *situs* (§ 233-34). Conversely, in proceedings involving movables, domicile[1131] applies. In relation to movables, two particular moments should be considered: a) the first matrimonial domicile at the time of marriage governs the properties acquired before it; b) the matrimonial domicile at the time of acquisition applies to the properties owned in the course of marriage (§ 257-259). These rules trigger a

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1124 Under US law, the parties are allowed to conclude (before or after the marriage) agreements determining the applicable law. By recurring to party autonomy, the parties may derogate from the general principles, for instance excluding the situs for immovables and the domicile for movables, and destinating their entire assets (movables and immovables) under the same law. In practice, such agreements do not seem to have 'force of law' but more an 'orientative' function determining the most significant relationship (M. J. STEGMAN, Matrimonial property in the American states: choice-of-law and conflict-of-laws issues, *Trusts & Trustees*, Vol. 25, 2019, p. 43).

1125 US citizens or foreigners.

1126 J. W. SINGER, Property Law Conflicts, *Washburn Law Journal*, Vol. 54, 2014 p. 133: "These cases represent paradigm false conflicts when the situs state has legitimate and strong interests in applying its laws to achieve its policies and the domicile state cannot legitimately assert whatever interests it may have "; Ibid. STEGMAN, p. 44.

1127 It should be noted that, depending on the state, such rules may apply to both spouses and partners (*cf.* section I).

1128 The Restatement is a treatise that is persuasive, not binding, towards Federal state authorities (ibid. STEGMAN, p. 42).

1129 It should be observed that Federal states may decide to apply neither the Restatement principles, nor the parties' agreements; but to go for an interest analysis in the application of their law. The determination of such 'interest' would be allocated to the US court first seised. Scholars argue that the first element to be looked at is the 'residence' of the party, together with additional factors such as the degree of protection: for instance, in divorce proceedings, of the at fault spouse (*i.e.* in the redistribution of assets). Additionally, in jurisdictional conflicts regarding a bi-national 'shared interest', the law of the competent court should apply. In any case, the determination process remains discretional.

1130 Ibid. STEGMAN; S. C. SYMEONIDES, Choice of Law, The Oxford Commentaries on American Law, 2016, p. 581.

1131 Matrimonial, or marital, domicile.

consequent 'multi-applicability' of different laws over different movables. It is debatable whether the change of domicile would affect the movables acquired during the marriage, for which the answer seems to be in the negative[1132]. With regard to international jurisdiction, the competent courts would be the ones of the *situs*, alternatively those exercising personal jurisdiction through the spouses' common domicile, or the defendant's domicile, at the time of the commencement of the proceedings.

**398.** In actual fact, US scholars indicate that the scission principle in relation to marital property is nowadays largely irrelevant. To this end, the principle of 'equitable allocation of all assets' on divorce would prevail, determining both jurisdiction and applicable law over proceedings incident to divorce upon the courts of the common domicile of the parties[1133]. An example should illustrate this rule: An American citizen owns immovables in Virginia, Washington, and in Geneva (Switzerland). A Chinese citizen owns immovables in Nevada and in Suzhou (China). They meet in New York, where they both live and work. After a period of cohabitation, they purchase a house in New York, as well as expensive paintings for its decoration. The couple enters into marriage in New York and later moves to California for employment reasons. They buy a new house in Los Angeles and furniture for it with the intent to let the house in New York. Some time after their divorce, the couple decides to seise the court in California for the determination of their properties. According to the principle of equitable allocation of all assets on divorce[1134], the courts in California[1135] should exercise jurisdiction and apply their own law over all the spouses' assets[1136].

**399.** Let us suppose that, instead of moving to Los Angeles after the marriage, the couple moved to Paris and, following divorce, the husband returned to New York. Under article 6(b) of the 1103 Regulation, the French courts would be internationally competent over the couple's property relations. In absence of choice of applicable law, the French courts should assess the couple's *first common habitual residence after the conclusion of the marriage*[1137] by virtue of

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[1132] This analysis aims to list the US rules of jurisdiction without going into details regarding their operation. For further explanation on this point see ibid. STEGMAN, p. 45.

[1133] Ibid. HAY *et al.*, p. 664.

[1134] Supreme Court of Washington, *In Re: the marriage of Kowalewski* [8 May 2008] 79662-9. This case concerned a Polish couple who lived in the US (Washington). The spouses petitioned for marital dissolution before the Pierce County Superior Court (Washington), which proceeded with the division of immovables and movables located in Washington and Poland. The husband filed a motion challenging the Washington jurisdiction over the real property in Poland. The court rejected it.

[1135] Place of the situs and defendant's domicile, but also common marital domicile.

[1136] Court of Appeals of North Carolina, *Lela Christine Sheehy Sherlock, Plaintiff, v. Roger Thomas Sherlock, Defendant* [1 May 2001] COA00-356.

[1137] This would indicate the time when the habitual residence is already established, if that is the case as much likely in the current hypothetical, and not prospectively (ibid. KOHLER, p. 206).

articles 20 and 26, which would probably determine New York[1138]. The US internal conflict-of-law rules[1139] would apply over the immovables and movables by virtue of article 33[1140] and article 21 of the Regulation, which provides for the unity of applicable law.

**400.** In matters involving the distribution of property as a related action to personal jurisdiction over divorce, the notion of 'residence'[1141] is considered synonymous with domicile[1142]. The following case should clarify such interchangeable operation. The case[1143] involved a US couple that applied for divorce and property division before the courts of Tennessee. Both spouses contended the divorce decree with regard to jurisdiction and distribution – at the time of divorce the husband was living in Tennessee and the wife in Florida. The Court of Appeal, among other matters, had to interpret the notion of domicile under US law.

> The Court confirmed that jurisdiction had been correctly exercised. It referred to the six-month period rule, according to which a person should be resident in that state before the seisin[1144]. To determine residence (as synonymous with domicile), the Court considered it as the place where a person has a principal home, enjoys his/ her fortunes, and lives regularly[1145]. Such place would be established through tangible actions accordingly with the individual's intention[1146]. 'Declarations' and 'conduct' were not the only elements considered by the Court. In addition to physical presence at the time of filing, particular attention was given to the vehicles and personal properties located in Tennessee. The Court said that other ties were indeed

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1138 Common place of living and of principal marital home at the relevant time. Complementary relevance should be allocated to the place of habitual work and of marriage celebration.

1139 These are the US rules examined in this subsection. We precise that the Property Regimes' Regulations exclude the renvoi (*i.e.* 1103, art. 32).

1140 § 1: "Where the law specified by this Regulation is that of a State which comprises several territorial units each of which has its own rules of law in respect of matrimonial property regimes, the internal conflict-of-laws rules of that State shall determine the relevant territorial unit whose rules of law are to apply".

1141 In principle, this notion does not mean habitual residence.

1142 See Court of Appeals of Tennessee, *Conley v. Conley* [9 May 2005] E2004-01309-COA-R3-CV: "*Our courts have interpreted the term 'residence' as used in Tenn.Code Ann. § 36-4-104(a) to be synonymous with domicile*".

1143 Ibid. *Conley v. Conley*.

1144 "The residency requirement in Tenn.Code Ann. § 36-4-104(a) is intended to assure that Tennessee has a sufficient relationship with the parties and their marriage to make it reasonable for the courts of this state to affect the parties' marital status".

1145 "Domicile is defined as the place where a person has his principal home and place of enjoyment of his fortunes; which he does not expect to leave, except for a purpose; from which when absent, he seems to himself a wayfarer; to which when he returns, he ceases to travel". It is our opinion that such an interpretation also refers to habitual residence, especially when the tangible actions prevail in the assessment as it was the case in the present judgment.

1146 "To create domicile in Tennessee, a person ordinarily must not only intend to establish a personal home in this state but must also act consistently with this intention".

established with Florida, for instance the voting registration and driving license issued there, which however did not alter the *significant relationship* with Tennessee. The Court confirmed the jurisdiction of Tennessee.

## § IV. UK-EU

**401.** In the UK, with specific focus on England and Wales[1147], the EU Regulations do not apply. The Matrimonial Causes Act 1973 provides a set of statutory principles. These are also referred to as '*statutory checklist of common sense considerations*'[1148] applicable to matters involving family property relations[1149]. In practice, whenever the judge is competent on divorce[1150], he/ she would also potentially apply orders referred to as ancillary relief relying on fairness and equality according to the Matrimonial Causes Act (section 25)[1151].

**402.** The Domicile and Matrimonial Proceedings Act 1973 (part II, section 5.2) governs the jurisdictional rules on divorce[1152]. It makes direct reference to the Brussels IIA Regulation[1153]. Thus, for divorce proceedings involving England and Wales plus a third State[1154], the English judge would apply similar alternative grounds mentioned in both the said Act and Brussels IIA, article 3[1155].

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1147 We will focus on the jurisdiction of England and Wales.

1148 *Z v. Z* (Divorce: Jurisdiction) [2009] EWHC 2626 (Fam).

1149 The effects of the partnership dissolution, under the Civil Partnership Act 2004, are essentially the same as those arising from the divorce dissolution (ibid. BEAUMONT/ MCELEAVY, p. 929). We recall that matrimonial regimes are a category that do not necessarily exist under UK law (ibid. COESTER-WALTJEN *et al.*, p. 1235).

1150 As for the US, we understand that it would be difficult to cite case law dealing with family property relations only. Therefore, as for the US case law, we will refer to situations in which both divorce and property relations are implicated.

1151 See S. GILMORE/ L. GLENNON, Hayes and Williams' Family Law, 2012, p. 63.

1152 Additionally, the Matrimonial and Family Proceedings Act 1984 governs the financial claims filed after a divorce pronounced in a foreign country. In relation to the Matrimonial and Family Proceedings Act 1984, some distinction may be encountered in relation to the Scottish jurisdiction, particularly relating to the judicial discretion over divorce and financial relief. In this regard, ibid. BEAUMONT/ MCELEAVY, p. 924.

1153 *Cf. infra* part III.

1154 This means that for pending proceedings related to UK-EU cross-border divorce, and instituted before the end of the transitional period, the English judge will continue applying the rules set out under Brussels IIA. By contrast, since 11 pm of 31 December 2020 (end of the transitional period), the 'Jurisdiction and Judgments (Family) (Amendment etc.) (EU Exit) Regulations 2019' entered into force, revoking the effects of Brussels IIA in the UK for proceedings started after the end of the transitional period.

1155 This Act also contains an additional ground based on either of the party's domicile in England and Wales.

**403.** Substantially, regarding international jurisdiction over property relations, the English courts would refer to the alternative grounds of habitual residence set out in the Domicile and Matrimonial Proceedings Act[1156]. With respect to the rules on applicable law, the conflict-of-law rules in England and Wales indicate the law of the 'matrimonial domicile'[1157], although English law is also applied as an indirect consequence of the jurisdiction (*lex fori*)[1158]. For proceedings falling outside divorce, or involving divorce judgments obtained abroad, it is observed that the English judge could still exercise jurisdiction over property relations[1159]. The following cases should help in illustrating the principles encapsulated in the mentioned Acts.

**404.** This case[1160] concerns a French-German couple, he, French, living in England, she, German, living in Monaco with their two children born in England. The couple concluded an ante-nuptial agreement under German law, and entered into marriage three months after in London. The agreement, for the relevance to this analysis[1161], provided that, during the marriage, separation of property would have applied. It included a choice of German applicable law over matrimonial property and succession. The couple separated and the husband filed for financial relief before the English courts. The High Court reduced the weight attributed to the agreement, as it affirmed that the husband was in a weaker circumstantial situation. In particular, the Court highlighted the undue influence or pressure under which the husband had to conclude the agreement[1162]. The Court of Appeal reversed this judgment. The husband appealed.

> The Supreme Court reiterated the principle that the power of English Courts is discretional, meaning that they are not bound by party

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1156 These grounds are also similar to the habitual residence of art. 6 of the Property Regimes' Regulations. An additional ground provided under UK law, but not under the Regulations, is the applicant's domicile/ habitual residence. The time for the habitual residence determination is the same (the seisin under the Regulations, the date of the application under UK law).

1157 Domicile, under the English law of marital properties, incorporates the matrimonial, or the husband's, domicile in situations involving both divorce proceedings or marital properties only (M. DAVIE, Matrimonial Property in English and American Conflict of Laws, *ICLQ*, Vol. 42, 1993, p. 873). Other authors indicate that either of the spouses' domicile should suffice to determine the applicable law. In addition, the establishing of the English jurisdiction would serve to indirectly determine English law as the *lex fori* (ibid. BEAUMONT/ MCELEAVY, p. 911).

1158 Ibid. COESTER-WALTJEN *et al.*, p. 1245.

1159 For instance, under the Matrimonial and Family Proceedings Act 1984, but in particular upon discretion of the competent English judge based on *forum conveniens* (*cf.* part I, chapter IV, section V above), or closest connection (*i.e.* one party's domicile, residence, nationality, location of the assets).

1160 *Granatino v. Radmacher* [2010] UKSC 42.

1161 See § 14 for additional clauses of the agreement.

1162 See § 15: "Baron J held that the circumstances surrounding the conclusion of the agreement fell foul of a number of the safeguards set out in para 4.23 of the Home Office consultation document (see para 5 above), and for that reason, the weight to be attached to it fell to be reduced".

autonomy[1163]. The discretion of the English judge relies on the principles enshrined in the Matrimonial Causes Act[1164]. The Court also confirmed the principle under which the English courts, competent under financial relief, will apply English law regardless of the parties' domicile, or of any other foreign connection (§ 103). The Court concluded that the husband was aware of the future implications arising from the conclusion of the agreement (§ 98)[1165]. The Court upheld the appeal decision and dismissed the husband's appeal.

**405.** This second case[1166] concerned the last proceeding of a 'titanic litigation' (9 million GBP, 4 year-proceedings). The former spouses were of Malaysian-Chinese origins. The husband was a Malaysian national and domiciliary[1167]. The wife was Australian and Canadian, habitually resident in the UK. They entered into marriage in Malaysia[1168]. The wife moved to Australia and, later, Canada[1169]. Afterwards, the couple purchased a house in England[1170], where they separated – she remained in England, he returned to Malaysia. She filed a divorce *ex-parte* petition before the English courts. He filed for divorce before the Malaysian courts. The English courts retained jurisdiction relying on *the habitual residence of the applicant during one year before the filing of the petition*[1171]. The Court focused on the disputed house to determine whether this could be considered as their '*family home*'. In this sense, pertinent elements were: the fact that that house had never been rented; the presence of the wife's clothes and

[1163] § 2-3: "A court when considering the grant of ancillary relief is not obliged to give effect to nuptial agreements […]. The approach of English law to nuptial agreements differs significantly from the law of Scotland, and more significantly from the rest of Europe and most other jurisdictions. Most jurisdictions accord contractual status to such agreements and hold the parties to them, subject in some cases to specified safeguards or exceptions. Under English law it is the court that is the arbiter of the financial arrangements between the parties when it brings a marriage to an end. A prior agreement between husband and wife is only one of the matters to which the court will have regard".

[1164] In particular, this discretion is founded on: fairness to hold the parties to the agreement; first consideration towards the children's welfare; respect of individual autonomy; distinction made between matrimonial and non-matrimonial properties in order to 'secure' the latter in case of legal separation; future circumstances and the recovery that should be granted to each spouse or partner at the time of separation, independently from what is contained in the agreement (§ 75-80).

[1165] In particular, that the agreement and the choice of applicable law were valid (§ 101); and that the couple's intention (revealed from the agreement) was to make London their first marital home, but to separate each spouse's own properties to be governed under German law (§ 96-98-101).

[1166] EWHC, *Chai v. Peng & Others* [2017] 792 (Fam).

[1167] The husband remained most of the time in Malaysia for professional reasons.

[1168] Two children were born in the UK.

[1169] Three children were born in Australia.

[1170] There is not much evidence about its use and ownership. Another house, central to the dispute, was purchased (£ 6.75 million) in the UK and managed by three companies (Norcross, Central Point and Dunross) that were owned by the husband. The three companies, together with the husband, represented the respondent before the instant Court.

[1171] Contrary to the Malaysian courts which argued that they had jurisdiction over divorce and financial claims based on *forum conveniens*.

the children's rooms; the evidence of the wife's e-mails confirming the 'strong' connection with, and attention to, that house[1172].

**406.** The following example should further deal with the intersection of the EU-UK rules: A tri-national couple, she, British, he, French-Italian, gets married in Italy and concludes an agreement, which contains a *professio juris* in favour of Italian law (community of properties)[1173]. They later move to live in France. Thereafter, the wife relocates to England with their children, where they stay at her parents' house. The husband continues to reside in France. After one year, the wife files for divorce in England. The husband files in France for the enforcement of the marriage agreement.

**407.** From the perspective of the English judge: jurisdiction should be retained over the divorce by virtue of Brussels IIA, article 3(1)(a), sixth indent[1174]. Such jurisdiction may be the basis for English applicable law. Jurisdiction and applicable law may be extended over the couple's property relations upon discretion of the judge who would potentially modify, intrinsically or not, the marriage agreement. From the perspective of the French judge: jurisdiction would be exercised under article 6(b), enforcing the marriage agreement under article 22(1)(a)[1175]. This may result in a potential conflict of jurisdiction and applicable law arising out of an EU-UK[1176] family property relations[1177].

## § V. Switzerland-EU

**408.** In Switzerland, the SPILA contains codified rules for both international jurisdiction and applicable law. In related actions linking property relations to

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1172 In locating the *wife's habitual residence*, other than the disputed house, the Court considered: factual elements (interests, permanence or stability); the intention; the genuine connections with English society (membership of gardening clubs, the Royal Horticultural Society, and the local Church); and the length of residence (the days spent in England, Malaysia, Canada, Australia, out of which 196 in England), irrespective of immigration status. Therefore, for the Court, England was the wife's habitual residence and jurisdiction should be exercised there.

1173 A divergence with the EU Property Regimes' Regulations is the potential rejection, in principle, of party autonomy under English law – or at least subject to judicial discretion that will often apply the *lex fori* (ibid. COESTER-WALTJEN/ PINTENS/ SCHERPE, p. 1239). This leaves important questions, even more so than in the case of the US, of unpredictability and uncertainty related to the freedom of the parties. The seminal case *Radmacher* represents an exception to the preceding rule and a precedent that mitigates judicial discretion (J. CARRUTHERS, Party Autonomy In The Legal Regulation Of Adult Relationships: What Place For Party Choice In Private International Law?, *ICLQ*, Vol. 61, 2012, p. 900).

1174 It is recalled that if the proceedings were instituted after the transitional period, the same ground of jurisdiction would apply under the Domicile and Matrimonial Proceedings Act 1973, s. 5.2.

1175 Art. 22(1)(b) would also apply. The law of the State of any of the spouses' nationalities can be elected (Ibid. KOHLER, p. 206).

1176 England and Wales.

1177 In practice, it may exceptionally be that the English judge would decide to enforce the marriage agreement (*cf.* Radmacher) and/ or the French judge would decide to decline jurisdiction, under related actions, in favour of the English court.

succession or divorce proceedings, the competent authorities for the latter[1178] would exercise jurisdiction over property regimes (article 51)[1179]. In cases where property regimes are the subject matter of principal actions, the competent authority is the one of the spouses'/ partners' domicile or, subsidiarily[1180], habitual residence (SPILA, article 46). The 'separate' habitual residence[1181] is enough to determine international jurisdiction. The Swiss authorities should retain jurisdiction also over Swiss citizens domiciled, or habitually resident abroad, in circumstances where proceedings may not be reasonably brought in either of those States (SPILA, article 47)[1182].

**409.** For the purposes of applicable law[1183], in absence of *professio juris*, the law of the actual or last (common) domicile applies (SPILA, article 54)[1184]. Party autonomy can be exercised, alternatively, in favour of the law of the actual common domicile/ prospective domicile after the marriage celebration[1185], or the law of either spouse's nationality (SPILA, article 52)[1186].

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1178 ATF, 5A_599/2009 [3 March 2010]. This is a case involving a German-Swiss couple living in Switzerland. The following are the facts in brief. The wife filed before the Swiss courts for the annulment of a post-nuptial agreement that provided for a regime of separation of properties. The husband petitioned for divorce in Poland by virtue of his domicile. He further objected to the Swiss jurisdiction over the post-nuptial annulment, being in favour of the Polish jurisdiction. The case arrived before the Swiss Federal Court. The Court rejected the husband's appeal but it referred to the principle of the 'unité du *jugement du divorce*'. The Court retained jurisdiction over the annulment of the agreement, as prior to the divorce judgment rendered by the Polish courts. It added that once the Swiss judgment was rendered, the Polish court, competent over the divorce, should extend such jurisdiction over the liquidation of the matrimonial regime, by virtue of same principle of unity. The Court added that, in the absence of such 'extension' of jurisdiction by the Polish courts, Swiss jurisdiction would continue to be exercised, and Swiss law should apply under art. 64 SPILA. We observe that the principle of unity should be extended to the registration of partnerships (ibid. GUILLAUME, p. 421).

1179 Art. 51 refers notably to art. 59 for divorce; art. 86 for succession; and art. 46 for matrimonial effects, which include principal issues of property regimes not ancillary to divorce and succession proceedings.

1180 Ibid. DUTOIT, Commentaire de la loi fédérale du 18 décembre 1987, art. 46.

1181 Whether concerning the respondent or the applicant.

1182 Ibid. DUTOIT, in absence of Swiss domicile, habitual residence and nationality, the Swiss authorities may still exercise jurisdiction based on art. 10(b) of the SPILA, which refers to a provisional jurisdiction for urgent matters.

1183 The Swiss rules governing applicable law are substantially different from those of the Regulations. In art. 26 of the latter, the 'timing approach' differs, namely when it refers to the time of the conclusion of the marriage. In art. 22, the formula of the (separate or common) habitual residence is different from that of (common) domicile in art. 52 SPILA – where habitual residence applies implicitly. Lastly, art. 22 better indicates the time of 'the conclusion of the agreement'.

1184 Habitual residence is implicitly and subsidiarily applicable (art. 20.2 of the SPILA). In absence of common domicile, the common nationality or, failing that, the Swiss regime of separation of property apply. With regard to the partnership, when the applicable law determined through the mentioned provisions do not recognise that status, Swiss law would govern it (art. 65 lit. c, 1) – except in the case of maintenance, which is not pertinent to the current analysis.

1185 Also in this case, habitual residence applies implicitly and subsidiarily.

1186 Concerning the partnership, the law of the place of the partnership registration may also be chosen (art. 65 lit. c, 2).

**410.** The following hypothetical should illustrate the EU-Swiss rules: A Swiss-French same-sex couple concludes a partnership in Switzerland, where they live for some years. Following disputes in the relationship, the French partner relocates to live and work in France. The Swiss partner also moves there where she agrees with her employer (*Credit Agricole*) to work on a remote basis for two months. Afterwards, she signs an official declaration before the French local authorities indicating that she is resident at her partner's address. Their relationship still being tense, she returns to Switzerland (for a "*transitional period of her life, currently unable to predict the future*", she says). The couple had concluded an agreement choosing French law as applicable to their immovables and shares, located both in France and Switzerland. Both partners would like to know which jurisdiction and law should govern their property relations.

**411.** In the current scenario, the focus is on the property relations' claim, dissociating it from the dissolution[1187]. The French partner may seise the French courts according to article 6(b) of the 1104 Regulation. The Swiss partner would be entitled to file before the Swiss courts for the annulment of the partnership agreement under article 51(1)(c) SPILA ('renvoi' to article 46)[1188].

**412.** The French judge may consider that the couple was habitually resident in France and the French partner still resides there (article 6 lit. b). In particular, the French judge may determine that France is the place of the couple's life settlement by virtue of, *inter alia*, the residency documents signed by the Swiss partner[1189]. The choice of the French property regime should also be a complementary, non-decisive, element for such determination.

**413.** The Swiss judge may consider that the Swiss partner might no longer, not yet (in absence of long-term intent)[1190], have (re-)established her domicile in Switzerland. Instead, the Swiss judge may retain specific attachments, for instance the conclusion of the partnership under Swiss law and the Swiss

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[1187] The Swiss partner here could file before the Swiss courts for the partnership dissolution, under art. 65(a) 'renvoi' to art. 59(1)(b), given her nationality (*and* '*domicile*' to be determined). In absence of both partners' domicile *and* nationality (*not the case here*), they may *exceptionally* apply before the Swiss courts by virtue of the place of the partnership registration (art. 65(b)). If the divorce jurisdiction is retained, the Swiss courts would also be entitled to deal with the partnership regime according to art. 63(1). On this point, see ibid. GUILLAUME, p. 404. The French partner here could seise the French courts based on their own private international law rules – falling outside the scope of Brussels IIA (*cf.* part III *infra*). In the latter scenario, an agreement is mandatory for the concentration of the dissolution-property regimes' jurisdiction pursuant to art. 5 of the 1104 Regulation (Art. 5(1): "Where a court of a Member State is seised to rule on the dissolution or annulment of a registered partnership, the courts of that State shall have jurisdiction to rule on the property consequences of the registered partnership arising in connection with that case of dissolution or annulment, where the partners so agree").

[1188] Art. 65(a) provides that chapter 3 applies over registered partnerships with one exception not relevant here.

[1189] Cour de cassation, Première chambre civile 3 octobre 2019, n° 18-22.945.

[1190] "currently unable to predict the future".

partner's place of work in Switzerland at the time of the filing[1191]. These elements may show durable attachments with Switzerland unlike the short stay in France within a precarious family context[1192].

**414.** In the current hypothetical, the competent court should apply the French applicable law by virtue of the agreement validly concluded under article 52(2) SPILA, precisely based on the French partner's nationality[1193].

## Section V Two Habitual Residences

**415.** Despite the attention that *common* cases deserve for the understanding of the legislation, two further *uncommon* issues are touched upon in this study[1194]. In this scenario, two distinctive situations must be taken into account[1195]. The first one involves the Regulations, articles 6 and 26[1196]. The second situation refers to the Swiss PILA, article 46, through article 51(1)(c)[1197], which is in our view similar to the UK conflict-of-law rules[1198].

### § I. Alternate Habitual Residence

**416.** This hypothetical[1199] illustrates the situation within the Regulations: A couple, he, Portuguese, she, Belgian, both academics, enters into marriage in Portugal where they intend to live. Given the limited job opportunities, the couple decides to move and live temporarily in Belgium, while seeking an appointment as University professors – "*we will get the chair and try to be relocated to Portugal*", they say. After one month, the husband moves to the Netherlands where he is offered a permanent contract, the wife stays in Belgium. The couple lives together only during weekends, holidays, and

1191 This moment is not actually indicated in the provision itself. The determination of the domicile may also take into account other appreciable assessment periods (*infra* CCC.1998.7431).

1192 Tribunal Cantonal de Neuchatel [08 may 1998], CCC.1998.7431: "*Le bref séjour qu'elle aurait fait en France, au domicile du mari dans un contexte matrimonial perturbé, ne permet pas de parvenir à une autre conclusion* […] *elle aurait conservé son ancien domicile*".

1193 The absence of specific choice of property regime within the partnership agreement would entail the applicability of the French statutory regime (community property).

1194 Part I, chapter IV, sections III and IV.

1195 The two situations are not, as said, conducive to creating regular jurisdictional conflicts. Nonetheless, more cautiousness in both international and national legislative texts, with the chosen formula for the use of habitual residence, would be helpful in the name of certainty and predictability.

1196 In relation to the applicable law, reference is principally made to the 1103 Regulation.

1197 By analogy art. 59, when property regimes proceedings are ancillary to divorce and the 'concentration of divorce-property regime jurisdiction' is established under art. 63(1).

1198 In particular through the Domicile and Matrimonial Proceedings Act 1973.

1199 The situation faced here is the one of expats who have established a 'principal' common place of living.

summer[1200]. During their ten-year relationship, the couple meets regularly – four weekends per month, and during the official holidays – in Portugal, Algarve, where they own a villa[1201]. This is considered their 'family and retirement home'. Their two children, born in Portugal, live there all year[1202]. They love the sea where their parents wish for them to enjoy their childhood. Ultimately, they are integrated in the local community and language. The husband, now divorced, would like to determine the jurisdiction and the law applicable to the couple's property relations[1203].

> The Portuguese spouse should have more daily attachments with the Netherlands, and the Belgian spouse with Belgium. The couple may have common attachments with Portugal, although it might seem *prima facie* unrealistic to argue that that is their place of settlement. This would be the case if it were not considered as such from a child's perspective and from the couple's prospect.

**417.** In a possible variation on this hypothetical scenario, the husband lives and works in Portugal and he visits Belgium regularly[1204]. The rationale in both the hypothetical and its variation is in our view the same: precisely, the determination of a *marital residence* that is the 'most common' and the 'most habitual' at two different points in time.

**418.** The habitual residence of the spouses/ partners, for the purposes of their property regimes, should focus on their common life according to the context of enjoying shared rights and interests over matrimonial/ partnership properties[1205]. In respect of the above circumstances, one may argue that the spouses knew that their life would be established through various international family and property ramifications. Ultimately, it was their responsibility to exercise party autonomy[1206] in order to avoid legal uncertainty and unpredictability. In absence of party autonomy, this

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[1200] The case of expats unable to live in the same State is more and more common. Just in my entourage, I can cite two situations that cover this scenario. The first one concerns a friend of mine who was living in Italy, travelling monthly to Russia for one year. The following year, his wife moved to France, and he moved to Switzerland whereby every weekend he travelled to France, or they alternated one weekend in France and one in Switzerland. Their two children lived six months in Russia and six months in Italy for one year, and six months with their mother in France and six months between Russia and Italy the year after. The second situation involves a colleague who currently lives in Switzerland, her husband lives in Germany, their child lives in England.

[1201] Purchased at the time of the marriage celebration.

[1202] With the Portuguese nanny, and during alternating periods with the paternal and maternal grandparents.

[1203] This is a separate action (Ibid. VIARENGO). That said, the result of our analysis would be the same under art. 5(1) of the 1103 Regulation with reference to art. 3, first and second indents, of the Brussels IIA Regulation.

[1204] Excluding Netherlands from the example.

[1205] Ibid. FRANZINA, Jurisdiction in Other Cases (ibid. VIARENGO/ FRANZINA), p. 82; and BONOMI, p. 241.

[1206] Regulations, art. 7 and 22.

'presumption of responsibility'[1207] would lead to the conclusion that the three States[1208] may be considered as alternate (common) habitual residences.

**419. Solution I.** One may argue, in the current hypothetical, that even if Portugal seemed to be unrealistically connected to the couple at the time of seisin (jurisdiction), and at the time of marriage (applicable law), the place does in fact constitute a *family home* indicating a 'principal settlement' at both relevant times[1209]. Furthermore, Portugal represents: the couple's common and regular destination with a future prospect[1210]; the place of location for the only owned villa among their properties; the chosen place in which to invest a considerable part of their wealth; the place of common personal integration, relying for instance on the children's and family's entourage and knowledge of the local language. Lastly, it is also the chosen place of marriage celebration[1211]. All this refers to the couple's 'family acclimatization' that may indicate the establishing of a *principal common marital/ family habitual residence*. Therefore, based on this first solution, articles 6(a) and 26(1)(a) should be satisfied according to their respective appreciable time.

**420. Solution II.** Another may also argue that an international couple with international family and property relations may have established an 'alternate habitual residence', whereby the *continuing common physical presence*[1212] at the time of seisin[1213] (jurisdiction), and the *continuing common physical presence* at the time of their marriage celebration (applicable law) should respectively be

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[1207] This study argues that spouses/ partners, when guided by norms, therefore presumably aware of their effects and limits, should be self responsible for the organisation of their marriage/ partnership, including for the consequences deriving by their decision, or their lack of knowledge ('*Ignorantia juris non excusat*'), to exclude private self determination regarding their right to exercise party autonomy (ibid. CARRUTHERS; S. R. BHATT, Freedom and Responsibility, *Journal of Indian Council of Philosophical Research*, 2018; ibid. KOHLER, p. 207: "This is however the price to be paid in order to achieve predictability and legal certainty for the couples' property relations, and it is for the parties to assess the consequences of their choice"). However, it is agreed that recourse to such a presumption may not always be made. Accordingly, it would require a circumstantial analysis of each single case, in particular when involving vulnerable persons subject to weakness, passivity and connection, which would affect the presence or absence of an agreement, though not justifying themselves from the non-exercise of autonomy (L. Walker, Party autonomy, inconsistency and the specific characteristics of family law in the EU, *J. Priv. Int. Law*, Vol. 14, 2018; A. DIDUCK, Autonomy and Family Justice, *Child & Fam. L. Q.*, Vol. 28, 2016).

[1208] Or two of them based on the mentioned variation.

[1209] Not only because it was intended so, but by reason of specific factors, including the *children's habitual residence*.

[1210] The final choice among two other States to spend their retirement together in that place.

[1211] This would be a complementary, non-decisive, element.

[1212] We recall that the term 'continuing' refers to: "the regular degree of presence that is in principle required for the individual's settlement. Such a presence implies that a qualified degree of proximity, established at a relevant time, is maintained through regular contacts with that particular place of settlement" (fn. 37).

[1213] Alternatively, the last continuing common physical presence during the six months preceding the seisin.

considered as the 'tie-breaker' element[1214]. According to the second solution (II), the courts, first seised, should assess key elements for the determination of the *last common habitual residence* at the seisin (jurisdiction) and the *first common habitual residence* after the conclusion of the marriage (applicable law). At a second stage of the determination, the same courts should solve the conflict of two well-established common habitual residences, alternately close to the seisin, by applying the *continuing common physical presence* at the seisin or *last continuing common physical presence* during the six months preceding the seisin (jurisdiction)[1215]. At a third and last stage of the determination, these courts should assess the spouses' *continuing common physical presence* at the time of their marriage celebration (applicable law)[1216].

**421.** Forum shopping could indeed be raised against the second solution (II). However, the *presumption of responsibility* finds its rationale in the 'safeguards' that each spouse should have taken through party autonomy to avoid forum shopping. The result of this second analysis would be that all three States may represent part of the couple's international ramified life, albeit through a different family-related context of personal integration (*i.e.* working place[1217], couple's regular life meeting point, family home environment, retirement home prospect). In this regard, it is argued that the *continuing physical presence* at a specific point in time would be an equitable, effective, 'tie-breaker rule' in respect of predictability and certainty. Consequentially, article 6(a) of the 1103 Regulation and article 26(1)(a) could apply. If so, it would be sufficient for one of the spouses or partners to file in one jurisdiction in order to determine international jurisdiction. In the event of parallel claims, *lis pendens* would mitigate the possible conflict of jurisdiction according to article 17[1218].

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[1214] This reasoning lies in the essential role, a prerequisite, covered by physical presence in the habitual residence determination (ibid. MARTINY, p. 248; HILBIG-LUGANI, p. 252).

[1215] At this stage, it would be relevant if these courts could decide whether to exercise or decline jurisdiction in favour of a more appropriate court for the parties' family and property interests according to a mechanism founded on transfer of jurisdiction such as that envisaged within Brussels IIA (*cf.* section VII *infra*).

[1216] In this situation, physical presence applies as a tie-breaker rule to solve the conflicts of two potential habitual residences. The closest connection rule, under the 1103 Regulation, art. 26(1)(c), should not be applicable as its operation should presumably intervene only in the absence of common habitual residence and common nationality at the relevant time.

[1217] In case that the couple had never met in Belgium nor in the Netherlands, a rare scenario in practice, then the working place would be excluded from the analysis. We recall that the habitual residence fact-based determination, as opposed to the domicile legal-based determination, focuses on the intradisciplinary family context (*cf.* part I)

[1218] For instance, in the current hypothetical, if the courts in Portugal were first seised for both the determination of jurisdiction and applicable law over property regimes, they should determine the spouses' principal habitual residence at the two relevant points in time. In case the analysis leads to the determination of two alternate habitual residences, the courts should assess the spouses' continuing physical presence at the relevant point in time. If such presence is found to be in another State, for instance in Belgium, the courts should decline jurisdiction. Instead, as opposed to the proposal conceived in this study, the courts in Portugal are currently not entitled to transfer jurisdiction directly to the courts in Belgium (*cf.* section VII *infra*).

## § II. Concurrent Habitual Residences

**422.** This first hypothetical illustrates the situation encountered in the Swiss-UK context: A British-Swiss couple, she Welsh, he Swiss, enters into marriage in Italy where they live during the beginning of their master's degree. Italy is also the place where the husband parents purchase a 'marital home' for their child and their daughter-in-law. About three months after the marriage, the spouses find employment in their countries of origin, respectively in Wales and Switzerland. The Welsh spouse would like to file an action for the annulment of a pre-nuptial agreement before the Welsh courts[1219]. The Swiss spouse meditates a divorce petition accompanied by the enforcement of the spouses' pre-nuptial agreement before the Swiss courts.

> The Welsh judge would be entitled to exercise jurisdiction and apply its own law[1220]. The Swiss judge would be entitled to exercise jurisdiction[1221] and apply Italian law[1222], in absence of actual common domicile or, failing that, its own law (articles 63.2 and 54.3).

**423.** A second hypothetical arising within the *EU18*-Swiss, instead of a Swiss-*UK*, context could envisage a slight variation: a German wife and a Swiss husband, this time living in Switzerland and Germany, respectively:

> Under the SPILA, the Swiss spouse would be able to apply before the Swiss courts by virtue of articles 59(1)(a) and 63(1) based on the defendant's domicile[1223]. With regard to the applicable law, the Swiss courts may conclude that the couple never established a common domicile, or subsidiarily, a common habitual residence[1224], and apply their own law (articles 63.2 and 54.3). According to the 1103 Regulation, the German spouse would be able to apply before the German courts pursuant to article 6(c) founded on the Swiss spouse's habitual residence. With regard to the applicable law, the German courts may likely apply the law of the common closest connection at the time of the conclusion of the marriage[1225], which might indicate Italian law.

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1219 The applicant spouse's habitual residence for at least a year immediately before the commencement of the proceedings, or subsidiarily either spouse's domicile on the date when the proceedings are begun.

1220 See the UK-EU scenario (section IV, subsection IV above).

1221 Art. 59(1)(b).

1222 If it is determined that Italy may have ever been the couple's last (common) domicile or habitual residence (art. 54.1 lit. b of the SPILA).

1223 The German spouse could apply for divorce before the courts in Germany by virtue of the Brussels IIA Regulation, but not for the enforcement of the 'pre-nuptial' if in absence of jurisdiction agreement between the parties under art. 5(2) of the 1103 Regulation.

1224 Under the Swiss notions of domicile and habitual residence (art. 20 of the SPILA).

1225 1103 Regulation, art. 26(1)(c).

**424.** The rule of separate habitual residence[1226] certainly allows some flexibility in the determination of jurisdiction between two States with which both parties have attachments[1227]. By contrast, in the above hypotheticals, the question of two habitual residences pertains more to a scenario implying two spouses who have each well established his/ her own habitual residence separately[1228]. It is typically the issue referred to in this study as *concurrent habitual residence*[1229], which cannot be solved through a 'principal marital/ family residence'[1230] or continuing 'physical presence'[1231]. This is particularly true when dealing with jurisdiction. Conversely, the possible applicability of closest connection for the determination of jurisdiction, supported in this study, would be a modern connecting factor, if generally linked to the marriage and not to the only place of marriage celebration[1232]. Currently, this rule applies only in intra-EU18 relations, therefore excluding Switzerland and the UK.

**425.** Thus, in the international setting, it does not seem that the issue relates to the operation of habitual residence *per se*, or at least not only that[1233]. The issues are two and are wider. The first one refers to the absence of an international convention on property regimes. Such a convention would provide harmonised conflict-of-law rules on international jurisdiction and applicable law, by virtue of habitual residence through one uniform *approach*, preferably the one set out in the EU Regulations. The second issue deals with the circumstances whereby 'concurrent habitual residence' is established by

1226 Or separate domicile.

1227 In this situation, the choice made by the UK and Swiss legislators, in particular when involving the determination of international jurisdiction, could be subject to criticism according to the basic rationale previously mentioned: "the habitual residence of the spouses or partners, for the purposes of their property regimes, should focus on their common life according to the context of enjoying shared rights and interests over matrimonial or partnership properties".

1228 This situation does not concern a common habitual residence, in that no common attachments were established with one single State. A separate habitual residence was established in two different States, each of which competent to exercise jurisdiction and apply its own law.

1229 Part I, chapter IV, section III.

1230 Principal habitual residence relying on a pure fact-based determination.

1231 Tie-breaker element in case of alternate habitual residence.

1232 For the actual state of this rule in relation to the applicable law, the couple's place of prospective acclimatization at the time of the marriage celebration may also apply, possibly supporting the interpretation of the actual closest connection rule (1103 Regulation, art. 26.1 lit. c). For instance, in the current hypotheticals, the place of marriage celebration may be a decisive indicator for the establishing of the spouses' prospective acclimatization within an appreciable period. That said, given also our previous proposal (*cf.* section II *supra*), closest connection would be better linked to the marriage itself, considering the spouses' whole marital life, rather than a specific period only, which is instead advisable and often required for the habitual residence assessment.

1233 As we mentioned in this Chapter, the spouse's or partner's separate habitual residence may trigger issues of parallel jurisdiction, and forum shopping too. Therefore, this approach seems to us aleatory in cross-border relations involving common family and property interests.

two different people, who form a couple, each of whom does not have significant attachments with the other's State of habitual residence[1234].

**426.** The proposed solution for the second issue should be to allow the establishing of one Court, a *super partes* or supranational entity, to adjudicate on such an issue[1235]. The structure of such entity could be a case-by-case one through the model of arbitration. In this regard, a list of worldwide experts in family law may be established under the auspices of the International Hague Network of Judges[1236]. The IHNJ would be in charge of the rules of procedure[1237] according to the Special Commission[1238] practice. The arbitration agreement, based on a collaborative approach between the parties[1239], would ensure the respect of the bi-national dimension of the relationship, equally requiring an effective bi-national justice[1240].

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1234 They do instead have common property interests.

1235 For more details on the characteristics, benefits and typologies of transnational courts, supranational entities, international arbitration, see note 30, ROMANO.

1236 For instance, the members of the IHNJ could intervene upon agreement of the parties. But more importantly the IHNJ covers a fundamental role in promoting effective working relationships (<https://assets.hcch.net/docs/62d073ca-eda0-494e-af66-2ddd368b7379.pdf>): "On that latter point, the Joint Conference (EC-HCCH) invited the different networks to operate in a complementary and co-ordinated manner in order to achieve synergies, and, as far as possible, to observe the same safeguards in relation to direct judicial communications […] The International Hague Network currently includes more than 80 judges from more than 55 States in all continents".

1237 An example is the 'Communication safeguards' governing transparency, certainty and predictability. They firstly refer to the 'overarching principle's: 6.1 Every judge engaging in direct judicial communications must respect the law of his or her own jurisdiction. 6.2 When communicating, each judge seized should maintain his or her independence in reaching his or her own decision on the matter at issue. 6.3 Communications must not compromise the independence of the judge seized in reaching his or her own decision on the matter at issue. They secondly refer to the 'Commonly accepted procedural safeguards': 6.4 In Contracting States in which direct judicial communications are practised, the following are commonly accepted procedural safeguards except in special circumstances […] parties are to be notified of the nature of the proposed communication; a record is to be kept of communications and it is to be made available to the parties; any conclusions reached should be in writing; parties or their representatives should have the opportunity to be present in certain cases, for example via conference call facilities.

1238 The Special Commission takes place every five years. It involves the Hague Member States, in particular the Contracting States, and other observers (*i.e.* EU, NGOs). The Special Commission activity concerns the operation of the different Hague Conventions. Conclusions and recommendations are usually endorsed during each Special Commission in order to ameliorate and review the conventions. For instance, the Special Commission approved the Emerging Guidance and General Principles for Judicial Communications applicable to the IHNJ activity.

1239 Some authors refer to it as a 'promising prospective increasing tendency' (note 30, ROMANO, p. 259: "*D'autres Etats autorisent les personnes opposées par un litige non-patrimonial à recourir à la justice arbitrale. Citons l'Allemagne et le Portugal: les dispositions de la ZPO et de la loi portugaise sur l'arbitrage énoncent que, s'agissant de contestations non-patrimoniales, la voie de l'arbitrage reste ouverte aussi longtemps que sont en cause des matières au sujet desquelles les parties ont la liberté de conclure un «accord transactionnel» («Vergleich»). Il s'agit de la tendance la plus moderne, qui paraît promise à se répandre*").

1240 Ibid. ROMANO: "*Et l'essentiel est ici que les êtres humains — les parents et l'enfant — engagés dans une relation qui se déploie bi- ou multiterritorialement puissent compter sur un tribunal neutre et équidistant, sur-étatique, à composition multinationale rendant la justice au nom de deux collectivités étatiques, à même de prononcer une décision ayant une efficacité directement bi- ou multiterritoriale* […]".

**427.** More interestingly, in the short term, recourse may be made to the mandate of the Court of Justice of the European Union[1241]. The intervention of a regional instance, that is equidistant from the cross-border jurisdictional conflict, would perhaps enable a more efficient handling of justice in the parties' interests. The CJEU already holds the characteristics of supranational impartiality, with long-standing experience in matters involving international family law. Ideally, a modification in the Court's judicial prerogatives by the EU 27 Member States in the field of family law may occur, allowing it to intervene not only via preliminary rulings, but also through specialised instances[1242]. The pertinence of a CJEU judgment would require more efforts in determining the rules[1243] according to which the conflict of two well-established separate habitual residences should be solved[1244]. A connecting factor that appears to be more predictable than others, in situations such as those concerning the above hypotheticals, refers to the place of marriage celebration – although its factual proximity with the individual's actual life

[1241] For any intra-EU 'conflict of habitual residence', therefore not involving UK or Switzerland – even though we recall that in the field of international intellectual property law, the EU Unified Patent Court may also apply the law of a non-Contracting State (art. 24 of the Agreement on a Unified Patent Court, signed in 19.02.2013). In relation to the CJEU, we especially refer to the 'General Court', which is today entitled to exceptionally intervene in individual's complaints.

[1242] The creation of an instance, within the CJEU, competent over individual claims regarding matters of international family law may be envisaged. "According to Article 257 TFEU, Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish specialised courts attached to the General Court to hear and determine at first instance certain classes of action or proceedings brought in specific areas. Parliament and the Council are required to act by means of regulations either on a proposal from the Commission after consultation of the Court of Justice or at the request of the Court of Justice after consultation of the Commission". This is currently possible only in specific circumstances, for example when involving appeals before the General Court concerning decisions taken by EU institutions in the field of competition, Community grants, contracts with EU institutions or the European public service. The only concrete example of specialised court under this provision is the Civil Service Tribunal, which was created in 2005 and dissolved in 2016. More recent examples involve the Unified Patent Court (D. SARMIENTO, Specialized Chambers at the General Court, *Data, Tech & IP, Institutional Law, Justice & EU Litigation,* 2019). See also CCBE comments on the functioning of the General Court, 2020: "the CCBE considers that the use of specialised chambers with judges possibly having previous experience in a particular field of law may also lead to judicial decisions of higher quality. The use of experts may also contribute to a better understanding of complex matters."; and art. 41.3 of the Agreement on a Unified Patent Court: "The Rules of Procedure shall guarantee that the decisions of the Court are of the *highest quality and that proceedings are organised in the most efficient and cost effective manner*. They shall ensure a *fair balance between the legitimate interests of all parties*".

[1243] These rules should not be confused with the sole grounds of jurisdiction or the laws, respectively, provided under the relevant family law instruments. They refer to the rules of procedure, often mentioned in the Treaty establishing the specialised Court (see Protocol no. 3 on the CJEU Statute, Title IVa, Art. 62c on Specialised Courts and Annex I to the Statute; and ibid. Agreement on a Unified Patent Court).

[1244] Under this analysis, we assume that two national courts would both be competent, based on the establishing of each spouse's habitual residence. This may trigger both a positive and a negative conflict of jurisdiction. In our view, it would not always be possible, in terms of predictability and legal certainty, to leave the resolution of such a conflict, for instance through the recourse to an additional connecting factor, upon the sole discretion of national courts. Practice shows that this solution may lead to unsatisfactory results (note 27, ROMANO).

should not be taken as granted[1245]. A potential solution, and compromise between predictability and proximity, in presence of concurrent habitual residences, would ultimately be to concentrate both international jurisdiction and applicable law at the place of closest connection to the marriage at the time of the seisin[1246], with exceptional focus on the common habitual residence at the time of marriage celebration. The context of concurrent habitual residence, the connecting factor chosen to solve it, and the CJEU intervention should not be interdependent though. A supranational instance would actually be entitled to intervene in any conflicting determination[1247].

## Section VI Absence of Habitual Residence

**428.** This context involves the scenario in which habitual residence is potentially not established or impossible to determine, even temporarily. Two similar situations are contemplated by: (i) asylum seekers who may have established, in the course of their life, property relations and interests, not yet sufficient to acquire a residence of habitual character at a specific point in time; (ii) the impossible determination of habitual residence (both common or separate) at a specific point in time, irrespective of the immigration status, because a qualified degree of proximity is complex to trace. This, as for the previous subsection, refers to a rare context that can however be encountered by reason of the current migration fluxes.

### § I. Case Studies

**429.** The following hypotheticals illustrate the issue of absence of habitual residence. One example is about an asylum seeker who arrives in Italy from Libya. After two months she gets married at the Somali Embassy in Italy, to a recognised refugee of Somali nationality, who holds a temporary residency permit in Italy. The couple communicates in Italian, which they learned in their respective countries of origin. After four months, the couple moves to

[1245] The Swiss legislator has suggested in the current SPILA reform over property regimes the use of *the place of celebration of the marriage* for the determination of jurisdiction under the SPILA (ibid. GUILLAUME, p. 409). We hesitate in recommending the applicability of this connecting factor in general conflicting contexts arising from the habitual residence determination. This study favours an actual qualified proximity at a relevant point in time, which may not systematically be represented by the place of marriage celebration. Even if the latter may circumstantially support the habitual residence assessment, its *exceptional* operation would be more appropriate in the family law setting, which requires closeness of justice with the individual's interests (note 12, BOELE-WOELKI).

[1246] As opposed to the proposal under art. 26(1)(c) of the 1103 Regulation applicable in absence of habitual residence, here, the place of closest connection to the marriage indicates a situation in which, despite two separate habitual residences are established, neither reflects the spouses' or partners' common marital and property interests.

[1247] In this regard, the other proposals should be applicable (*cf.* conclusions *infra*).

Germany where they live for six months. The wife has filed for asylum in both Italy and Germany, which is still pending. The husband has filed for asylum in Germany despite his refugee status in Italy. He owns properties in Somalia and Eritrea, and holds a retail license in Italy[1248]. She owns properties in Libya and Iran. While in Germany, they decide to separate: he returns to Italy and she moves to live with a friend in France where again she files for asylum. After three months, the wife files for divorce in France, claiming the property regime determination. The husband files for liquidation in Italy.

**430.** Another example[1249] involves a married couple, she, stewardess of Italian nationality, he, pilot of German nationality. The couple gets married in Rome, and own an inherited house in Munich (flight destination chosen by the couple) where they spend 100 days per year. The couple works for Alitalia and lives: 100 days in Rome (domicile of the company) where they purchased a house, 100 days in London (flight destination chosen by the couple) where the husband's parents live, and 65 days in Geneva (flight destination chosen by the couple) where the wife's parents live. The couple has selected the said destinations for personal reasons, particularly related to their wish to live in Europe, with less relevance given to the presence of their respective families. The wife is willing to file for the annulment of the spouses' post-nuptial agreement in Italy.

## § II. Current Issues

**431.** In absence of modern connecting factors, the couples in the two examples of subsection I, may have no access to justice founded on qualified proximity.

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[1248] F. NICHOLSON/ J. KUMIN, Interparliamentary Union and UNHCR, A guide to international refugee protection and building state asylum systems, No. 27, 2017, p. 54: "Generally speaking, the Convention and Protocol aim to make sure that recognized refugees are treated on an equal footing with other lawfully-staying foreigners as far as acquisition of property, employment and housing are concerned. With respect to education, refugees are to be treated on an equal footing with nationals".

[1249] A similar judgment was rendered by the Supreme Court of Seychelles, *Dituro v. Dituro* (DC 136/2014) [2016] SCSC 169, § 29-34-39: "In the present case even if the Court believed that the Petitioner had been personally present in Seychelles for two weeks in each month of the year preceding filing of the petition, there is no evidence of a settled purpose on his part of making the principal or sole permanent home in the country of residence and the conditions for establishing residence as laid down in Wilmore v Wilmore are therefore not fulfilled. I am also of the view that the character and duration of the residence are not of such a nature as to establish a fixed and settled intention on his part to make Seychelles his permanent home. […] In fact there is no evidence to show the Petitioner's intention of making Seychelles the centre of his personal, social and economic interests. The evidence also shows that Seychelles is not the Petitioner's sole or principal residence since he also resides in Dubai during the time when he is not in Seychelles or flying to the US or Italy. […] In view of this Court's findings that the Petitioner is neither domiciled in Seychelles nor was habitually resident in Seychelles throughout a period of one year ending with the date when proceedings began, I hold that this Court has no jurisdiction to entertain this Petition".

**432.** In the first hypothetical of subsection I[1250], without dealing with divorce matters, there is no agreement on jurisdiction under article 5(2) of the EU Regulations[1251], therefore article 6 should apply[1252]. For the purposes of international jurisdiction, it might in practice be difficult to assess where the couple is, and was, last habitually resident at the time of seisin, under article 6(a) and (b). It also seems hard to assess where the respondent is habitually resident at the time of seisin, under article 6(c), with regard to both spouses. In particular, it proves complex to trace their movements under potentially precarious conditions of status and personal integration[1253]. In absence of common nationality, article 6 will remain ineffective. With regard to article 26, for the determination of the applicable law, the 'first common habitual residence after the conclusion of the marriage' appears hard to locate. Some indicators might nevertheless favour Italy as the place of closest connection pursuant to article 26(1)(c)[1254].

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1250 Italian-French-German case (i).

1251 In any case, even if there were an agreement, perhaps not needed under art. 5(1), in absence of habitual residence, the renvoi of art. 5 may only be made in favour of art. 7 of Brussels IIA. The latter refers to the national PIL rules of the Member State in question (*cf.* part III *infra*).

1252 Is it right to consider that a refugee couple (one spouse holding asylum, the other without) could establish habitual residence for the purposes of civil law? The answer should be yes. See V. BUMBACA, Commentaire : Tribunal fédéral, IIe Cour de droit civil Arrêt du 23 mai 2018 en la cause de C. contre A., B. – 5A_121/2018, in: FamPra.ch, 1/2019). See also Cour de cassation, civile, Chambre civile 1, 23 novembre 2016, 15-24.445: "*par une appréciation souveraine de ces éléments, estimé que les époux, qui ont vécu ensemble de manière précaire et non stable en Turquie où, pour des raisons politiques, il leur était impossible de s'installer et de fixer le centre de leurs intérêts patrimoniaux et pécuniaires* "; and Cour de cassation, civile, Chambre civile 1, 28 janvier 2015, 14-11.273; and ibid. MARTINY, p. 249.

1253 A refugee's precarious condition is not sufficient to exclude the establishing of his/ her habitual residence; the anamnesis should always focus on the factual settlement. See Cour de cassation, civile, Chambre civile 1, 23 novembre 2016, 15-24.445: "*que pour déterminer la loi applicable au régime matrimonial, les juges doivent rechercher l'endroit où les époux ont souhaité fixer le centre principal de leurs intérêts patrimoniaux et pécuniaires ; qu'en considérant, pour retenir l'application de la loi française, que les époux X... avaient localisé le centre de leurs intérêts pécuniaires en France, sans rechercher quelle était leur volonté à la date du mariage et durant la période qui l'avait immédiatement suivi, la cour d'appel a privé sa décision de base légale au regard de l'article 3 du code civil et des principes du droit international privé français en matière de régimes matrimoniaux* ; *Mais attendu que l'arrêt relève que les époux, mariés le 20 février 1979 en Turquie, y ont résidé, d'abord, chez leurs parents, puis, quelques mois, à Istanbul où est né leur premier enfant ; qu'il constate que M. X... n'y est resté que jusqu'à la fin du mois d'octobre 1980, date de sa fuite en France, où il a obtenu le statut de réfugié politique le 18 mars 1999, puis la nationalité française en 2002, tandis que Mme Y... est arrivée en France au mois d'octobre 1982, où elle a également obtenu, le 23 novembre 1982, le statut de réfugié politique ; que la cour d'appel, qui a procédé à la recherche prétendument omise, a, par une appréciation souveraine de ces éléments, estimé que les époux, qui ont vécu ensemble de manière précaire et non stable en Turquie où, pour des raisons politiques, il leur était impossible de s'installer et de fixer le centre de leurs intérêts patrimoniaux et pécuniaires, avaient entendu soumettre leur régime matrimonial au régime légal français ; que le moyen n'est pas fondé*".

1254 To give an interpretation of closest connection, currently absent within the EU Property Regimes' Regulations, we refer to *prospective acclimatization*. Mere presence alone should not be a synonym of closest connection.

**433.** In the second hypothetical of subsection I[1255], a common habitual residence or the habitual residence of the respondent under article 6[1256], may hardly be traceable for the purpose of international jurisdiction. Concerning the applicable law, there are no elements for a clear-cut determination of habitual residence[1257]. The closest connection rule under article 26(1)(c) might indicate Italy, being the place of marriage celebration[1258].

**434.** However, in both scenarios, article 26 would be ineffective in absence of competent jurisdiction determined in an EU18 Member State. In the context of 'subsidiary jurisdiction' under article 10 of the Regulation, both couples would be able to seise the courts in the State where their immovables are located. That jurisdiction may still be limited to the territory of the property location, with consequent parallel jurisdictions in place[1259].

**435.** Exceptionally, forum *necessitatis* (article 11) could apply. Unlike article 6, article 11 operates in the absence of general jurisdiction and on an 'exceptional basis'. The latter means that spouses should not hold a common/ separate habitual residence, common nationality, or common/ separate properties in an EU18 Member State at the relevant time[1260]. In addition, the couple should hold a sufficient connection with an EU18 Member State and close connection with a third State[1261]. It is submitted that the couple in the above hypotheticals may have achieved initial *acclimatization,* which should create, instead, the prerogatives for a court of general jurisdiction under article 6. In this regard, such a jurisdiction should apply whenever the spouses' common/ separate habitual residence is not established, but other elements may determine it in the near future[1262].

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1255 English-German-Italian-Swiss case (ii).

1256 Common nationality does not apply.

1257 The constant cross-border movement, typical of flight personnel, precisely involving couples with no children, in some circumstances may not identify an environment that can be categorised as stable. The couple's chosen destination would rather imply an occasional stay. The place of living of the couple's parents, unlike cases involving the protection of children (*cf.* part III, chapter II *infra*), would not be considered as a strong element in a context where adult children are also living elsewhere with no dependency relationship. The role of the owned assets in more than one State does not hold strong significance, in particular as they are not necessarily considered as 'marital home'. Lastly, in context, the nationality and the duration would not be determining.

1258 Ibid. MARTINY, p. 254.

1259 The question pertaining to which law should apply is not clear-cut. The applicable law may still be that under art. 26(1)(c).

1260 G. BIAGIONI, No Other Court of a Member State has Jurisdiction (ibid. VIARENGO/ FRANZINA), p. 121.

1261 The Regulations do not provide any guidance in that regard (ibid. p. 122).

1262 This rule should avoid complex situations in which, beyond wars, the unreasonableness to bring a claim before a third State, and the sufficient connection with an EU18 Member State, would currently be of difficult determination. Sufficient connection in an EU18 Member State should be better contextualised, as well as entitle the courts of that Member State to hold general jurisdiction prerogatives.

## § III. Proposed Resolution Model on 'Mere' Presence

**436.** An interesting model for international jurisdiction, applicable to similar situations involving the impossibility to determine habitual residence, would be the one envisaged by the Hague Convention on the International Protection of Adults 2000[1263], article 6. The following modifications are suggested, in line with the ambit of the EU Regulations:

1. For spouses and partners who are refugees and those who, due to disturbances occurring in their country, are internationally displaced, the authorities of the Member State have the jurisdiction provided for in Article 6 on the territory of which these spouses or partners are jointly present at the seisin as a result of their displacement; or failing that, on the territory of which these spouses or partners were last jointly present within the six months, or one year at most, preceding the seisin as a result of their displacement.
2. The provisions of the preceding paragraph also apply to spouses and partners whose habitual residence cannot be established.

**437.** With regard to the applicable law, a suggested proposal may be that such forum should apply the law of the common mere presence at the time of the marriage celebration; or, failing that, its own law[1264]. In relation to registered partnerships, the applicable law under the 1104 Regulation[1265], should continue to be a valid option also in circumstances involving the absence of habitual residence. Therefore:

(i) In the first hypothetical of subsection I[1266], the German courts could retain international jurisdiction (*last joint mere presence at the seisin*) and apply Italian law (*common mere presence at the time of the marriage celebration*), or subsidiarily German law (*lex fori*).

(ii) In the second hypothetical of subsection I[1267], the courts of the place of *actual or last joint mere presence* should be seised. The court in Rome would then apply Italian law, representing both the law of the *common mere presence* at the time of the marriage celebration and the *lex fori*.

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[1263] This Convention will be examined in part IV.

[1264] Reference to the *lex fori* may be useful in circumstances where the marriage celebration may not require the spouses' common physical presence. This is, for instance, the example indicated in chapter I, where a marriage is concluded through virtual means (Cass., sez. I civ., n. 15343 del 25 luglio 2016).

[1265] Art. 26(1): "the law of the State under whose law the registered partnership was created".

[1266] Italian-French-German case (i).

[1267] English-German-Italian-Swiss case (ii).

## § IV. Proposed Resolution Model on Prospective Acclimatization

**438.** Derogation from the rule of mere presence, concerning both jurisdiction and applicable law, should be provided in scenarios where a couple has been physically present 'plus something more' in one Member State, without yet establishing habitual residence at the time of the determination. This is the situation to which we refer in this study as *prospective acclimatization*.

(i) In the first hypothetical of subsection I[1268], the couple celebrated their marriage in Italy and hold a common language. These elements, in addition to the couple's joint presence at the time of the marriage celebration, may be indicators of a common prospective acclimatization in Italy. With regard to the applicable law, the courts in Italy would apply their own law[1269].

(ii) In the second hypothetical of subsection I[1270], it is submitted that the couple's prospective acclimatization should be located in Italy. This is the place that proves to be closer to the marriage, where the parties celebrated their marriage and purchased a house. Ultimately, Italy is also the State where their employer's principal place of business is, which may create a professional nexus between the couple and the country[1271]. Based on the proposal conceived here, the Italian courts would be internationally competent and apply their own law.

## § V. Lis Pendens

**439.** Considering the proposal in the previous subsection, the *lis pendens* rule under article 17 would mitigate the possible conflict of parallel jurisdiction[1272]. The court first seised in matters of property regimes, for instance respectively in France (first scenario) and in Italy (second scenario), according to the hypotheticals of subsection I[1273], should firstly assess habitual residence under article 6 of the 1103 Regulation. Once concluded that habitual residence cannot

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1268 Italian-French-German case (i).

1269 The place of prospective acclimatization should allow for the parallelism between forum and *jus* founded on the proximity principle and the location of stronger attachments, replacing the absence of habitual residence and derogating from mere presence. Prospective acclimatization may determine closest connection in absence of habitual residence. In respect of applicable law, prospective acclimatization would therefore operate under art. 26(1)(c).

1270 English-Germany-Italian-Swiss case (ii).

1271 Ibid. MARTINY, p. 249. That said, the place of habitual work would be a complementary element (chapter I *supra*).

1272 According to the *lis pendens* rule under the Property Regimes' Regulations, the courts first seised are entitled to request information to all the other courts on the date when they were seised (C. I. NAGY, Lis pendens, ibid. VIARENGO/ FRANZINA, p. 159).

1273 Italian-French-German case (i); English-German-Italian-Swiss case (ii).

be determined[1274], the courts in France and in Italy would apply the 'model rule', *supra*, on mere presence at the relevant point in time. The assessment of specific elements elsewhere such as former common physical presence, place of marriage celebration, property location, refugee status, or professional relations, would entitle the courts in Italy and in France to possibly proceed with a transfer of jurisdiction[1275] to the better placed courts based on prospective acclimatization.

## Section VII Proposed Model for a Collaborative Determination and Transfer of Jurisdiction

**440.** The rule on transfer of jurisdiction is not provided under the Regulations[1276]. This rule should not be confused with the rule on prorogation of jurisdiction[1277]. In particular, under the proposed rule, the courts first seised, not yet exercising general jurisdiction, should be entitled, by way of exception, to transfer the proceedings[1278] upon determination of a court of the EU18 Member State that is better placed to deal with the case[1279]. In this context, appropriateness should correspond to the spouses' actual common family and property interests. The principal aim of this rule should therefore be to support the habitual residence determination based on a collaborative approach[1280], and solve potential conflicting determinations. Thus, such a transfer would appear particularly useful in relation to alternate, and absence of, habitual residence[1281]. More importantly, it would avoid costly and lengthier proceedings upon the parties concerned[1282]. A good compromise for a collaborative approach would also be to enable the request of jurisdiction from the courts in Member State B[1283] when they would exceptionally conclude

1274 And nationality cannot apply.

1275 *Infra* section VII.

1276 Ibid. BIAGIONI, p. 120.

1277 Choice-of-court agreements under art. 7 of the Regulations (*cf.* section II *supra*).

1278 Beyond the collaborative habitual residence determination, the transfer should occur upon a party's initiative or *ex officio*.

1279 This rule should not comprise the scenario where exclusive jurisdiction is founded on a choice-of-court agreement.

1280 Such an approach is also required under Brussels IIA for the child's best interests assessment in proceedings involving parental responsibility (note 290, Practice guide, p. 34-35).

1281 According to the connecting factors mentioned *supra* (*cf.* sections V and VI).

1282 Courts should likewise rely on the supported exchange of information through administrative authorities (*i.e.* Central Authorities, notaries, migration services) and perform the transfer in an expeditious manner (note 662, LAMONT, p. 79).

1283 Upon a party's initiative or *ex officio*.

that, taking into account the circumstances of the case, the spouses' actual common family and property interests should be determined in their State[1284].

**441.** Indeed, this rule does not concern the applicable law, even though it is argued that transfer of jurisdiction would have an indirect impact on the applicable law determination[1285]. For instance, a court is seised first in Member State A and determines through a collaborative approach that the centre of the spouses' actual common family and property interests are located in Member State B. Under the recommended rule, they would be entitled to transfer directly the case to the courts of Member State B[1286]. If the latter apply the law of the spouses' last common habitual residence under the conditions laid down in the current version of article 26(3)[1287], the transfer of jurisdiction would also affect the applicable law determination.

# Conclusions

**442. Summary.** This Part dealt with three interrelated contexts: marriage, partnership, and consequent property relations. In absence of modern Hague treaties on celebration, validity and recognition of marriages (and generally absent in the context of partnerships' registration), the analysis focused on other treaties and selected national legal orders. The same methodology was followed in the framework of general effects of marriages and partnerships. The EU Regulations[1288] have finally provided a set of regional rules applicable to 18 Member States with effects on EU-third States family property relationships. They refer to habitual residence primarily. The analysis has shown that practical issues may arise in relation to specific provisions

[1284] In the context of property regimes, the former habitual residence of the spouses at the time of the seisin, the habitual residence of the spouses at the time of marriage celebration, the EU 18 Member State whose law is applicable, the place of closest connection to the marriage in absence of spouses' common/ separate habitual residence, would be potential alternatives if found more appropriate in the spouses' actual common family and property interests. That said, in point, our view is more general in that the transfer of jurisdiction should primarily ensure a collaborative approach aiming to prioritise the determination of the spouses' actual common family and property interests for the assessment of habitual residence and for the resolution of potential conflicts arising from its determination. As opposed to the doctrine of *forum non conveniens* and the US rule on intra-country federal transfers (*cf.* part I, chapter IV, section V above), the current recommended rule should take inspiration from the transfer of jurisdiction under Brussels IIA founded on international cooperation within a common area of justice and mutual trust (ibid. FALCONI, p. 673; ibid. LAMONT, p. 72).

[1285] See part I, chapter IV, section V.

[1286] This concretely means that the spouses may not need to file a separate claim before the courts of Member State B if the transfer occurs *ex officio* (ibid. LAMONT, p. 80).

[1287] According to the proposal under art. 26, the impact on the applicable law would even be more accentuated.

[1288] Property relations were analysed principally in relation to the EU Property Regimes' Regulations 1103 and 1104, in particular by focusing primarily on international jurisdiction and applicable law involving property regimes as a matter of substance.

governing jurisdiction and applicable law. Additionally, practical examples involving EU-third States scenarios lead to the hope for a future international convention. The analysis has valued the Hague Property Regime Convention 1978 that was helpful in identifying elements for the habitual residence determination.

## Marriage and partnership:

**443. Proposal I**[1289]**.** International jurisdiction of the administrative authorities and applicable law should primarily be concentrated in the State of the prospective spouses' or partners' common habitual residence, as an alternative to their common nationality; and subsidiarily in the State of the prospective spouse's or partner's separate habitual residence, as an alternative to their separate nationality. A subsidiary approach, based on prospective acclimatization or physical presence, should fill in the absence of, or impossible recourse to, habitual residence/ nationality. Habitual residence should expressly be mentioned in domestic legislations as an alternative connecting factor. Ultimately, habitual residence should reflect a 'close and real connection to the marriage, or to the partnership, at a relevant time'[1290].

## Property regimes:

**444. Proposal II.** Habitual residence should be founded on a qualified proximity with the actual common family and property interests of the spouses/ partners.

**445. Proposal III.** According to the two-fold test approach of this study, the determination of habitual residence should consider the case law analysed[1291], and refer to decisive elements such as: common physical presence; the family and principal home supported by administrative evidence (not limited to residency permits); the regular settling and resettling; the settled purpose; the child's place of birth and place of living; the presence of principal fortune. Complementary, non-decisive, elements should be: the common nationality; the intention; and the professional life. The place of celebration or registration

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[1289] This is the only suggested proposal. For additional recommendations, we refer to chapter I, section III.

[1290] The habitual residence determination, in addition to physical presence, should require key elements such as: home and life settlement at the time of marriage celebration (or of the partnership registration) showed through social integration in the local community; the period of time before the celebration (*i.e.* six months). Complementary elements may be: the intent to live in the place of marriage or of union; the place of work.

[1291] Chapter II, section III.

may be exceptionally decisive. The intention and the administrative evidence, alone, shall not suffice to establish habitual residence. The immigration status shall not be relevant.

**446. Proposal IV.** Article 26(1)(a)(i) should be added to the Regulation 1103[1292]. The recital § 49, should equally be modified[1293].

**447. Proposal V.** A six-month appreciable period for the assessment of habitual residence should be added in article 6 of the Property Regimes' Regulations, as an example, in lit. a[1294]; and in article 26, as an example, in lit. a[1295]. With regard to couples whose habitual residence cannot be determined, an extended period to one year may be provided by reason of their multiple, potentially precarious, cross-border movements.

**448. Proposal VI.** When habitual residence cannot be determined, it is suggested to add, in the Property Regimes' Regulations, article '6(a)(i)'[1296], and article '6(a)(ii)'[1297]. Article '26(1)(a)(i)' should be added in the 1103 Regulation[1298]; article 26(1)(c) of the 1103 Regulation should cover prospective acclimatization.

**449. Proposal VII.** In presence of two (potentially) alternating habitual residences, a principal habitual residence should be located in the place of common family/ marital acclimatization at the relevant point in time currently provided by the Regulations[1299]. Alternatively, when such determination proves so complex that the efficiency and effectiveness of justice would be

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1292 'The law of the State in which the parties have their last common habitual residence should subsidiarily apply in place of the law previously applicable'.

1293 'The *lex fori* corresponding to the last common habitual residence of the spouses should constitute the first criterion when the effects of such law are considered more reasonable for the property interests of the parties and the proper administration of justice'.

1294 'in whose territory the spouses or partners are habitually resident at the time the court is seised, provided that their physical presence was regularly settled within six months before the seisin'.

1295 'of the spouses' first common habitual residence after the conclusion of the marriage, provided that their physical presence is regularly settled within six months after the conclusion of the marriage'.

1296 'For spouses and partners who are refugees and those who, due to disturbances occurring in their country, are internationally displaced, the authorities of the Member State have the jurisdiction provided for in article 6 on the territory of which these spouses or partners are jointly present at the seisin as a result of their displacement; or failing that, on the territory of which these spouses or partners were last jointly present within the six months, or one year at most, preceding the seisin as a result of their displacement. The provisions of the preceding paragraph also apply to spouses and partners whose habitual residence cannot be established'.

1297 'Derogation applies in presence of a prospective acclimatization'. A recital should provide an explanatory reference to the notion of *prospective acclimatization*. For instance: 'Prospective acclimatization triggers closest connection to the marriage in absence of habitual residence. Mere presence alone should not be a synonym of closest connection. In addition to the spouses mere presence, their place of union celebration, property location, refugee status, common language may determine prospective acclimatization, even if these factors should not be cumulative or exhaustive'.

1298 'In exercising their jurisdiction under article 6(a)(i), the courts shall apply the law of the common mere presence at the time of the celebration of the marriage; or, failing that, their own law'.

1299 With regard to the applicable law, the proposal here concerns only the framework of the 1103 Regulation.

compromised, the continuing common physical presence at the relevant point in time[1300] shall be considered the tie-breaker element. In presence of two concurrent habitual residences[1301], a super partes entity[1302] should be entitled to adjudicate directly over potential conflicts. In this regard, a relevant connecting factor should be the place of closest connection to the marriage at the seisin[1303], with exceptional focus on the common habitual residence at the time of marriage celebration.

**450. Proposal VIII.** A proposed model of transfer of jurisdiction in the context of property regimes should be introduced based on the principle of appropriateness[1304].

[1300] Continuing common physical presence at the seisin for jurisdiction; continuing common physical presence at the time of marriage celebration for the applicable law (*cf.* chapter II, section V).

[1301] A supranational instance would hold the power to intervene in any conflicting habitual residence determination.

[1302] Through arbitration schemes or a new instance within the CJEU (*cf.* chapter II, section V).

[1303] For both jurisdiction and applicable law.

[1304] Appropriateness shall refer to the spouses' actual common family and property interests. The former habitual residence of the spouses at the time of the seisin, the habitual residence of the spouses at the time of marriage celebration, the EU18 Member State whose law is applicable, the place of closest connection to the marriage in absence of spouses' common/ separate habitual residence, would be potential alternatives if found more appropriate in the spouses' actual common family and property interests.

# PART III: Divorce, Parental Responsibility and Maintenance

**451.** This Part examines habitual residence for the purposes of jurisdiction[1305] and applicable law. It focuses on the implementation of treaties[1306] and conflict-of-law rules pertaining to specific national legal orders. This analysis confronts the conflicting context consequent to the end of a marriage or of a partnership. It contemplates a dispute concerning matrimonial rights and obligations, possibly extended to parental responsibility involving custody and visiting rights over a child.

**452.** This Part is composed of three chapters. *Chapter I* deals with proceedings involving divorce as the principal matter, including ancillary proceedings concerning property and parental relations. *Chapter II* tackles proceedings on parental responsibility. *Chapter III* faces proceedings involving financial support[1307] as the principal matter and ancillary to divorce and parental responsibility. The *Conclusion* refers to a short list of proposals relating to this Part.

## Chapter I: Divorce

**453.** This Chapter is composed of six sections. *Section I* deals with habitual residence under the Hague Convention 1970. *Section II* examines the rules of the Brussels IIA and Rome III Regulations concerning divorce. *Section III* tackles the prorogation of jurisdiction in accordance with Brussels IIA and the 1996 Hague Convention. *Section IV* refers to the interconnecting proceedings involving divorce and property regimes governed by the EU and the Swiss legislations. *Section V* analyses the Turkish and US conflict-of-law rules on

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[1305] Reference is made to specific aspects of jurisdiction such as forum shopping, *lis pendens*, transfer and prorogation.

[1306] Bilateral conventions will not be part of this analysis. For instance, the "*Convention franco-tunisienne relative à l'entraide judiciaire en matière civile et commerciale et à la reconnaissance et à l'exécution des décisions judiciaires, fait à Paris le 28 juin 1972*". This Convention provides that the recognition of divorce judgments (between Tunisia and France) is allowed if the competent jurisdiction emanating the judgment is founded on the nationality plus the 'ultra-annual' habitual residence of the petitioner at the time of the institution of the proceedings (art. 16.1 lit. d).

[1307] In some domestic legislations, financial support, or financial consequences of divorce may incorporate property regimes (*i.e.* Switzerland, UK). We refer to financial support only in relation to spousal and child maintenance. See J. M. SCHERPE, The Financial Consequences of Divorce in a European Perspective, European Family Law, Vol. III, 2016.

divorce, as well as their intersection with Brussels IIA and Rome III. *Section VI* faces the issues of concurrent, alternate, and absence of, habitual residence.

## Section I Habitual Residence under the Hague Convention 1970

**454.** Habitual residence plays a primary alternative role within the HC-1970[1308]. The Explanatory report[1309] gives some guidance about its interpretation in the context of the Convention[1310]. In the report it is acknowledged that habitual residence should be subject to a pure factual analysis – *principal focus on the objective element*. The report further states that in difficult circumstances concerning multiple (simple) residences, the factual analysis should consider an additional factor, the intent – *complementary focus on the subjective element*.

**455.** The objective and subjective analysis may nevertheless indicate that each State represents a habitual residence. In the latter scenario, a person has acquired an alternate or a concurrent habitual residence, according to which the degree of physical presence[1311] and the intent are equal in each State. In relation to the time factor, the report specifies that the establishing of a habitual residence may occur within less than a year, provided that its duration is continuous in time.

**456.** The institution of the proceedings triggers the determination of habitual residence. At this particular point in time, the person should be settled according to specific tangible steps. Other than the degree of physical presence and the intent, reference to additional factors is not made within the report. National case law may add some complement to this analysis.

**457.** It seems that the simple authorisation to reside in a State does not constitute sufficient proof of an effective and continuous settlement. This is the approach of the Swiss Federal Court. The case[1312] involved a Swiss-German couple, he, Swiss-German, living in Poland, she, Swiss, living in Switzerland.

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1308 For a complementary analysis, see part I, chapter I, section II.

1309 Ibid. BELLET/ GOLDMAN, p. 11-12.

1310 A relevant example concerning the coming into play of habitual residence is found under art. 2 of the Convention.

1311 Such presence should correspond to the person's place of living in more or less permanent fashion, as opposed to an occasional brief stay.

1312 ATF, 5A_601/2009 [30 November 2009]: § 4.3.2: "*A cet égard, la question de la résidence habituelle du demandeur en Pologne une année avant le dépôt de la demande doit être instruite, les faits tels qu'ils ressortent du dossier cantonal ne permettant pas de conclure à la réalisation de cette condition. En effet, selon l'arrêt attaqué le recourant et demandeur à l'action polonaise 'vit en Pologne, où il est autorisé de séjour depuis le 17 janvier 2006'. Or, ces informations ne suffisent pas à déterminer si l'intéressé y avait réellement sa 'résidence habituelle' une année à compter du dépôt de sa demande en justice le 3 juillet 2007*".

They filed separately for divorce, before the courts of their respective countries, albeit in Poland first. The husband was contending the recognition of the future Polish divorce judgment in Switzerland, in respect of the HC-1970[1313]. The Swiss Appeal Court ('*Chambre des recours du Tribunal cantonal vaudois*') refused to stay proceedings. The Federal Court reversed the appeal decision.

**458.** The UK approach (in England and Wales) considers that an expiring visa does not preclude a person from acquiring habitual residence. This was ruled in a case[1314] involving a Saudi-British couple, he, Saudi-British, living in Jeddah, she Saudi (born in Bahrain), living in London. The couple married in London through Islamic ceremony. A *Talaq*[1315] was pronounced by the husband and submitted by Deed of Confirmation before the Sharia Court in Jeddah. The ex-husband filed for recognition of *Talaq* before the English Court, which was accepted[1316]. The case does not involve the HC-1970 directly. However, the English courts apply statutory law (*i.e.* Family Law Act 1986) in implementing the Convention[1317], therefore the rules governing the recognition of divorce judgments under English law apply equally to scenarios involving Contracting and non-Contracting States. This includes the use of habitual residence as a connecting factor[1318].

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1313 Applicable to both Switzerland and Poland.

1314 *H v. S* [2011] EWHC B23 (Fam), § 4: "*The fact that the wife is technically an overstayer does not impede the acquisition of her habitual residence*".

1315 Talaq is an Islamic form of divorce whereby it is sufficient for the husband to submit his wish to divorce before the Sharia Court without knowledge of it by the wife – a sort of 'repudiation'. However, following a recent Ministry of Justice Regulation dated 2019, this form of divorce should no longer apply to Saudi Arabia, meaning that knowledge of divorce should be given to the wife, at least by a text message, in order to guarantee right to alimony. The same happened in India, in 2017, where the Supreme Court banned this practice considering it as unconstitutional (*Shayara Bano v. Union of India* WP (C) 118/2016; Protection of Rights on Marriage Bill, 2019).

1316 § 63: "Finally, stepping back from consideration of the cases I ask what is the purpose and policy of s46(1) and the International Convention to which it gives effect? The answer it seems to me is that it provides a mechanism to afford recognition to a Sharia divorce which is more than and has developed from mere oral delivery so that there can be no issue that it has been pronounced. It is also required to be effective within its own jurisdiction. If that is right, the Saudi process as now performed using the machinery adopted by the husband has produced a divorce religiously valid as certified by a religious Court and further effecting a full change of civil status in the eye of the state and the society in which it was pronounced via the registration mechanism. I find it difficult to classify that result and the process by which it was achieved it as outside the intention and boundaries of our recognition code".

1317 § 20: "Statutory reform gives English effect to the 1970 Hague Convention on the Recognition of Divorces and Legal Separations agreed following the 1968 Hague Conference on Private International Law […]. The 1971 and 1986 Acts both afford recognition to divorces obtained by Judicial or other proceedings a phrase imported directly from Article 1 of the 1970 Convention".

1318 Family Law Act 1986, Part II, section 46.

# Section II EU Acquis in Divorce Matters

## § I. Brussels IIA: Guiding Principles for the Habitual Residence Uniform Determination

**459.** Brussels IIA, article 3, provides that the common habitual residence of the spouses, or alternative grounds still referring primarily to habitual residence[1319], determine international jurisdiction over divorce. The Regulation does not contain rules governing the applicable law, which are therefore found in Rome III (*cf.* subsection II *infra*).

**460.** Habitual residence operates differently when governing divorce or parental responsibility[1320]. Such an approach may be contradictory with the conception of a single instrument for matters of divorce and parental responsibility[1321]. In this regard, some preliminary aspects deserve attention in relation to the operation of habitual residence within the ambit of the Regulation, namely: a) the *objective* of habitual residence proves fragmented in its implementation whether it applies to divorce or to parental responsibility proceedings; b) the longstanding CJEU interpretation of habitual residence within Brussels IIA has dealt with proceedings involving children only, without clarifying yet whether the factors highlighted in case law may also be applicable to divorce proceedings through a different perspective (*i.e.* adult's, or family); c) a relevant moment in time for the habitual residence determination in matters of divorce is not indicated in article 3[1322], diverging from article 8.

**461.** The first preliminary remark (I) relates to the objective of habitual residence within the Regulation. Brussels IIA does not give any guidance for the interpretation of the adult's habitual residence, nor has the CJEU ever dealt with the notion in divorce cases. By contrast, Brussels IIA provides a guiding principle for international jurisdiction over parental responsibility. In this regard, recital 12 of the Regulation states that jurisdiction should be located in the child's habitual residence by virtue of proximity and best interests. It is

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1319 A lesser role is played by nationality and domicile. See, in this sense, note 272, STONE, p. 604.

1320 Parental responsibility is discussed in chapter II *infra*.

1321 § 1 and 6: "The European Community has set the objective of creating an area of freedom, security and justice, in which the free movement of persons is ensured. To this end, the Community is to adopt, among others, measures in the field of judicial cooperation in civil matters that are necessary for the proper functioning of the internal market. […] Since the application of the rules on parental responsibility often arises in the context of matrimonial proceedings, it is more appropriate to have a single instrument for matters of divorce and parental responsibility".

1322 By contrast, art. 3(1)(a) fifth indent indicates that the applicant's current habitual residence should be established at least one year immediately before the application. Art. 3(1)(a) sixth indent clarifies that the applicant's current habitual residence must be established six months immediately before the application. Both clarify the appreciable period for the assessment.

argued that recital 12 may be extended to adults, notwithstanding the different type of protection that should be addressed.

**462.** In the context of divorce, best interests might refer to, *inter alia*, the right to remarry (and to divorce), access to efficient and effective justice (including expeditious proceedings avoiding significant costs), and entitlement to parental rights preserving the parent-child relationship when involving children. This reference does not formulate any proposal to define adult's best interests[1323], nor does it aim to suggest a set of exhaustive indicators[1324].

**463.** Enlarging the scope of recital 12 towards adults would provide a harmonised guiding principle for the habitual residence determination within the Regulation, despite the different protection of interests[1325]. And, consequently, it would allow its uniform implementation[1326]. In addition, the applicability of recital 12 over adults would aim to fulfil two of the general principles enshrined in Brussels IIA, namely: (a) '*to ensure respect for the fundamental rights of the child as set out in Article 24 of the Charter of Fundamental Rights of the European Union*' (§ 33)[1327]; and (b) '*to promote the amicable resolution of family disputes*' (§ 25)[1328]. In accordance with the ambit of the Regulation, covering both children and adults, the courts better placed in implementing the above two principles should be those entitled under proximity founded on best interests.

**464.** The second preliminary remark (II) deals with the *almost* complete absence of CJEU guidance for the determination of habitual residence in divorce proceedings[1329]. Some scholars do not exclude the applicability of

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[1323] The concept of best interests applicable to children, particularly within the context of art. 8 of the Regulation, remains currently widely interpreted.

[1324] The purpose of referring to such a fundamental principle under Brussels IIA is not to provide a restrictive interpretation of what children's best interests are. Such an approach may even become conflicting with the children's fundamental rights recognised under the UNCRC. N. CANTWELL, Are 'Best Interests' a Pillar or a Problem for Implementing the Human Rights of Children?, in: T. LIEFAARD/ J. SLOTH-NIELSEN, The United Nations Convention on the Rights of the Child, 2016, p. 62.

[1325] Technically, recital 12, applies to families within the context of art. 8, given that the petitions relating to parental responsibility are often 'interconnected' with divorce and are principally filed by the child's parents. Therefore, the scope of article 8 generally refers to both children and adults although its principal focus is indeed on the protection of the child's interests, being the weaker party and requiring special protection (UNCRC, article 20).

[1326] Ibid. STONE, p. 607

[1327] In relation to this principle, article 24(3) of the EU Charter provides that: "Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents".

[1328] Concerning this principle, family disputes generally arise between parents, before involving children.

[1329] Only one ruling dealing with the habitual residence assessment in divorce proceedings under Brussels IIA, art. 3, has been issued at the time of drafting this book (CJEU, C-289/20, 25 November 2021, *IB v. FA*: This case was about an Irish-French couple, he French, she Irish, with three children. Their marriage was celebrated in Ireland where all the children were born. He relocated to France, although his wife and children (now adult) remained settled in Ireland where he was regularly travelling. He filed before the French courts for divorce, which rejected jurisdiction in first instance and stayed proceedings in appeal). Currently, another case (Request for a preliminary ruling from the Audiencia Provincial de Barcelona (Spain) lodged on 6 October 2020 —

factors relevant to parental responsibility being also applied to divorce[1330]. It would be important for the Luxembourg Court to intervene and finally clarify this matter, especially to the extent of interconnected proceedings (i.e. divorce-custody). An attempt at uniformity in this sense was already indicated in its reasoning applicable to the child's habitual residence[1331], even though in its recent ruling 'IB v. FA C-289/20' the professional ties of one single spouse have taken precedence over the 'family ties and place of marital life' (§ 59), which should be subject to criticism in our view.

**465.** Let us assume that the initial proposal conceived here applies[1332], namely that '*habitual residence corresponds to a regular place of settled and stable dwelling*', such would be conducive to determining the habitual residence of an adult, as well as that of a child. Consideration should be given not exclusively to the general indicators of habitual residence, but rather to the perspective from which such indicators should be assessed[1333].

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*M P A v. LC D N M T* (C-501/20)) concerning, *inter alia*, habitual residence under art. 3 of Brussels IIA is being examined. The couple, she Spanish, he Portuguese, concerned by the request for the CJEU preliminary ruling, 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. The wife filed, *inter alia*, a divorce petition before the Spanish courts, which retained jurisdiction in first instance and declined it in appeal. The case was referred to the CJEU. In its working document (Summary C-501/20– 1), the Luxembourg Court refers to the concept of habitual residence of the minor children: judgments of 17 October 2018, UD (C-393/18 PPU, EU:C:2018:835); of 8 June 2017, OL (C-111/17 PPU, EU:C:2017:436); of 9 October 2014, C (C-376/14 PPU, EU:C:2014:2268); of 22 December 2010, Mercredi (C-497/10 PPU), and of 2 April 2009, A (C-523/07, EU:C:2009:225). Furthermore, the CJEU excludes any reference to the domestic provisions of the Spanish Civil code (art. 40) "given that the CJEU's case-law on the habitual residence of minor children is clear and indicates that the concept of habitual residence constitutes an autonomous concept of EU law and that the domestic law of the Member States is not applicable for the purpose of determining its meaning and scope". The Luxembourg Court provides introductory guidance concerning the recommended fact-based assessment, in particular "In assessing the habitual residence of the spouses seeking to divorce, it is necessary to determine the duration, regularity and stability of the spouses' residence in a country such as Togo. Account must be taken of the fact that their residence in that country is directly related to the performance of their duties […]". See also Opinion of Advocate General Szpunar, *MPA v. LC D N M T*, 24.02.2022, C-501/20.

1330 Ibid. STONE. See also T. KRUGER, Finding a Habitual Residence, in: I. VIARENGO/ F. C. VILLATA, Planning the Future of Cross Border Families, 2020.

1331 "The terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Union, having regard to the context of the provision and the objective pursued by the legislation in question". See CJEU, *A, Mercredi v. Chaffe* [2011] C-497/10.

1332 Part I, chapter IV, section I.

1333 The place of work, or that where a driving license was issued, would be more indicative in establishing the degree of personal integration of an adult, rather than of a child for whom the school environment, or the local football club membership card, might be more determining. In both cases, the degree of *personal integration* as a general indicator would determine the place of social interests. Furthermore, the place where the family interests are located, the location of a principal (family) home, as well as durability, intent, may apply as general indicators for both children's and adults' habitual residence. For instance, the *time factor* for an adult might be compatible with his/ her tax residence, and with the semester enrolment at school for the child. The *settled home* might be located where the adult's invested a considerable part of his/ her fortunes and principally occupied his/ her owned immovable, and for the child where the place of his/ her personal identity

**466.** The third preliminary remark (III) deals with the absence of a moment[1334] guiding the determination of habitual residence, and identifying its *effective change*. The seisin is indicated in contexts involving parental responsibility only. It is apparent, in circumstances pertaining to adults, as for children, that this time delimitation would prove useful in terms of predictability and certainty.

**467.** The variety of alternative grounds designated under article 3 leaves the opportunity anyway for couples to choose among different formulas[1335]. This rule, nevertheless, does represent hazards of (un)predictability and (un)certainty in that couples may be tempted to embark on a 'race to the courthouse' at the moment their dispute arises[1336]. A short example may illustrate the issue.

**468.** In a case involving an Italian-French couple[1337], living and working in Italy for six months, and in France for the other six months, both States may be considered as the couple's habitual residence[1338].

> According to article 3(1)(a) first, second, third, and fourth indents, the divorce application may be filed in both States, at any time, potentially triggering a conflict of jurisdictions whereby the operation of *lis pendens* (article 19.1) should be inevitable[1339]. By contrast, article 3(1)(a) fifth and sixth indents seem to limit the sphere of action of the applicants even though this time, as for third and fourth indents, the EU legislation refers to the use of a 'separate' habitual residence[1340].

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within a rooted community is. The *subjective element* for an adult may be to live in a State to keep his/ her principal social relations, which would be potentially the same for the child, though in different social environments. Lastly, *family interests* could indeed be applicable to both children and adults, representing a specific degree of stability and well-being, or a context of solidarity for specific vulnerable families (I. DE CARLO/ G. AEBY/ E. WIDMER, Recomposition Familiale : Variété des Configurations et Ancrage Sociodémographique, *Sociograph*, 2012).

1334 It is said that the 'date of application' should be implied in art. 3 as the moment of determination. See, in this sense, ibid. STONE, p. 605.

1335 Alternatively, to refer to their nationality or domicile depending on the geographical context.

1336 Especially if the moment of determination of habitual residence is not well delimited. Ibid. STONE, p. 607: "*Thus it seems possible for a person who returns to his country of origin, or to an earlier residence, to resume a habitual residence there immediately on arrival*".

1337 Art. 3(1)(b) and domicile are therefore excluded.

1338 This scenario involves the two uncommon issues of alternate or concurrent habitual residence (*cf.* Parts I and II).

1339 In relation to this aspect, *lis pendens* (*cf.* part I, chapter IV, section V) proves to be a valuable tool in solving conflicts of jurisdiction and of habitual residences. The court first seised should rely on a *factual analysis* for the determination of habitual residence, in line with the objectives of the Regulation, and not on a *chronological time-based rule* only (*cf.* section VI *infra*). The latter means that in absence of habitual residence or in presence of a principal habitual residence elsewhere, the court first seised should more appropriately proceed with a transfer of jurisdiction, which today is applicable to the sole matter of parental responsibility (Brussels IIA, art. 15).

1340 We have already expressed criticism for this approach which may potentially lead to forum shopping, in particular when a couple lives separately and each spouse may prefer to apply before his/ her country of origin. With regard to fifth and sixth indents, we also find that the term 'immediately before the application' does not imply that habitual residence must also be continuous

## § II. Pre- and Post- Brussels IIA: National Case law

**469.** In line with the proposal for a two-fold test approach[1341], we will now examine national case law in order to assess specific elements aimed at determining habitual residence within the EU divorce proceedings.

**470.** The UK courts have considered that short duration (even if regular)[1342] and reference to an apartment address that is not occupied, may not be sufficient for the determination of habitual residence. In the present case[1343], whose contents are essentially similar to the others[1344], a petitioner, Italian citizen, living in Italy, filed for divorce before the Family Court of England and Wales. There was no objection or litigation between the parties relating to jurisdiction, in fact it was said that the couple had agreed in circumventing law in order to access justice in England. More precisely, the petitioner, had declared, concertedly with the respondent, that the couple's habitual residence was in England, relying on the address of an apartment that was *de facto* not occupied by either of them[1345]. The Court retained as a relevant element the

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at the time of 'the commencement of the proceedings' (see *Tan v. Choy* [2014] EWCA Civ 251, § 29). At the same time, it is also true that reference to the seisin, for instance, a relevant time used under art. 8 over parental responsibility, does not imply either that habitual residence must be regularly established before it.

1341 Part I, chapter IV.

1342 "To put this in context, the petition in Diaferio v. Rodrigues TS10D00587, originally received by the court on 19 October 2010 and returned for correction of what for present purposes was an immaterial error, was issued on 16 November 2011, based on two years' separation. The parties were said to have married on 28 September 2008 and separated on 7 October 2008. The petitioner's address was given as Flat 201. The affidavit in Form M7 purportedly sworn by the petitioner on 15 February 2001 (it was bogus like the others) alleged that she had lived at Flat 201 since 7 October 2008. It also stated that the reason for the parties' separation was that 'We came to the conclusion that we had grown apart'. There are, taking the affidavit at face value, two curiosities about this: first, that the parties had 'grown apart' within nine days of the marriage and, second, that the petitioner had allegedly taken up residence in this country the day she separated from her husband in Italy. Neither is impossible; each is somewhat unlikely. The decree nisi followed on 23 March 2011 and the decree absolute on 20 September 2011".

1343 The judgment involved 180 scandalous petitions for irregular divorce (EWFC, *Rapisarda v. Colladon*, 30.09.2014).

1344 § 9: "*In each of the cases before me jurisdiction was sought to be founded in accordance with, in most of the cases, the fifth or, in a small minority of the cases, the third limb of Article 3.1(a). So, in every case it was being asserted that either the applicant (the petitioner) or the respondent was habitually resident in England and Wales*".

1345 § 31-32: "I have before me 180 cases in each of which an apparently Italian petitioner presented a petition for divorce to the English court. Examination of the court files in these 180 cases shows that in every instance it was asserted that the English court had jurisdiction to entertain the petition in accordance with the Council Regulation on the basis, in most of the cases, that the petitioner was habitually resident and had been resident in England and Wales so as to satisfy the requirements of the fifth limb of Article 3.1(a) or, in a small minority of the cases, that the respondent was habitually resident in England and Wales so as to satisfy the requirements of the third limb of Article 3.1(a) […] In 179 of the cases (I shall deal separately with the other case, La Marca v Prestieri BY12D00274, where an address in Epsom was given as the petitioner's residence) the address given for the petitioner or the respondent, as the case may be, was identical: Flat 201, 5 High Street, Maidenhead, SL6 1JN. I shall refer to this as 'Flat 201'. The address given for the other party – and these were different addresses – was in each case in Italy […]".

location of the *matrimonial home*, considering it as a base, where personal 'things' were kept (alluding to clothes, personal belongings)[1346]. A short reference to the place of taxation was also made[1347]. The Court concluded that habitual residence was not in England[1348]. Consequently, the divorce judgment ('decree nisi' and 'decree absolute')[1349] was considered void for fraud, and the petition rejected[1350].

**471.** The instant case[1351] involved a British couple, with a child, who got married in England. The husband filed for divorce before the French courts, France being allegedly the actual habitual residence of his wife. The French Supreme Court upheld the appeal judgment, declining jurisdiction on the basis that the defendant's habitual residence was not established in France. For the Court of Appeal the defendant had maintained her habitual residence in England at the relevant time by virtue of specific elements, namely: her tax residency; her record on the electoral register; her use of bank accounts; her and her daughter's access to medical care; and even her usual hairdressing salon and her dog's veterinary clinic. The Supreme Court upheld this reasoning and disregarded the elements related to the child's enrolment at school in France, the respondent's established social life, the respondent's intent to improve her French language skills, the opening of bank accounts in France, the consistent use of the French address, and the purchase of a car, which were not indicative of factual stability[1352]. The Supreme Court also

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1346 § 92: "[…] *the greater part of the year being spent working abroad, although it appears that the matrimonial home in Verona was his 'base' and where he kept his things*".

1347 "*He paid no tax in this country*".

1348 § 33-34: "[…] there is no reason to believe that either the petitioner or the respondent, as the case may be, whose address was stated to be Flat 201 had ever resided in England or Wales […]. Be that as it may, it is certain that none of them can ever have resided at Flat 201".

1349 § 6: "An application for divorce is made in the English court by an originating process called a petition. The person applying for divorce is called the petitioner; the other spouse is called the respondent. An order for divorce is called a decree. The first decree is called a decree nisi: it is a provisional order which does not itself terminate the marriage. The second decree is called a decree absolute: it is a final order which brings the marriage to an end*".*

1350 This case does not fall directly under Brussels IIA, even though English law governing divorce (*i.e.* the Domicile and Matrimonial Proceedings Act 1973) refers to, *inter alia*, the same connecting factors and grounds of jurisdiction contained in article 3 of the said Regulation. See § 8 of the case: "Jurisdiction to entertain the petition is conferred by section 5(2) of the Domicile and Matrimonial Proceedings Act 1973: The court shall have jurisdiction to entertain proceedings for divorce … if (and only if) – (a) the court has jurisdiction under the Council Regulation; or (b) no court of a Contracting State has jurisdiction under the Council Regulation and either of the parties to the marriage is domiciled in England and Wales on the date when the proceedings are begun*".* The grounds of jurisdiction under the Domicile and Matrimonial Proceedings Act 1973 received a slight modification under the 'Jurisdiction and Judgments (Family) (Amendments etc) (EU Exit) Regulations 2019 (SI 2019/519)'. The latter will substantially replicate the grounds currently provided under art. 3 of Brussels IIA, which will cease to apply for cases instituted on or after 1 January 2021.

1351 Cour de Cassation, civile, 14 December 2005, 1880, 05-10.951.

1352 "*Mais attendu que la résidence habituelle, notion autonome du droit communautaire, se définit comme le lieu où l'intéressé a fixé, avec la volonté de lui conférer un caractère stable, le centre permanent ou habituel de ses intérêts ; que l'arrêt, après avoir relevé que la compétence des*

concluded that the mother's and the child's stay in France was lacking a settled purpose, which was instead located in England by virtue of the regular contacts maintained there. The French judge, despite the different approach[1353] between Brussels II and Brussels IIA in relation to the applicant's and respondent's habitual residence, concluded that the latter was not established in France, in absence of decisive elements. The French decision appears useful in that habitual residence was maintained in London, although the mother and the child were temporarily living elsewhere[1354].

**472.** The case[1355] concerned, *inter alia*, a motion to modify a divorce decree issued by the Ukrainian courts, filed by a Ukrainian wife against her Ukrainian husband before the Italian Tribunal of Modena. The latter retained jurisdiction under article 3(1)(a) of Brussels IIA[1356]. Decisive elements for the couple's habitual residence assessment were the purchase of an apartment, under the regime of co-ownership, corresponding to the family's home where their child was raised. The Court excluded tax residency and temporary (even if regular) 'stays' in other States, namely in Ukraine, as elements for the determination of habitual residence[1357].

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*juridictions françaises ne pouvait être fondée que sur la résidence habituelle du défendeur, a fait application de cette définition ; qu'ayant souverainement relevé, d'une part, que le séjour en France de Mme Y..., dans la résidence secondaire de la famille, était temporaire et avait pour but principal d'aider l'enfant commun à poursuivre momentanément sa scolarité en France et, d'autre part, qu'il ne ressortait pas des pièces produites, notamment par l'épouse, que celle-ci ait eu la volonté de transférer en France le centre habituel et permanent de ses intérêts, la cour d'appel en a exactement déduit, sans méconnaître l'article 2 du Règlement CE n° 1347 du 29 mai 2000 alors applicable, que le juge aux affaires familiales français était incompétent pour connaître de l'action en divorce ; que le moyen n'est fondé en aucune de ses branches".*

1353 The French judicial interpretation involved habitual residence under the Brussels Regulation (1347/2000), superseded by the current Brussels IIA. Article 3(1)(a), third indent of the current Brussels IIA, represents a new ground of jurisdiction, which was absent in the previous Regulation. This 'new' ground would be applicable in the instant case, potentially relying on the respondent's habitual residence.

1354 "*que ces éléments faisaient ressortir qu'elle avait donné à son installation prévue pour dix-huit mois un caractère de stabilité objective, peu important qu'elle ait aussi conservé des contacts réguliers à Londres* […]*".*

1355 Tribunale di Modena [23 June 2016] No. 1286.

1356 "*Il Tribunale, definitivamente pronunciando, dichiara cessata la materia del contendere sulla domanda di separazione personale tra Y , nato a (omissis) (UKR) il (omissis)/84 e X , nata a (omissis) (UKR) il giorno (omissis)/66, per effetto del riconoscimento del divorzio pronunciato tra gli stessi in Ucraina in data 17/7/2014* […] *Questo giudice, dunque, non condivide l'orientamento seguito dalla giurisprudenza di merito citata dal resistente, nella parte in cui afferma che, preclusa la decisione sulla separazione per effetto dell'intervenuto divorzio, va senz'altro dichiarata inammissibile la domanda, "restando assorbita ogni ulteriore questione ad essa conseguente in merito agli altri capi della decisione (quale la mancata disciplina dell'affidamento dei figli e dei rapporti patrimoniali tra le parti), che potranno eventualmente formare oggetto di autonomo procedimento di revisione delle condizioni di divorzio, qualora ne sussistano i presupposti" (Trib. Belluno, sentenza del 5/11/2010)*".

1357 "*Nella fattispecie la giurisdizione italiana e la competenza di questo tribunale vanno senz'altro affermate, in quanto entrambe le parti sono residenti a (omissis) (MO), ove hanno acquistato in regime di comproprietà al 50% un appartamento su cui grava un mutuo fondiario, sito in via (omissis) n. (omissis) ed adibito a casa coniugale fino al sorgere della presente controversia agli inizi del 2014, quando la ricorrente si trasferita dalla sorella, nell'ambito dello stesso fabbricato condominiale. Nella medesima abitazione i coniugi hanno cresciuto la figlia minore Li., allevata dai nonni paterni in Ucraina fino all'età di sei anni e portata in Italia nel*

**473.** The analysis of these three cases allows us to conclude that, in the context of divorce, the matrimonial home occupied on a principal basis, as well as the regular contacts[1358] with a given State, should be considered both as determining elements. The relevancy of the time factor in relation to the living duration at a relevant time should show, irrespective of its length, a settled purpose rather than an occasional presence. Lastly, tax residency may be a potential useful factor for the anamnesis.

## § III. Rome III: Relevant Provisions and Preliminary Remarks

**474.** This Regulation[1359] sets out the rules in matters involving applicable law over divorce or legal separation. A choice of applicable law (article 5) may alternatively be concluded[1360] in favour of the spouses' common habitual residence, or of their last common habitual residence still current for one of them, at the time the agreement is concluded[1361]. In absence of *professio juris* (article 8), the following grounds on habitual residence are applicable on a subsidiary basis[1362]: the spouses' common habitual residence at the seisin; their last common habitual residence provided that more than a year has not elapsed and that it is still one of the spouses' current habitual residence at the seisin[1363]. As for the uniform operation of habitual residence under Brussels IIA, some preliminary remarks should be made concerning habitual residence within Rome III.

**475.** The Regulation does not give any factual guidance for the habitual residence assessment. It is mentioned that the terms used within Rome III should be enacted consistently with Brussels IIA[1364]. In this regard, the previous reasoning on recital

*2007, prima a (omissis) (MO) e poi a (omissis); febbraio 2014, invece, la minore è affidata ai Servizi Sociali di Vignola* […] *Di conseguenza, nessuna rilevanza gioca il fatto che - saltuariamente, anche se per un periodo continuativo - il coniuge abbia trascorso periodi presso diversa residenza all'estero*".

1358 With regard to the significance attributed to the notion of 'regular contacts', according to the judgments under analysis, such may be the place of the initial family life settlement, for instance where the celebration of marriage occurred, with which contacts are maintained at a relevant point in time. The intent of the person, or family, concerned by the determination may play a complementary role in the assessment of such contacts.

1359 The Regulation does not apply in several Member States (it did not apply to the UK either before Brexit). However, the Regulation does promote the universal application of the law designated by its rules, which may be that of a third State or EU Member State not participating in the enhanced cooperation.

1360 The choice of applicable law may be concluded at any moment including at the seisin and during the proceeding. See § 20 of the Regulation: "An agreement designating the applicable law should be able to be concluded and modified at the latest at the time the court is seized, and even during the course of the proceeding if the law of the forum so provides".

1361 Alternatively, the law of either spouse's nationality at the time the agreement is concluded, or the *lex fori*, may be elected by the spouses.

1362 The subsidiary character is implied through the mention 'or failing that'.

1363 The common nationality of spouses at the seisin and the *lex fori* apply also on a subsidiary basis.

1364 § 10: "*The substantive scope and enacting terms of this Regulation should be consistent with Regulation (EC) No 2201/2003*".

12[1365], according to which habitual residence should be founded on proximity and best interests, should also apply for the determination of the law applicable to divorce.

**476.** The Regulation indicates that the law of habitual residence[1366] subject to a *professio juris*[1367] should determine a 'special connection' with the spouses. It further states that, in absence of *professio juris*[1368], a 'close connection' should be established between the spouses and the law of habitual residence[1369]. It is observed that no further guidance is provided for the interpretation of special and close connection, which is referred to for the determination of both habitual residence and nationality.

## § IV. Rome III: National Case Law

**477.** The CJEU has not yet rendered any judgment on the interpretation of habitual residence under this Regulation, which leads us to take up the guidance of national case law[1370].

**478.** The French *Cour de Cassation* interpreted habitual residence for the purposes of both Brussels IIA and Rome III. The case[1371] involved an Azeri couple living with their two children in France. The wife filed petition for divorce before the French courts, which was challenged by the husband. The Supreme Court maintained that for the purposes of article 3 of Brussels IIA, the spouses' habitual and stable residence was in France[1372]. The Court concluded that French law should apply based on article 8 of Rome III.

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1365 *Cf.* subsection I *supra*.

1366 Alternative to the law of nationality.

1367 § 16: "Spouses should be able to choose the law of a country with which they have a special connection or the law of the forum"

1368 § 21: "Where no applicable law is chosen, and with a view to guaranteeing legal certainty and predictability and preventing a situation from arising in which one of the spouses applies for divorce before the other one does in order to ensure that the proceeding is governed by a given law which he considers more favourable to his own interests, this Regulation should introduce harmonised conflict-of-laws rules on the basis of a scale of successive connecting factors based on the existence of a close connection between the spouses and the law concerned. Such connecting factors should be chosen so as to ensure that proceedings relating to divorce or legal separation are governed by a law with which the spouses have a close connection".

1369 Alternative to the law of nationality.

1370 See also the cited French and Italian decisions implementing Rome III (*cf.* part I, chapter I, section IV). Concerning the French decision (Cour d'Appel de Toulouse, 25 May 2008, No. 06/02241), we recall the following decisive elements: the duration; the nationality; the place of marriage celebration; the school enrolment; the 'habitual' nature of the residence obtained with no fraud/ violation of the father's parental rights. With regard to the Italian decision (Tribunale Rimini (IT), 13.04.2015, No. IT-807), the following decisive elements were determined: the place of marriage celebration; the establishing and registration of the family residence; the duration; the place of birth of the three daughters; and the absence of relocation during the proceedings.

1371 Cour de cassation, civile, Chambre civile 1, 24 février 2016, 15-10.288, Inédit.

1372 The Court added that the child's habitual residence was also in France under art. 8 of Brussels IIA.

Relevant elements for the couple's habitual residence determination were: the living duration in France; the purchase of an immovable in France; the common spouses' settled purpose in France; the children's place of birth/ place of living at the time of the petition; and the children's enrolment at school.

## Section III Prorogation of Jurisdiction

**479.** The 1996 Hague Convention sets out the rules for the jurisdiction and applicable law over the international protection of children. The scope between this Convention and Brussels IIA is very similar[1373]. The Convention prevails over the Regulation[1374] concerning parental responsibility, which involves Member States[1375] and third States that have ratified the Convention[1376].

**480.** The most relevant aspect for this analysis relates to the provision concerning the *prorogatio fori* contained in both instruments. According to this rule, the divorce jurisdiction is extended to matters of parental responsibility, following the agreement of the parties[1377]. In this regard, article 12 of the Regulation and article 10 of the Convention provide respectively a somewhat different approach, although the rule operates substantially in the same way.

**481.** The Regulation refers to a *mandatory*[1378] prorogation[1379] in favour of the jurisdiction of divorce for all matters arising in connection between divorce

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1373 For a detailed analysis of the provisions of the Convention and the Regulation see part I, chapter I.

1374 Articles 61 and 62 of the Regulation govern its relationship with the Convention. In this regard, we recall three aspects that appear relevant to us: (a) the rules on applicable law for parental responsibility are contemplated only by the Convention; (b) if a judgment is rendered in a first Member State and should be recognised in a second Member State, that is party to the Convention and where the child is habitually resident, the rules on recognition and enforcement of the Regulation will continue to apply; (c) the Convention does not provide rules on jurisdiction over divorce, which are instead set out under the Regulation. The reason for the rule under lit. (b) lies in the EU objective to create a common judicial area (see note 290, Practice guide, p. 89).

1375 Applying or not the Regulation. For instance, a parental responsibility proceeding involving Denmark would be governed by the rules of the Convention. We recall that the Regulation is not applicable to Denmark.

1376 For instance, the Convention would apply to a parental responsibility proceeding concerning Italy and Switzerland.

1377 It is important to recall that, in addition to the parental agreement, prorogation requires cumulative conditions, namely: the establishing of jurisdiction on divorce and the proceeding is still pending; the consent of both parents, and at least one of them holds parental responsibility; the parental responsibility holder's habitual residence at the time of the commencement of the proceedings in the agreed State (peculiarity of the Convention); and the child's best interests determination (see also CJEU, *E v. B* [1 October 2014] C-436/13, § 45: "*It follows that jurisdiction in matters of parental responsibility must be determined, above all, in the best interests of the child*").

1378 Brussels IIA, art. 12(1): "*The courts of a Member State…shall have jurisdiction*".

1379 We refer to such context as 'prorogation' since the term appears concretely meaningful to us.

and parental responsibility[1380]. The Convention provides that the competent authority over divorce *may* also be entitled to apply protective measures over the person and the property of the child.

**482.** Concerning the interplay between articles 12(1) and (3)[1381] of the Regulation, and 10 of the Convention, it is noticed that prorogation of jurisdiction refers to the habitual residence of the parental responsibility holder. In this regard, the CJEU has indirectly furnished a few elements of interpretation for the habitual residence of the parental responsibility holder. In particular, the Court considered as relevant the purchase or rental of accommodation, even though it seems that this would be a complementary element[1382]. Additionally, the Court referred to the intention to establish habitual residence relying on a lasting character of duration[1383]. It concluded that habitual residence should denote a degree of permanence[1384], representing the person's centre of interests factually determined through certain tangible steps[1385].

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1380 We recall that, in proceedings other than those dealing with divorce, the Regulation indicates that the State of prorogation, including when the child's habitual residence is outside the EU, should be the one of 'substantial connection' with the child. Substantial connection refers alternatively to the parental responsibility holder's habitual residence or to the child's State of nationality. This provision is similarly provided within the Convention, art. 8, under 'transfer of jurisdiction', which is intrinsically different from that of prorogation (*cf.* chapter II *infra*). Ibid. STONE, p. 655.

1381 In the context of substantial connection, prorogation remains a temporary exception to the general rules of jurisdiction. The exceptional character of this rule is particularly highlighted in relation to the child's habitual residence which remains an exclusive ground, with no alternative grounds set out under article 8 of the Regulation (and 5 of the Convention). On this subject, see also Ibid. *E v. B*, § 49: "It must accordingly be held that a prorogation of jurisdiction, on the basis of Article 12(3) of Regulation No 2201/2003, is valid only in relation to the specific proceedings for which the court whose jurisdiction is prorogued is seised and that that jurisdiction comes to an end, in favour of the court benefiting from a general jurisdiction under Article 8(1) of that regulation, following the final conclusion of the proceedings from which the prorogation of jurisdiction derives".

1382 See CJEU, *Mercredi v. Chaffe* [2011] C-497/10, § 50: "In the context, the Court has stated that the intention of the person with parental responsibility to settle permanently with the child in another Member State, manifested by certain tangible steps such as the purchase or rental of accommodation in the host Member State, may constitute an indicator of the transfer of the habitual residence".

1383 The Court clarified that intention should be of paramount importance and that duration should only be an indicator.

1384 In part I, chapter IV, it was said that the degree of permanence attributed to the interpretation of habitual residence may lead to the overlapping operation between domicile and habitual residence.

1385 § 51: "In that regard, it must be stated that, in order to distinguish habitual residence from mere temporary presence, the former must as a general rule have a certain duration which reflects an adequate degree of permanence. However, the Regulation does not lay down any minimum duration. Before habitual residence can be transferred to the host State, it is of paramount importance that the person concerned has it in mind to establish there the permanent or habitual centre of his interests, with the intention that it should be of a lasting character. Accordingly, the duration of a stay serves only as an indicator in the assessment of the permanence of the residence, and that assessment must be carried out in the light of all the circumstances of fact specific to the individual case".

## Section IV Concentrate Jurisdiction under the EU Acquis and the Swiss Legislation

**483.** The EU acquis in family matters contemplates specific rules governing international jurisdiction over property regimes in connection with divorce. The Property Regimes' Regulations[1386] provide in article 5 that when the courts of a Member State are seised to rule on an application for divorce, or dissolution of partnership, these shall be competent also over matters of property regimes (§ 1). This rule is known as *concentrate jurisdiction*. Concerning registered partnerships, the agreement of the partners is required for this jurisdiction to apply (§ 1). With regard to divorce, the spouses' agreement should take place in specific scenarios falling under article 3(1)(a) fifth and sixth indents of Brussels IIA[1387].

**484.** The reason for the jurisdiction agreement lies in the fact that, otherwise provided, a spouse/ partner would be legitimated in filing a petition for divorce/ dissolution together with the liquidation of the couple's property regimes in a State in which the other spouse/ partner has never lived. In the context of registered partnerships, this is more accentuated by the fact that Brussels IIA does not cover registered partnerships[1388]. In this regard, the partners are subject to the jurisdictional grounds contemplated by the national conflict-of-law rules of the courts seised for the dissolution and the liquidation[1389].

**485.** A similar approach pertaining to concentrate jurisdiction can be found under the Swiss legislation, within the SPILA[1390]. Some examples will illustrate the EU and Swiss scenarios. A Portuguese couple enters into marriage in Portugal after completing their school education. The husband moves to Switzerland where he starts a traineeship ('*apprentissage*') while his spouse continues living in Portugal. After a year, he meets an Italian lady with whom he starts a relationship. Consequently, he would like to file for divorce from his wife.

> According to the Swiss legislation, he could file a petition for divorce before the Swiss courts under article 59(b) SPILA based on his ultra-

[1386] For a detailed analysis of the Property Regimes' Regulations, see part I, chapter I, and part II, chapter II.

[1387] The 1103 Regulation indicates other scenarios to which concentrate jurisdiction applies, not relevant for this analysis (§ 2). These are typically the conversion of legal separation into divorce and the residual jurisdiction, respectively under art. 5 and 7 of the Brussels IIA Regulation.

[1388] Ibid. VIARENGO, p. 74.

[1389] Ibid.

[1390] On the SPILA provisions governing interconnected proceedings involving divorce and property regimes, see also part II and note 27, ROMANO, p. 63.

annual residence[1391]. The jurisdiction over matters of divorce would enable him to claim the liquidation of the property regime before the same courts according to article 63(1)[1392]. In such circumstances, the Swiss courts would apply their own law to the divorce proceeding based on article 61. The claim over property regimes should instead be governed by the Portuguese law of the spouses' last common domicile on the basis of article 54(1)(b)[1393].

**486.** A French-German couple married and settled in Germany. The husband, French, who moved to, and lived in, France for six months would like to file a petition for divorce and liquidation of the matrimonial regime before the courts in France.

The husband should be legitimated to file for divorce in France under article 3(1)(a), sixth indent, of Brussels IIA. However, the courts in France would not be able to extend their jurisdiction without the spouses' agreement required under article 5(2) of the 1103 Regulation[1394]. For the purposes of the applicable law, it is clarified that the Property Regimes' Regulations do not provide 'concentration'. Thus, if competent under article 5(2), the French courts should apply the rules of Rome III for divorce[1395] and those of the Property Regimes' Regulations governing the liquidation[1396].

**487.** In conclusion, concentrate jurisdiction under the EU acquis and the Swiss legislation[1397] may simply disregard the idea of jurisdiction based on

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1391 With regard to the Swiss notion of domicile within the meaning of art. 59(b), its interpretation should be found under art. 20(1)(a) SPILA. In addition, art. 59(b) specifies that a yearly residence, also potentially referred to as 'ultra-annual residence', would establish domicile. The ultra-annual residence, if corroborated by factual elements assessed through the Swiss case law, should incorporate the Swiss notion of habitual residence under art. 20(1)(b). Habitual residence should further apply under art. 59(a) or (b), on a subsidiary basis, by virtue of art. 20(2). In the context of art. 59(b), which ultimately provides for an interplay between domicile and habitual residence, factual elements are usually indicative of the person's centre of life interests composed of his/ her social and family ties. The centre of life interests may refer to the person's family place of living only if their relationship is regularly maintained at the relevant time. In this regard, the apartment lease, the tax residency and the health insurance would not be considered determining according to the Swiss Federal Court (ATF 5A_917/2018; *a contrario* BGE 136 II 405).

1392 There is enough evidence to conclude that the Swiss courts would exercise concentrate jurisdiction by virtue of the principle of '*unité du jugement du divorce*' (*cf.* part II, chapter II, section IV).

1393 In absence of *professio juris*, art. 63(2) renvoi to art. 52 and 54 previously examined in part II, chapter II, section IV.

1394 In absence of such an agreement, the competent courts for the liquidation of the matrimonial regime should be those under art. 6 of the 1103 Regulation that we have already examined (*cf.* part II, chapter II, section II).

1395 This should be German law according to art. 8(b) of Rome III.

1396 German law should govern the liquidation of the matrimonial regime based on art. 26(1)(a).

1397 The SPILA does not provide a jurisdictional ground for divorce based on common qualified proximity. We argue that harmonisation with the jurisdictional grounds contemplated by Brussels IIA, art. 3, would allow better coordination in EU-Swiss divorce proceedings, involving as a consequence also property regimes through concentrate jurisdiction.

proximity[1398] intended as concerning both spouses. In line with our proposal advocating for qualified proximity towards both spouses in matters of property regimes[1399], it is argued that article 5 of the 1103 Regulation may have envisaged concentrate jurisdiction only in favour of article 3(1)(a), first and second indents[1400] relying on the spouses' common habitual residence[1401].

## Section V Divorce Conflict-of-law Rules in the US and Turkey

**488.** By having already explored the conflict-of-law rules on property regimes provided under Turkish and US legislations[1402], this analysis will tackle the rules on divorce. Reference is also made to interconnecting proceedings involving Brussels IIA.

### § I. US-EU

**489.** Under US law (Restatement Second of Conflict of Laws)[1403], the *lex fori* applies over matters of divorce, provided that the petitioner or both parties have connection with the forum, for instance through domicile[1404] or substantial connection[1405]. Jurisdiction is in principle vested in the authorities

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1398 A. BONOMI, Compétence accessoire versus proximité et prévisibilité du for : quelques réflexions sur ces objectifs antagonistes à l'aune des Règlements sur les régimes et les partenariats (ibid. in: ANCEL/ ANCEL) p. 228.

1399 Part II, chapter II, section V.

1400 As an alternative to the spouses' common nationality or domicile under art. 3(1)(b).

1401 This solution might find additional support in one basic incoherence, among others, between, on the one side, art. 3 of the Brussels IIA Regulation, for which grounds no hierarchy is provided, and art. 5 of the 1103 Regulation, on the other side, introducing it (A. BONOMI, Les règlements européens sur les régimes matrimoniaux et les effets patrimoniaux des partenariats enregistrés : un premier regard depuis la Suisse, Journée de droit successoral, 2019, p. 181). With regard to such incoherence, see also '*Proposition de Règlement du Conseil relatif à la compétence, la loi applicable, la reconnaissance et l'exécution des décisions en matière de régimes matrimoniaux'* COM(2011) 126 final, art. 4; and CJEU, *Iaszlo Hadadi (Hadady) v. Csilla Marta Mesko, épouse Hadadi (Hadady)* [16 July 2009] C-168/08, § 48. Concerning the potential risk of rush to the courthouse arising from a spousal agreement, dealing with property regimes in connection with divorce, that cannot determine in advance the competent court for divorce under Brussels IIA, see VIARENGO, p. 76.

1402 Part II, chapter II, section IV.

1403 § 285.

1404 See *Alton v. Alton*, 207 F.2d 667 (3d Cir. 1953). See also ibid. HAY *et al.,* p. 692. The matrimonial domicile has been historically the predetermined connecting factor under the US divorce conflict-of-law rules on applicable law, even though according to the current practice the domicile of either spouse would nowadays also be a valid alternative.

1405 Ibid. HAY *et al.*, p. 694. The forum law of substantial connection relies on the application of a (most) significantly related law to the parties and the marriage.

of the spouses' common or separate domicile[1406] or residence[1407]. With regard to foreign judgments concerning divorce, their recognition and enforcement would rely on judicial discretion[1408].

**490.** The following hypothetical illustrates the EU-US scenario: A US-French couple enters into marriage in New York and settles in California. The wife, French national, later relocates to France. After six months, she is willing to file for divorce before the French courts. Meanwhile, she is served notice of a divorce application filed by her husband before the courts in California. She files before the US courts for dismissal of her husband's application.

**491.** According to Brussels IIA, article 3(1)(a), sixth indent, the wife could file for divorce in France. The French courts would be entitled to retain jurisdiction[1409] and apply Californian substantive law relying on Rome III, articles 4 and 8(b)[1410]. According to US law, the courts in California would also be entitled to exercise jurisdiction and apply their own law, based on the plaintiff spouse's domicile or continued residence[1411].

## § II. Turkey-EU

**492.** Under Turkish law, the PIL code sets out the rules governing divorce. The applicable law of the spouses' common habitual residence[1412] applies on a

[1406] Ibid. SYMEONIDES, p. 568. Domicile should refer to a "nexus between the person and the place of such permanence as to control the creation of legal relations and responsibilities of the utmost significance" (Ibid. HAY *et al.*, p. 698, which refers to the US Supreme Court judgment *Williams v. North Carolina* (II), 325, 1945).

[1407] States' practice shows that a 'substantial living period' (*i.e.* six-month continuing physical presence) is sufficient, as opposed to the only place of marriage celebration, for the determination of residence (L. M. REESE/ R. S. GREEN, That Elusive Word, Residence, *Vanderbilt Law Review*, Vol. 6, 1953). See also J. K. VAND DE KAMP, Office of the Attorney General, State of California, 1984 <https://oag.ca.gov/system/files/opinions/pdfs/84-104_0.pdf>); and ibid., HAY *et al.*, p. 695, in relation to *ex parte* divorce actions.

[1408] Ibid. SYMEONIDES, p. 569. See also Supreme Court of New York, *Bourbon II* [2 December 2002] 751 N.Y.S.2d 302 (App. Div); and District Court of Appeal, Second District, Division 2, California, *Scott v. Scott* [2 July 1958] Civ. 22959.

[1409] Art. 19 of Brussels IIA, *lis pendens*, may apply upon discretion of the French judge. Generally, in absence of bilateral or multilateral conventions, national conflict-of-law rules would govern *lis pendens*. However, its national implementation might be different from the EU rule on *lis pendens*. See Advocate General's opinion, *Stefano Liberato v. Luminita Luisa Grigorescu* [6 September 2018], C-386/17, § 61.

[1410] 'Renvoi' being excluded within Rome III, art. 11.

[1411] The US courts in California may refuse the wife's application to dismiss the divorce proceeding, even though they could still decide to proceed with the recognition of a final French judgment based on the principle of comity. On this subject, see Supreme Court of New York, *Bourbon II* [2 December 2002] 751 N.Y.S.2d 302 (App. Div). The US courts in California would assess the jurisdiction of the foreign courts in France according to the US standards (ibid. HAY *et al.*, p. 718-719).

[1412] Turkish or foreign citizens.

subsidiary basis[1413]. The domestic rules on internal jurisdiction govern international jurisdiction[1414]. Such rules are in particular the forum of the respondent's legal domicile or, alternatively, of his/ her habitual residence[1415].

**493.** Turkish nationality determines international jurisdiction for those citizens[1416] who are found in the impossibility of bringing an action, or who are reluctant to do so, concerning their personal status, including divorce[1417], before the courts of a foreign country[1418]. The internal competent forum in Turkey is located at the citizen's habitual residence[1419]. For foreigners, the question appears contradictory. Some scholars indicate that article 41 should be extended to the foreigner's personal status[1420]. This rationale should not apply to matters involving divorce of foreign couples residing in Turkey[1421]. Our understanding is that the Turkish courts should exercise international jurisdiction over foreign couples by virtue of a teleological interpretation of articles 40 and 42[1422]. In this regard, jurisdiction is alternatively allocated to the courts of either foreign spouse's habitual residence, or alternatively, to the

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1413 In absence of common nationality or in presence of multiple common nationalities. See art. 14(1): "The grounds and provisions for divorce and separation shall be governed by the common national law of the spouses. If the spouses have different nationalities, the law of the place of their common habitual residence, in case of absence of such residence, Turkish law shall govern".

1414 PIL code, art. 40.

1415 Z. D. TARMAN/ B. BAŞOĞLU, Matrimonial Property Regime in Turkey, Asser Press, No. 3, 2014.

1416 Concerning Turkish citizens, choice-of-court agreements towards a foreign court under art. 47 might not be allowed over matrimonial matters, including divorce. Conversely, the divorce judgment of a foreign court competent upon agreement by the parties should in principle be recognised by the Turkish courts (Z. D. TARMAN, International Divorce in Turkey: Jurisdiction and Applicable law, in: M. ZUPAN, Private International Law in the jurisprudence of European courts – family at focus, 2015, p. 418).

1417 Ibid. TARMAN.

1418 Ibid. p. 416: "In order for Turkish courts to have jurisdiction in accordance with Article 41, it is not mandatory for both parties to be Turkish nationals and it is sufficient for one of the parties to be a Turkish national either as a defendant or a plaintiff. […] A legal suit concerning personal status must not or could not have been litigated in a court of a foreign country. This is the second requirement parties have to meet in order to benefit from the jurisdiction rule of PIL Code Article 41".

1419 This is subsidiary to additional grounds of jurisdiction. See ibid., TARMAN, p. 418: "In divorce cases, besides the court at the place of domicile of one of the spouses, the court at the spouses' common habitual residence for the last 6 months before the trial also has jurisdiction (TCC Article 168). If there is no competent court based on internal jurisdiction rules concerning a divorce case of Turkish nationals, for example, if the habitual residence of the Turkish national in question is not in Turkey (Code of Civil Procedure Article 9), the courts indicated in Article 41 shall have jurisdiction". The competent courts under art. 41, in absence of habitual residence, are those of the last Turkish domicile, or subsidiarily, the courts in Istanbul, Ankara or Izmir.

1420 Ibid. TARMAN, p. 419: "Since Article 41 of the PIL Code relates to only one of the spouses being a Turkish national, particularly regarding matrimonial conflicts, it subjects persons who are not Turkish nationals to the international jurisdiction of Turkish courts as well. For this reason, the international jurisdiction of Turkish courts has been extended to cover conflicts concerning the personal status of foreign nationals as well".

1421 A first reading of art. 42 whose heading refers to the "lawsuit concerning personal status of foreigners", indicates the competent court in circumstances involving (only) "guardianship, tutelage, missing persons and the declaration of death". Art. 42 should therefore exclude divorce.

1422 Ibid. TARMAN, p. 485.

courts of the spouses' common habitual residence established six months before the commencement of the proceedings[1423].

**494.** The following hypothetical will show the EU-Turkish scenario: A Turkish-German couple entered into marriage in Germany and later moved to Istanbul for working reasons. The wife, German, is unhappy about her life in Turkey, and relocates to Germany where, after one year, her intent is to file for divorce. The husband opposes the German jurisdiction and applies for divorce before the courts in Turkey.

> Under Brussels IIA, article 3(1)(a), fifth indent, the courts in Germany would be entitled to retain jurisdiction. Turkish law should govern the divorce under Rome III, articles 4 and 8(b). Concerning the husband's petition, the Turkish courts 'may'[1424] retain jurisdiction relying on the applicant's nationality by virtue of article 41, TPIL code. They should apply their own law under article 14, TPIL code[1425].

## § III. Prospect of an International Convention on Divorce

**495.** Two issues are raised with regard to *EU-US* and *EU-Turkish* scenarios. In the previous hypotheticals (*cf.* subsections I and II), US and Turkish laws were applicable under Rome III, article 8(b). The latter provision requires that a year has not elapsed from the last common habitual residence. In the event that the temporal condition were not fulfilled, the French courts in the *US-French* scenario (subsection I *supra*), and the German courts in the *Turkish-German* scenario (subsection II *supra*), would potentially apply their own law under Rome III, article 8(d). This situation, particularly involving the US-French scenario[1426], may cause, as a first issue, an international conflict of applicable laws. A second related issue concerns the possible non-recognition of the divorce judgments. In absence of a treaty applicable between the US and the EU, and Turkey and the EU, respectively, or all together, concerning the

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[1423] These are alternatives to, or they should apply in absence of, domicile. In absence of both habitual residence and domicile, international jurisdiction should be attributed to the courts of the location of the assets. See, TARMAN/ BAŞOĞLU, p. 358.

[1424] With regard to international jurisdiction, we argue that the courts in Turkey should decline jurisdiction based on art. 41, as a consequence of the pending suit before the courts in Germany (ibid. TARMAN, p. 486).

[1425] Ibid. p. 419: "The grounds for and the effects of divorce and separation shall be governed by the common national law of the parties. Where the parties have different nationalities, the law of common habitual residence shall apply, and if this does not exist, Turkish law shall apply".

[1426] Under the US-French scenario, this issue is more accentuated according to the rules on jurisdiction, which in the hypothetical of subsection I *supra* may determine both the US and French courts as competent. Thus, divergent rules on applicable law may lead to a more realistic conflict. With regard to the Turkish-EU scenario (subsection II *supra*), art. 41 of the TPIL code should mitigate the jurisdictional conflict, giving priority to the pending action before the courts first seised, therefore reducing the possible conflict of applicable laws.

applicable law and recognition in divorce matters, States should reduce such potential conflicts based on a discretional coordination.

## Section VI Concurrent, Alternate, Absence of Habitual Residence

**496.** As recalled in other contexts of this study[1427], a ground of jurisdiction is often not available to those people whose habitual residence cannot be determined or is not established. In addition, the multiple grounds provided under Brussels IIA, article 3, although their flexibility is noticed, may raise the issue of alternate and concurrent habitual residence.

### § I. Concurrent Habitual Residence

**497.** The scenario of concurrent habitual residence[1428] triggers a situation whereby each of the two Member States involved in the divorce proceeding is the habitual residence of *one spouse only*. In this regard, an application for divorce involving *both spouses* can be filed separately even when the other spouse does not establish any attachments with the State of the seised courts. This is a jurisdiction that would therefore neutralise proximity over one of the spouses, although without causing a prejudice against the uniform implementation of the Brussels IIA Regulation[1429]. Although concurrent habitual residence is generally found to be in respect of legal certainty and predictability[1430], it may induce 'rush to the courts' by the spouses. In this regard, conflicting jurisdiction may arise whenever the spouses file before two courts each of which competent under article 3[1431]. The question of concurrent habitual residence resulting from the approach of 'separate' habitual residence should not be underestimated. A solution in this study was proposed

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1427 *Cf.* property regimes under part II, chapter II, section VI of this book.

1428 See also part I, chapter IV, section III of this monograph.

1429 *Mikołajczyk v. Marie Louise Czarnecka and Stefan Czarnecki* [13 October 2016] C-294/15, § 49-50: "It follows from the foregoing that the jurisdiction rules laid down in Article 3 of Regulation No 2201/2003, including those referred to in the fifth and sixth indents of Article 3(1)(a), are designed to protect the interests of spouses. Such an interpretation is consonant with the objective pursued by that regulation, which established flexible conflict of law rules to reflect the mobility of individuals and to protect the rights of a spouse who has left the country of common habitual residence, while ensuring there is a genuine link between the party concerned and the Member State exercising jurisdiction (see, to that effect, judgment of 29 November 2007, Sundelind Lopez, C-68/07, EU:C:2007:740, paragraph 26)".

1430 *Edyta Mikołajczyk v.* Czarnecka and Czarnecki, § 34: "the scope of Regulation No 2201/2003 [would undermine] the attainment of that objective, in so far as [that exclusion] would be liable to increase legal uncertainty as a result of there being no uniform regulatory framework in this area".

1431 *Lis pendens* would mitigate the effects of potential conflicting jurisdiction (art. 19.1).

concerning the establishing of one Court, a *super partes* or supranational entity, to adjudicate on such a matter[1432].

**498.** An example illustrates the issue of concurrent habitual residence under Brussels IIA: A Slovenian-Belgian couple entered into marriage in Finland (Helsinki) where they lived for the last twenty years. At the age of 67 and 65, respectively, without children, they relocate to Spain to enjoy their retirement. The couple lives there for a year when disputes start. The wife, Belgian, moves to Belgium to finally live with her sister. The husband, Slovenian, moves to Slovenia where he inherited his parental house. The couple lives separately for six months when they decide to divorce and enjoy personal interests that they sacrificed during their marital life.

> According to Brussels IIA, applicable to Belgium and Slovenia, each spouse has the right to file before the Belgian and Slovenian courts, respectively, by virtue of article 3(1)(a), sixth indent[1433]. Concerning the applicable law, the Slovenian and Belgian courts would be entitled to apply their own respective law according to article 8(d) of Rome III[1434].

**499.** On a last note, the interconnection of divorce with other proceedings such as property regimes requires coordination of conflict-of-law rules. In this regard, the assessment of the competent forum for divorce becomes more delicate since that other related proceedings, such as those concerning property regimes, may be centralised before the same competent forum, specifically the one of divorce[1435]. Therefore, the effects of a biased determination of the competent forum for divorce, founded on the interests of one spouse only may intrinsically affect the jurisdiction over interconnected proceedings contemplating spouses' common personal and property rights.

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[1432] *Cf.* part II, chapter II, section V. It was said that the model of arbitration may be inspiring with the support of the International Hague Network of Judges. Alternatively, in the short term, a special instance within the prerogatives of the General Court (CJEU) may be created based on art. 257 of the TFEU, if amended or its scope enlarged to family law. In this regard, we indicated the place of closest connection to the marriage as a connecting factor aimed to solve a potential conflicting jurisdiction resulting from habitual residence. The time of determination should be the seisin, with exceptional focus on the common habitual residence at the time of marriage celebration.

[1433] Third and fourth indents should also be applicable, excluding the other grounds of jurisdiction under art. 3.

[1434] In absence of *professio juris* under art. 5, and the other laws under art. 8 being excluded. On the question relating to the applicable law, it is observed that a conflict of applicable laws may arise under art. 8(d) of Rome III. This should be an indirect consequence of the formula contained within Brussels IIA concerning the 'separate' habitual residence of the spouses. Precisely, art. 3(1)(a), sixth indent, of Brussels IIA, allows only for the *lex fori* under art. 8(d) of Rome III to govern the divorce. In absence of a mechanism such as *lis pendens*, the conflict of applicable laws remains currently (un)resolved by the discretion of the two national courts involved in the proceeding.

[1435] Ibid. WALKER.

## § II. Alternate Habitual Residence

**500.** The issue of alternate habitual residence[1436] concerns the spouses' common or separate habitual residence at a different time close to the seisin. The provision under consideration is article 3 of Brussels IIA.

**501.** The following hypothetical describes the contextualised situation: An Austrian-British young married couple lived for two years in Austria where the wife is a UN trainee and the husband is a banker. He accepts a better employment opportunity in England for an initial six-month contract, and she remains in Austria. A child, Nina, was born in Spain (Barcelona), which represents the maternal grandparents' place of retirement. Neither of the spouses can take care of Nina, who therefore lives with the maternal grandparents. By reason of their working commitments, the spouses cannot visit each other regularly in England and Austria. Nonetheless, regular family visits occur in Spain, with a duration oscillating in between two/ four months per year. Thereafter, the husband is offered to join one of the Bank affiliates in Spain for a one-year contract. Given the pleasurable time Nina is enjoying in Spain, her parents plan their joint relocation there with a family life prospect. Prior to it, the husband is informed of an internal financial banking crisis leading to the termination of his contract. During a short family reunion in Spain, a huge fight follows between the spouses, due to the wife's resignation from the UN and the couple's investment in a villa located in Barcelona, with a view to concretise their family prospect. Following the dispute, the wife remains in Spain and the husband returns to England.

**502.** The couple may have acquired *common* and *separate* alternate habitual residences in Austria, England[1437] and Spain[1438]. The husband, advised by his lawyer, would like to file before the spouses' actual common or, alternatively, the respondent's own habitual residence, in order to join an application for the liquidation of the property regimes without resorting to his wife's agreement pursuant to article 5(2) of the 1103 Regulation[1439]. Additionally, the husband believes that the child's habitual residence is well-established in Spain where he would like to concentrate all his actions, including over child custody. His main reason seems to be to avoid lengthy and costly proceedings – this analysis deals with the divorce aspects only.

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[1436] See part I, chapter IV, section III.

[1437] Since 31 December 2020, 11 p.m., the Brussels IIA Regulation is not any longer applicable to the UK for divorce proceedings instituted on or after 1 January 2021. The 'Jurisdiction and Judgments (Family) (Amendments etc) (EU Exit) Regulations 2019 (SI 2019/519)' substantially replicate the grounds currently provided under art. 3 of Brussels IIA.

[1438] Concerning international jurisdiction, the multiple alternative grounds of Brussels IIA, art. 3, would increase the number of available fora, but may not mitigate the conflict of jurisdiction.

[1439] *Cf.* section IV *supra*.

**503. Solution I.** One solution, according to this study[1440], would be to assess if a principal habitual residence on a common basis is established. The relevant time for determination, absent in Brussels IIA, should be the *time of the institution of the proceedings*. For instance, the regular family visits in Spain, the wife's work resignation and the couple's (main) investment with a concrete view to relocate to Spain, the child's habitual residence, and the establishing of a family environment originated by the regular parental contacts with the maternal grandparents' place of settlement, may be all relevant elements conducive to indicating Spain as the family's principal habitual residence at the relevant time. For the purposes of this assessment, correspondence and other documentation purporting to determine where a 'family home', as opposed to a 'family holiday home', is located might also play a complementary role[1441]. Such an approach would allow primacy of *common family interests* over *each spouse's personal and professional interests* potentially established in the place of their respective work[1442].

> According to this solution, the Spanish courts could exercise jurisdiction over divorce based on Brussels IIA, article 3(1)(a), first indent[1443]. Their own law should govern the divorce proceeding pursuant to article 8(a) of Rome III[1444].

**504. Solution II.** Another solution would be to conclude that Austria, England, and Spain are all eligible to be considered as the couple's *common* or *separate* alternate habitual residence without assessing if a principal habitual residence is established[1445]. Under this proposal, it is maintained that the spouses' current continuing common physical presence, or last continuing common physical presence and one of them is still continuously present there at the time of the institution of the proceedings, should trigger international jurisdiction. In this regard, the following interpretation is suggested: the spouses' current, or last, continuing common physical presence should be assessed within one year prior to the institution of the proceedings[1446].

> Based on this solution, the Spanish courts would be competent under article 3(1)(a), second indent, according to the spouses' last common habitual residence and one of them still resides there, determined on the

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1440 See part I, chapter IV, section III.

1441 *V v. V (Divorce: Jurisdiction)* [2011] EWHC 1190 (Fam), § 54-55.

1442 Ibid. WALKER.

1443 Art. 3(1)(a), second indent, remaining available.

1444 Art. 8(b) being also potentially applicable.

1445 The process of assessing a principal habitual residence may in some circumstances entail lengthy and costly proceedings (*cf.* note 27, ROMANO).

1446 Reference to an appreciable period for the assessment is supported in this study to the extent of better predictability and certainty, but also for a qualified and realistic proximity of the spouses with the competent jurisdiction. A year time is already indicated in art. 3(1)(a), fifth indent, of Brussels IIA and art. 8(b) of Rome III.

basis of the spouses' last continuing physical presence and one of them is still continuously present there at the institution of the proceedings. The Spanish courts should be entitled to apply their own law to the divorce proceeding[1447].

## § III. Absence of Habitual Residence: Mere Presence or Prospective Acclimatization?

**505.** In situations involving the absence of specific factors establishing habitual residence, this study supports the use of mere presence as a connecting factor[1448]. Furthermore, it is suggested that a new rule based on prospective acclimatization[1449] should be introduced when a couple has acquired some stronger degree of proximity, than mere presence, allowing more predictability and certainty in the determination of jurisdiction and applicable law over divorce. The main provision under study is article 3 of Brussels IIA.

**506.** The following example represents the scenario of this proposal: A Tunisian-Egyptian couple[1450] married in Greece with the intent to live in Europe. The wife, Egyptian, arrived in Greece and holds a temporary permit awaiting a decision concerning her asylum request. The husband, Tunisian, lived in a refugee camp in Lesbos (Greece) for one year and holds a refugee temporary permit for three years. Four months after their marriage, the couple moves to Sweden where they submitted a request for asylum. Again, after four months, they move to France where they file an additional request for asylum. After a further four months, the couple separates in France. He relocates to Italy and she remains in France. The wife would like to file for divorce.

In this scenario it would be hard to locate the couple's common or separate habitual residence under article 3 of Brussels IIA. The multiple relocations aimed for the sole purpose of obtaining asylum do not indicate a stable and settled purpose. The absence of specific factors,

[1447] Under this proposal, the applicable law refers to the spouses' current common, or last common, habitual residence according to art. 8(a) or (b), whose assessment would rely on the spouses' last continuing physical presence considered as the tie-breaker rule. This reasoning lies in the essential role, a prerequisite, of physical presence in the habitual residence determination.

[1448] This rule is currently provided under Brussels IIA and the HC-1996 in matters of parental responsibility. The role of physical presence acts differently than in the case of alternate habitual residence (*cf.* subsection II *supra*). The rule aims to open an additional forum available at the place of physical presence, unlike the rule suggested under alternate habitual residence, which operates to solve a conflict of habitual residences.

[1449] Part I, chapter III, section IV of this monograph.

[1450] This hypothetical is inspired by the Swiss case 'Tribunal fédéral, IIe Cour de droit civil Arrêt du 23 mai 2018 en la cause de C. contre A., B. – 5A_121/201' (see the author's comment on the Swiss case at note 1252 above).

irrespective of the couple's status[1451], concludes that no current grounds contained in article 3 would apply[1452].

**507.** This study suggests introducing two additional fora under article 3 of Brussels IIA[1453]. The first one should rely on the couple's current common presence at the *time of the institution of the proceedings,* or last common presence within one year prior to the relevant time and one of them is still present there. The second one contemplates the use of prospective acclimatization in line with a qualified degree of proximity advocated for here.

**508. Solutions.** In summary, in the current hypothetical, two solutions should be envisaged: (i) The French courts should be competent based on the couple's last common physical presence within one year prior to the time of the institution of the proceedings[1454]. (ii) The place of the couple's prospective acclimatization might potentially be located in Greece where the couple's marriage was celebrated and their four-month presence, after marriage, was of regular duration. A complementary, non-decisive, element supporting the assessment should be the couple's initial request for asylum submitted in

[1451] This case scenario might also be envisaged regardless of the asylum status. See *Pierburg v. Pierburg* [2019] EWFC 24, ZC18D00010, § 77-81. See also ibid. WALKER.

[1452] Currently, art. 7 of Brussels IIA (art. 6 of the Recast) contains some grounds on residual jurisdiction, which would potentially apply to the current hypothetical. Residual jurisdiction provides that, where art. 3 (and other provisions that are not relevant for this analysis) cannot apply, jurisdiction should be governed by the PIL or conflict-of-law rules set out in each Member State's legislation. It is our opinion that the situation envisaged in art. 7 would still leave some room for unpredictability and uncertainty. Firstly, it is not sure either that national legal orders provide rules on persons whose habitual residence, as well as domicile and nationality, may not be determined. For instance, under French law, a couple that is temporarily present in France, not holding French nationality, may not have access to justice there (see Cour de cassation, civile, Chambre civile 1, 15 novembre 2017, 15-16.265: "[…] *en application de l'article 14 du Code civil qui dispose que l'étranger, même non résidant en France, pourra être cité devant les tribunaux français pour l'exécution des obligations par lui contractées en France avec un Français*"). Secondly, it might be the case that habitual residence is not yet established (or the fora of the domicile and nationality are temporarily unavailable) but that some elements may be conducive to determining that a couple will soon settle in a Member State. This latter situation would not qualify as being under 'residual jurisdiction', but it would still fall under 'general jurisdiction' by reason of a common prospective acclimatization.

[1453] It is proposed that two paragraphs to art. 3 be included. Art. 3(3), adding two indents, should be read as follows: '1. Where spouses' habitual residence cannot be established and jurisdiction cannot be determined on the basis of the previous paragraphs, the courts of the Member State where the spouses are present at the time of the institution of the proceedings, or where they were last present within one year prior to the relevant time and one of them is still present there, shall have jurisdiction. 2. Paragraph 1 shall also apply to refugee spouses or spouses internationally displaced because of disturbances occurring in their country'. Art. 3(4) should provide that: 'When it is clear from the circumstances of the case that the couple's attachments to one Member State, at the time of the institution of the proceedings, qualify for prospective acclimatization, jurisdiction should be exercised in that Member State'.

[1454] French law should govern the petition for divorce based on the rule of *lex fori* under art. 8(d) of Rome III.

Greece, consequent to which a temporary right to stay was granted. According to this solution, the courts in Greece should exercise jurisdiction[1455].

## § IV. Lis Pendens, Collaborative Determination and Transfer of Jurisdiction

**509.** According to this study, *lis pendens* and transfer of jurisdiction should be considered as complementary rules[1456]. Brussels IIA excludes transfer of jurisdiction in divorce proceedings[1457], unlike in the context of parental responsibility[1458]. *Lis pendens* under the Regulation, article 19(1) and (3), provides that the courts in Member State B, second seised, must stay proceedings until the courts in Member State A, first seised, have established jurisdiction[1459]. This rule implies that two parallel claims are filed concerning the same identity of parties and subject matter. Its operation should mitigate potential conflicts of jurisdiction and irreconcilable judgments. Two parallel claims filed in two different Member States[1460], one concerning divorce and the other property regimes, would fall under the scope of *lis pendens* if they are found to be dependent[1461].

**510.** In relation, to the intersection of *lis pendens* and transfer of jurisdiction, the latter rule would allow the courts of two different Member States to coordinate jurisdiction. In particular, such a rule would enable the courts first seised to request information from the courts second seised[1462] in order to avoid conflicting determinations of habitual residence[1463] and/ or to derogate from it when the spouses' interests so require[1464]. This study refers to a two-step

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1455 The courts in Greece should be entitled to apply their law relying on the *lex fori* under art. 8(d) of Rome III.

1456 See part I, chapter IV, section V. See also ibid. Practice guide, p. 38.

1457 As opposed to prorogation of jurisdiction (*cf.* section III *supra*).

1458 For the transfer of jurisdiction in relation to parental responsibility, see chapter II *infra*.

1459 We recall that current CJEU developments have been incorporated in the Brussels II-A Recast, for instance an exception to *lis pendens* is provided in the case of choice-of-court agreements (B. MUSSEVA, The recast of the Brussels IIa Regulation: the sweet and sour fruits of unanimity, ERA Forum, 21, 2020, p. 135).

1460 The coordination of parallel proceedings before the courts of a Member State and of a third State are, regrettably, not governed by Brussels IIA. With regard to specific cases concerning Italy and the UK, see M. C. BARUFFI, The application of the Brussels IIa Regulation in the Italian legal order, *Working Paper Series*, 2017, n. 4, 2017, p. 10; and P. BEAUMONT, Interaction of the Brussels IIa and Maintenance Regulations with (Possible) Litigation in Non-EU States: Including Brexit Implications (ibid. in: VIARENGO/ VILLATA).

1461 Ibid. Practice guide, p. 15.

1462 Ibid. p. 36.

1463 *I. e.* in the context of subsection II above.

1464 In the case '*S v. S (Brussels II Revised - Articles 19(1) and (3) - reference to CJEU) [2014] EWHC 3613 (Fam)*' the UK courts held that it was regrettable that the rule on transfer of jurisdiction was not provided in the field of divorce (§ 17: "This is a sorry tale of manoeuvring in the face of the seemingly inflexible jurisdiction rules in relation to divorces which are contained in Brussels II Revised. It is a remarkable and

process[1465] whereby the court first seised would proceed with: (a) the collaborative factual assessment for the determination of habitual residence; and (b) the possible consequent transfer of jurisdiction[1466]. Transfer of jurisdiction should also enable the request[1467] from the courts second seised if, taking into account the circumstances of the case, habitual residence were located in their Member State or they were better placed in the spouses' interests[1468]. Such a collaborative process and fact-based determination of habitual residence founded on the spouses' interests would obviate the establishing of jurisdiction based on the sole 'first-in-time rule', potentially favouring the party that has won the race to the courthouse.

**511.** It is recalled, however, that neither transfer of jurisdiction nor *lis pendens* concern the applicable law, although both may trigger a direct impact towards its determination. For instance, when the courts in Member State A are first seised, based on article 3, fifth or sixth indent, of Brussels IIA, they may apply their own law pursuant to article 8(d) of the Rome III Regulation if applicable to that Member State. In case those same courts decide to transfer jurisdiction towards the courts of Member State B, the *lex fori* of the latter courts may govern the divorce proceeding based on the said article 8(d).

# Chapter II: Parental Responsibility

**512.** This Chapter focuses principally on the role of children as individual rights' holders for the determination of the competent forum and the applicable law in parental conflicts[1469]. Such determination relies on habitual residence as a principal connecting factor, specifically under the relevant Hague[1470] and EU[1471] instruments.

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regrettable fact that Brussels II Revised contains within Article 15 a procedure which allows a court which has jurisdiction to transfer the case in question to another court within the European Union if it is better placed to hear it, but that power is available only in relation to children's cases. There is no comparable provision within Brussels II Revised which allows a court to transfer a divorce to the courts of another member state on the basis that the courts of that latter member state would be best placed to hear the case […] So one can see that in relation to divorce cases the anomalous situation arises that there are no powers, in contrast to civil claims and children claims, to achieve a transfer to a court which is better placed to hear the case or otherwise is a more convenient forum".

1465 See part I, chapter IV, section V.

1466 Beyond the collaborative habitual residence determination, the transfer of jurisdiction should occur upon a party's request or *ex officio*.

1467 In circumstances other than the collaborative habitual residence determination, the transfer should be requested upon a party's initiative or *ex officio*.

1468 For instance, when the jurisdiction of the courts first seised was triggered by forum shopping (*cf. supra* UK, *Rapisarda v. Colladon*) or those courts would also exercise jurisdiction towards property regimes at the detriment of one spouse (ibid. VIARENGO, p. 76).

1469 Parental conflicts comprise matters of parental responsibility and international child (civil) abduction.

1470 *I.e.* Hague Conventions 1980 on Civil Abduction and 1996 on Child Protection (*cf.* part I, chapter I, section III).

1471 *I.e.* Brussels IIA Regulation (*cf.* part I, chapter I, section IV).

Prior to the triggering of parental conflicts, some attention must be given to family origins, in particular concerning the establishing of the parent-child relationship. To this end, this analysis also examines habitual residence in relation to intercountry adoption and international surrogacy arrangements. *Section I* deals with parent-child relationship. *Section II* tackles parental conflicts and child protective measures. *Section III* examines international child (civil) abduction.

## Section I Establishing of the Parent-Child Relationship

**513.** The establishment and contestation of the parent-child relationship are excluded from the scope of the HC-1996 and Brussels IIA. Currently, there are no international uniform rules[1472] governing jurisdiction and applicable law over such aspects. Reference should be made to the practice of the ECtHR in matters of legal parentage and the ongoing activities of the Hague Conference in the field of surrogacy. In addition, the following analysis examines habitual residence within specific national legislations and in the framework of intercountry adoption.

### § I. Legal Parentage and Surrogacy

**514.** Legal parentage engages specific rights on behalf of children[1473], notably parental responsibility and maintenance. It also triggers the respect of *fundamental* human rights, such as the right to private and family life as well as the child's right to identity[1474]. Thus, it is important to provide uniform international family law rules governing legal parentage in the context of cross-border surrogacy.

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[1472] Bilateral treaties exist in matters of parent-child relationship, *i.e.* '*Convention franco-polonaise du 5 avril 1967 relative à la loi applicable, la compétence et l'exequatur dans le droit des personnes et de la famille*'. Art. 1 of this Convention states that the child's domicile, which is the connecting factor determining jurisdiction, should be interpreted as habitual residence. See Cour de Cassation, Chambre civile 1, du 5 novembre 1991, 89-17.328.

[1473] The ECtHR judgment, *Paradiso and Campanelli v. Italy* [24 January 2017] 25358/12, examines such rights. In this judgment, an Italian married couple who had a surrogate child born in Russia, was found guilty of criminal fraud and falsification of documents by the Italian Embassy in Moscow and the local Italian authorities. Thereafter, the child was placed under adoption, withdrawing child custody from the Italian couple. The Court judged that, although there was violation of private and family life by reason of the parent-child relationship being already established, the surrogacy process was against the Italian public policy, in particular due to the absence of genetic link.

[1474] *Mennesson and Labassee v. France* [26 juin 2014] 65192/11 and 65941/11. In this judgment, the French *Cour of Cassation* refused to register in their civil records the transcription of the US birth certificates of two children born respectively in California and Minnesota through surrogacy, whose fathers were the biological parents. The ECtHR reversed the French decision. With specific regard to surrogacy, the ECtHR stated that, even if this practice remains forbidden under specific jurisdictions, the parent-child relationship should be recognised in respect of the child's right to identity (§ 46, 96) and the right to private life (§ 86-87-92-100).

**515.** An attempt to elaborate a Convention in the field of international surrogacy arrangements (ISAs)[1475] and legal parentage is ongoing at the Hague Conference. This 'work in progress' should conceive two instruments, namely a Hague Convention on the recognition of foreign judicial decisions on legal parentage, and a separate protocol on the recognition of foreign judicial decisions on legal parentage arising from ISAs[1476]. The Hague Conference recognised the need for uniform private international law rules governing legal parentage in international situations. In this regard, it was stated that habitual residence should be introduced as a connecting factor determining indirect jurisdiction[1477].

**516.** In relation to habitual residence within international surrogacy, the German Federal Court of Justice (*Bundesgerichtshof*) has given important guidance. The case[1478] concerned German intended parents and a surrogate child born in Ukraine. The child was brought to Germany immediately after birth to live there permanently. The intended parents commenced the appropriate registration procedures at the German civil registry in accordance with the birth certificate issued in Ukraine. The German civil registry filed suit before the German District Court to register the Ukrainian surrogate mother as the legal mother. The proceedings reached the Federal Court of Justice. The Court applied German law, according to the EGBGB (article 21) on the basis of the child's habitual residence as a primary connecting factor. It held that the child was habitually resident in Germany at the time of the commencement of the proceedings. The Court clarified that: '*Persons (adults and children) have their habitual residence in the place where they have the centre of their lives. Their presence in this place must reflect an adequate degree of permanence and cannot be just temporary or intermittent. In order to determine the habitual residence of minors, particularly of infants, it is necessary to assess the parents' integration in their social and family environment as the child generally shares their social and family*

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1475 In relation to surrogacy the term 'arrangement' is commonly used. Despite the debate around the use of this terminology, a *surrogacy arrangement* presents different aspects, such as, *inter alia*, the typology of the surrogacy process, the consent of all the parties (excluding the child, the agreement is usually concluded before the child's birth), the age of all the parties, the remuneration of the surrogate mother, the medical expenses. The arrangement may involve up to five parties, including the seminal fluid and oocytes donors. These aspects are not discussed in detail.

1476 <www.hcch.net/en/projects/legislative-projects/parentage-surrogacy/>.

1477 Council on General Affairs and Policy of the Conference, Report of the fifth meeting of the Experts' Group on Parentage / Surrogacy, 2019, p. 3-4. This Report provides that the *State of child's birth,* ensuring certainty and predictability, plus the *habitual residence of the person giving birth* to the child, in respect of proximity, should be the prevalent connecting factors in determining indirect jurisdiction in a potential Hague Convention. Other authors have indicated *the habitual residence of the intended parents*, when they are recognised as legal parents in the State of child's birth, as an element determining the child's habitual residence (see in this sense, D. WILSON, International Surrogacy and the Adoption (Intercountry) Act: Defining Habitual Residence, *New Zealand Family Law Journal*, Vol. 8, 2016).

1478 BGH, Mar. 20, 2019, Docket No. XII ZB 530/17, ECLI:DE:BGH:2019:200319BXIIZB530.17.0.

*environment'*. It concluded that the habitual residence of a child and his/ her parents is generally located in the same place.

**517.** This case proves important for the assessment of habitual residence in the context of parent child-relationship arising out of surrogacy. Surrogate children and intended parents are likely to hold a family habitual residence in the same place, at the time of the commencement of the proceedings involving legal parentage. Such residence should correspond to the place of family life where they are physically present on an adequate and regular, excluding short, duration. In relation to the formula according to which a family habitual residence should be assessed, in line with the Hague Conference's position, some authors have argued in favour of the coincidence between the child's and surrogate mother's habitual residence at the time of birth. The latter approach, in particular for the determination of the applicable law governing legal parentage and the upholding of the above rights, would better ensure the establishing of the parent-child relationship in the ISAs' context[1479].

**518.** It is concluded that both the *Bundesgerichtshof's* and the Hague Conference's approaches would be supportive of certainty and predictability, provided that the family habitual residence[1480] assessment should satisfy the child's best interests[1481].

## § II. National PIL Rules on Parent-Child Relationship

**519.** The Swiss PILA, article 66(1), states primarily[1482] that an action for the establishing, declaring or contesting of a parent-child relationship can be filed before the Swiss authorities of the child's habitual residence[1483]. This action is governed primarily[1484] by the Swiss law of the child's habitual residence in accordance with article 68(1)[1485]. The judgments on the declaring or contesting of a parent-child relationship rendered in the State of the child's habitual

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[1479] R. BLAUWHOFF/ L. FROHN, International Commercial Surrogacy Arrangements: The Interests of the Child as a Concern of Both Human Rights and Private International Law, in: C. PAULUSSEN/ T. TAKÁCS/ V. LAZIĆ/ B. VAN ROMPUY, Fundamental Rights in International and European Law, 2016, p. 217.

[1480] The term 'family' in the ISAs' context should more appropriately refer to the child and the primary caregiver as possibly indicating both the intended parents and the surrogate mother.

[1481] The applicable law determination should take into account the respect of the child's best interests intended as to his/ her fundamental right to, *inter alia*, a family and an identity. In this regard, the competent courts should be entitled to alternatively, or subsidiarily, assess the family habitual residence, at the time of birth or at the time of the commencement of the proceedings. This approach would be similar to the Swiss PILA, art. 69 *infra*.

[1482] Subsidiary grounds of jurisdiction are mentioned in art. 67.

[1483] This is alternative to the domicile of one of the parents.

[1484] Subsidiary laws are applicable according to art. 68(2).

[1485] The moment for the determination of the law applicable to the declaring or contesting of the parent-child relationship is the child's date of birth or the date of the filing of the action if the child's best interests so require in accordance with art. 69 (see also ATF 5A_222/2018, 28.11.2019).

residence[1486] should be recognised in Switzerland by virtue of article 70. Furthermore, the SPILA, article 79(1), indicates on a primary basis[1487] that the Swiss courts of the child's habitual residence[1488] should be competent over an action concerning the relations between parents and children[1489]. Swiss law should primarily[1490] govern this action relying on the child's habitual residence under article 82(1). The Swiss Federal Court[1491] has stated that, for the purposes of an action to declare the parent-child relationship, the child's habitual residence[1492] should be located at the place of the parent's '*centre de vie*', and concerning newborns at the custodian parent's '*centre de vie*'.

**520.** The French legislation, article 311-14 of the Civil code[1493], provides that the law applicable to an action for the establishing or contesting of a parent-child relationship should rely on the mother's nationality at the time of the child's birth[1494]. In absence of the mother's identity, the child's personal law (nationality) should govern this action. The law that governs the establishing of a parent-child relationship is extended to its effects according to article 311-14. The French courts are competent over an action on the establishing or contesting of a parent-child relationship based on a 'simple connection' between the child and the forum[1495]. This connection is in principle assessed by virtue of the child's place of birth and the birth certificate attesting his/ her status[1496]. A foreign judgment establishing the parent-child relationship in

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1486 This is alternative to the child's nationality, and to the State of nationality or domicile of one of the parents.

1487 Subsidiary grounds of jurisdiction are mentioned in art. 80.

1488 This is alternative to the Swiss courts of the respondent parent's domicile or, in absence of domicile, the respondent parent's habitual residence.

1489 These are typically the effects of the establishing of the parent-child relationship, excluding the name (art. 33, 37 to 40), the protection of minors (art. 85) and inheritance (art. 86 to 89).

1490 Subsidiary laws are applicable according to art. 82(2).

1491 5C.123/2003 /frs [18 September 2003], § 3.1.

1492 Within the meaning of art. 20(1)(b) SPILA.

1493 This provision allows for the applicability of the 'renvoi' (see Arrêt n°178 du 4 mars 2020 (18-26.661), Cour de Cassation, Première chambre civile, ECLI:FR:CCASS:2020:C100178).

1494 Specific exceptions may apply. For instance, a child who is French or habitually resident in France, may not be deprived of his/ her right for the establishing of a parent-child relationship under French law even if a foreign law (*i.e.* Tunisian law), applicable by virtue of the mother's nationality, prevents it (see Cass., Première ch. civ., 10.2.1993, 89-21.997). Furthermore, under art. 311-15 of the Civil code, French law may always apply if all the actors concerned (the child and at least one of his/ her parents) are habitually resident in France at the time of the seisin.

1495 Art. 318-1 of the Civil code.

1496 Generally, the French courts would likely exercise jurisdiction unless the child or the applicant parent hold the nationality, and one of them is a resident, of a foreign State, and a judgment rendered in that State were in conformity with the French public policy. These conditions would exclude the jurisdiction of the French courts based on a cumulative reading of art. 14, 15 and 318-1 of the Civil code and art. 42 and 1070 of the Code of Civil Procedure (see Tribunal de grande instance de Paris, 1re chambre 1re section, 28 août 2017, no. 16/10494; and Cour de cassation, Chambre civile 1, du 6 février 1985, 83-11.241, Publié au bulletin).

accordance with the *lex fori*[1497], and in conformity with the French public policy[1498], should be recognised under French law.

**521.** Italian PIL, article 33, states that the action on the establishing or contesting of a parent-child relationship, and the related effects, are governed by the child's personal law (nationality) at the time of his/ her birth[1499]. The Italian jurisdiction over this action is founded on the child's or either of the parents' habitual residence[1500] in accordance with article 37[1501]. A foreign decision[1502] on the establishing of the parent-child relationship should be recognised under Italian law if in conformity with the foreign applicable law governing the decision, and determined under the Italian PIL[1503], provided that it would not be contrary to public policy[1504].

**522.** The Dutch legislation[1505] specifies that the action on the establishing or contesting of a parent-child relationship, and the related effects[1506], are principally governed by the parents' common national law[1507]. On a subsidiary basis, parent-child relationship is governed by the law of the parents' common habitual residence, or failing that by the law of the child's habitual residence[1508]. In the event of multiple common nationalities, habitual residence

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1497 This indicates both the substantive law and the conflict-of-law rules.

1498 *I.e.* art. 336 of the Civil code.

1499 This is alternative to the national law of either parent if it were considered more favourable for the child. However, the determination of the applicable law under the Italian PIL based on nationality as a traditional connecting factor has been subject to criticism (see E. BERGAMINI, Problemi di diritto internazionale privato collegati allo status di figlio e questioni aperte, *RDIPP*, 2/2015, p. 319).

1500 The domestic use of habitual residence in matters of parental responsibility, through the combination of art. 316, 317-bis and 337-ter of the Italian Civil code, allows us to conclude that 'residence' under art. 37 should mean *habitual residence* (R. GIOVAGNOLI, Leggi complementari al codice civile, 2011, p. 552; see also C. CAMPIGLIO, Art. 37, in: AA.VV., Commentario del nuovo diritto internazionale privato italiano, 1996). Under art. 37, habitual residence is alternative to nationality. Lastly, the habitual residence of the 'presumed parent' should not be applicable under art. 37 (see Trib. Milano, sez. IX civ, sentenza 16 maggio 2016, no. 6071).

1501 Art. 3 and 9 of the Italian PIL are also applicable.

1502 The decision may contemplate both a judgment or a document, which should not be subject to a power of verification by the Italian authorities (Cass., 1º ottobre 2003 no. 14545, D).

1503 Alternatively, because the decision rendered in State C produces legal effects under the law of State B, in line with the provisions of the Italian PIL, the decision should also be recognised in the Italian jurisdiction (State A).

1504 Art. 65 and 68.

1505 Act of 14 March 2002 regarding a regulation for conflicts of laws in respect of family relationships arising from descendancy (affiliation), art. 1 and 2.

1506 Art. 8 of the Act. The effects of the parent-child relationship involving only the mother and the child are governed by the law of their common nationality, or failing that by the law of the child's habitual residence (art. 8.2).

1507 Under art. 3 of the Act, when the child was born outside of marriage, the law of the mother's nationality or Dutch law by virtue of her habitual residence in the Netherlands should govern the parent-child relationship.

1508 According to art. 2 of the Act, the child's habitual residence, or Dutch law, apply on an alternative basis to an action purporting to annul the parent-child relationship by virtue of a denial of marital paternity when this action would not be any longer possible under art. 1. Within art. 2, the applicable law should be determined in the child's best interests.

takes over. The relevant time for such an action is the child's date of birth or the dissolution of the marriage taking place before the child's date of birth[1509]. A foreign judgment establishing a parent-child relationship and the related effects should be recognised in the Netherlands by operation of law[1510]. The Dutch courts are competent based on the sufficient connection with the claim, for instance based on the nationality and/ or habitual residence of the applicant or the child[1511].

**523.** Under the Law Reform (Parent and Child) (Scotland) Act 1986, the action on the establishing or contesting of a parent-child relationship should be brought before the Court of Session or sheriff court. The jurisdiction of the Court of Session is founded on the child's, or either of his/ her parent's, habitual residence[1512], provided that he or she lived there for at least a year before the date when the action is brought[1513]. The jurisdiction of the sheriff court relies on the child's place of birth plus his/ her habitual residence[1514] at time of the filing or death. The action concerned, and the effects of a parent-child relationship should be governed by the law of the child's domicile at the time at which the question arises[1515]. From the view of the Scottish courts, the child's welfare seems to be the guiding principle when adjudicating on a parental order, avoiding recourse to the recognition of a foreign decree[1516].

**524.** In summary, the analysis made here shows that habitual residence is used as a primary connecting factor, mainly on an alternative basis, for the determination of international jurisdiction over the establishing or contesting of a parent-child relationship and its related effects. This is in particular the case under Swiss, Scottish, Italian and Dutch legislations[1517]. In relation to applicable law, the role of habitual residence differs among the national legislations touched upon. It applies primarily under Swiss law and to some extent under French law[1518]. It applies subsidiarily under Dutch law, and it

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1509 Art. 1, 2 and 6 of the Act.

1510 One of the reasons to refuse recognition is the absence of sufficient connection between the actors concerned and the forum where the judgment was rendered (art. 9 of the Act).

1511 Jurisdiction under Dutch law is governed by the Code of Civil Procedure (see K. SAARLOOS, European private international law on legal parentage? Thoughts on a European instrument implementing the principle of mutual recognition in legal parentage, Océ Business Services, 2010, p .120).

1512 This is alternative to the child's place of birth or to the alleged/ presumed parent's domicile at the relevant time.

1513 The date may also correspond to the time of death or to the yearly habitual residence before the time of death.

1514 The territorial connection applies when required by the relevant sheriffdom.

1515 S. 41 and 22(3) of the Family Law (Scotland) Act 2006.

1516 Ibid. BEAUMONT/ MCELEAVY, p. 788. Recently, the UK Privy Council (*C v. C*, 2019, UKPC 40) applied this principle to enforce a declaration of parentage made in Latvia, in relation to a child habitually resident in Latvia, for the purposes of maintenance proceedings in the forum court of Jersey.

1517 French law relying on the child's place of birth.

1518 Conditioned upon the absence of mother's identity.

does not apply under Italian and Scottish[1519] legislations. Concerning recognition, only Swiss law expressly refers to habitual residence on an alternative basis[1520].

## § III. Habitual Residence within Intercountry Adoption

**525.** This analysis refers to the change of habitual residence during the course of the adoption[1521]. The legal context at stake is that of the Hague Convention 1993[1522]. Article 2 states that the Convention is applicable whenever the adoptive child is habitually resident in the Contracting State of origin and is brought to the Contracting State of destination[1523] prior to the beginning of the adoption process or after the adoption decree. In line with the interpretation of article 16 of the Convention, the child should be habitually resident in the Contracting State of origin in the course of the adoption process, particularly at the time the duties are discharged[1524]. The latter interpretation, nevertheless, may clash with the former one of article 2. Still, according to the interpretation of article 14, the PAPs should establish their habitual residence in the Contracting State of destination at the time of the filing of the adoption application. Technically, in accordance with the combination of articles 2 and 14, the adoptive child and the PAPs should not be habitually resident in the same Contracting States *at the time of the application for adoption*[1525]. Thus, the change of habitual residence of both actors concerned during the course of the

[1519] Even though, in actual practice reference is also made to habitual residence (Ibid. BEAUMONT/ MCELEAVY).

[1520] The other legislations rely in principle on the validity according to the law of the requesting State and on the public policy conformity with the law of the requested State.

[1521] The well course of the adoption, and the child's well-being, may be impaired if subject to a change of habitual residence during the procedure. In this sense, reference is made to the immigration and the adoption requirements, which should be taken into account when deciding to relocate after the adoption procedure has started and prior to the obtainment of the adoption decree. The legislation of the State of the prospective adoptive parents' (PAPs) habitual residence established after the beginning of the adoption may provide additional immigration and adoption requirements, different from those required by the legislation of the PAPs' habitual residence at the time of the commencement of the adoption. An example is the visa requirements on behalf of an adoptive child who, according to his/ her best interests, should live with his/ her adoptive parents before the adoption decree.

[1522] Part I, chapter I, section III.

[1523] Also called receiving State. These terms are used interchangeably.

[1524] Ibid. PARRA-ARANGUREN, Explanatory Report, § 76. See also M. VERWILGHEN, La genèse d'une convention sur l'adoption d'enfants originaires de l'étranger, *Revue belge de droit international*, Vol. 1, 1991, p. 449.

[1525] Arrêt n°213 du 18 mars 2020 (19-50.031) - Cour de Cassation - Première chambre civile; O. LOPES PEGNA, Effetti in Italia della Adozione Co-parentale pronunciata all'Estero: Vecchie e Nuove Questioni, *RDIPP*, Vol. 3, 2016, p. 733.

adoption does not seem to be an issue within the Convention[1526], provided that articles 2 and 14 are fulfilled.

**526.** The following English case[1527] should better illustrate the issue pertaining to the change of habitual residence. A British couple, domiciled in the UK, habitually resident in the US by reason of the husband's employment, filed an application for adoption before the UK local authorities. Although the HC-1993 is applicable to both the UK and the US, their respective laws require different and restrictive conditions in relation to the adoption of a foreign child[1528]. In short, the prospective adoptive parents could not file before the US authorities for an adoption application of a child habitually resident in the UK[1529]. And nor could they file for a child's placement order in the US and later apply therein for a domestic adoption, as such was in violation of English law[1530]. The English courts were seised of the matter.

> The Court reiterated article 2 of the HC-1993, stating that the adoptee was required to maintain his/ her habitual residence in the UK for the purposes of the adoption and the applicability of the Convention (§

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1526 Reversely, for the current guidance provided by the Permanent Bureau's note on habitual residence, including the issues arising out of its change within the adoption procedure, we refer to part I, chapter I, section III. In particular, according to the PB's note a collaborative approach should take place between the Central Authorities of the Contracting States concerned. Such an approach should help in determining the PAPs' eligibility for adoption, and in assessing relevant factors for their habitual residence determination. In circumstances such as in the English judgment above, Central Authorities should ensure that, other than the conditions relating to article 2, those concerned by art. 5 of the Convention are fulfilled (*i.e.* the immigration controls under art. 5 lit. c). The habitual residence fact-based determination through a collaborative assessment is a modern and valuable approach. On many occasions, however, it may involve lengthy procedures, difficult confrontation with adoption requirements provided in domestic laws, necessitating courts' interventions such as in the English judgment (see also K. STOUTAMYER LAW/ D. BERGER/ M. TERCERO-PARKER/ E. FERRON, Intercountry Adoption, Domestic Adoption and the Post-Hague Landscape, Immigration Practice Pointers, 2012-13, p. 4). Specific guidance in the determination of habitual residence, in addition to the elements indicated in the PB's note, would support the coordinated intervention of the Central Authorities.

1527 *Kent County Council v. PA-K and IA (a child)* [11 March 2013] EWHC 578 (Fam).

1528 § 10-11: "However, from a US perspective, neither route is viable. If IA were to be adopted under English domestic provisions, her adoptive parents would have had to live with her for two years in the UK before they would be eligible for a visa permitting her to enter and remain with them in the USA. There are practical reasons why they cannot pursue that option […]. The alternative of a Convention Adoption order would not be available to the Xs if they were to apply in the USA because, as a matter of US policy, only US citizens are eligible to apply when America is the receiving State".

1529 Because they were not US citizens at the time of the application, which is a compulsory requirement under US law, when US is the receiving State.

1530 § 12: "The original plan, put forward as I understand it by the American authorities, was for IA [the child] to be placed in the USA and then adopted under American domestic law. However, a placement of that kind would have been in contravention of s.85 of the ACA 2002 ('Restriction on taking children out of the UK for adoption') unless she had been removed under the auspices of s.84 ('Giving parental responsibility prior to adoption abroad') which in the case of the USA would have to have been authorized under the Convention. In any event, because Mr and Mrs X retain their UK domicile, under s.84(2), they would not be eligible under UK law to apply for such an order".

19)[1531]. Furthermore, the issue before the Court was to determine whether the adoptee may have been considered to be habitually resident in the UK, in spite of the fact that she was placed under foster care with her prospective adoptive parents in the US[1532]. The Court concluded affirmatively. It decisively relied on the 'shared intent'[1533] by the local authorities, the prospective adoptive parents, and the Court, to determine that the '*continuing child's habitual residence*' was in England during the adoption, despite she was physically present in the US[1534].

**527.** The reasoning of the UK court is supported in that the child's habitual residence should continue to be determined in his/ her State of origin during the whole procedure until the adoption decree. The latter approach responds to issues of certainty and predictability, ensuring the correct implementation of the Convention founded on the separate habitual residence of the actors concerned. Despite the determining moment of the filing indicated in the Convention, it is argued that the length of the procedure as that required by the adoption justifies the need of a continuing habitual residence in order to uphold the child's best interests by virtue of proximity[1535]. The appreciable period for the determination of the child's continuing habitual residence in the State of origin should therefore be better delimited. In particular, a better synergy between articles 2, 14 and 16 should be provided.

**528.** Concerning the habitual residence fact-based determination, in the other fields of family law examined in this book it was said that physical presence generally represents a prerequisite. However, as stated by the English courts, it would not be wrong to determine that within intercountry adoption an adoptive child might be habitually resident in one State but physically present in another[1536] in his/ her best interests[1537].

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[1531] The Court did not clarify at which moment the child was required to be habitually resident in the UK. In our view that should correspond to the whole adoption process.

[1532] § 20: "It is therefore necessary to consider whether it is possible for IA to remain habitually resident here notwithstanding that pursuant to the local authority's plan she will be living with Mr and Mrs X in the USA. The local authority accepts that if she were to be living with them under a private arrangement for two years or so, she would become habitually resident in the USA".

[1533] § 23: "He observed that the children's time in that country had always been at the behest of the local authority which, alone, had determined when it began, for how long it continued and when it came to an end".

[1534] § 28: "What is of infinitely greater, even vital, importance is that I should pronounce myself entirely satisfied, as I do, that IA – as the result of an intention shared by the local authority, Mr and Mrs X and, indeed, the court – will remain habitually resident in England. The placement in the USA with the Xs is either disregarded by application of s.105(6) and / or on the facts the local authority has no settled intention that IA should live in the USA".

[1535] The principle of proximity should be generally upheld as in other fields of family law examined (see *M (Children) (Habitual Residence: 1980 Hague Child Abduction Convention)* [2020] EWCA Civ 1105, § 42).

[1536] This reasoning nevertheless should not aim to 'defraud' intercountry adoption. In particular, a child should not continue to be habitually resident in a non-Contracting State to circumvent the safeguards of the Convention. Whenever the adoptive child or the PAPs were to sever regular contacts with that State, their habitual residence there would be abandoned. In this regard, a child

## Section II Child Custody and Visiting Rights

**529.** Habitual residence principally governs international jurisdiction and applicable law over parental responsibility (Brussels IIA) and the protection of children (HC-1996). We will focus on habitual residence for the determination of jurisdiction and applicable law under the two legal instruments. Reference is also made to specific exceptions[1538]. In addition, the US UCCJEA, as an example of national legislation implementing similar rules and concepts, is likewise examined.

### § I. General Jurisdiction under Brussels IIA

**530.** It is recalled[1539] that the Regulation attributes general jurisdiction to the courts of the child's habitual residence at the time of the seisin (article 8). In the matter of visiting rights, jurisdiction should be retained for three months following the child's relocation to another State (article 9)[1540]. The CJEU has given guidance through an important number of judgments[1541] for the interpretation of the child's habitual residence under the Regulation. In this regard, recital 12 of the latter instrument is the guiding principle for the child's habitual residence assessment. Accordingly, the child's best interests should determine the proximity with the competent forum. The following judgments of the CJEU will illustrate the intersection of best interests and proximity.

**531.** This case[1542] involved a Spanish-German couple living in Spain. Two children were born there, Merlín and Samira. Following marital disputes, the wife, German national, wished to return to Germany with their children. In

born in one State and later living in another, should not be deemed habitually resident in his/ her place of birth without having established specific attachments regularly maintained post-relocation. Lastly, a child must have been physically present at least once in a State in order to establish his/ her habitual residence therein.

1537 Therefore the child's best interests and habitual residence become interconnected in that the authorities of the child's habitual residence should be better placed to represent and protect such interests, ultimately by assessing the suitability of the child's family environment and his/ her personal views where possible. On this subject, see V. BUMBACA *et al.*, Cour européenne des droits de l'homme : l'intérêt supérieur de l'enfant, la considération primordiale dans la prévention et la gestion des échecs de l'adoption, in: C. JEANNIN (ed.). Vers une plus grande compétence : apprendre des échecs de l'adoption internationale. Genève : Service social international, 2017, p. 60-62: "*L'intérêt supérieur de l'enfant devrait être primordial dans les procédures d'adoption, afin de garantir la prévention des échecs de l'adoption internationale et des conséquences qui en découlent pour les enfants concernés. Une attention particulière doit être portée au droit de l'enfant d'être entendu et de voir son opinion pris en considération*".

1538 In particular, we will refer to transfer of jurisdiction and provisional (also indicated as temporary) or emergency jurisdiction, which all fall under the broad category of exceptional, subsidiary, jurisdiction.

1539 For a detailed analysis of the Regulation, please refer to part I, chapter I, section IV of this book.

1540 Member State or third State.

1541 Some were already referred to in part I, chapter I, section IV above.

1542 *Purrucker v. Vallés Pérez* [15 July 2010] C-256/09, ECLI:EU:C:2010:437.

this respect, a parental agreement was concluded before a notary in Spain, which governed, *inter alia*, joint parental responsibility and right of custody, as well as the father's visiting right. According to the agreement, the 'permanent place of residence' of both mother and children was fixed in Germany. At the time of the intended relocation, Samira had to finally remain in Spain due to a surgical operation. Afterwards, three parallel proceedings occurred. One before the Spanish courts[1543] concerning the obtainment of the father's right of custody and the implementation of provisional measures. The Spanish judge adopted provisional and urgent measures granting sole custody to the father[1544]. A second proceeding was brought before the German courts[1545] in relation to, *inter alia*, the granting of the mother's right of custody[1546]. A third and last proceeding concerned the enforcement of the Spanish judgment before the German courts. On the latter proceeding brought by the father, it was asked to additionally judge on the return of Merlín to Spain. Despite the approval of lower courts, the Federal Court (*Bundesgerichtshof*) referred to the CJEU for a preliminary ruling.

> The CJEU[1547] concluded that the proximity principle should guide the determination of habitual residence, whose courts are the most appropriate to take measures in the child's best interests.

**532.** This second case[1548] concerned a Lithuanian-Dutch and Argentine couple. A child, dual national, Lithuanian and Italian, was born in the Netherlands from this relationship. The family lived in the Netherlands (2004-2006), then they moved to Italy, and after a short period of time they relocated to Canada. Afterwards, the mother and the child moved to Italy (July-November 2011) and later to the Netherlands[1549]. The mother filed a petition for divorce before

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[1543] The Spanish courts retained jurisdiction in first instance, according to international law in force between Spain and Germany, as well as to Spanish law governing custody. The courts stated that the parents resided in and their last family home was Spain. Accordingly, the applicant spouse was still habitually resident in Spain at the time of the proceedings; Merlín's habitual residence was in Spain until his relocation to Germany (§ 36). The mother opposed this interpretation, arguing that the child's best interests were better protected in Germany and the agreement was still in force.

[1544] Additional accompanying and accommodation measures were mentioned (§ 37: "2. Prohibition on leaving Spain with the children without the court's prior approval. 3. Delivery of passports of each of the children to the possession of the parent exercising rights of custody. 4. Any change in the residence of the two children Samira and Merlín is subject to the prior approval of the court.").

[1545] The German courts stayed proceedings, according to art. 19(2) of Brussels IIA (*lis pendens*), waiting for the Spanish judgment to acquire force of *res judicata*.

[1546] § 36: "The legal representative of Bianca Purrucker submitted at the hearing that this court did not have jurisdiction because, first, Merlín was legally residing in Germany and, consequently, the interests of that child should be dealt with in Germany, and, secondly, the parties had come to a private agreement".

[1547] The Court stated that the Spanish judgment pertained to a proceeding concerning the scope of art. 20 of the Regulation. The latter provision does not entail substantive jurisdiction, which is instead provided under art. 8 (§ 61). In this regard, the Court added that, conversely, art. 11 of the HC-1996 is designed to be a rule of jurisdiction (§ 89).

[1548] *W and V v. X* [15 February 2017] C-499/15, ECLI:EU:C:2017:118.

[1549] The facts mention that the father was habitually resident in Lithuania (§ 12).

the courts in Canada, following which a judgment, including divorce and the granting of sole custody on her behalf, was rendered[1550]. The Lithuanian courts were seised by the father for divorce and sole custody[1551]. A judgment concerning divorce, fixing the child's residence with his mother, assigning the child's contact arrangements with the father, ordering maintenance towards the child's support, was issued[1552]. Furthermore, additional proceedings were initiated in the Netherlands awarding, *inter alia*, sole custody to the mother and fixing the child's residence at her place[1553]. In a new proceeding[1554], the father seised the Lithuanian District Court for an order determining, *inter alia*, the child's residence, that was declared inadmissible[1555]. The Regional Court stayed proceedings and referred to the CJEU for a preliminary ruling.

> The CJEU stated that the child's habitual residence assessment should take place in respect of recital 12[1556]. Its determination should occur at the seisin, which freezes international jurisdiction[1557]. On the habitual residence fact-based determination, the Court recalled the interpretation

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1550 § 13: "X petitioned for divorce before a Canadian court. Several decisions have been made by that court since May 2011, including a decision of 17 April 2012 granting W and X a divorce and awarding X sole custody of child V". This judgment was not recognised by the Lithuanian and Dutch courts, later seised.

1551 This Court granted an interim order allocating the child's residence to the father's domicile for the duration of the proceedings (§ 16). The father applied for a return order before the same courts, which was dismissed (§ 17). The residence order was afterwards set aside and the father's appeal was considered inadmissible (§ 18).

1552 Again, the Court judged the father's appeal inadmissible (§ 20).

1553 § 23: "That court noted that, under Netherlands law, sole custody of a child may be granted to one parent either when there is an unacceptable risk that the child may suffer as a result of its parents' disagreements and there is no prospect of any adequate improvement in the near future or where a change in the custody arrangements is otherwise necessary in the interests of the child". The Dutch courts did not recognise the Lithuanian judgment, save for the part dealing with the contact arrangements (§ 24). The Lithuanian courts did not recognise the Dutch judgment (§ 25).

1554 § 59: "In those circumstances, the lodging, on 28 August 2014, of the application for amendment of the decision of 8 October 2013 must be considered to be the starting point of new proceedings. It follows that the court seised, in this case the Vilniaus miesto apylinkės teismas (District Court, Vilnius), must determine the court with jurisdiction, taking into account, in the first place, the habitual residence of child V at the time that court was seised, in accordance with Article 8(1) of Regulation No 2201/2003".

1555 The judgment was in part overturned in appeal by the Regional Court and referred back to the lower Court (§ 28). According to the District Court, international jurisdiction was upon the Dutch authorities, as against the interpretation of the Regional Court, which conversely stated that the Lithuanian courts were competent (§ 30).

1556 § 51: "As is apparent from recital 12 of Regulation No 2201/2003, that regulation was drawn up with the objective of meeting the best interests of the child and, to that end, it favours the criterion of proximity. The EU legislature, in effect, considered that the court geographically close to the child's habitual residence is the court best placed to assess the measures to be taken in the interests of the child (judgment of 15 July 2010, Purrucker, C-256/09, EU:C:2010:437, paragraph 91). According to that recital, jurisdiction should lie in the first place with the Member State of the child's habitual residence, except in certain cases of a change in the child's residence or pursuant to an agreement between the holders of parental responsibility".

1557 Jurisdiction should be determined and established at "the time when the document instituting the proceedings is lodged with the court" and should cease at the time "when the proceedings have been brought to a close" (§ 54).

given under *Mercredi v. Chaffe*[1558]. It further clarified that physical presence is an essential element[1559]. The Court concluded that the child's habitual residence was in the Netherlands[1560].

**533.** The two cases under analysis confirm that the child's habitual residence determination should be founded on proximity with his/ her best interests. The habitual residence assessment should take place at the time when the document instituting the proceedings is lodged with the court. The child's physical presence and the degree of protection guaranteed over his/ her interests are an essential prerequisite for the establishing of habitual residence at the relevant time.

## § II. General Jurisdiction under the Hague Convention 1996

**534.** Like the Brussels IIA Regulation, this Convention[1561] allocates general jurisdiction to the authorities[1562] of the child's habitual residence for the protection of his/ her person and property (article 5.1). Under the Convention, general jurisdiction should cease as soon as the child relocates to another Contracting State (article 5.2)[1563]. In absence of supranational courts exercising jurisdiction in the framework of the Convention[1564], the following national judgments should provide further enlightenment on the operation of habitual residence under the treaty rules.

**535.** This first case[1565] involved a Belgian-Russian unmarried couple living in Switzerland (Geneva), with a daughter born from their relationship. The father acknowledged paternity, and the couple signed a declaration on joint

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1558 According to this judgment, the habitual residence assessment should consider: the child's integration in a social and family environment (factually determined by the national court); the conditions and reasons of the child's stay; the child's nationality; his/ her physical presence (not temporary or intermittent).

1559 Unlike nationality which is a mere fact (§ 63).

1560 § 62-66-67: "However, in the case in the main proceedings, it is common ground that child V has never been to Lithuania […]. Thus, in a case such as that in the main proceedings, it is the courts of the Member State of the child's habitual residence that have jurisdiction in matters of parental responsibility. In the present case, the courts thus designated by the referring court are the Netherlands courts […]. It is, consequently, for those courts to decide on applications, such as those of W, seeking to change the child's place of residence, vary the amount of maintenance and change the contact arrangements for the parent concerned".

1561 For a detailed analysis of the Convention, please refer to part I, chapter I, section III of this monograph.

1562 Courts and/ or Central Authorities.

1563 Competent authorities may instead retain jurisdiction when relocation occurs to a non-Contracting State.

1564 This statement does not preclude national courts from consulting the CJEU guidance while assessing habitual residence in cross-border cases not involving Brussels IIA, the texts of the two instruments being similar.

1565 BGer 5A_21/2019 vom 01.07.2019.

custody[1566]. Thereafter[1567], the mother seised the Swiss authorities[1568] for the obtainment of sole custody, jointly with a request for provisional and superprovisional measures[1569], which were upheld[1570]. Afterwards, the father claimed for provisional and superprovisional measures, aiming to, *inter alia,* prohibit the mother from relocating with their daughter, which was accepted. The mother and the daughter, however, moved to Russia during the Christmas holidays. The father seised the courts to re-establish contacts with his daughter and to obtain joint custody. The mother, while in Russia, seised the Swiss courts seeking to, *inter alia,* fix their daughter's domicile in Russia[1571]. The courts upheld, on a provisional basis, the father's request for the re-establishment of contacts with his daughter and for the obtainment of joint custody[1572]. The same courts[1573] ordered a social assessment, carried out by the Swiss local administrative authority[1574].

> The Swiss Federal Court concluded that the couple's daughter was habitually resident in Russia on the lawful basis that the mother held

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1566 '*Autorité parentale conjointe*'.

1567 The mother's motion followed the criminal proceedings for sexual abuse towards a friend of her husband's. In this regard, the mother asked the courts to deny contacts between the daughter and the father.

1568 '*Tribunal de protection de l'adulte et de l'enfant*'.

1569 '*Mesures superprovisionnelles et provisionnelles*'. B. STUCKI/ J. PAHUD, Le Régime des Décisions Superprovisionnelles et Provisionnelles du Code de Procédure Civile, *Semaine Judiciaire*, II 137, 2015, p. 2: "*L'appellation mesures superprovisionnelles est trompeuse. Il s'agit en réalité de mesures provisionnelles prononcées dans une première décision qui, elle, est superprovisionnelle. Cette première décision doit nécessairement être remplacée par une seconde décision, après audition de la partie visée. C'est au regard de la décision, non de son objet, que la distinction entre les adjectifs « superprovisionnel » et « provisionnel » prend son sens*".

1570 Superprovisional measures contemplated, *inter alia*, ceasing contacts between the father and their daughter, denying permission to leave the Swiss territory without the court's prior authorisation, and withdrawing the father's custody (§ B. B. a.).

1571 The mother added to her request that she would stay temporarily in Russia with her daughter for the reason that three experts had visited the child and reached the conclusion that she had probably – '*très probablement*' – been sexually abused – '*victime d'attouchements ou autres actes à caractère sexuel*'.

1572 B. h.: "*Par ordonnance du 6 février 2017, le Tribunal de protection, statuant sur mesures provisionnelles, a notamment levé l'interdiction faite à A._____ d'entretenir tout contact avec sa fille C._____, lui a restitué l'autorité parentale sur l'enfant, lui a réservé un droit aux relations personnelles devant s'exercer à raison de trois contacts téléphoniques par semaine dans l'attente du rapport d'évaluation sociale que le SPMi était invité à établir dans les meilleurs délais*".

1573 A request for return was also filed by the father in respect of the HC-1980. The courts, through provisional measures, fixed the daughter's residence at the father's domicile, the withdrawal of the mother's custody, and the daughter's return to Switzerland. The mother appealed against this judgment (*cf.* BGer 5A_68/2018 vom 23.01.2018). The Swiss Court of Appeal ('*Chambre de surveillance de la Cour de Justice*') reversed the decision concerning the provisional measures, holding that the jurisdiction over the daughter's custody was by then attributed to the Russian authorities. The father appealed before the Federal Court challenging the Russian jurisdiction. However, the Russian Supreme Court rejected the return application (C.).

1574 '*Service de protection des mineurs*' ('SPMi'). The assessment reported the father's suitable parental capacity and the mother's lack of cooperation (§ B. i.).

sole custody over the child prior to the relocation[1575]. According to the Court, the mother's official steps carried out in Russia, purporting to recognise their daughter's habitual residence there, showed her intentions, before the alleged wrongful removal or retention, to relocate with their daughter to Russia, and to abandon Switzerland[1576]. Their daughter had, therefore, acquired habitual residence in Russia some ten days after the relocation[1577].

**536.** This second case[1578] concerned a married couple, she, Swiss-Irish-Danish, he, French-Swiss. The couple had two children and lived on an alternate basis in both France and Switzerland. Following the spouses' separation, the Swiss courts were seised to order protective measures and maintenance towards the children. The application was dismissed for lack of jurisdiction. Meanwhile, the father settled in France and the mother relocated primarily to Switzerland. The children were alternating their stay between both their parents' domicile. Afterwards, the husband filed for divorce before the French courts, which fixed the children's principal habitual residence in Switzerland. The courts retained jurisdiction over parental responsibility on the basis of article 8 of Brussels IIA. An appeal was brought before the French Court of Cassation. During the pending divorce proceedings in France, and following the father's arrest, the children moved to live principally with their mother in Switzerland.

The Court maintained that the children's habitual residence was lawfully established in Switzerland by virtue of their school enrolment during the pending divorce proceedings. Accordingly, jurisdiction over parental responsibility was established in Switzerland and not in France. In the Court's view, habitual residence should operate under article 5(2) of the HC-1996, in that the children's lawful relocation to Switzerland from France would freeze jurisdiction upon the Swiss courts.

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[1575] The Federal Court, on the father's arguments that their daughter's relocation was wrongful by virtue of the Swiss later decision withdrawing the mother's custody, reiterated that the relocation was lawful because when the mother left Switzerland for Russia she had not yet received, or she may not have known of, this decision (§ 7.4.1). The Court determined international jurisdiction based on art. 5 of the HC-1996 (applicable between Switzerland and Russia), and it maintained that the principle of *perpetuatio fori* does not apply under the Convention (§ 5.1).

[1576] § 6 : "*La cour cantonale a par ailleurs relevé que, quelques jours après son arrivée en Russie et alors qu'elle était seule titulaire de l'autorité parentale, la recourante avait effectué des démarches visant à faire constater que le domicile de sa fille se trouvait en Russie, agissant avec l'intention manifeste de s'installer, avec l'enfant, dans son pays d'origine*".

[1577] § 6: "*Dès ce moment, la résidence habituelle de l'enfant se trouvait donc en Russie et non plus en Suisse, en sorte que la compétence pour prendre des mesures tendant à la protection de sa personne ou de ses biens avait été transférée aux autorités russes, conformément à l'art. 5 al. 2 CLaH96*".

[1578] Arrêt n° 557 du 30 septembre 2020 (19-14.761), Cour de cassation, Première chambre civile, ECLI:FR:CCASS:2020:C100557.

**537.** This last case[1579] concerned an Italian-US couple, who lived and legally separated in Italy. She, US national, relocated to the US, he, Italian national, remained in Italy. Initially, the mother was followed by their daughter to the US by virtue of a preceding judgment rendered in Italy[1580]. Subsequently, the father filed an application before the same jurisdiction to modify, *inter alia,* the previous decision on parental responsibility[1581]. Meanwhile, the mother had filed for divorce and parental responsibility before the US courts in Washington[1582]. The Italian Court of Cassation declined jurisdiction[1583], although the Court of Appeal adopted provisional and urgent measures purporting to establish the daughter's habitual residence in Italy until the rendering of the US substantive orders[1584]. Based on the provisional jurisdiction of the Italian courts, the father claimed before the courts in Milan obtainment of, *inter alia,* sole custody, the daughter's residence in Italy, the arranging of access rights between the mother and the daughter[1585].

> The Italian courts declined international jurisdiction on the basis of article 5[1586] of the Convention. In particular, general jurisdiction should be established based on the child's habitual residence at the time of the

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1579 Tribunale Ordinario di Milano, sez. XI civ. [2 July 2018] No. 11146/2017.

1580 "*Premetteva il ricorrente di essersi separato dalla moglie LONG Chandra Lyn con separazione consensuale del 11.12.2012, omologata dal Tribunale di Roma ii 18.12.2012, concordando l'affidamento condiviso della figlia con collocamento presso la madre in Italia, un suo ampio diritto di visita, un contribute a suo carico per ii mantenimento della figlia e della moglie e la possibilita da settembre 2014 per la moglie e la figlia di trasferire la residenza nello Stato di Washington, una regolamentazione del suo diritto di visita che teneva conto della nuova residenza della bambina e un contributo solo per il mantenimento della figlia*".

1581 "*In ragione di comportamenti pregiudizievoli e ostacolanti della sua relazione con la figlia posti in essere dalla moglie, lo stesso in data 10.4.2015 promuoveva un ricorso per modifica delle condizioni di separazione avanti al Tribunale di Roma, la cui giurisdizione veniva contestata dalla moglie che, a fronte del rigetto dell'eccezione sollevata da parte del Tribunale di Roma* […]".

1582 "[…] *atteso che la giurisdizione della Autorità Giudiziaria americana deve essere valutata con riguardo al memento in cui le domande in pagina 11 di 14 punto di responsabilità avanzate dalla signor LONG, insieme alla domanda di divorzio, sono state proposte e atteso che a novembre 2015 e incontestato che Alanis viveva ancora ad Everett (Stato di Washington) con la madre*".

1583 "*Con ordinanza del 7.2/5.6.2017 la Corte di Cassazione dichiarava il difetto di giurisdizione del Giudice italiano per essere la minore residente abitualmente negli Usa al momento in cui era stato promosso il ricorso dal signor BORRELLO*".

1584 "*Il Tribunale di Roma con decreto del 21.6/26.7.2017, preso atto della pronuncia della Suprema Corte, disponeva, ex art. 20 del regolamento UE 2201/2003 e 11 della Convenzione dell' Aja del 1996 in via provvisoria e d'urgenza, che la minore rimanesse in Italia per i prossimi anni scolastici e continuasse a frequentare la scuola italiana, ove era già stata iscritta, sino al momento in cui il Giudice statunitense non avesse assunto i provvedimenti definitivi di sua esclusiva attribuzione e che la madre poteva vedere la figlia in Italia previa comunicazione al marito e compatibilmente con le esigenze della minore*".

1585 "*Sosteneva, quindi, il ricorrente sussistere ora la giurisdizione del Tribunale Italiano, sia per i provvedimenti cautelari e urgenti sia nel merito, perché la minore, per accordo stesso delle parti e in ogni caso, era da giugno 2016 residente stabilmente in Italia e ora viveva stabilmente a Milano con il padre*"

1586 Reference is also made to art. 8 of Brussels IIA, directly applicable to Italy (*cf.* part I, chapter I, section IV).

institution of the proceedings[1587]. Accordingly, they concluded that the jurisdiction should be attributed to the US courts, taking into account the US substantive proceedings on divorce and parental responsibility founded on the mother's claim at the time of her daughter being habitually resident in Washington.

**538.** The national cases under analysis indicate that the child's habitual residence, for both purposes of custody and visiting rights, should be factually determined through the child's physical presence and the primary care giver's settled purpose at the time of the institution of the proceedings. A child might effectively change his/ her habitual residence on the basis of his/ her primary carer's settled purpose factually assessed through objective indicators, irrespective of the duration. The change of habitual residence may occur during proceedings which do not concern general jurisdiction over parental responsibility[1588]. A child might be habitually resident in two States at a different point in time, although he or she should be habitually resident in one State at the seisin on the basis of his/ her de-integration from the former habitual residence and integration in the actual habitual residence[1589].

## § III. Continuing Jurisdiction under Brussels IIA and the HC-1996

**539.** The question of continuing jurisdiction, under article 9(1) of the Regulation, and article 5(2) of the Convention, reveals an important divergence[1590]. The Regulation provides that the authorities of the former

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1587 "*Non può, infatti, confondersi il piano della valutazione per decidere la questione della competenza giurisdizionale, cui l'Autorità Giudiziaria americana, per prima investita delle domande, deve procedere avendo riguardo unicamente alla residenza abituale della minore al momento della proposizione della domanda* […]".

1588 An example is an action concerning divorce as to the substance and parental responsibility on a provisional basis.

1589 A similar analysis was made by the UK courts within the framework of Brussels IIA in the case '*D (A Child - Jurisdiction - Habitual Residence) [2016] EWHC 1689 (Fam)*'. The latter involved a British-French unmarried couple. A child was born from this relationship. The mother and the child were dual nationals, British and French, the father was British. The couple initially lived in London where the child was born. The parents shared parental responsibility over the child. At some point, the couple separated. The mother became the child's primary carer, and the parents agreed on contact arrangements between the father and the child. Thereafter, the mother moved to France with the child, which was contested by the father. The English courts held that the effective transfer of the child's habitual residence should be assessed through tangible steps, notably his/ her physical presence and integration within a social and family environment, which must exclude a peripatetic life. The courts added that at the seisin under art. 8 of Brussels IIA, the child should be integrated in the new, and abandon the former, State. The latter refers to the see-saw rule established under English law (§ 91). The courts concluded that, under art. 8 of Brussels IIA, the child was habitually resident in France at the seisin by virtue of continuous duration, settled home, school, circle of friends, language skills, settled family, the mother's intention and conduct which did not show evidence of her having engaged in actual pre-planning of the move to England (§ 99).

1590 This divergence may raise two legitimate opinions. Some may argue that in the context of Brussels IIA, continuing jurisdiction might be contrary to a common judicial area founded on mutual trust.

habitual residence of the child, and current habitual residence of the parent granted visiting rights, retain jurisdiction for three months, only for proceedings involving access rights. In the framework of the Convention, continuing jurisdiction applies, exceptionally[1591], in relation to proceedings between Contracting and non-Contracting States, irrespective of the specific duration (*i.e.* three months) or of the disputed matter (*i.e.* visiting rights). Consequently, within proceedings involving Contracting States, the child's change of habitual residence would 'automatically' entail a transfer of jurisdiction under the Convention[1592].

**540.** In an era where cross-border movements occur easily and expeditiously, habitual residence may sometimes not be established following the child's relocation. The fact-based determination requires broader analysis[1593]. In this regard, the rule designated in the Convention may no longer fulfill the principles of proximity and best interests. Furthermore, the child might lose attachments with the forum of the former habitual residence, and not yet acquire a new place of habitual residence[1594]. In order to truly assess the abandoning of the former, and the gaining of a potentially new, habitual residence[1595], the authorities of both States concerned should rely on a case-to-case collaborative[1596] assessment based on a *child-centred approach*[1597].

**541.** The rule under the Convention remains suitable in the way that continuing jurisdiction is not limited solely to visiting rights and it applies towards non-Contracting States only. Actually, the anchored jurisdiction upon the former habitual residence may in some circumstances prove unrealistic

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And, others may argue that, in the context of the HC-1996, the effective change of habitual residence might, in some circumstances, be difficult to trace leaving a somewhat legal vacuum in the establishing of international jurisdiction.

1591 Continuing jurisdiction applies at the discretion of the courts in the Contracting State (see note 5, LAGARDE, p. 555, § 42; and ATF 5A_236/2016, 15 January 2018, § 3.1.3).

1592 A. BUCHER, Jurisprudence suisse en matière de droit international privé de la famille, *SRIEL*, Vol. 26, 2016, p. 466: "*Les autorités de la nouvelle résidence habituelle deviennent compétentes dès le jour du transfert de cette résidence, même si, dans l'Etat de provenance, l'instance est pendante en appel, devant une autorité pouvant revoir la cause tant en fait qu'en droit (ATF 132 III 586 ss, RSDIE 2007 p. 331)".* BUCHER identifies specific issues relating to the implementation of art. 5(2), for instance when the court of first instance authorises the primary carer's relocation with the child (note 588, BUCHER, p. 73).

1593 G-E (Children: Hague Convention 1980: Repudiatory Retention and Habitual Residence) [1 March 2019] EWCA Civ. 283, § 58.

1594 This is typically the situation of 'absence of habitual residence' (*cf.* part I, chapter IV, section IV).

1595 In those circumstances where the de-integration and integration of the child is hardly traceable or in those jurisdictions where the English see-saw rule is inapplicable (*D (A Child - Jurisdiction - Habitual Residence)*).

1596 *I.e.* transfer of jurisdiction (see part I, chapter IV, section V). An additional example is the collaborative approach encouraged by the HCCH within intercountry adoption (*cf.* section I *supra*).

1597 The child-centric evaluation of habitual residence must take into account the child's age (see *S (Children),* 2020, EWCA Civ 515, § 78).

without an appreciable period being provided[1598]. However, despite the expressed support towards such an approach, an appreciable period like the one contained in the Regulation better responds to legal certainty and predictability. It, ultimately, avoids issues of concurrent habitual residence during a specific length of time[1599]. It, additionally, faces the absence of habitual residence[1600]. It, lastly, supports the determination of the effective change of habitual residence, which should be triggered by the three months indicated within the Regulation.

**542.** In conclusion, as far as a collaborative factual assessment between the authorities of the child's former and potentially new habitual residence cannot be reached in each single case within the Convention, the rule adopted by the Regulation is more compatible with the principles of proximity and best interests. An enlarging of its scope beyond visiting rights is advised in this study, even in absence of the current habitual residence of the parent granted visiting rights, given that the child's habitual residence assessment should focus on his/ her own acclimatization.

**543.** The following case[1601] should clarify in context the preceding analysis. The facts involve a British-Nigerian and Finnish couple, he British-Nigerian, she Finnish, with a five-year old child. In 2010, the couple married in Finland and lived in England for three years. In 2013, the couple separated, the mother wished to relocate with the child to Finland. The English courts were seised on the child's relocation from England to Finland. In 2014, the Deputy District Judge held that the mother was permitted to remove the child to Finland on a permanent basis[1602]. In 2015, the father appealed before the Family Court at Guilford concerning jurisdiction over custody and modification of visiting rights under articles 8 and 9 of Brussels IIA. The Family Court held[1603] that the child was habitually resident in Finland at the seisin, excluding continuing jurisdiction[1604]. According to the Court, the child was lawfully present in Finland at the relevant time[1605]. In this regard, the following elements were retained as decisive: the administrative evidence[1606]; the child's/ primary carer's place of living; and the child's nursery attendance. Conversely, the

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1598 Continuing jurisdiction may additionally last for an indefinite period of time, until the ascertaining of the habitual residence effective change.

1599 This may often suffice to factually assess the establishing of the new habitual residence replacing the former one.

1600 As a consequence of the non-establishing of a new, and the loss of the former, habitual residence.

1601 *J (A Child) (Finland) (Habitual Residence),* 2017, EWCA Civ 80.

1602 Contact arrangements between the father and the child were also established.

1603 § 21.

1604 In particular, the father's request was filed four months after the child's move from England to Finland, not corresponding to the three-month timespan indicated in Brussels IIA.

1605 At the fourth month after the relocation, concerning visiting rights, and at the seisin, in relation to custody.

1606 "[…] extract from the Population Information System of Finland […]" (§ 21).

Court considered irrelevant the child's place of birth, the three-year living period following birth, the child's language ability to communicate with both parents, and the substantive contacts with the father[1607]. The case reached the Court of Appeal.

> The Court upheld the previous decisions[1608]. It maintained that when assessing the child's habitual residence, courts should take into account '*the factors in the old and new lives of the child, and the family*'[1609]. The Court added that the review of all of the relevant evidence should not become '*an unworkable obstacle course through which the judge must pick his or her way by a prescribed route or risk being said to have made an unsustainable finding*'. The Court specified that '*in some cases it will be necessary to carry out quite a detailed analysis of the situation that the child has left; in other cases, less detail of that will be required and the judge will be able to explain shortly why that is and focus more on the circumstances in the new country*'[1610]. Accordingly, courts should not fall into the potential trap for which a proceeding concerning visiting rights and contact arrangements would make them extensively argue the determination, or re-determination, of the child's habitual residence[1611]. In the view of the Court, the child's integration in Finland was successfully achieved at the relevant time[1612].

**544.** This case allows us to conclude that continuing jurisdiction, if accompanied by an appreciable period, would help in determining the effective change of habitual residence[1613]. On the contrary, the habitual residence of the parent granted visiting rights, for the purposes of proceedings involving their modification, may clash with the child's habitual residence fact-based determination founded on his/ her best interests.

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1607 § 21, 23, 24 and 60.

1608 § 55.

1609 § 62.

1610 Ibid.

1611 § 69, 70.

1612 The Court's determination of the child's habitual residence was based on: (a) the child's age of three and half years (at the time of the relocation) and the inevitable (given his age) connection with his mother's habitual residence at the relevant time (§ 66); (b) the commitment and mother's intention, as primary carer, to live in Finland for life (§ 67, 68); and (c) the maternal grandparents' support and well-established relationship with the child (§ 68).

1613 Under Brussels IIA, in absence of the establishing of habitual residence at the fourth month after the relocation, jurisdiction over both custody and visiting rights should be frozen upon the child's former habitual residence, which will actually remain his/ her current one.

## § IV. Transfer of Jurisdiction under Brussels IIA and the HC-1996

**545.** Transfer of jurisdiction[1614] is an exceptional rule to general jurisdiction under Brussels IIA and the HC-1996[1615]. The State[1616] courts seised in the child's habitual residence[1617], for matters of parental responsibility, may transfer jurisdiction to the courts of another State, provided that it would be in the child's best interests[1618]. The courts of a State[1619], other than that of the seised courts, may also request jurisdiction if they were more appropriate from the perspective of the child's best interests.

**546.** Brussels IIA, article 15, refers to the notion of *particular connection*[1620]. The Convention, articles 8 and 9, refers to the notion of *substantial connection*. The explanatory report to the Convention gives some examples of the meaning attributed to substantial connection[1621], similar to the one contemplated by the Regulation for particular connection[1622]. Furthermore, article 8(2) of the Convention indicates additional fora[1623], including the forum of divorce[1624].

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1614 The proposal of this study advocates for the use of transfer of jurisdiction in the whole area of international family law (*cf.* part I, chapter IV, section V above).

1615 The transfer may occur either *ex officio* or through parental agreement. When the transfer is requested *ex officio*, one parent's approval is sufficient.

1616 EU Member State under the Regulation, or Contracting State to the Convention.

1617 At the time of the institution of the proceedings.

1618 The CJEU has given guidance in the case '*Child and Family Agency v. J.D. [26 October 2016] C-428/15, ECLI:EU:C:2016:819'* for the implementation of this rule under the Regulation. The Court held that the transfer must occur only in presence of a situation that primarily conforms to the child's best interests. In this regard, the rule has to ensure a better examination of the case in accordance with, *inter alia*, the procedural rules of the Member State receiving the transfer (§ 57, 58). See also note 741, FALCONI, p. 688.

1619 EU Member State under the Regulation, or Contracting State to the Convention.

1620 The Regulation, art. 15, provides an interpretation of 'particular connection' in reference to alternative places, such as: (a) habitual residence of the child after the seisin; or (b) former habitual residence of the child; or (c) child's nationality; or (d) habitual residence of a holder of parental responsibility; or (e) location of the child's property and the case concerns measures for the administration, conservation or disposal of this property.

1621 See note 5, LAGARDE, p. 561, § 55: "It will permit, according to the case and always as a function of the child's best interests, the possible jurisdiction, for example of the authorities of the State of the former habitual residence of the child, or of the State in which members of the child's family live who are willing to look after him or her".

1622 For a concrete analysis of particular connection under Brussels IIA, see also *MK* [2020] EWCA Civ 1002, No. B4/2020/0793, § 37: "The child has a particular connection with France (former habitual residence, nationality, mother's habitual residence"; and CJEU, *IQ v. JP*, [4 October 2018] C-478/17, § 38: "In addition, the factors listed in Article 15(3) of that regulation all — if not expressly, at least in essence — concern evidence of a close connection between the child concerned in the case and a Member State other than that of the court having jurisdiction to hear the case on the basis of Article 8(1) or Article 12 of that regulation (see, by analogy, judgment of 27 October 2016, D., C-428/15, EU:C:2016:819, paragraph 52)".

1623 a) a State of which the child is a national; b) a State in which property of the child is located; c) a State whose authorities are seised of an application for divorce or legal separation of the child's parents, or for annulment of their marriage.

1624 The forum of divorce is excluded by the Regulation (see note 741, FALCONI, p. 682).

The Regulation, article 15(5), adds a six-week period to accept or decline the transfer, which is not mentioned in the Convention[1625].

**547.** The first two alternative grounds on which transfer relies under the Regulation represent the child's 'new' or 'last' habitual residence[1626]. These grounds confirm the importance of assessing proximity and the child's best interests in the place of habitual residence[1627].

**548.** The following national judgment should illustrate the habitual residence assessment under this rule. This case[1628] concerned a child, Italian, who lived in Belgium. Following parental separation, the mother moved to Italy with the daughter. There, she filed for, *inter alia*, legal separation and child custody before the courts in Italy. The father opposed and claimed, *inter alia*, transfer of jurisdiction to the courts in Belgium. The Italian courts retained jurisdiction over legal separation and declined it for matters of parental responsibility. According to the courts, the child was habitually resident in Belgium at the seisin on the basis of article 8 of Brussels IIA[1629]. In this regard, the same courts proceeded with the transfer of jurisdiction towards the courts in Belgium under article 15 of the Regulation[1630]. The case reached the Court of Appeal of Catania (Sicily).

> The Court retained jurisdiction over parental responsibility on the basis that the child's habitual residence was in Italy at the seisin under article

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1625 The Convention makes reference to a discretional exchange of views. In this regard, the explanatory report, p. 561 (§ 56) refers to a 'reasonable period of time' without specifying further. Transfer of jurisdiction should require more uniformity within the Regulation and the Convention.

1626 According to the Opinion of Advocate General Wathelet, in the case *IQ v. JP* (ibid.), the current habitual residence of the child should also be considered as a ground under art. 15, whenever it shows closer connection, in the child's best interests (§ 59, 62, of the Advocate General's Opinion). The case under *IQ v. JP* had involved three children holding current habitual residence in the UK and former habitual residence in Romania. The question had been to determine whether the courts in Romania seised for, *inter alia*, divorce and parental responsibility matters could transfer jurisdiction in appeal to the UK courts. Despite the affirmative interpretation of the Advocate General's Opinion (§ 72), the CJEU disregarded it and concluded (§ 35 of the ruling) that the connecting factors indicated under art. 15(3) should be exhaustive, in line with its previous judgment (ibid.) *Child and Family Agency v. J.D* (§ 51).

1627 *Cf.* subsection I *supra*.

1628 Corte d'Appello di Catania [21 June 2016].

1629 "*Con sentenza non definitiva n. 1384/2015, emessa in data 30/6/2015, il Tribunale di Siracusa accertava la sussistenza della giurisdizione del Giudice Italiano sulla domanda di separazione tra i coniugi, ai sensi dell'art. 3 par. 1 lett. b) del reg. CE n.2201/2003 e, per l'effetto dichiarava la separazione dei coniugi; accoglieva l'eccezione di difetto di giurisdizione del Giudice Italiano sulle domande relative alle statuizioni in tema di responsabilità genitoriale sulla minore B. X. ritenendo che quest'ultima risiedesse abitualmente in Belgio*".

1630 Based on a parallel action brought in the Italian jurisdiction by the father, purporting to acknowledge abduction, the child was returned to Belgium. However, this decision was reversed by the Italian Supreme Court of Cassation ("*Con sentenza n. 6139 del 26/3/2015, la Corte di Cassazione, adita dalla P., annullava il decreto di rimpatrio emesso dal Tribunale per i Minorenni di Catania, rilevando che il presupposto per ordinare il rimpatrio è costituito dal fatto che, al momento del trasferimento del minore, il richiedente eserciti effettivamente il diritto di affidamento in modo non episodico e continuo, e che il Tribunale per i Minorenni di Catania non aveva accertato la sussistenza di tale presupposto* […]"

8 of Brussels IIA[1631]. Decisive elements were those indicated by the CJEU in matters of parental responsibility[1632]. Furthermore, the Court specified, in accordance with the Italian practice[1633], that the child's habitual residence should be located in the place where he or she factually established the center of his/ her emotional ties, in particular through his/ her daily life relationships within the community, in conformity with his/ her best interests[1634].

## § V. Temporary Jurisdiction under Brussels IIA and the HC-1996

**549.** The authorities of the State[1635] where the child is temporarily present[1636] may adopt provisional and/ or urgent measures[1637] for the protection of the

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1631 "*La Corte d'Appello di Catania, con sentenza n. 883/2015, emessa in data 2/10/2015, in totale riforma sul punto dell'impugnata sentenza, dichiarava la giurisdizione del giudice italiano sulle questioni relative all'affidamento della minore B. X ed all'esercizio della responsabilità genitoriale sulla minore stessa* […] *In particolare, la Corte accertava che la residenza abituale della minore, alla data in cui l'autorità giudiziaria italiana era stata adita, contrariamente a quanto ritenuto dal Tribunale, era in Italia nel Comune di A., e che l'attuale presenza della minore in Belgio era rimasta priva di titolo giustificativo, a seguito della decisione della Corte di Cassazione italiana*". The latter judgment has been confirmed by the Court of Cassation (Cass., civ., sez. VI, 22/09/2017, n. 22218).

1632 Corte di Giustizia UE 22/4/2009, C.-523/07 A.C.; Corte di Giustizia EU 22/12/2010, C-497/10, PPU (Mercredi): "[…] *oltre alla presenza fisica del minore in uno Stato membro, si devono considerare altri fattori idonei a dimostrare che tale presenza non è in alcun modo temporanea o occasionale e che la residenza del minore denota una certa integrazione in un ambiente sociale e familiare. Si deve in particolare, tener conto della durata, della regolarità delle condizioni e delle ragioni del soggiorno nel territorio di uno Stato membro e del trasloco della famiglia in tale stato, della cittadinanza del minore, del luogo e delle condizioni della frequenza scolastica, delle conoscenze linguistiche nonché delle relazioni familiari e sociali del minore nel detto Stato*".

1633 "*la residenza abituale del minore deve "corrispondere ad una situazione di fatto, dovendo per essa intendersi il luogo in cui il minore, in virtu' di una durevole e stabile permanenza, anche di fatto, ha il centro dei propri legami affettivi, non solo parentale derivati dallo svolgersi in detta località la sua quotidiana vita di relazione*" (Cass. S.U. 18/9/2014 n. 19664).

1634 Additional elements were the parental relationships with the child, including with her maternal grandparents, the school integration, and the language (lacking Belgian and speaking Italian). In retaining international jurisdiction, the Court also acknowledged the absence of the father's habitual residence in Belgium, particularly based on the administrative evidence according to which he was resident in Italy ("*inoltre, osserva la Corte che, ancora nel corso del precedente procedimento, è stato prodotto in atti dalla reclamante un certificato di residenza del B. rilasciato il 4/4/2016 dal Comune di A., dal quale risulta che il B. a tale data risulta ancora residente in quel Comune (cfr. certificato di residenza del reclamato in atti*")).

1635 EU Member State for the Regulation; Contracting State to the Convention.

1636 This situation indicates, principally, that the child is present in a State other than that of his/ her habitual residence. We exclude in this subsection the scenario where the child does not hold any habitual residence and the State of his/ her (mere) physical presence becomes likewise the place of his/ her habitual residence (*cf.* subsection IX *infra*). The examples provided in the Practical Handbook on the Operation of the 1996 Child Protection Convention (HccH, Hague publications, 2014), clarify that the child must be outside the State of his/ her habitual residence, even though for temporary reasons (*i.e.* medical treatment), in order to trigger art. 11 (see Practical Handbook, p. 70).

1637 Protective measures fall under the definition of judgment under Brussels IIA, art. 2(4).

child. This situation is provided in both the HC-1996/ Brussels IIA and falls outside the rules of general jurisdiction[1638]. It leads to an exceptional ground asserting jurisdiction of provisional, or 'emergency'[1639], nature[1640]. The CJEU[1641] clarified that 'urgency nature' must refer to both the child's situation[1642] and the impossibility of seising the competent court of general jurisdiction[1643].

**550.** On the contrary, a proper definition of urgency under article 11 of the Convention does not seem to be provided[1644]. In this respect, the CJEU

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1638 Concerning this rule, the Regulation and the Convention provide similar common features. In this regard, *lis pendens* does not apply in the context of temporary jurisdiction, and provisional or urgent measures should cease as soon as the courts holding general jurisdiction deal with the child's situation. However, the Regulation and the Convention technically differentiate on three aspects concerning this jurisdiction. First of all, within the Regulation, art. 20 is a 'common provision', an exception to be interpreted restrictively, that should not be glossed with a rule determining substantive jurisdiction such as article 8. By contrast, art. 11 (and 12) of the Convention, designates a rule of concurrent jurisdiction. Secondly, art. 20 of the Regulation incorporates all measures, which shall be provisional and/ or urgent, concerning a child physically present in a Member State at the time the measures are adopted by the courts of that Member State (these conditions are cumulative). Conversely, art. 11 and 12 of the Convention refer to urgent and provisional measures rather differently, whereby the former and the latter denote respectively a 'necessary' or 'provisory' nature (the child's physical presence is required in both situations under the Convention). Thirdly, the Regulation does not provide extra-territorial effects of the measures adopted within temporary jurisdiction, although the CJEU has given contradicting guidance in the cases ibid. '*Purrucker v. Vallés Pérez*, C-256/09' (§ 100) and '*C v. M* [9 October 2014] C-376/14, ECLI:EU:C:2014:2268' (§ 21, 44). In contrast, art. 11 of the Convention specifies measures that are subject to recognition and enforcement (art. 12, reversely, produces effects only in the territory). On the mentioned aspects, see ibid. Practical Handbook on the Operation of the 1996 Child Protection Convention, p. 69-79; note 5, LAGARDE, p. 569; CJEU, *Purrucker v. Vallés Pérez* (C-256/09); and CJEU, *Jasna Detiček v. Maurizio Sgueglia* [23 December 2009] C-403/09, ECLI:EU:C:2009:810.

1639 The US UCCJEA, s. 204, provides an inspiring reference for the meaning of 'Temporary Emergency Jurisdiction'. The latter indicates that situation where the child is physically present in one State, whose authorities do not hold (or do not yet have) general child-custody jurisdiction, and he or she requires necessary, emergency, protection by reason of threatened mistreatment or abuse towards the child itself or towards his/ her sibling or parent (*cf.* subsection XI *infra*).

1640 We will refer to it as 'temporary jurisdiction'.

1641 Ibid. *Detiček v. Sgueglia*, § 42.

1642 Ibid. § 54-56-60: "One of those fundamental rights of the child is the right, set out in Article 24(3) of the Charter, to maintain on a regular basis a personal relationship and direct contact with both parents, respect for that right undeniably merging into the best interests of any child […]. In this respect, it is clear that the wrongful removal of a child, following a decision taken unilaterally by one of the parents, more often than not deprives the child of the possibility of maintaining on a regular basis a personal relationship and direct contact with the other parent […] However, a balanced and reasonable assessment of all the interests involved, which must be based on objective considerations relating to the actual person of the child and his or her social environment, must in principle be performed in proceedings before the court with jurisdiction as to the substance in accordance with the provisions of Regulation No 2201/2003".

1643 In this context, a provisional measure in the Member State of the child's physical presence cannot be incompatible with a previous judgment rendered in the State of the child's current habitual residence, which was recognised and declared enforceable in the State of the child's current physical presence (see *Detiček v. Sgueglia*, § 61). The latter rule applies in respect of the principle of mutual trust recalled under recital 21 of the Regulation.

1644 It is, nevertheless, stated in the Lagarde Report that the rule represents a derogation from articles 5-10 of the Convention, which should be interpreted 'rather strictly' (see ibid. LAGARDE, p. 567, § 68).

guidance may not apply in the context of this provision, as it would not be binding[1645]. Under the Convention, urgency is determined through a case-by-case approach[1646]. The handbook on the operation of the Convention delimits the urgency situation, which should be generally that of '*irreparable harm*' or when the protection of the child's best interests might be compromised. The Convention neither indicates a definition of 'provisional nature'. However, the explanatory report to the Convention specifies that the nature of the child's presence in the State adopting provisional measures should refer to, *inter alia*, vacation, short periods, harvest[1647].

**551.** The importance of clarifying the urgent/ provisional prerogatives allocated to temporary jurisdiction has an impact towards the determination of the child's habitual residence. In this regard, the CJEU[1648] held that the child's habitual residence, provisionally established by virtue of a measure taken within temporary jurisdiction under Brussels IIA, should be determined, for the purposes of a judgment falling under general jurisdiction, on the basis of the reasons and intention of the child's and primary caregiver's stay pursuant to the provisional/ urgent measure[1649]. More specifically, the authorities in the State of the child's current physical presence should determine the potential effective change of the child's current habitual residence as a consequence of the child's provisional residence measure.

**552.** The effective change[1650] of the child's habitual residence should not be glossed with the nature of the measure[1651]. The courts in the State of the child's current physical presence at the seisin should principally look at the child's fact-based determination[1652]. In particular, courts should first assess if the

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[1645] However, EU Member States courts bound by Brussels IIA are encouraged to act in accordance with the canons of the Regulation interpretation, directly applicable to their national laws (as an example, see High Court of Ireland, *J. MCB VL.E.*, 28 April 2010, § 52).

[1646] The authorities of the State where the child is present have discretion over the child's situation and the adoption of necessary measures (ibid. Practical Handbook, p. 69).

[1647] Ibid. LAGARDE, p. 569, § 74.

[1648] *C v. M* [9 October 2014] C-376/14, ECLI:EU:C:2014:2268.

[1649] Ibid. § 55-57: "When examining in particular the reasons for the child's stay in the Member State to which the child was removed and the intention of the parent who took the child there, it is important, in circumstances such as those of the main proceedings, to take into account the fact that the court judgment authorising the removal could be provisionally enforced and that an appeal had been brought against it. Those factors are not conducive to a finding that the child's habitual residence was transferred, since that judgment was provisional and the parent concerned could not be certain, at the time of the removal, that the stay in that Member State would not be temporary. […] As part of that assessment, it is important that account be taken of the fact that the judgment authorising the removal could be provisionally enforced and that an appeal had been brought against it".

[1650] For a complementary analysis in relation to the 'effective change', see also subsection III *supra*.

[1651] P. BEAUMONT/ J. HOLLIDAY, Recent developments on the meaning of "Habitual Residence" in alleged child abduction cases, in: M. ZUPAN, Međunarodno privatno pravo u praksi europskih sudova, 2015, p. 16.

[1652] In *C v. M*, the child temporarily relocated to Ireland on 12 July 2012. On 31 March 2013, the father filed for return in France. On 29 May 2013, the father filed for return under the HC-1980 and

child's physical presence corresponds to a *mere physical absence* from his/ her principal habitual residence[1653], as opposed to a settlement. In this regard, the primary carer's settled purpose, subject to an objective assessment, should be considered determining when the child does not hold a sufficient degree of maturity[1654]. Lastly, reference to a habitual residence appreciable assessment period, prior to the seisin, would delimit the prerogatives of temporary jurisdiction[1655] and better determine the degree of importance attributed to the child's absence for the triggering of a change in his/ her habitual residence[1656].

## § VI. Rules on Applicable Law under the HC-1996

**553.** The Regulation does not provide rules on applicable law, which should be found in the Convention. The latter specifies that the law applicable to custody is the *lex fori*[1657] (article 15.1), even when it refers to a third State (article 20). Furthermore, the exercise of parental responsibility is governed by the child's actual habitual residence (article 17).

**554.** Some exceptions are given to the general rule, namely: (a) the child's person or property have 'substantial connection'[1658] with another State,

Brussels IIA in Ireland. The child had therefore lived approximately 9 and 11 months, respectively, in Ireland at the relevant dates.

1653 In this regard, if the child's temporary absence from State A is finally no longer reflective of proximity and best interests, at the time of the institution of the proceedings under general jurisdiction, the habitual residence effective change should occur. Conversely, if the child's temporary absence from State A does not show that his/ her physical presence is rooted in State B, the child's principal habitual residence may still be anchored in State A.

1654 In *C v. M*, the child was four at the time of the relocation. Thus, his own acclimatization may well have been taken into account on a primary basis. On the question relating to the child's own acclimatization based on his/ her age, see also V. BUMBACA, Remarks on the judgment of the US Supreme Court "Monasky v. Taglieri", in: IPRax, 2021.

1655 For instance, under the US UCCJEA, s. 204, the courts of the child-custody jurisdiction should communicate with the courts of the emergency jurisdiction in order to determine, *inter alia*, a period for the duration of the temporary order. In addition, under the US UCCJEA, the child's home state could be located in the State of emergency jurisdiction only if a child-custody determination were not previously commenced in another State. This clarification excludes, precisely, the issue in *C v. M*, where the French jurisdiction was not seised for matters of custody but for issues relating to divorce. According to the US UCCJEA, in *C v. M*, the child's home state should be determined in Ireland, on the basis of, *inter alia*, a six-month time-based factor (*cf.* subsection XI *infra*).

1656 In *C v. M*, the 'effective change' of the child's habitual residence from France to Ireland should have occurred if the child had abandoned regular contacts with France within the living period of approximately one year in Ireland, prior to the filing for return following alleged wrongful retention, a matter that was principally examined in the decision.

1657 The *lex fori* under art. 15 refers to the internal law of the State exercising jurisdiction, excluding its conflict-of-law rules (see art. 21 of the Convention).

1658 The law of substantial connection is, in principle, based on the child's best interests and not on proximity (ibid. LAGARDE, § 89; Practical Handbook, p. 91). This exception should not be utilised too easily according to both the Explanatory Report and the Practical Handbook to the Convention. The use of the child's best interests, outside the aegis of proximity, does not appear fully clear-cut, particularly, if located in the context of recital 12 of Brussels IIA, which advocates in favour of proximity and best interests for the child's habitual residence assessment. Reference, by analogy, to the 'substantial connection' set out under art. 8 and 9 of the Convention, as well as to 'particular

therefore that other State's law should apply (article 15.2); (b) the change of habitual residence entails a parallel change of applicable law (article 15.3); (c) the attribution or extinction of parental responsibility by operation of law is governed by the law of the child's habitual residence (articles 16.1)[1659]; (d) the attribution of parental responsibility by law subsists to the change of the child's habitual residence (articles 16.3)[1660]. The following examples briefly examine the practical implementation of these rules.

**555.** A child was born in Germany to an Italian couple. The child and his family are habitually resident in France at the time of the institution of the proceedings for custody pursuant to article 8 of Brussels IIA. Thereafter, the mother moves with her child lawfully to Spain.

> French law should govern custody, as *lex fori* under article 15(1) of the Convention, based on the child's habitual residence at the time of the institution of the proceedings. However, the implementation of the measures taken under French law, including for custody, should be further governed by Spanish law, in accordance with article 15(3), as soon as the child acquires habitual residence in Spain[1661].

**556.** In 2013, a child was born in Switzerland to an unmarried couple. The same year[1662], the child lawfully moved to Jamaica with his father, without concluding a joint parental written agreement for the exercise of parental responsibility[1663]. The mother filed for the attribution of parental responsibility and sole custody before the Swiss courts on the basis of article 5[1664].

> Jamaican law should govern the attribution of parental responsibility, as well as its exercise, based on the child's habitual residence by virtue

connection' under art. 15 of the Regulation, would have perhaps better clarified the scope of art. 15(2) of the Convention. Additional guidance on the interpretation of substantial connection might be found under Swiss law. In this regard, BUCHER (*cf.* note 588, p. 61) indicates that substantial connection should be assessed in relation to the child's activities, such as the place where the child goes to school, to the canteen, plays tennis and takes lessons at the conservatory, even though such elements would not be determining for the location of the child's habitual residence.

1659 The attribution or extinction of parental responsibility by agreement or unilateral act, without the intervention of judicial or administrative authorities, is governed by the law of the child's habitual residence at the time the agreement or the unilateral act takes effect (art. 16.2).

1660 For the parent who does not hold parental responsibility yet by law at the change of the child's habitual residence, that would be governed by the law of the new child's habitual residence (art. 16.4).

1661 Ibid. BUCHER, p. 65.

1662 A modification of Swiss law (Civil code, art. 296 ff.) occurred in 2014, which provides joint parental responsibility for both married and unmarried couples (*cf.* ATF 5A_202/2015).

1663 This was obligatory before the modification of the Swiss legislation.

1664 We recall that the Swiss authorities would apply the Convention also in proceedings involving third States according to art. 85 of the PILA (see also ATF 5A_331/2015, 20 January 2016, § 2.2).

of articles 16.1 and 16.4 of the Convention. Jamaican conflict-of-law rules should also apply to matters of custody[1665].

## § VII. Alternate Habitual Residence

**557.** In context, the issue of alternate habitual residence[1666] concerns the establishing of the child's habitual residence in two States at two different points in time close to the seisin. This issue was particularly highlighted in the Swiss and the UK practices[1667]. In this regard, a clear example is the one of children whose residence is fixed at both parents' domicile in proceedings involving custody[1668]. In the latter circumstances, a child might acquire two *consecutive*[1669] habitual residences at each parental domicile. This analysis follows specific national approaches[1670] on this issue, contemplating some additional proposals advocated for here[1671].

**558.** In the context of custody, alternate habitual residence should not substantially affect the efficient determination of international jurisdiction and

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1665 It should also be said that Jamaican conflict-of-law rules applicable to personal actions, referring to, *inter alia*, divorce and custody, rely on the person's domicile at the time of commencement of proceedings. In this sense see E. BOXILL, International Marriage and Divorce Regulation and Recognition in Jamaica, *Fam. Law Q.*, Vol. 29, 1995, p. 583. However, in practice relating to custody, Jamaican courts may refer to the *degree of connection* between the child and the country. In this regard, important factors are: nationality, physical presence, habitual residence, length of time spent by the child in that country, first language, race or ethnicity, religion, culture, child's best interests interpreted as the familiarity and rooting with a specific environment, child's wishes, child's needs, parental capacities, to the date of the proceedings (see Supreme Court of Judicature of Jamaica, *Strong-Forrester v. Leighton Forrester*, 2007, No. HCV 2230, § 16-17-19-61-61-75).

1666 For a complementary analysis, see also part I, chapter IV, section III.

1667 Ibid. BUCHER, p. 59; and BEAUMONT/ MCELEAVY, p. 183, 204. According to BEAUMONT/ MCELEAVY, it would be artificial to select one over the other to be the habitual residence of an individual whose life is so equally split between two jurisdictions. The same authors point out that in those circumstances involving one habitual residence and another residence of lesser degree, the latter would be categorised as 'non-habitual residence' according to the CJEU practice (reference is made to *Di Paolo v. Office National de l'Emploi* (76/76) E.C.R. 315, 1977).

1668 Under Swiss law, the scenario is typically that known as '*garde alternée*', which corresponds to the one of 'shuttle custody' considered under UK and US practices (*cf.* part I, chapter IV, section III). In relation to the US practice, see US Court of Appeals for the third circuit, *Didon v. Castillo* [22 June 2016] Nos. 15-3350/ 15-3579: "The authorities on this issue are inconsistent in their usage of terminology. The phrases 'concurrent habitual residence,' 'alternating habitual residence,' and 'dual habitual residence' are sometimes used interchangeably. However, 'concurrent habitual residence' refers to a situation where a child is habitually resident in two countries at the same time, whereas 'alternating habitual residence' refers to a distinct situation where a child is moved in between two countries on a regular basis (known as 'shuttle custody') such that her habitual residence alternates between those countries".

1669 Unlike simultaneous habitual residences, which is the issue of concurrent habitual residence (subsection VIII *infra*).

1670 Ireland, Switzerland, UK and to some extent the US.

1671 *I.e.* principal habitual residence and continuing physical presence (*cf.* part I, chapter IV, section III of this monograph).

applicable law. The courts first seised in State A[1672] should principally proceed with a fact-based determination of the child's habitual residence at the time of the institution of the proceedings[1673]. In case the child's habitual residence were located in another State B, the courts in State A should decline jurisdiction. According to this study, in such circumstances they would be entitled to transfer jurisdiction to the better placed courts of State B[1674] in the child's best interests[1675]. The courts of State B must stay proceedings in respect of *lis pendens*[1676], if seised after the courts of State A, until the jurisdiction of the latter courts is established. The same first-in-time rule should avoid conflicts of applicable laws[1677]. In this regard, the child's habitual residence determination at the relevant time should freeze both jurisdiction and applicable law under the Regulation and the Convention. Accordingly, the rules on applicable law under the Convention, articles 15(1) and 15(3), clearly provide for the *lex fori* of the child's current habitual residence following its effective change[1678].

**559.** Specific issues may still be encountered when dealing with the child's alternate habitual residence. In particular, in custody proceedings involving newborns or children with no sufficient degree of maturity[1679], the child's habitual residence may be objectively linked to the alternating parental habitual residence located in two different States[1680]. The habitual residence

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1672 EU Member State for the Regulation; and Contracting State to the Convention.

1673 Under both art. 8 of the Regulation (seisin) and 5 of the Convention.

1674 The courts of State B, which the child has particular or substantial connection with, may also request jurisdiction (*cf.* subsection IV *supra*).

1675 *Cf.* subsection IV *supra*.

1676 Art. 19(2) of the Regulation and 13 of the Convention (see also part I, chapter IV, section V). The parallel proceedings should concern the same child/ren and subject matter. In particular, the UK courts held in the case '*GM v. KZ [2017] EWFC 73'* that the Polish jurisdiction, based on two children's habitual residence determination at the time of the lodging of a custody application made by their mother, was wrongfully retained because the UK courts were already seised on custody by the father on the basis of the children's habitual residence established in the UK on the relevant date. In this regard, it was found that due to the later dismissal of the mother's custody application by the courts in Poland (not counting additional *new* applications made by the mother based on which habitual residence was found to be in Poland), the application filed later to the UK courts by the father was the one relevant for the determination of jurisdiction under Brussels IIA (§ 29).

1677 Ibid. BUCHER, p. 65.

1678 This aspect was already examined in the previous subsection VI.

1679 Ibid. BUCHER, p. 50.

1680 Under the Swiss Federal Court's guidance, it is said that a child could hold a consecutive habitual residence if the length of each alternating stay is so durable that a regular change of habitual residence would occur (see ATF, 5A_1021/2017, 8.3.2018; ATF 5A_846/2018, 6.11.2018). The Irish Supreme Court held, in the case '*AS v. CS (A minor)* [19 November 2009]', that a child, alternating periods of life in Australia and Ireland, was habitually resident in Australia by virtue of, *inter alia*, the lack of parental settled purpose in Ireland. The Irish Supreme Court's judgment implies that the child's habitual residence, in particular involving newborns, should be assessed through a parent-centred approach. The US Court of Appeals for the third circuit maintained in the case '*Didon v. Castillo'* (ibid.) that, in rare scenarios, a child can hold an 'alternating habitual residence' as a consequence of his/ her life consistently split in two locations. According to the US reasoning, 'alternating habitual residence' means one habitual residence alternating at each given time, as opposed to two habitual residences at the same time (*cf.* concurrent habitual residence *infra*). On

assessment should be child-centred[1681] in that the child's, as opposed to the parent's[1682], principal habitual residence determination would prevail. The authorities seised for custody or visiting rights[1683] should allocate decisive weight to the child's best interests[1684], as advocated in Brussels IIA, recital 12[1685]. The latter principle should be extended to the applicable law, which according to the Convention is directly related to the forum of the child's current habitual residence.

**560.** In accordance with the first solution (I), a child living with his/ her primary carer in State A, and going to school in State B where his/ her non-custodial parent lives, would be considered habitually resident in the latter State if his/ her life and social bonds are preponderant in that State[1686]. Conversely, the newborn's habitual residence should be located with the

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the difference between alternating and concurrent habitual residence under UK law, see note 5, BEAUMONT/ MCELEAVY.

1681 In my experience at the International Social Service, the child's well-being, intended as his/ her stability, harmonious development (*i.e.* family, school, social relationships, economic capacity), should be principally considered in the assessment of his/ her habitual residence (*cf.* subsection X *infra*). Furthermore, the UK courts held, in the case '*In the matter of A (Children) (AP), [2013] UKSC 60*', that the child's habitual residence determination, even when involving newborns, should focus on his/ her own family integration, irrespective of the parental intentions or agreements (§ 86, 90). This principle can also be ascribed to the US Supreme Court's guidance (see *Monasky v. Taglieri*, US Supreme Court, 18-935, 2019) and to some extent to the Swiss Federal Court (ATF 5A_877/2020, 20 November 2020). Conversely, the Irish (*i.e.* 'High Court of Ireland, *J. McB. v. L.E.*, 28 April 2010') and to some extent the Swiss courts (*i.e.* ATF 5A_274/2016, 26 August 2016) have, in circumstances involving newborns, primarily referred to the parent's habitual residence.

1682 Ibid. BUCHER, p. 64: "*Lorsqu'il s'agit de connaître le « lieu habituel de travail », on peut réduire l'hypothèse et choisir le lieu « principal » de cette activité. S'agissant de la résidence habituelle, le respect de l'égalité de traitement entre les parents n'autorise pas une telle simplification* […]".

1683 Both under general or temporary jurisdiction (*cf.* sections I, II, V above).

1684 In the case '*Re M and L [2016] EWHC 2535 (Fam)*' the UK courts referred to the child's best interests as a 'tie-breaker rule' in determining the child's substantial connection. More specifically, the courts declared themselves better placed, under art. 9 of the HC-1996, to decide on the best interests of a child, who lived in both the UK and Norway, establishing habitual residence in both countries at a different point in time, preserving contacts with Norway where the mother lived, but being physically present in the UK where the father and brother lived. The child's brother was subject to the UK jurisdiction concerning living and contact arrangements. Thus, according to the courts, the child's best interests required the UK courts to deal with both siblings' living and contacts arrangements and avoid conflicting judgments with the courts in Norway.

1685 On the importance of assessing the child's habitual residence in respect of the child's best interests as a prerogative of EU law in matters of parental responsibility, please refer to *Raqeeb v. Barts NHS Foundation Trust* [2019] EWHC 2531 (Admin) and [2019] EWHC 2530 (Fam), in particular at § 108 and 152. The case concerned a five year old girl necessitating life sustaining treatment. The UK NHS trust authorities refused to authorise the child's transfer to an Italian hospital in order to receive such a treatment. The parents contested the refusal. The UK courts retained jurisdiction under art. 8 of Brussels IIA, based on the child's habitual residence, for the determination of her best interests, in context intended as her free movement, welfare and medical treatment, which led to the approval of her transfer to Italy.

1686 According to the Swiss Federal Court, the child's participation in school, social, and recreational activities are decisive in locating the child's attachments (see ATF, 6.11.2018, 5A_846/2018; ATF, 18.4.2019, 5A_131/2019). Conversely, the US courts have determined that the child's habitual residence should be located at his/ her place of living, irrespective of the place where he or she goes to school (Ibid. *Didon v. Castillo*).

primary carer's place of living[1687] in State A, if this is the place that better determines the child's best interests. In particular, in the latter scenario, the issue of alternate habitual residence would not occur as the primary carer's settlement should be considered prevalent[1688] in the child's best interests[1689].

**561.** It is also noteworthy to mention that, despite the importance of clarifying the habitual residence initial determination time, an appreciable assessment period[1690] is missing in both the Regulation and the Convention. Precisely, the courts seised for custody or visiting rights may trace the child's life and social bonds established before the institution of the proceedings as they are not bound to limit their enquiry at the seisin[1691]. In the scenario where the child's principal habitual residence cannot be determined, clear-cut at the relevant time, the use of the child's continuing physical presence as a tie-breaker rule should be adopted. More specifically, physical presence, as a prerequisite of habitual residence and proximity[1692], should be assessed at the determination time under the Regulation and the Convention[1693].

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1687 According to the CJEU ruling '*OL v. PQ* [8 June 2017] C-111/17', the child necessarily shares the social and family environment of the reference person(s) with whom he or she lives, by whom he or she is in fact looked after and taken care of (§ 45). On this subject, see also note 609, ROGERSON, p. 34.

1688 This includes the situation where the child goes to nursery in State B, as we assume that, in the context of newborns, the life and social relations may not reflect a sufficient degree of integration by reason of their insufficient degree of maturity. The assessment should also consider the place where the child lived with both parents before their separation (CJEU, *HR*, 28 June 2018, C-512/17).

1689 This implies that the habitual residence of the child who encounters parental abuse should be dissociated from the one of the primary carer exercising violence (*Re E (Abduction: Article 13B Deferred Return Order)*, 2019, EWHC 256). In this scenario, the child's habitual residence should be located in State B, if based on other factors better suited to his/ her best interests such as a family environment composed of the non-custodial parent's and the grandparents' habitual residence. An example is found in a case involving the International Social Services, concerning two children wrongfully retained by the mother, whose custody was awarded to the maternal grandparents, all living in Switzerland. ISS carried out an intercountry child assessment (*cf.* subsection X *infra*) showing that the children's family and social environment was in Italy, based on their attachments with that country, including where their father and paternal grandparents lived.

1690 Reference to the rule of continuing jurisdiction under both instruments is encouraged (*cf.* subsection III *supra*). We add that continuing jurisdiction is also applicable under the US UCCJEA (*cf.* subsection XI *infra*).

1691 On this point, the High Court of Ireland has concluded in the case (ibid.) '*J. McB. v. L.E.*' that the child's habitual residence determination should be fact-based having regard to all the circumstances of the child concerned at the relevant time (the seisin under Brussels IIA).

1692 CJEU, *UD v. XB* [17 October 2018] C-393/18; Swiss Federal Court, ATF 5A_346/2012 [12 June 2012], ATF 5A_584/2014 [3 September 2014], ATF 5A_274/2016 [26 August 2016]; Irish Court of Appeal, *Hampshire County Council v E & anor (Approved) (Rev 1)* [2020] IECA 100. By contrast, the UK courts have not always agreed on the central role of physical presence (see *A Child - Jurisdiction - Habitual Residence*, 2016, EWHC 16, § 96; and *Re H*, 2014, EWCA Civ 1101, § 22). Concerning unborn children, practices seem to converge, in our opinion justly, on the necessary child's physical presence after birth (CJEU, *OL v. PQ*, 8 June 2017, C-111/17 PPU; Swiss Federal Court, ATF 5A_346/2012; *Re G (Abduction: Withdrawal of Proceedings, Acquiescence, Habitual Residence)*, 2007, EWHC 2807 (Fam)).

1693 Under the Convention, art. 5, we have already indicated, based on the case law examined in this study, the time of the institution of the proceedings as relevant for the habitual residence determination.

**562.** In this sense, a child living lawfully with the father in State A, and lawfully with the mother in State B, on an alternate basis, may anchor his/ her life in both States, by virtue of family and social relations. According to the second solution (II) above, the child's physical presence at the relevant time should freeze international jurisdiction and the applicable law on the basis that both States hold current, even though alternating, substantial connection with the child[1694]. Thus, physical presence in this context should be interpreted as an element of qualified proximity, and not as mere presence. Concerning newborns, the child's continuing physical presence would essentially correspond to the one of his/ her primary carer[1695].

## § VIII. Concurrent Habitual Residence

**563.** The situation falling under concurrent habitual residence[1696] refers to the determination of the child's habitual residence in two States at the same time. This scenario has generally been excluded, mainly for legal objections[1697]. In particular, it is said that a situation where a child would be considered as habitual resident in two States, at the same time, may obviate the operation of both habitual residence and the international legal instruments concerned[1698].

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1694 Ibid. *Re M and L [2016] EWHC 2535 (Fam)*, § 32.

1695 In presence of child abuse exercised by his/ her primary carer, the child's best interests should take precedence over the child's physical presence, and the primary carer's habitual residence should not be considered in the assessment. In this regard, the UK courts held in the case '*Re L (Habitual Residence - Domestic Abuse) [2016] EWHC 1844 (Fam)*' that the habitual residence of a child, who lived in an unstable environment with her father in the UK (*i.e.* domestic violence against the mother), was still established in her State of origin, Ukraine, by virtue of her and her family's (*i.e.* mother, grandparents, aunts, cousins, friends) strong continuing link with that State (§ 24). On such basis, the UK courts concluded that the authorities in Ukraine should have retained jurisdiction under art. 5 and 9 of the HC-1996.

1696 For a complementary analysis under this study, see also part I, chapter IV, section III.

1697 Ibid. BUCHER, p. 60; Ibid. BEAUMONT/ MCELEAVY, p. 204; ibid. HAY *et al.*, p. 300. Such an exclusion seems to be supported by the explanatory report to the Convention, which provides that the acquisition of a new habitual residence should automatically and instantaneously cause the loss of the former one (note 5, LAGARDE, § 41). We recall, however, that under Swiss law some authors have highlighted the possibility of a dual habitual residence (ibid. MASMEJAN, p. 100; B. SCHNEIDER, Le domicile international, Neuchâtel, 1973, n° 246; A. MARTIN-SERF, « Du domicile à la résidence », *Rev. trim. dr. civ.*, 1978, p. 535. Professors G. P. ROMANO and A. BUCHER seem to agree on the latter version. Some authors have also found concurrent habitual residence to be consistent with the HC-1980 (see R. SCHUZ, The Hague Child Abduction Convention - A Critical Analysis, Private International Law Series, Vol. 4, 2013, p. 205).

1698 Reference is principally made to the HC-1980 (*cf.* section III *infra*). See the judgment of the Swiss Federal Court, ATF 5A_877/2020 [20 November 2020] § 9: "*Le principe du recours exclusif au rattachement à la résidence habituelle de l'enfant, consacré notamment dans la CLaH 80, s'oppose à ce qu'un enfant jouisse, d'un point de vue juridique au moins, de plusieurs résidences habituelles simultanées*"; and *Re V. (Abduction: Habitual Residence)* [1995] 2 FLR 992.

Legal certainty and predictability would, in fact, require that, at the time of the institution of the proceedings, only one habitual residence should exist[1699].

**564.** It is our opinion that concurrent habitual residence would be avoided in the future if specific mechanisms advocated for here were upheld[1700]. To this end, the separation of alternate from concurrent habitual residence is strongly encouraged[1701]. The transfer of jurisdiction[1702] based on a collaborative approach between the authorities of the two States concerned should be exercised under the aegis of the child's best interests[1703]. Recourse to continuing jurisdiction[1704], as provided under Brussels IIA, and on a general basis[1705], would support a more effective habitual residence determination. The prerogatives of temporary jurisdiction[1706] should be better delimited in order to avoid potential overlaps with general jurisdiction.

**565.** On a last prospective point, one of the proposals advanced in this study, concerning the adult's concurrent habitual residence, is the creation of a *super partes* entity aimed to solve potentially conflicting determinations[1707]. More specifically, in relation to parental responsibility, it is argued that the UN Child Rights Committee could intervene in solving conflicting determinations, such as in the context of concurrent habitual residence. The UN Committee on the Rights of the Child (UNCRC) currently holds *quasi*-judicial power[1708] over

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1699 Such conclusion is supported in this study in that the child's physical presence at the relevant time is considered a prerequisite of habitual residence, then a 'tie-breaker rule' in matters of conflicting determinations (*cf.* subsection VII *supra*). Accordingly, a child should not in fact be able to hold two habitual residences at the same time.

1700 First of all, the 'two-fold test approach' suggested in this study should allow for the effective determination of habitual residence, in matters of jurisdiction and applicable law, by virtue of a qualified proximity.

1701 Alternate habitual residence should be solved by the proposals indicated in subsection VII (*cf. supra*).

1702 Transfer of jurisdiction should be complementary to *lis pendens* (*cf.* subsections IV and VII *supra*).

1703 The child's habitual residence determined through a child-centred approach (*cf.* subsection VII *supra*) should avoid concurrent habitual residence based on the parents' habitual residence in two different States.

1704 *Cf.* subsection III *supra*.

1705 According to this study proposal, continuing jurisdiction should apply to parental responsibility as a whole.

1706 *Cf.* subsection V *supra*.

1707 *Cf. supra* chapter I of this part III; and part II, chapter II, section V. It was said that the model of arbitration may be inspiring with the support of the International Hague Network of Judges. Alternatively, in the short term, a special instance within the prerogatives of the CJEU may be created based on art. 257 of the TFEU, if the scope of the latter provision were extended to include family law.

1708 The UNCRC Committee is composed of 18 independent experts. In addition to individual communications (art. 5), the following powers are attributed to the Committee in the framework of the 'third protocol' to the Convention on the Rights of the Child on a communications procedure: It promotes friendly settlements (art. 9). It holds a specific power of request for interim measures before the State party concerned (art. 6). It provides views and recommendations to the parties concerned (art. 10). It has the right to submit, *ex officio*, inquiries involving States concerned by possible systematic violations of children's rights (art. 13). The Committee may be recognised as competent for inter-state communications whereby a State party claims that another State party is

communications filed by individual children[1709] purporting to implement the standards and safeguards of the UN Convention on the Rights of the Child of 20 November 1989[1710]. In particular, the UNCRC guidance would encourage a uniform interpretation[1711] of habitual residence in the child's bests interests[1712] founded on article 3 of the 1989 Convention[1713].

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not fulfilling its obligations (art. 12). ROMANO (note 30, fn. 64) suggests that an 'Appellate Committee' may be instituted at the UNCRC based on an additional protocol (a 'fourth protocol').

1709 Art. 5(1) of the third protocol provides that: "Communications may be submitted by or on behalf of an individual or group of individuals, within the jurisdiction of a State party, claiming to be victims of a violation by that State party of […]" the UNCRC. We recall that individual communications under art. 5 may be submitted within one year from when the domestic remedies in the State concerned are exhausted (see A. SKELTON, International Children's Rights Law: Complaints and Remedies, in: U. KILKELLY/ T. LIEFAARD, International Human Rights of Children, 2019, p. 73).

1710 <https://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIndex.aspx>: "On 19 December 2011, the UN General Assembly approved a third Optional Protocol on a communications procedure, which will allow individual children to submit complaints regarding specific violations of their rights under the Convention and its first two optional protocols. The Protocol entered into force in April 2014". According to the practice, the Committee has mainly intervened in complaints brought by adults or legal representatives. However, the possibility for children to directly submit communications is encouraged in order to provide interpretations in a more child-friendly manner (ibid. SKELTON, p. 76).

1711 Such an interpretation could be initially rendered as a form of general comment, or general recommendation, at the UNCRC on the 'thematic issue of habitual residence and child best interests'. The endorsement of a general comment at the UNCRC would encourage greater uniformity in the operation of habitual residence, including in non-Contracting States to the HC-1996. "General Comment is a quasi-legal document published by the UN Committee on the Rights of the Child which provides a detailed interpretation of an article or issue relating to the Convention on the Rights of the Child, and provides guidance on the actions required by governments to ensure its implementation". The latter soft-law instrument should pinpoint the intersection of habitual residence and best interests, consolidating the use of a child-centred approach for the determination of the child's habitual residence in respect of universal principles, namely, best interests (art. 3), special protection (art. 20), and right to be heard (art. 12). An interview with Professor Philip Jaffé, member of the UNCRC, confirmed that this solution might indeed be envisaged, even though the outcomes depend on the UNCRC agenda.

1712 The third protocol expressly states in its preamble: "Recognizing that the best interests of the child should be a primary consideration to be respected in pursuing remedies for violations of the rights of the child, and that such remedies should take into account the need for child-sensitive procedures at all levels". The UNCRC held in the communication '*56/2018 V.A. v. Switzerland*' that, while assessing the child's best interests in relation to a transfer of international responsibility between two States under the Dublin III Regulation (*cf.* part I, chapter I, section IV), the authorities should take into account, including through the child's views, the social ties in the place where he or she currently lives and the trauma caused by the multiple changes of environment. In this respect, we argue that the authorities dealing with the child's habitual residence determination in parental disputes should principally consider the child's best interests, including his/ her need for special protection and right to be heard (see also '*E (Children),* 2020, EWCA Civ 1030', § 76, and Supreme Court of the Russian Federation, No. 5-KG21-107-K2, 2021 (*on the implementation of art. 57 Russian Family Code*), concerning the central role attributed to children's wishes in parental disputes). In the Russian judgment, '5-KG21-107-K2', concerning a Russian family who initially lived in Moscow, but who later agreed that the husband would move to live in France, for professional reasons, together with the child, and the mother would remain settled in Moscow, the Supreme Court stated that, in determining the child's habitual residence, the lower courts should have assessed, *inter alia*, the *child's interests taking into account his/ her views*.

Concretely, in our view, the child shall hold the fundamental right to access justice before the authorities that are most familiar with his/ her situation in order to provide effective legal remedies (see UN General Assembly resolution 67/1, § 12-16; Opinion of Advocate General Colomer on *Roda Golf & Beach Resort SL*, 5 March 2009, C-14/08, § 29). Under international family law rules, particularly within Brussels IIA, such authorities should be primarily located at the child's habitual residence. In this regard, we recall the CJEU cautiousness in emphasising the protection of fundamental rights in proceedings involving jurisdiction over parental responsibility (see G. BIAGIONI, Jurisdiction in Matters of Parental Responsibility Between Legal

## § IX. Absence of Habitual Residence

**566.** In the absence of habitual residence[1714] at the relevant date, under both Brussels IIA and the HC-1996[1715], mere presence in a EU Member or HC-1996 Contracting State[1716] is sufficient to determine international jurisdiction[1717]. Accordingly, the *lex fori* applies under article 15(1) of the Convention[1718]. Thus, in this context, the forum and the law of the child's current[1719] physical presence provide continuing protection over the child's best interests as a prerogative of legal certainty[1720].

**567.** This jurisdiction typically involves displaced and unaccompanied minors in precarious situation[1721], who are obliged (*i.e.* by reason of wars) to abandon

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Certainty and Children's Fundamental Rights, *European Papers*, Vol. 4, 2019, p. 295). In addition, we believe that the Committee's guidance over the interpretation and implementation of best interests, as a universal principle under the 1989 Convention, in the habitual residence determination and derogation (*i.e.* particular/ substantial connection) for the purposes of jurisdiction and applicable law under private international law, would be necessary in solving conflicting determinations.

1713 A universal principle enshrined in both Brussels IIA and the HC-1996.

1714 For a complementary analysis, see part I, chapter III, section IV.

1715 Art. 13 of the Regulation and 6 of the Convention. See also CJEU, *A* [2 April 2009] C-523/07, § 43.

1716 In this context, physical presence does not show a qualified degree of proximity. It is mere presence. Nonetheless, the latter does not preclude the child from establishing habitual residence in the EU Member or HC-1996 Contracting State of mere presence (see K. GATZSCHE, Child Protection in Flight Situations: The Hague Child Protection Convention and Unaccompanied Minors, *Cuad. derecho transnac.*, Vol. 11, 2019, p. 345). Further to the absence of habitual residence and physical presence in an EU Member State, the Regulation (art. 14), as opposed to the Convention, includes an additional ground (falling outside art. 12) which is that of residual jurisdiction based on the law of the forum (for more details on this point, S. MUSTASAARI, Finnish Children or 'Cubs of the Caliphate'?, *Oslo Law Review*, 01/2020; and *AG and AB (Children)* [2018] EWHC 381 (Fam)).

1717 The explanatory report to the Convention clarifies that the authorities in the State of the child's physical presence exercise the same general jurisdiction normally attributed to the authorities of the child's habitual residence. This is an important clarification as it admits that the prerogatives of the jurisdiction of art. 6(1) of the Convention should not be compared with those of the emergency or provisional jurisdiction under art. 11 and 12 (*cf.* subsection V *supra*). This is reiterated under articles 11(2) and 12(2), which state that the measures taken by the authorities under the emergency or provisional jurisdiction should lapse as soon as the authorities which have jurisdiction under article 6 (in addition to 5, 7, 8, 9, 10) have adopted measures required by the situation (note 5, LAGARDE, p. 555).

1718 The other exceptions to the *lex fori* mentioned in subsection VI continue to apply. However, it is observed that with regard to parental responsibility under art. 16 of the Convention, a rule replacing habitual residence is not provided (ibid. BUCHER, p. 57).

1719 Note 660, CORNELOUP, p. 7.

1720 Ibid. LAGARDE, p. 557: "The children contemplated by this paragraph often have need, even without a situation of urgency, for their protection to be organised in a lasting manner. They may indeed, for example, be led to apply for asylum or be the subject of a request for adoption. It is therefore necessary to designate a legal representative and the normal jurisdiction attributed by the Convention to the authorities of the State of their habitual residence is here inoperative, since these children have by hypothesis broken all links with the State of their previous habitual residence, and the precariousness of their stay in the State where they have provisionally found refuge does not allow it to be considered that they have acquired a habitual residence there".

1721 These are in particular refugee children, including those seeking asylum (see K. HILBIG-LUGANI, KSÜ, in: T. RAUSCHER, Europäisches Zivilprozess und Kollisionsrecht, Vol. V, 2016, § 38; and ibid. Practical Handbook, p. 41).

a more stable environment[1722]. Those children whose habitual residence cannot be determined[1723], for other reasons than asylum migration or displacement, are included in the scope of the Regulation and the Convention[1724].

**568.** In the context of mere presence, a child may be present in multiple States[1725] at different points in time. The change of physical presence should deprive the former authorities from general jurisdiction[1726], and the law of the new Contracting State of mere presence should govern the protection of the child[1727]. Furthermore, in specific circumstances where the child alternates multiple stays in different countries, establishing a *quasi*-qualified degree of proximity[1728] in one of them, at time of the institution of the proceedings, jurisdiction and applicable law should be determined in the State of quasi-qualified proximity[1729].

**569.** The case under analysis is particularly the one of children seeking protection through different EU Member or HC-1996 Contracting States by

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1722 This is the scenario covered under art. 13(2) of Brussels IIA and 6(1) of the HC-1996. We should recall that, concerning this issue, similar mechanisms may be found in public international law remedies, such as those provided under the Dublin III Regulation and the Geneva Convention. Specifically, concerning children seeking asylum, international responsibility is determined in the place of their actual physical presence at the time of the filing for asylum, in accordance with the principle of best interests (see '*MA and others v. Secretary of State for the Home Department*, 6 June 2013, C-648/11; and S.C. GROVER, Child Refugee Asylum as a Basic Human Right: Selected Case Law on State Resistance, 2018). Under the Geneva Convention, physical presence plus the intention should suffice to determine residence under art. 12(1) (see part I, chapter I, section II of this book).

1723 According to Brussels IIA, it means that a child should not hold a habitual residence at all, even in non-EU Member States (note 181, MAGNUS/ MANKOWSKI, p. 160; and ibid., *AG and AB (Children)* § 36). In relation to the Convention, the contacts with the former habitual residence should be broken to render the latter inoperative (ibid., LAGARDE, § 44). Ultimately, this is the case when the parents and/ or the child lead peripatetic lifestyles (*NH v. AH*, 30 July 2015, High Court of Justice Family Division, No. ZE15C00253).

1724 This is the scenario falling under art. 13(1) of Brussels IIA and 6(2) of the HC-1996. According to the explanatory report to the Convention, this jurisdiction of necessity should cease as soon as the child acquires habitual residence in a Contracting or non-Contracting State. In case habitual residence is established in a non-Contracting State, the courts of the Contracting State of physical presence will exercise temporary jurisdiction under art. 11 or 12 of the Convention (ibid. LAGARDE, § 45).

1725 Ibid. Practical Handbook, p. 42.

1726 Unless habitual residence is acquired in the former State of presence and the change of physical presence amounts to holiday or similar short absences (*cf.* subsection V *supra*).

1727 This conclusion should be the result of the combination of art. 5(2), 6 and 15(1) of the Convention. The same answer should be given under Brussels IIA, art. 13, as the context falls outside the rules on continuing jurisdiction (*cf.* subsection III *supra*).

1728 A degree of proximity, not qualifying yet for the establishing of habitual residence, but that is greater than mere presence. On the different quality of proximity between mere presence and habitual residence see ibid. CJEU, *A*, Advocate General's Opinion, ECLI:EU:C:2009:39, § 20.

1729 Some authors have already raised this issue hoping for a genuine fact-based determination, in particular when the child's habitual residence may possibly be found in a third State, before exercising jurisdiction on mere presence (see T. KRUGER, Civil jurisdiction rules of the European Union and their impact on third States, PhD thesis, 2005, p. 89).

virtue of their nomadic life[1730]. In such circumstances, the determination of jurisdiction and applicable law in the place of current mere presence may lead to inconsistent measures[1731], ultimately without long-term prospect[1732].

**570.** It is submitted that the courts seised under general jurisdiction, in accordance with Regulation or the Convention, should assess specific factors[1733] indicating the child's prospective acclimatization[1734]. In the event that such were established in another EU Member or HC-1996 Contracting State, a mechanism similar to transfer of jurisdiction should apply[1735]. In this regard, the applicable law should be that of the substantial connection under

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[1730] This issue was particularly encountered in the Swiss (ATF 5A_121/2018, 23.05.2018) and UK (ibid. *NH v. AH*, 30 July 2015, High Court of Justice Family Division) practices. In the Swiss case, a refugee child born in Greece, moved with his father, Afghan, mother, Iranian, to Switzerland passing through Finland and Norway. After one year from the child's arrival in Switzerland, the Swiss Federal Court ordered the child's return to Greece on the basis that the habitual residence was established in Greece and the child was unlawfully removed to Switzerland. The Court did not consider the year spent in Switzerland, the time spent in Finland (six to seven months), and the extremely tenuous contacts with Greece (note 1252, BUMBACA). In the UK case, a 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. The UK courts firstly retained jurisdiction based on art. 11 of the HC-1996 Convention, and later concluded on the absence of the child's habitual residence at the time of the hearing under art. 6(2).

[1731] In such circumstances, *lis pendens* should reduce conflicting jurisdiction. In practice, welfare decisions may concern different measures (*i.e.* legal representation, foster care, cross-border placement) not always involving proceedings pertaining to the same cause of action as according to art. 13 of the Convention (ibid. LAGARDE, p. 571) – article 19(2) of Brussels IIA would not require in principle that identity (Advocate General's opinion, C-489/14). To the extent of children seeking asylum, it is observed that authorities often find it impossible to trace children crossing borders, so that the measures taken under their jurisdiction become *de facto* provisional (German local authorities raised this issue during the Conference 'Families Beyond Borders: Migration with or without Private International Law', at fn. 99). In this regard, their jurisdiction would correspond more precisely to that under art. 11 and 12 of the Convention, and 20 of the Regulation, rather than to general jurisdiction examined in this subsection. Thus, under temporary jurisdiction, *lis pendens* would be excluded and issues of (non-)recognition may also arise (ibid. CORNELOUP, p. 79). On the importance of recognition and enforcement of welfare decisions without delay see *E (Children)* [2020] EWCA Civ 1030, § 70.

[1732] Unlike under temporary jurisdiction (*cf.* subsection V *supra*), the long-term care of the child is a prerogative of general jurisdiction, including under art. 13 of the Regulation and 6 of the Convention (ibid. Practical Handbook, p. 161).

[1733] These may be, non-cumulative, meaningful links, comprising: family connections; cultural ties; knowledge of the language; the possession of a residence permit; the applicant's previous period of residence in the other State; and any other connections that would expedite or enhance the prospects of integration (ibid. LEGOMSKY). In case such non-cumulative 'meaningful links' were concurrently present in different States, the child's mere presence and/ or that of his/ her primary carer, including his/ her representative (*i.e.* curator ad litem), at the time of the institution of the proceedings should be enough to freeze international jurisdiction.

[1734] For a complementary analysis, see part I, chapter III, section IV. The rule of prospective acclimatization should be useful in determining substantial connection under art. 15(2) of the Convention. It may be introduced under art. 16 for matters of parental responsibility. Some authors have indicated the possible recourse to a prospective habitual residence, a residence that is not yet of habitual degree, although that degree may be tangibly reached (ibid. BUCHER, 59). This was confirmed in the Advocate General's opinion (§ 83) of 16 May 2017 on the case *OL v. PQ*, C-111/17 PPU.

[1735] Currently, transfer of jurisdiction does not cover physical presence, according to art. 15 of the Regulation and 8/ 9 of the Convention (*cf.* subsection IV *supra*).

article 15(2)[1736]. The other courts seised of the same matter should stay proceedings until the jurisdiction of the courts first seised is established[1737].

## § X. Intercountry Child Assessments

**571.** A question that is not often explored is the one concerning intercountry assessments[1738], which are aimed to ensure due consideration of the child's best interests in cross-border parental disputes[1739]. The assessment is in practice requested by the judicial from the local administrative[1740] authorities, including other bodies[1741]. Central in this process is the holistic approach, with reference to the child's best interests, through a professional team of lawyers, mediators[1742], social workers, child's professionals, psychologists and other experts in child-related disciplines. The result of this approach allows a comprehensive anamnesis of the child's social and family environment[1743].

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1736 The child's best interests should be primarily considered.

1737 On the basis of the *lis pendens* rule under articles 19(2) of the Regulation and 13 of the Convention.

1738 At fn. 42.

1739 For practical examples, we refer to ibid. PANNAIKADAVIL-THOMAS/ BUMBACA, p. 548: "In an International Family conflict case a father from Tunisia and a mother from Czech Republic are divorcing. The father lives with the child in Tunisia. The Czech Court requests the intervention of the State Central Authority in order to obtain a social report on the child situation in Tunisia, thus, to issue a decision on child custody. The Czech Central Authority (ISS Partner and responsible for the HC-1996 cases), requests assistance from the authorities in Tunisia in order to obtain a social report about the concerned minor, born in 2008. Since Tunisia has not ratified the HC-1996, no cooperation mechanisms exist between Czech Republic and Tunisia in matters relating to child custody proceedings, the Czech Republic CA submits a request for intervention before the ISS General Secretariat to advise whether there is an ISS correspondent available for cooperation".

1740 *I.e.* regional for France and Italy, or cantonal for Switzerland.

1741 Reference is made to the International Social Services (ISSs), an NGO network of 140 worldwide branches. Concretely, the assessment is carried out by ISSs within and outside the Conventional framework (*i.e.* HCs-1980, 1996, 2000). The assessment relies on a coordination and cooperation process between local authorities. In this regard, the Court refers a case to the local child protection authority (*i.e.* '*Service de protection des mineurs'* in Switzerland), which mandates ISSs. See also N. BALA/ M. JO MAUR, The Hague Convention on Child Abduction: - A Canadian Primer, *Canadian Family Law Quarterly*, Vol. 33, 2014, p. 26: "[...] *There is also a need for timely involvement of independent mental health professionals in these cases, to interview children and ensure that their views and perspectives are understood by the court; too often this does not occur in cases where it would be very helpful*".

1742 International family mediation was not dealt with in this study. This is an ISS core activity, which should be promoted and encouraged as an amicable out-of-court dispute resolution method. Its fundamental operation does not directly involve the habitual residence assessment, precisely at the stage where the judicial procedure concerning custody or visiting rights is initiated. It is still noteworthy to mention that the mediation agreement may affect the determination of the child's living arrangements, having an impact on the establishing of the child's habitual residence. For more information on international family mediation, please refer to 'Charter for International Family Mediation Process' (<http://www.ifm-mfi.org/sites/default/files/CHARTER/ENGLISH/IFM%20Charter_ENG.pdf>); and A Guide to International Family Mediation (<https://www.iss-ssi.org/images/Conf-MFI/guides/Guide_EN.pdf>).

1743 Ibid. PANNAIKADAVIL-THOMAS/ BUMBACA, p. 534: "The ISSs multidisciplinary approach refers to a legal, social, psychosocial perspective analysis which aims to evaluate which administrative and judicial decision would be the most appropriate for the beneficiary concerned. To reach such anamnesis,

**572.** This assessment holds two important characteristics in relation to the child's habitual residence. It determines *in concreto* the best interests of the child based on the single facts of the case. It locates jurisdiction on a child-friendly basis, assessing the child's social and family integration in a given State[1744]. Currently upon discretion[1745] of the national courts, it is suggested that an obligation under the Hague Conventions[1746] be provided for the recourse to intercountry child assessments[1747].

## § XI. Home State under the US UCCJEA

**573.** The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)[1748] applies in all the fifty states of the US[1749]. It employs the concept

ISSs carry out important intercountry child assessments, also applicable to vulnerable adults, in order to collect important information and draft a final report to be submitted to those competent authorities involved in the cross-border proceeding […]". In this regard, practice shows that courts are attentive to child welfare assessments, even though yet on a limited basis (see reported cases, Swiss Federal Court, ATF 5A_162/2019, 24 April 2019, § 4.2.2; Cour de Justice de Genève, chambre civile, 10 fevrier 2017, ACJC/161/2017, § 4.2.2; *In the matter of A (Children) (AP)*, 2013, UKSC 60, § 65; ECtHR, *Henrioud c. France*, 5 November 2015, No. 21444/11, § 13; ECtHR, *M.R. and L.R. against Estonia*, 15 May 2012, No. 13420/12, § 8; see unreported cases, ibid. PANNAIKADAVIL-THOMAS/ BUMBACA, p. 550). The present author has carried out an interview with the Deputy District Attorney with regard to the practice of the US courts in Sacramento. She confirmed that sometimes courts appoint a mediator/ child professional in order to evaluate children's opinions and voice their objections in the context of a return application following abduction (this has happened in 3 out of 12 cases between 2018-2020).

1744 Determining, or derogating from, habitual residence.

1745 Under Brussels IIA, art. 55(a)(i) and (c), intercountry assessments are in principle mandatory: "*To this end, they shall* […] collect and exchange information […] on the situation of the child; […] *facilitate communications between courts, in particular for the application of Article 11(6) and (7) and Article 15*;". However, practical issues were highlighted under the latter provision (see *MK Appellant – and – a Local Authority,* 2020, EWCA Civ 1002, § 65; and V. LAZIĆ/ W. M. SCHRAMA, Cooperation between Central Authorities in Matters of Parental Responsibility, in: (ed.) V. LAZIC, Regulation Brussels IIbis, 2018, p. 287). In this respect, the Brussels IIA Recast, art. 80(4), introduces a three-month deadline to provide the requested assessment, which should improve the efficiency and the effectiveness of this process.

1746 Such obligation could be introduced in art. 32(a) of the HC-1996:

'On a request made with supporting reasons by the Central Authority or other competent authority of any Contracting State with which the child has a substantial connection, the Central Authority of the Contracting State in which the child is habitually resident and present ~~may~~ shall, directly or through public authorities or other bodies, a) provide a report on the situation of the child'.

1747 Interestingly, the Swiss practice shows that courts ('*Tribunal de Protection*') exercising jurisdiction over children and vulnerable adults have been recently equipped with judges specialised in extra-legal fields, even though the transnational dimension of the assessment, typical of ISSs activity, may still be absent (<http://ge.ch/justice/tribunal-de-protection#:~:text=Le%20Tribunal%20de%20protection%20se,fonction%20de%20juges%20de%20paix>).

1748 This Act was approved in 1997. In 2009, it repealed the Uniform Child Custody Jurisdiction Act (UCCJA). The UCCJEA aims to reduce competition, prioritising principal jurisdiction to the child's home state and avoiding overlaps with the parent's continuing residence in the child's former home state (ibid. HAY *et al.*, p. 755).

1749 The US has neither signed nor ratified the HC-1996. One of the reasons of this non-ratification seems to be the difficulty within the US national legal system in accepting the scope of art. 5(2) and 6(1) of the Convention (see L. E. TEITZ, Children Crossing Borders: Internationalizing the

of home state[1750] as a main connecting factor to determine international 'original jurisdiction'[1751]. Home state may be considered substantially different from habitual residence. Specifically, the US concept relies on a time-based, rather than a fact-based, approach. A uniform definition[1752] has also been set out under the UCCJEA[1753]. Importantly, unlike habitual residence, home state is typically considered a national connecting factor[1754] that has not been subject to conventional standardisation[1755].

**574.** Despite the important differences between the two notions, the practical and transnational implementation of home state render both very similar in their scope[1756]. In this regard, the US concept is applied consistently by the state courts, taking into account the circumstances of each single case. The

Restatement of the Conflict of Laws, *Duke Journal of Comparative and International Law*, Vol. 27, 2017, p. 529; and V. BUMBACA/ J. WÖLLENSTEIN, Conference Report : Cross Border Child Protection, International Conference, Geneva, 21-23 October 2015, p. 3).

1750 By virtue of s. 105 of the UCCJEA, the term 'State' includes foreign States, which are also referred to as 'sister states'. This implies that foreign custody awards are usually recognised in the US, provided that they do not violate international human rights in accordance with the principle of international comity. In this regard, the Superior Court of Pennsylvania, in the case '*H.L.K v. F.A.A* [2014] 1831 WDA', refused to recognise a custody decree emanating from Saudi Arabia, which awarded sole custody to a Saudi Arabian father, on the basis that the courts in Saudi Arabia were lacking subject-matter jurisdiction under the UCCJEA. These aspects are greatly discussed in M. BLAIR, International Application of the UCCJEA: Scrutinizing the Escape Clause, *Fam. L. Q*, 38, 2004, p. 547.

1751 Initial child-custody jurisdiction or original jurisdiction (UCCJEA, s. 201) are interchangeable terms referring to the general jurisdiction attributed to the authorities of the child's home state for the granting in first instance of the original custody award (ibid. HAY *et al.*, p. 764). On this matter, according to s. 203 of the UCCJEA, the home state courts, or the courts exercising original jurisdiction under s. 201 to 203 (*i.e.* significant connection), continue to hold the power to modify the custody award save the exceptions provided under s. 203.

1752 S. 102(7): "The state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding. In the case of a child less than six months of age, the term means the state in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period".

1753 Unlike national definitions of habitual residence (*cf.* part I, chapter II of this book), referred to in this monograph as 'contextualised references' orienting but not exhaustively determining the required fact-based assessment, we support the current definition of home state in that the child's and the custodian's physical presence within six months or the period from the child's birth to the commencement of the proceedings are sufficient factors for the home state assessment.

1754 L. HARRIS, Family Law, 5th ed., 2014.

1755 (Ibid. Introduction): "Habitual residence has been essentially adopted since its origins as a conventional, *quasi*-standardised, connecting factor whose factual operation has been generally linked to treaty-based objectives (*i.e.* Hague Conventions, EU Regulations). Its implementation within national legal orders should therefore be compatible with the binding treaty objectives. The aim and operation of habitual residence have been adapted to the transnational setting, in that a national or international definition is systematically avoided. Thus, habitual residence does not relate to a single national interpretation, although over the years the domestic legislative efforts in conceptualising it within national legal orders have affected its foundations. This study argues that habitual residence should operate as an inter-country concept, fundamentally by endorsing it in a uniform manner, and avoid domestic 'free-standing' legislative adaptations".

1756 M. W. WALLER, California Family Law for Paralegals, 5th ed., 2009, p. 82; J. STEWART, Family Law: Jurisdictional Comparisons, 2012, p. 496; and M. A. PONTRELLI/ J. S. EHRLICH, Family Law in Focus, 2017, p. 455.

focus on geographical and temporal proximity, established between the courts and the child, is the objective of home state[1757]. Still, some limited exceptions allow to replace, or derogate from, the use of home state[1758]. All these aspects indicate a somewhat close operation[1759] between the uniform concept of home state and the intercountry habitual residence. Comparably, the rules contained in the UCCJEA converge with those previously examined with reference to Brussels IIA and the HC-1996[1760]. The following judgments should illustrate the practical operation of the preceding rules.

**575.** This case[1761] concerned a Mexican-US unmarried couple. A child was born from their relationship in El Paso. Later, the mother and the child moved to Mexico. The day after, the father filed a petition for voluntary paternity before the Texas courts. The mother opposed the US subject-matter jurisdiction[1762]. The Court of Appeal concluded that the child's home state was in Texas.

> The Court first of all referred to the UCCJEA definition of home state. In this respect, the Court retained: (a) the child and parental responsibility holder living duration in the US; and (b) within six consecutive months

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1757 In relation to proximity, habitual residence and home state differ substantially in the fact that, unlike habitual residence, home state does not require the child's best interests determination (see UCCJEA's comment, p. 4). Actually, there is no reference to best interests in the Act. Accordingly, the *child's best interests* have to do with the merits of a case and not with subject matter jurisdiction. Thus, state courts are not bound by *them* while assessing jurisdiction. The US legislators have, instead, provided a rule governing significant connection, which under the UCCJEA, acts as a derogation rule (s. 202). Under the latter rule, courts should consider the child's welfare. See A. A. ZASHIN, C. R. REYNOLDS, and A. M. KEATING, Filling the Gaps with Public Policy: The Application of the Hague Convention Protocol in US Courts in the Absence of a Co-Signing State, *Int J Law Policy Family*, 2014, p. 124-125).

1758 Inconvenient forum (s. 207, 208), emergency jurisdiction (204).

1759 In some circumstances reference has been made interchangeably to habitual residence and home state (ibid. HAY *et al.*, p. 766).

1760 The UCCJEA does not directly deal with the applicable law, although it specifies under s. 102 that the US competent court will apply its own substantive law to determine child custody orders. Original jurisdiction, s. 201, states that the state court first seised *may* decline jurisdiction in favour of another state court when home state or significant connection are in the latter state. The combination of s. 201 and 202 define significant connection as the place where the child and his/ her parents (or one parent or a person acting as a parent) are both physically present and care, protection, training, and personal relationships are provided to the child based on substantial evidence. The departure from the rule on original jurisdiction is to, *inter alia*, avoid *lis pendens* (s. 206), unjustifiable conduct (s. 208) and transfer the case to a better placed court (s. 207), prioritising home-state jurisdiction. In relation to the transfer of jurisdiction (inconvenient forum), which remains upon discretion of the courts, the child's welfare should also be considered (s. 207 lit. b (1)). The same rule allows prorogation of jurisdiction in favour of the state courts competent for divorce (s. 207 lit. d). The UCCJEA, s. 204, states that the child's mere presence may establish emergency jurisdiction in those circumstances concerning the safety of the parties and the child (*i.e.* abuse, mistreatment). This jurisdiction is better articulated than under Brussels IIA and the HC-1996 (*cf.* subsection V *supra*). In particular, s. 204 designates an important duty of communication between the two jurisdictions and a time-limit concerning the validity of the emergency orders. Lastly, s. 202, governs continuing jurisdiction in that the state courts under s. 201-203 retain jurisdiction until neither the child nor his/ her parents (including the person acting as a parent) have a significant connection with the courts of that State.

1761 Court of Appeal of Texas, *IN RE: Veronica Maria Calderon-Garza* [27 June 2002] 08-01-00496-CV.

1762 Subject-matter jurisdiction refers to child custody determination under the UCCJEA, s. 201.

from the child's birth[1763], including temporary absences[1764]. The Court considered pertinent the child's place of birth (El Paso), the child's living period with his mother in the US from birth until their relocation to Mexico, and the relevant time of the commencement of the proceedings. The Court did not retain the mother's intention.

**576.** The following case[1765] concerned a Japanese couple with three children born in Japan. At some point in their life, following a series of transpacific moves, they lived in the US, purchasing a house in Nevada. The mother became a permanent US resident and, after a short living period in Japan, remained in the US with the children. The husband opened a '*card dealers*' school in Japan, with the intent to live there with his family. The older children were enrolled at school in Nevada. After almost one year, they returned to Japan, where the father purchased a house. Eight months after, the mother filed for, *inter alia,* a 'custody emergency motion and immediate return' before the Nevada District Court. The latter retained subject-matter jurisdiction by virtue of the children's habitual residence and awarded temporary sole custody to the mother. After subsequent appeals, the Court granted, *inter alia,* the children's sole custody to the mother[1766].

The Court specified that the child's home state assessment refers to either the time of the commencement of the proceedings, or the period within six months prior to the commencement of the proceedings and one parent continues to live there[1767]. It added that a temporary vacation of three months, such as in the case of the three children in Japan, is not relevant. The Court held that Nevada was the children's home state[1768].

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1763 Concerning a child less than six months of age as in the present case.

1764 The mother contended that her and her child's stay in El Paso would qualify for temporary absence from Mexico. The Court maintained that the child, who had never been physically present in Mexico before the relocation from the US, could not be deemed as absent from Mexico.

1765 Supreme Court of Nevada, *Shinichi Ogawa, Appellant, v. Yoko Ogawa, Respondent* [12 November 2009] 48571.

1766 "The district court subsequently entered a default divorce decree on November 22, 2006, explaining that Shinichi was 'defaulted' based on his 'non-appearance'. The court awarded Yoko spousal and child support (including arrearages), the marital home, all of the household furnishings and personal property in her possession, a car, one half of Shinichi's 25-percent interest in the house in Japan, and attorney fees and costs. The decree also awarded Yoko sole legal and physical custody of the children, with Shinichi to have "no contact with the minor children. Shinichi timely appealed".

1767 "If Nevada either is the child's home state on the date when the child custody proceedings commence, or was the child's home state within six months before the proceedings commenced and the child is absent from Nevada but a parent continues to live in Nevada, Nevada courts have jurisdictional priority to make initial child custody determinations".

1768 "In this case, testimony and other evidence in the record substantially supports the district court's finding that when the children left for Japan in June 2004, their absence was intended to be a temporary three-month vacation. Thus, under the UCCJEA, the children's absence from June through August did not interrupt the six-month pre-complaint residency requirement, Felty, 882 N.Y.S.2d at 509, and Nevada was their home state. As Nevada was the children's home state within six months of filing the action, and Yoko continued to live in Nevada after the children left and when

**577.** The next case[1769] involved a child born in Florida to an unmarried couple[1770]. The child lived in Florida until aged less than two weeks, when she relocated to New York with her mother. The same day, the father filed before the courts in Florida, and the mother petitioned before the courts in New York, both proceedings involving, *inter alia*, child custody[1771]. The courts in New York granted, *inter alia*, the child's temporary placement to the mother. They maintained that New York was the new child's home state at the time of the lawful relocation due to the alleged domestic violence against the mother[1772].

> The Florida Court of Appeal stated that Florida was the child's home state at the time of the competing petitions. According to the Court, decisive elements were the child's physical presence with both parents in Florida since birth to relocation. It held that a six-month-old child's home state (*birth state*) is established in the place where he or she lived from birth with a parent or a person acting as a parent. The Court[1773] concluded that New York was properly exercising emergency jurisdiction, upon coordination with the courts in Florida, based on the child's presence and purporting to protect the parties[1774].

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the action was commenced, Yoko filed her custody action within the time frame allowed under the UCCJEA, and the district court properly exercised home-state jurisdiction".

1769 *James Baker, Appellant, v. Cara Catherine Tunney, Appellee* [21 October 2016] 5D15–4139.

1770 "Moreover, many courts have recognized that, under the UCCJEA and its prior versions, a putative father's rights may be akin to those of a father of a child born to a marriage".

1771 Likewise, the father filed for a 'motion for an emergency pick-up order/ order to show cause'. The latter concerns a party's request for the courts to hold a hearing at the earliest possible time as the situation may harm the child. The courts issue an order that requires the parties to provide specific information for subsequent orders. At the hearing before the courts in Florida, the mother argued that the father was intoxicated, angry and threatening and that New York was a more stable, supportive and protective atmosphere for the newborn. For these reasons, the mother requested the placement of the child before the courts in New York.

1772 "The New York court concluded that Florida was initially the home state of the child, but New York became the home state of the child when the mother and child arrived in New York, leaving the—fleeing the alleged domestic violence and dangerous actions of the father".

1773 The Court added that the courts in the child's home state may decline jurisdiction, or the courts of another State may be competent for child custody determination if: (a) there is a more appropriate jurisdiction intended as a place where the child and the parental responsibility holders, or holder, have a significant connection, greater than physical presence, and where substantial evidence exists concerning child care, protection, training, and personal relationships; (b) the courts under the preceding lit. a declined jurisdiction on the grounds that another forum is more appropriate; (c) no home-state, or more appropriate, jurisdictions can be found.

1774 "Florida was the child's home state at the time of the filing of the competing petitions because from birth to relocation, the child lived in Florida with both Father and Mother. The child was less than six months old, and the child's home state is where the child lived from birth with a parent or person acting as a parent. This conclusion does not mean that New York improperly exercised jurisdiction. The New York court based its decision on the emergency jurisdiction provisions of the UCCJEA. See N.Y. Dom. Rel. Law § 76–c (McKinney 2015). The statute provides that New York could properly exercise temporary jurisdiction "if the child is present in the state [and] it is necessary in an emergency to protect the child, a sibling or parent of the child." Id. The Florida and New York courts in this case consulted and agreed to allow New York to exercise temporary jurisdiction based upon Mother's allegations of domestic violence. Yet, while New York arguably could have exercised temporary emergency jurisdiction, it did not become the child's home state simply because Mother filed a child custody petition in New York. Father filed a custody petition in Florida, the child's home

**578.** The cases examined suggest that home state should be assessed starting from the child's birth, irrespective of the time before it. Thus, the child's physical presence is essential. The physical presence of the parent living with the child is a decisive factor for both the home state determination and continuing jurisdiction. Home state should be located at the relevant appreciable period indicated within the UCCJEA[1775], depending on the child's age. The child's temporary absences and the parental intent are not decisive. Courts should coordinate original jurisdiction, and its derogation, in particular when the welfare of the child, and of the parent living with the child, so require.

## Section III International Child Civil Abduction

**579.** Habitual residence plays a primary role in asserting custody jurisdiction in international child abduction[1776]. The authorities of the child's habitual residence, in principle prior to the wrongful removal or retained relocation[1777], should exercise jurisdiction over custody and visiting rights. In this regard, the Hague Convention on civil aspects of child abduction (HC-1980) provides that the left-behind parent, who suffered breach of his/ her custody rights, should file for return before the period of one year has elapsed (article 12.1)[1778]. It is

state, which precluded New York from exercising permanent jurisdiction in this case. See § 61.517, Fla. Stat. (2015); N.Y. Dom. Rel. Law 76–c (McKinney 2015). Absent Florida expressly relinquishing its jurisdiction to New York, both the dismissal under review and New York's assumption of home state jurisdiction were improper".

1775 Ibid. s. 102.

1776 A short note recalls that international child abduction is a growing issue, which above all is detrimental to children's best interests and the parent-child relationship (see TGI Paris, ord., *Ahnine c/ Al Saud*, 12 janvier 2012, No. 11/38839 where after three years proceedings and a French judgment awarding custody to the mother, the child was retained in Saudi Arabia). Between 2008-2015 a slightly increasing rate of parental abductions was released and a significant proportion of return applications ended in judicial refusal under the HC-1980 (source: HccH, 2015). Main difficulties concern, *inter alia*, a lack of cooperation patterns among Contracting and non-Contracting States (*i.e.* non-compliant States were indicated in the US Congressional Research Service Report dated 29 September 2020, R46553: Argentina, Brazil, and Peru, Egypt, Lebanon, and Jordan). The issue of wrongful retention beyond time limited consent in breach of the left-behind parent's custody rights appears to be one of the most controversial issues (R. TSCHERNING, International Child Abduction: A 'Time-Limited Consent' Does not Change the Habitual Residence of a Child, University of Calgary*, Faculty of Law Blog Publications*, 2016). In 2018, a considerable rise in outward abduction applications and return orders was reported by the Swiss Central Authority and the International Social Service. Still, between 2008-2015, a slight decrease was instead highlighted in applications concerning access rights following abduction (ibid. HccH).

1777 This situation refers to the retained child's stay in the Hosting State beyond the time settled through a temporary parental agreement, which can be oral or written. Nonetheless, the parental agreement should not be considered determining for the child's habitual residence (Ibid. ATF 5A_877/2020, § 9; and US *Monasky v. Taglieri*).

1778 Additional exceptions founded on the child's best interests may advise against the child's return (art. 13 and 20). It is said that the authorities in the Hosting State should not mandate a comprehensive best interests assessment as the main objective of the Convention is the prompt return of the child to his/ her habitual residence prior to wrongful removal or retention. Even so, the exceptions derive

particularly noted that a wrongful removal or retained relocation may trigger a change of habitual residence by virtue of the child's integration in the Hosting State[1779]. Accordingly, courts in the latter State would be entitled to retain custody jurisdiction[1780].

**580.** This Section examines specific rulings of national and regional courts concerning habitual residence in the context of wrongful removal or retained relocation principally under the rules of the HC-1980. In addition, specific reference is made to the situations of absence and alternate habitual residence in the context of civil abduction.

## § I. Case Law Analysis

**581.** The first is an English case[1781]. It concerned an Italian-British couple with three children, aged 7, 4 and 2 years. They were born and lived in England, for six, three and almost one years, respectively. Thereafter, the mother, British national, and the children moved to Italy to join the father, Italian national, working as a naval officer in Rome. After almost 10 months, the mother and the children returned to England due to continuous psychosocial and physical abuse[1782]. The mother filed for residence orders before the Local County Court. She initiated contacts with domestic violence services. In May 2010, the father

from a child's best interests' consideration in that the child should not be harmed by the return (1980 Child Abduction Convention Guide to Good Practice, HccH publications, 2020, p. 25)

1779 HC-1980, art. 12.2: "[…] *shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment*". See also Opinion of Advocate General Maciej Szpunar delivered on 24 September 2014 (*C v. M*): § 80: "*In other words, the acquisition of habitual residence has nothing to do with the lawfulness of a move. Habitual residence can, in principle, be acquired as a result of an unlawful move*"; and *B (A Child) (Abduction: Habitual Residence)* [2020] EWCA Civ 1187, § 97; and L. HECKENDORN URSCHELER/ I. PRETELLI *et al.*, Cross-border parental child abduction in the European Union, PE 510.012, 2015, p. 64.

1780 Yet, some authors have argued that the discretion under art. 12(2) does not contain an exception to the return of a child settled in the Hosting State, when it is clear that his/ her habitual residence was located in the State prior to the wrongful return. Accordingly, this should be true even when the application is filed after 12 months from the wrongful removal or retention (see N. LOWE, Some Moot Points on the 1980 Hague Abduction Convention, *VUWLR*, 6, 2015, p. 690). Concerning the State of return, it is said that the authorities in the State of refuge are not obliged to order the child's return to the State of habitual residence prior to the wrongful removal or retention. This should mean that the child's return may take place to the State of the left-behind parent's habitual residence, by then different from the child's habitual residence prior to the wrongful removal or retention (see E. PÉREZ-VERA, 'Explanatory Report on the 1980 Hague Child Abduction Convention', HccH publications, 1982, § 112; and *In the matter of C (Children)*, 2018, UKSC 8, § 35; *B (A Child) (Abduction: Habitual Residence)*, § 115).

1781 *DT v. LBT (Abduction: Domestic abuse)* [2010], EWHC, No. 3177 (Fam).

1782 § 10: "Over the years the father's behaviour has had a profound emotional effect upon the mother. By badgering, intimidation, violence and playing on her affections and desire for a normal family life, he exerted sufficient emotional pressure on the mother to prevent her from separating from him until earlier this year. The pattern found in this case is typical of what is colloquially known as battered wives syndrome".

applied for return proceedings in accordance with the HC-1980. The mother opposed[1783].

> According to the High Court of England and Wales, a delay[1784] in the decision should not be capable of influencing the outcome of the judgment[1785]. It retained as decisive elements for the habitual residence determination: the duration of the children's stay in Italy; their *integration into normal Italian life*[1786]; the mother's intended participation in the Italian integration for both the children and herself[1787]. The Court considered both children's and mother's views. They held that the children's ones could not amount to direct objections to the return[1788]. It considered the risk of emotional harm caused by a potential separation between the children and their mother as a primary carer[1789]. The Court dismissed the return under article 13 of the HC-1980, although habitual residence was found to be in Italy[1790].

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1783 § 6: "Habitual residence: She says that the children were not habitually resident in Italy on the date that she brought them to England even though they had been physically present there since 15 July 2009. She alleges that her presence in Italy with the children was not voluntary but was as a result of improper pressure by the father. She also contends that the children had not integrated in Italy in the sense necessary for habitual residence".

1784 The judgment was rendered after a 6 month-proceeding, instead of 6 weeks as bound by the Convention (art. 11.2).

1785 § 18: "These proceedings have been unfortunately prolonged, having concluded in about 6 months rather than 6 weeks. Apart from the length of the father's separation from the children, the only other material consequence is that the child, D, has now embarked on a period of specialised schooling, which began in September 2010. Although relevant, this is not a factor that, in our view, tips the decision. In other words, the outcome is not affected by the delay".

1786 § 26-27: "For the father, attention is drawn to the degree of the children's integration into normal Italian life over a 9-month period, with a long-term rented apartment, school for D and nursery for G, parties with schoolmates, a mother who worked and the father who remained at home, parents who socialised, and an initial 3-week visit to the paternal grandparents in Sicily. For the reasons given by the father, I cannot accept the argument that these children had not sufficiently integrated into the regular order of Italian life to have acquired habitual residence there, nor indeed that the mother had not done so herself".

1787 Ibid.: "The period of time, the degree of integration of the children into normal Italian life, and the nature of the mother's participation in that process are too extensive to be accounted for by the mother's description of herself as 'a zombie' whose will was broken and who was totally controlled by the father. Despite the effect of the domestic abuse, I am satisfied that it would be a misunderstanding to regard the mother as someone who had lost her free will to such an extent that she was not responsible for her actions. My conclusion is that this was habitual residence for the children, albeit reluctant and unhappy habitual residence for the mother".

1788 § 37: "D. [child] said that he did not want to go back to Italy, repeating the sentence several times and saying that it was because it is too hot. He said that he wouldn't hate going back but would mind a bit. He liked England better than Italy. D also gave some accounts of his father's behaviour, to which I will return".

1789 Ibid. "The return of these children to Italy without their mother is not an acceptable option. It would undoubtedly expose them to a grave risk of emotional harm to be separated from their primary carer. They are very young and they depend upon her. D has special needs, and the father has never cared for the children as a group alone".

1790 § 66: "I keep in mind the purpose of the Hague Convention and considerations of comity with the Italian jurisdiction, which must weigh heavily, despite the lifelong connection of these children to this country. However, as already stated, the unusual combination of factors in this case (namely

**582.** The following is another English case[1791] involving a Chinese couple with two children. They were born and lived mainly in England[1792]. The marriage ended in the couple's *de facto* separation during a Christmas trip to China[1793]. The father returned to England, the mother and the children stayed in China. At this time, the mother repeatedly expressed her wish for divorce[1794]. She filed for divorce in China, which was challenged by the father[1795]. He filed an application for jurisdiction over abduction.

> The High Court of England and Wales determined the children's habitual residence in China[1796] at the relevant date according to Brussels IIA, article 10[1797]. It took into account two dates: (a) the date of the family trip to China when the children's habitual residence was in the UK[1798]; and (b) the date when the mother decided not to return to the UK, through tangible steps[1799]. According to the Court, this last moment was the '*objective act*' relevant for the determination of habitual

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the mother's refusal to return as a result of domestic abuse, combined with special features relating to D and the absence of effective protective measures) lead me to conclude that the mother has made out her case on this issue to the necessary high standard".

1791 *L v. M* (Rev 1) [2019] EWHC 219 (Fam).

1792 The couple conceived twins, Frederick and William, through IVF, which took place in China, even though they were born in England (§ 9).

1793 § 23-24: "What appears to have changed on 12 December is that the Mother said that she wanted a divorce, and was not intending to return to the UK, at least in the short term. The parties arrived in China at Shanghai airport. They were met at the airport by the paternal grandfather, both maternal grandparents and various helpers who came with them. The Father asked the Mother to accompany him to his family home in Taiyuan (in Northern China), but she left with her family and the children for Sanya (in Southern China on Hainan Island). She did not give the Father an address at that stage. On 17 December the Father transferred £45,000 from the joint account to his sole account. He says he did this to protect his financial position, given that the Mother had indicated that she wanted a divorce".

1794 § 26: "On 11 February 2018 the Father travelled to China for Chinese New Year and went to Sanya to see the Mother. It is not disputed that the Mother repeated her request for a divorce and said she did not intend at that stage to return to the UK".

1795 The Chinese courts rejected the application and the mother appealed. No orders were taken by the Chinese courts (§ 31-33: "In June 2018 the Mother filed for divorce in China, which the Father resisted. He said in the court documents that as at February 2018 the parties had been reconciling. The Chinese court rejected the divorce application in October and the Mother is currently appealing that decision. At the present time therefore the Chinese courts have not made any orders, or indeed engaged in any consideration of the position of the children, or what living or contact arrangements should be in place […]. There has been no assessment of the children's welfare in China, as there are no proceedings in respect of them at the current time").

1796 § 73: "For these reasons I have reached the conclusion that the children were habitually resident in China not England by the end of March 2018, the date on which they were unlawfully retained under article 10, and therefore I find that this Court has no jurisdiction".

1797 Art. 10 of the Regulation substantially supplements the rules laid down under the HC-1980 (§ 45).

1798 Relevant elements were the duration of the children's life in England together with their parents, their integration interpreted through medical care and socialisation (§ 58: "I should start by making clear that it is obviously the case that the children were habitually resident in England up to 14 December. They had spent their entire, albeit short, lives here and both their parents were here. They were integrated in England, to the degree one would expect given their very young age, by reason of medical care and some socialisation. Mr Devereux accepts this was the case").

1799 Namely, her reiterated wish to divorce, the divorce communication to the husband and the instruction of the case.

residence under article 10[1800]. The Court excluded the parental intentions because they were highly '*confused and conflicting*'[1801]. It referred to a mix of factors identified through English and CJEU case law. The Court stated that the analysis must be child-focused and it must reflect some degree of integration in a social and family environment, which should indicate stability[1802]. Accordingly, the child's integration should be found in relation to the family, referring to the mother as the primary carer, the grandparents, the nannies employed to care for the children, and the Chinese culture[1803]. Considering the children's young age, integration outside of the family environment was limited[1804]. The Court held as relevant the language (Chinese), in the context of young children, or newborns[1805]. It retained the '*practical connection*' and the '*loving environment*' which were indicators of proximity and best interests[1806]. It assessed the mother's

1800 § 61: "To the degree that there had been a mutual understanding that the Mother and children would return to London at some point, I think the Mother was making clear at the end of March that this was no longer her intention, and she was keeping the children in China. I will therefore take the end of March as the date at which I should determine the children's habitual residence, and therefore for deciding whether this Court has jurisdiction".

1801 § 29: "It is not possible for me to judge with certainty what was in each parties' mind at this time. However, I do accept the Mother's evidence that she was highly confused and conflicted in terms of what she intended to do, the degree to which she wanted at various points to reconcile with the Father and her future plans. As I will return to below, this is one of the reasons why I do not think trying to decide the issue of habitual residence on the basis of the parties' intentions is very helpful in this case […]. The relevance of intention is potentially a complicated one. There may be cases where the parental intention is absolutely clear, and there is objective evidence, such as an application for a visa in the new country showing a clear intention. Here, the Mother's intention may have been somewhat uncertain in early 2018, and may well have fluctuated. This is hardly surprising given that her marriage had broken down, and she was dealing with a new and emotionally very difficult situation. In my view by late March her evidence suggests that she was clear she was not returning to England, but this is not a case where I think intention alone is likely to be the critical factor".

1802 Unlike the children's stability, the permanence of such integration is not relevant (§ 66).

1803 § 63: "[…] ethnically and culturally these are Chinese children […]". The Court referred to 'children's roots' considered as family and cultural ties, which were brief in England but extensive in China (§ 68).

1804 Ibid.: "Firstly, the habitual residence of the child corresponds to the place it has some degree of integration in a social and family environment and the whole consideration must be child- focused (i and ii). In March 2018 the children were living in China with their Mother, who had been their primary carer throughout their lives, their maternal grandparents and nannies. The evidence suggests that they were well integrated in this environment. It is correct that they were not living with their Father, and they were not in England where they had spent their first six months. However, ethnically and culturally these are Chinese children, and as I understand the specific consideration around integration, it is to cover a situation where a child is physically in a country but not integrated within it. However, in this case these are very young children, so integration into a country or community is necessarily limited. To the degree they could be, these children were integrated into their Chinese social and family environment by March 2018. I note that it is not necessary for the children to be "fully" integrated into the new country".

1805 In this case the children were 9 months at the relevant date (§ 64).

1806 § 69: "The children quite clearly here had a practical connection in China, but also and importantly they were being fully cared for in a loving environment. That is not to underestimate the importance of them being separated from the Father, but there is certainly no conflict here between their best interests and their being found to be habitually resident in China".

habitual residence in China as primary carer[1807]. The Court confirmed the change of habitual residence without the consent of the left-behind parent if the intention at the relevant date is unequivocal and confirmed through tangible steps. It considered less relevant '*remaining links*' to England, such as: the children's nationality; the father's place of living, the father's home including the children's room and possessions; limited contact with the father; medical care; school enrolment[1808].

**583.** This is a US case[1809] concerning a child, J.B., US citizen, born in Ukraine. For the first three years of J.B's life, the family lived in Ukraine, Ireland and Lithuania[1810]. After a seven-week summer holiday in Munich, the mother and the child relocated to the US, Pittsburgh. The father settled in Germany where afterwards, by reason of J.B's cardiac surgery, the family lived for two years. Later, the family moved to Pittsburgh[1811]. J.B. attended school for one year, where he appeared well-integrated. A dispute arose over J.B's habitual residence. Despite an agreement concluded for J.B's return to Germany, the mother wanted her son to remain in the US. Consequently, she petitioned for divorce before the Pennsylvania Family Court in Allegheny County, obtaining custody on a provisional basis. The father filed a return application under the HC-1980 to the Pennsylvania District Court. The latter focused on the *parents' shared intent*[1812], and the *child's acclimatization* based on J.B's activities and views, which showed his acclimatization in the US. The father appealed.

The US Court of Appeals, 3rd cir., held that habitual residence must be determined through the child's physical presence, showing acclimatization and the degree of settled purpose from a child's

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1807 The establishing of habitual residence was the result of her actions and intentions, since she did not work in England, she had *de facto* separated from her husband, and she was living in China with her parents at the relevant date (§ 67).

1808 § 72: "Finally, I fully take into account the fact that the Father was living in England and that the children retained a home in England. Their room and possessions were still in the flat in Canary Wharf. They remained registered at the GP surgery, and as I have recorded above they had been given a pre-school place at Eaton Place School. However, taking the evidence in the round and focusing on the position of the children, as opposed to the position of the Father, I do not think that the remaining links to England outweigh the strong evidence in favour of the children being habitually resident in China. Their links to England were their nationality and the fact that their Father was living here. There may be cases where nationality is important, but given the young ages and the background of these children it seems to me to have little impact on their habitual residence. There is no suggestion that their immigration status in China was precarious. The fact that their Father was in England, and they had still had a home here is relevant, but does not outweigh all the factors which point to habitual residence having been acquired in China".

1809 US Court of Appeals, *Charles Wesley Blackledge, Appellant v. Olga Grigorievna Blackledge* [3 August 2017] 16-3667.

1810 No reference to the specific length of their stays is made, except for the indication of 'some weeks in Vilnius'.

1811 A three-year German visa was secured to the mother and the child.

1812 The Court concluded that there was no clear agreement between the parties.

perspective[1813]. Such settled purpose should be determined through both the child's acclimatization and shared parental intent. In fact, the parental intent is likely to influence the child's attitude in establishing contacts, and it affects the length of time for acclimatization[1814]. The Court excluded that a child's move of a limited duration would cause a change of habitual residence. Still, this rule may encounter an exception when such move is directly related to a *settled purpose*. The latter comprises various motivations, including *inter alia*, education, business or profession, employment, health, family or merely love of the place[1815]. The Court asserted that the parental intent is of paramount importance[1816] when involving *very young children* – acclimatization would be then secondary. Instead, a four-year old child should be excluded from that category because maturity, cognitive and social abilities are relevant for acclimatization. To that end, a child is able to form meaningful connections with the people and places encountered each day – parental shared intent is, thus, secondary[1817]. The Court stated that J.B. moved to the US for a settled purpose, agreed by his parents. Clearly, to pursue a normal life, make long-term friends and plans, developing routines in a sense of environmental normalcy, putting down roots, in a country and culture he was familiar with[1818] and which offered him major stability[1819]. The Court maintained that J.B. achieved familiarity by making friends easily, enjoying activities outside school[1820], being successful at school, improving his skills[1821],

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1813 "A child's habitual residence is the place where the child has been physically present for an amount of time sufficient for acclimatization and which has a degree of settled purpose from the child's perspective".

1814 "To assess whether a child's habitual residence meets this threshold we analyze both the child's acclimatization and the 'shared parental intent'—a factor that is relevant because 'the child's knowledge of his parents' intentions is likely to color his attitude to the contacts he is making' and 'affect the length of time necessary for a child to become habitually resident or otherwise influence a child's ability to acclimatize', and, in addition, because it bears on the parents' own intentions 'regarding their child's presence in a particular place".

1815 "Regardless of the motivation for the location selected, or whether the stay was meant to be permanent or temporary […]".

1816 "However, once a child is old enough to develop a certain routine and acquire a sense of environmental normalcy', acclimatization becomes the central inquiry".

1817 The Court further considered the possibility of a consecutive, alternating habitual residence. It stated that, unlike in the present case, when a child spends equal periods of time with both parents by virtue of a shuttle custody agreement or an alternate habitation agreement, the child's move should be accompanied by a settled purpose assessed through a fact-intensive and circumstantially-based inquiry to qualify for habitual residence.

1818 "On the contrary, when Respondent and J.B. moved to the United States, J.B. was returning to a country and culture with which he was already familiar and a city in which he had previously lived for two years […]".

1819 "[…] a city that, by the time of the retention date, was the longest and most stable residence he had known in his fairly nomadic early years".

1820 *I.e.* soccer, swim team.

1821 *I.e.* he learned how to program a robot.

therefore achieving a sufficient degree of maturity for meaningful connections. US was also J.B's own preference. The Court concluded that, at the time of retention, US was J.B's habitual residence[1822].

**584.** This is a Brazilian case[1823] involving a US-Brazilian couple, she Brazilian, he holding US citizenship. The mother and the child moved to Brazil on apparent vacation agreed with the father. Thereafter, she retained the child. The father applied before the New Jersey Court, which awarded him temporary custody, stating wrongful removal. Further, the father submitted a return application to the US Central Authority under the HC-1980. In parallel, the Brazilian Federal Court ruled that although the relocation was unlawful, the child should continue to reside in Brazil as one year had elapsed and his habitual residence had changed. The father opposed. Following the mother's death[1824], the Brazilian administrative authorities awarded custody to the stepfather. The maternal grandparents denied the father his visiting rights. The father appealed.

The Brazilian Federal Court ordered[1825] the child's return to the US. It declined jurisdiction, considering that the child's habitual residence, prior to wrongful retention, was in New Jersey[1826]. According to the Brazilian Court, the father did not hold the power to obtain the return under article 12(1)[1827]. In such circumstances, no matter how long the child had lived in Brazil after retention, his habitual residence was unlawfully constituted in Brazil[1828].

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1822 "But because that evidence overwhelmingly demonstrates the parties intended J.B.'s residence in Pittsburgh, albeit of specific, limited duration, to carry 'a degree of settled purpose', Whiting, 391 F.3d at 549, we nonetheless conclude that the 'shared parental intent' factor favors the United States as J.B.'s habitual residence".

1823 2009.51.01.018422-0. See also D. GOLDMAN, A Father's Love: One Man's Unrelenting Battle to Bring His Abducted Son Home, 2012. The present author has interviewed Mr David Goldman, Sean's father, through Linkedin.

1824 She died in Brazil while giving birth to another child from a second husband.

1825 Known as 'Pinto's judgment'.

1826 "*Noutro giro, para os fins dispostos no artigo 15 da Convenção da Haia - prova da ilicitude da retenção/transferência, nos termos da lei do Estàdo da residência habitual do menor - há documento idôneo nos autos a demonstrar que a retenção de SEAN no Brasil constituiu violação à legislação aplicável ao caso no Estado de Nova Jérsei, em que, como acima fixado, a criança residia habitualmente* […]. *Seguindo esse raciocínio, se a permanência de SEAN no Brasil encontrava-se viciada na sua origem, evidentemente, a residência habitual do menor jamais poderia ter sido validamente fixada em nosso País, como, de maneira equivocada, data venia, sustentou o Réu".*

1827 "*É que a exceção contida no art. 12 da Convenção parte de uma premissa lógica, qual seja, a de que a criança objeto do pedido de restituição esteja em poder de um de seus genitores. Afinal, evidentemente, a Convenção da Haia trabalha com a premissa central de que, na imensa maioria dos casos, o autor do ato ilícito de remover ou reter o menor em outro país, que não o de sua residência habitual, é um de seus pais. Assim, é óbvio que as exceções constantes da Convenção, em especial a de que trata o artigo 12, devem ser lidas e interpretadas à luz dessa mesma premissa, sob pena de se alcançar resultados geradores de perplexidade".*

1828 "*Não importa, em suma, o quanto de tempo se passou desde o início da permanência de SEAN no Brasil, à revelia de seu pai, para fins de se aferir qual seria a residência habitual da criança. O que importa é que a situação de ilicitude nunca deixou de existir. Por isso, permissa venia, é totalmente*

**585.** This next is a Swiss case[1829] concerning a Swiss-Italian-Moroccan couple[1830], with two children. The family lived in Italy. There, the courts rendered a divorce judgment, ordering, *inter alia*, custody to the mother, contact arrangements, and joint parental responsibility[1831]. Afterwards, the mother and the children settled in Switzerland without the father's consent. The father declared them missing persons before the Italian police. He then submitted to the Italian authorities an application for return under the HC-1980, which was transferred to the Swiss authorities. The father also filed a criminal proceeding before the Public Prosecutor in Geneva for criminal abduction[1832]. The Swiss Court[1833] ordered the children's return to Italy, including superprovisional measures[1834]. The mother opposed. The order was upheld in appeal. The case reached the Federal Court.

> The Court reiterated the Convention's objectives, in particular the child's prompt return to his/ her habitual residence prior to wrongful removal[1835]. It recalled the exceptions to the return by virtue of article 13(1)(b) implemented through article 5 LF-EEA[1836]. The Court upheld the children's return to Italy in absence of valid exceptions. It nevertheless maintained that a return order *is not conducive to reinstating the previous habitual residence*[1837]. Therefore, the habitual residence of the child must be chosen in agreement between the parents exercising joint

*incorreto falar em fixacao residência habitual do menor em nosso País, apenas em vista do decurso de um dado, ainda que expressivo, lapso temporal*".

1829 BGer 5A_305/2017 vom 19.05.2017.

1830 She Italian/ Moroccan, he, Swiss/ Italian.

1831 '*Autorité parentale conjointe*'.

1832 This is an interesting point, which is not discussed in this study. Swiss practice shows that an action against criminal abduction is often filed jointly with civil abduction (ATF 5A_162/2019, 24 April 2019; ATF 5A_257/2016, 6 July 2017; ATF 5A_705/2014, 15 October 2014). This seems to be also the case in other jurisdictions (ibid. HECKENDORN URSCHELER/ PRETELLI *et al.*).

1833 *'Cour de Justice du Canton de Genève'.*

1834 B.a: "*Statuant sur la requête de mesures superprovisionnelles déposée par le père dans le cadre de son action en retour des enfants, la Cour de justice a, par prononcé du 23 février 2017, fait interdiction à la mère de quitter le territoire suisse avec les mineurs et ordonné le dépôt des cartes d'identité et passeports suisses et étrangers et/ou tout autre document de voyage des enfants, au greffe de la Cour. La mère a déposé les cartes d'identité et passeports italiens des enfants le 3 mars 2017, étant précisé que les documents d'identité suisses des enfants sont périmés et que le père n'a signé aucune demande de renouvellement de ces documents".*

1835 According to this principle, the authorities in the State of habitual residence prior to the removal should exercise jurisdiction over custody and visiting rights (according to articles 1, 3, 4, 5 and 12).

1836 '*Loi fédérale sur l'enlèvement international d'enfants et les Conventions de La Haye sur la protection des enfants et des adultes*', 2007. Such exceptions can be summarised as follows: (a) when the child's placement at the left-behind parent's domicile is against the child's best interests; (b) when the abducting parent cannot afford to take care of the child at his/ her habitual residence prior to the wrongful removal; (c) when the child placement towards a third person is manifestly against the child's best interests. These situations are all conducive to determining an intolerable situation for the child.

1837 § 6.3: "*Ceci posé, il convient de rappeler une nouvelle fois que l'ordre de retour n'implique pas la réintégration de la résidence habituelle avant le déplacement illicite".*

parental responsibility, in accordance with the law of the State of the child's habitual residence prior to the wrongful removal[1838].

**586.** This is a CJEU ruling[1839] concerning parental responsibility[1840]. The case involved an unmarried Belgian-Polish couple living in Belgium, where a child was born from this relationship. The mother, Polish, often travelled with the child to visit her family in Poland. The parents separated. The mother and the child moved to Poland, without the father's agreement. The mother filed a petition before the Polish courts to fix the child's residence in Poland and put in place visiting rights. The claim was rejected[1841], and then accepted in second instance[1842]. During the appeal, which was still pending in Poland, the father filed for parental responsibility before the courts in Belgium. The latter stayed proceedings[1843]. The Polish courts (first instance), which were again hearing the case in the main proceedings[1844], referred to the CJEU for a preliminary ruling.

The Court set out, for the first time, an important distinction between decisive and non-decisive elements to determine the child's habitual

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1838 See also Cour de Justice [6 April 2017] C/3722/2017-CLAH, DAS/62/2017, § 3.2: "*Pour déterminer le ou les parents titulaires du droit de garde, qui comprend en particulier celui de décider du lieu de résidence de l'enfant (art. 5 let. a CLaH80), il y a lieu de se référer à l'ordre juridique de l'Etat de la résidence habituelle de l'enfant immédiatement avant le déplacement".*

1839 CJEU, *HR* [28 June 2018] C-512/17.

1840 Its analysis is likewise useful for the habitual residence assessment in the context of civil abduction as the case presents similarities with that scenario.

1841 § 18: "[…] dismissed that application, on the ground that the Polish courts lacked international jurisdiction to hear the case. According to that court, since HR lives and works in Brussels and MO lives with her, the child's place of habitual residence is in Belgium*".*

1842 § 21-22: "In that regard, the court of second instance considered that, at the time the application was submitted, MO's place of habitual residence was in Poland. Against that background, that court recalled that, according to the case-law of the Court, in particular the judgment of 22 December 2010, Mercredi (C-497/10 PPU, EU:C:2010:829), the place of habitual residence is the place where the child demonstrates some degree of integration into the social and family environment. According to the court of second instance, MO, who was 18 months old when the application was submitted in the main proceedings, was not integrated into the Belgian social environment, in so far as she did not attend crèche or nursery school and did not have a child minder of that nationality, and in so far as the only person she visited in connection with that environment was her father. Since September 2016, MO's family environment has been limited to her mother, who has custody of her on a day-to-day basis. MO is connected to Polish tradition and culture via her mother and her mother's family, given that she has had a Polish child minder and primarily expresses herself in Polish, has spent holidays, festivals and the majority of HR's parental leave in Poland, and was christened in that Member State […] In addition, according to that same court, the fact that HR and KO have not married and have not bought property in Brussels shows that HR does not plan to stay in Belgium longer than is required by the nature of her work. Conversely, the purchase by HR of property in Poznań, together with her frequent and prolonged stays in Poland, show that she has the intention of returning to live in that Member State".

1843 § 19-23: "However, that court stayed the proceedings pending the outcome of the proceedings initiated before the Polish courts […] In April 2017 the Belgian public prosecution authorities prohibited HR from leaving the territory of Belgium with MO for an indefinite period. However, HR obtained permission to stay in Poland with the child from 11 July 2017 to 12 August 2017".

1844 Due to the setting aside of its initial order.

residence[1845]. In context, they were showing that the child was habitually resident in Belgium under article 8 of Brussels IIA.

**587.** This last is an ECtHR ruling[1846] involving a Romanian couple. They lived in Italy where a child was born. The mother and the child moved to Romania without the father's consent. The latter filed an application for return under the HC-1980 before the Italian authorities[1847] and later before the courts in Romania. The child's return was ordered in first instance and quashed in appeal[1848]. Afterwards, the mother petitioned for divorce and custody before the courts in Romania. These pronounced the divorce and awarded sole parental responsibility to the mother, fixing the child's habitual residence in Romania. The case reached the ECtHR[1849].

> The Court maintained that in all decisions concerning children, their best interests are paramount, including in the framework of HC-1980 and Brussels IIA[1850]. It reiterated a wish not to substitute the habitual residence assessment provided by the national courts. Nonetheless, its decision considered, *inter alia*, the respect of the child's best interests' principle within the framework of article 8 of the European Convention on Human Rights. The Court held that the wrongful removal was in

[1845] § 66: Decisive elements are: "– the fact that, from its birth until its parents' separation, the child generally lived with those parents in a specific place; – the fact that the parent who, in practice, has had custody of the child since the couple's separation continues to stay in that place with the child on a daily basis and is employed there under an employment contract of indefinite duration; and – the fact that the child has regular contact there with its other parent, who is still resident in that place". Non-decisive elements are: "– the stays which the parent who, in practice, has custody of the child has spent in the past with that child in the territory of that parent's Member State of origin in the context of leave periods or holidays; – the origins of the parent in question, the cultural ties which the child has with that Member State as a result, and the parent's relationships with family residing in that Member State; and – any intention the parent has of settling in that Member State with the child in the future".

[1846] *Michnea v. Romania* [7 October 2020] Application no. 10395/19.

[1847] He also lodged a criminal complaint in Romania.

[1848] § 15: "In this connection, it observed that the couple had had their permanent residence in Romania both when the child had been conceived and when they had married. The court noted that at the time when the marriage had been concluded and Y had been born, the applicant and his wife had been living in a flat rented temporarily in Italy, their lawful residence being still in Romania at that time […] In the court's view, the mere fact that the applicant worked in Italy (since January 2016, according to the evidence submitted to the file), lived in Italy (with X and Y also registered as living with him) and had expressed the intention to buy property there (which eventually he had not done), could not change that fact".

[1849] "The applicant complained that the refusal of the Romanian courts to order the return of his child to Italy had breached his right to respect for his family life, protected by Article 8 of the Convention […]".

[1850] *Strand Lobben and Others v. Norway* [GC], no. 37283/13, § 204, 10 September 2019 (§ 37: "The same philosophy is inherent in the Hague Convention, which associates this interest with restoration of the status quo by means of a decision ordering the child's immediate return to his or her country of habitual residence […] The Court further notes that the European Union subscribes to the same philosophy in the framework of a system involving only European Union member States and based on a principle of mutual trust. The Brussels II bis Regulation […]").

violation of article 8 of the ECtHR[1851]. In this regard, it stated that the child's home was in Italy at the relevant time, namely prior to the wrongful removal, by virtue of: the 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; the child's integration in a family and social environment according to the CJEU case law. The Court confirmed that the habitual residence fact-based determination should not be glossed with the notion of legal domicile[1852].

## § II. A Child Centred Approach: Factual Proximity and Best Interests

**588.** The habitual residence assessment, according to the mentioned case law[1853], and the proposal advocated in this book, should be child-centred. In this respect, the child's best interests and factual proximity should be principally considered for the habitual residence determination[1854]. The child's

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1851 § 40: "At the outset, the Court considers that the Bucharest Court of Appeal's decision of 14 June 2018 denying the return of the applicant's child to Italy constituted interference with the applicant's right to respect for his family life".

1852 § 19: "The case was heard by the Sighetul Marmaţiei District Court. The applicant, through his lawyer, announced that his permanent residence was within the geographical jurisdiction of that court. His father's family lived in that area […]"; § 48: The Court (ECtHR) observes that during the divorce proceedings the applicant, through his lawyer, announced that his permanent residence was within the geographical jurisdiction […] That said, the Court must reiterate that, for the purpose of the Hague Convention, the concept of 'habitual residence' is a question of pure fact, differing from domicile […] The Court of Appeal's decision does not explain why that court gave precedence to what appears to be the parents' Romanian domicile over the clear factual elements before it indicating that the family had been living in Italy"

1853 *Cf.* subsection I *supra*.

1854 The HC-1980 states in its preamble that the child's best interests should be of paramount importance for custody (on this point see also ibid. KILKELLY/ LIEFAARD, p. 179). Brussels IIA, which covers civil abduction, provides that the meaning of habitual residence is shaped in the light of the child's best interests, emphasising the criterion of proximity (§ 12). Thus, the child's best interests are clearly part of the objectives pursued by the two instruments (*Re E (Abduction Article 13B Deferred Return Order),* 2019, § 9). In order for the courts of the Hosting State to determine, and derogate from, habitual residence in the context of civil abduction, the child's best interests, in our view, should guide the determination, as extensively argued in this study in relation to custody (*cf.* section II *supra*). This does not mean that the courts in the Hosting State should determine custody jurisdiction, but simply they should assess habitual residence founded on proximity with the child's best interests at the relevant time (ibid. *Re E (Abduction Article 13B Deferred Return Order),* § 10). The collaborative approach through intercountry child assessments may prove useful in the determination of the child's best interests, avoiding free-standing interpretations (*cf.* section II *supra*). Additional ways of direct communication exist (*i.e.* 'Judicial Protocol Regulating Direct Judicial Communications Between Scotland, and England & Wales in Children's Cases': "Scotland and England & Wales share a common commitment to the rule of law and to the principle that the welfare of the child is the paramount consideration when his or her needs or rights are being considered by the courts"). We recall nevertheless that the following are facts which may disagree with our statement: The Deputy District Attorney of Sacramento said that "*the best interests of the child are not a factor considered as the HC-1980 is not based on best interests. It is simply to determine whether the child should be returned to have custody decided in the other country or be*

best interests, regardless whether the abduction involves newborns or adolescents, should guide the exceptions to the child's return, for instance in presence of domestic violence or child abuse.

**589.** In particular, the child's physical presence and its regular settlement, showing family and social integration, become primarily relevant when children reach a sufficient degree of maturity. On this aspect, a four-year child may already express his/ her own views[1855], provided that they are compatible with his/ her best interests[1856] and own acclimatization[1857]. The regular contacts with both parents determine the child's family environment. Although the appreciable period occurring before the wrongful act is principally relevant for the overall assessment, family environment is often located in the place where the child lived with both parents prior to parental *de facto* separation. The settled purpose is determining in the newborn's family and social integration[1858] and should be child-focused, actual fact-based and not contradictory[1859].

**590.** In relation to the procedural rules, the time-based conditions as in accordance with the HC-1980, relating to the six-week period from the date of the proceedings for the rendering of a return order, and the year period from the wrongful removal whereby the return proceedings should start, prove complex matters. Despite the importance attributed to the said conditions, they should not be decisively relevant in the child's habitual residence determination. The delay should not change the circumstances of a wrongful

*heard in the US*". The same opinion was reported in ibid. BUMBACA/ WÖLLENSTEIN, p. 6; and 1980 Child Abduction Convention Guide to Good Practice.

1855 Mr Goldman (*cf.* subsection I *supra*) stated that "*a child should never be in the position to decide with whom of his/ her parents to live as such would cause long lasting emotional and psychological problems for the child*". It is agreed that, as reported in subsection I, the relationship with both parents should be respected. The child's views would still be relevant in the assessment of the degree of integration within his/ her family and social environment (*NT v. LT*, 2020, EWHC 1903, § 88-101; and *PT (A Child),* 2020, EWHC 834, § 33). For instance, in the context of intercountry adoption, CANTWELL argued that "In light of this, one of the key elements in a best interests determination (BID) must be the child's own opinion" (ibid. note 160, p. 19).

1856 In the case '*NT v. LT* [2020] EWHC 1903 (Fam)' the UK courts maintained that, despite the child's objections to living in his habitual residence prior to the wrongful act, the return order was in his best interests and welfare (§ 101).

1857 School, friends, hobbies, housing, culture, language, effective family care, should all be decisive factors for the child's rooting within a local community. The child's place of birth, the civil status registration, medical care are rather complementary. The child's nationality, the parental domicile, the permanence of the child's stay should not be relevant.

1858 Concerning unborn children, a child cannot be considered abducted from one State to another, if he or she was not born before the wrongful act. Precisely, a child cannot establish habitual residence without physical presence (see also section II *supra*). We nevertheless observe that in some circumstances involving siblings, one living in State A and the newborn being physically present in State B, the newborn's habitual residence may be determined in State A, for instance according to the French practice (note 588, BUCHER, p. 59). This is clearly a derogation from habitual residence in respect of the newborn's best interests, which comprise family reunification or more precisely children's non-separation according to the UK practice (ibid. *Re M and L*, 2016, EWHC 2535 (Fam), § 36).

1859 Ibid. HAY *et al.*, p. 767 (fn. 19).

relocation on the basis that the child has settled in a new environment. Specifically, a change of habitual residence cannot be constituted unlawfully, especially when the child's return falls outside of the left-behind parent's powers, who anyway avoided evidence of acquiescence.

**591.** The return order should not preclude a change in the child's habitual residence according to the law of the State of his/ her habitual residence prior to the wrongful act. In circumstances involving newborns, the change of habitual residence should be determined whenever possible[1860] in respect of the parent-child relationship with both parents.

## § III. Alternate Habitual Residence in Relation to Abduction

**592.** The US case *Blackledge*[1861] has shown that an approach founded on a *factual and circumstantial assessment*[1862] should determine the child's principal habitual residence[1863]. This conclusion is supported here[1864]. Notwithstanding the close degree of proximity between a child and two or more States, the judicial analysis should always consider specific facts assessing the child's acclimatization[1865]. Based on the case law examined in this Section[1866], the following elements are revelatory of acclimatization[1867] in the context of

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1860 Domestic violence or child abuse may be an exception.

1861 *Cf.* subsection I *supra*.

1862 This approach was recently held by the UK courts in '*Z (A Child: Hague Convention application),* 2020, EWHC 1901', § 47: "[…] that the child is at the centre of the exercise when evaluating his or her habitual residence, involving looking at real and detailed consideration of the child's day to day life and experiences, family environment, including an appreciation of which adults are most important to the child. Habitual residence is essentially a factual issue". In the latter case, a 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. The courts held that the child was habitually resident in the UK at the relevant time based on his integration in a UK social and family environment, clearly focusing on his nursery friends and the close extended family, rather than on the parental shared intentions which were not supported by factual evidence from a child's perspective (§ 77).

1863 The conclusions in relation to alternate habitual residence within custody proceedings are generally applicable to civil abduction, in that when the child holds anchored substantial connections with two States, the child's continuing physical presence prior to the wrongful relocation or retention should be considered as the 'tie-breaker rule'.

1864 *Cf. supra* section II in relation to custody.

1865 This conclusion should exclude, unlike in the UK judgment *'B (A Child) (Abduction: Habitual Residence'*, § 32), the possibility of ordering the child's return to the left-behind parent's habitual residence where the child has never been physically present unless his/ her best interests so require.

1866 *Cf.* subsection I *supra*.

1867 *Paz v. Mejia De Paz* [29 October 2001] 2nd US District Court, S.D. New York, No. 01 CIV 6463 MGC. In the latter US case, a child who was born in New Zealand and frequently relocated to Peru and the US was found to be 'acclimatized' in the US by reason of her accustomed life with her mother, as primary carer, and her extensive school period in the US where her friends and extended family lived.

alternate habitual residence[1868]: the child's physical presence[1869]; the appreciable period showing the child's integration[1870]; the child's social and family environment; the child's welfare[1871]; the child's age and the settled purpose[1872].

**593.** A four-year old child[1873], alternating regular contacts with States A and B, should be habitually resident in the place of his/ her own acclimatization prior to parental *de facto* separation, and in any case before the wrongful act – objectively assessed and noticeable for the left-behind parent. In this regard, the child's removal to, or retention in, State B[1874] should be considered wrongful if, at the mentioned relevant time, the child held a qualified degree

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1868 In relation to concurrent habitual residence prior to the wrongful removal or retention, we refer to section II of this Chapter as the conclusions in matters of shuttle custody would apply, by analogy, to civil abduction. Consequently, we exclude this scenario under the present analysis given that the only situation in mind would be that of a child holding one habitual residence prior to the wrongful removal and another after that time. Actually, this situation would amount more precisely to an alternate habitual residence, which would be solved by the unlawful constitution of the latter (*cf.* subsection II *supra*). On this matter, the UK courts maintained in the case '*GM v. KZ [2017] EWFC 73*' that two children, wrongfully removed by their mother from the UK to Poland, should return to the UK, where their lawful habitual residence was, regardless of the fact that they had lived 15 months in Poland after their relocation. In particular, the courts affirmed that this was in the children's best interests because it was the only way to ensure their right to a normal relationship with each of their parents (§ 43).

1869 ATF 5A_346/2012 [12 June 2012], § 4.4; *ZA & Anor v. NA* [2012] EWCA Civ 1396, § 60.

1870 The combined reasoning of the CJEU ruling *HR* and the UK judgment *L v. M* (*cf. supra* subsection I) show that the appreciable period should be located: (i) generally before the wrongful act objectively assessed and perceptible by the left-behind parent; (ii) specifically before parental *de facto* separation. The latter should determine the child's integration in his/ her family environment, while the former should indicate the overall habitual residence assessment.

1871 In the case '*NT v. LT* [2020] EWHC 1903 (Fam)' the UK courts held that a child, born and well-integrated in the UK social and family environment, should return to Russia, where he held his habitual residence prior to the wrongful act, by virtue of the wider welfare considerations that would be made by the courts in that State. The UK courts considered decisive, *inter alia*, the cultural connections and the child's close extended family in Russia (§ 100). In the case 'Cass., sez. V, pen. 8660/19 [27 February 2019]' the Italian Court of Cassation stated the child's habitual residence, prior to the wrongful act, should be located where the child holds his/ her emotional ties aimed to ensure his/ her harmonious development ("*dovendo intendersi il luogo in cui il minore, in virtù di una durevole e stabile permanenza ha consolidato, consolida, ovvero, in caso di recente trasferimento, possa consolidare una rete di affetti e relazioni tali da assicurargli un armonico sviluppo psicofisico*").

1872 Ibid. *Paz v. Mejia De Paz*; and Cour de cassation, 1ere ch. civ. [4 March 2015] 14-19015. In the latter French case, the Court of Cassation stated that the child's habitual residence, in the context of civil abduction, should consider, *inter alia*, the parental shared intentions, provided that they are assessed through tangible steps (*i.e.* purchased or rented house).

1873 In the scenario involving newborns or unborn children, the habitual residence determination requires their physical presence, which would often be located at the place of the parents' common family environment, or alternatively coincide with the primary carer's physical presence (*cf. supra* section II; and ATF 5A_877/2020, § 9: and "*La résidence habituelle d'un enfant coïncide le plus souvent avec le centre de vie d'un des parents, les relations familiales du très jeune enfant avec le parent en ayant la charge étant en règle générale déterminantes*"). On this matter, the parental family environment and/ or the settled purpose from a child's perspective are determining (*cf.* subsection II).

1874 Even when this is a non-Contracting State and the child later moves to a Contracting State. The latter move causes the provisions of the Convention to be extended over the wrongful act occurring in the non-Contracting State (*Re H (Abduction: Retention in Non-Contracting State),* 2019, EWCA Civ 672, § 53).

of social and family bonds[1875] in State A, for instance where he or she lived with both parents prior to their *de facto* separation, with no settled purpose from a child's perspective in State B[1876]. Therefore, a comparative assessment of both jurisdictions should occur[1877]. In addition to factual proximity, the child's best interests should support the determination of the degree of the child's integration in States A and B in relation to the above appreciable period. Specifically, the separation from his/ her primary carer[1878] or close extended family, as well as from his/ her social entourage, should be avoided. Thus, if the primary carer lived, or the child's entourage was, in State A, that should indicate a sufficient degree of integration. The child's best interests should also guide the derogations from habitual residence, for instance if the wrongful act was determined by domestic violence or analogous situations[1879].

## § IV. Absence of Habitual Residence in Relation to Abduction

**594.** In the framework of the HC-1980, the issue pertaining to the absence of habitual residence should be interpreted independently from the context of custody. In particular, this situation may exclude the applicability of the Convention and its safeguards[1880]. With regard to Brussels IIA, it has been said that when two conclusions lead to the determination of one habitual residence or its absence, the former should prevail[1881]. Based on the current practice, and irrespective of the context, the lack of habitual residence may be a true reality. It would be artificial to determine the child's habitual residence, or revive his/ her last one[1882], for the sole purpose of rendering the Convention

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1875 School, friends, hobbies, housing, culture, language, effective family care.

1876 The child's visit to the parent holding access rights, or temporary holidays, would not trigger a settled purpose from a child's perspective. A considerable 'amount of adult pre-planning', a transfer of the child's family, as well as social life, through objective factors such as a house, even if rented, nursery, or close extended family, would be more valuable factors (ibid. HAY *et al.*; *B (A Child) (Abduction: Habitual Residence*); *Re P and O (Child Abduction: Anticipatory Breach)*, 2016, EWHC 3535, § 69; *JDTK*, 2019, CSOH 4; and Cour de cassation, 4 March 2015).

1877 Ibid. *Z (A Child: Hague Convention application),* § 72: "What the court is required to do is to undertake a comparative analysis of the position in both jurisdictions".

1878 Ibid. KILKELLY/ LIEFAARD, p. 181.

1879 Ibid. See also I. PRETELLI, Original Aporiae in the 1980 Child Abduction Convention and in the Brussels II System*, iFamZ*, 4, 2019.

1880 Ibid. BUCHER, p. 59; BEAUMONT/ MCELEAVY, p. 184; and US *Monasky v. Taglieri.*

1881 Ibid. *Re P and O (Child Abduction: Anticipatory Breach)*, § 67; *In the matter of B (A child),* 2016, UKSC 4, § 42.

1882 *B (A Child) (Abduction: Habitual Residence)* [2020] EWCA Civ 1187, § 68: "[…] it would be 'wholly contrary to the interests of' the child for her to be 'returned to Australia, where there are no family members, where there is no family home' and where the father had no employment. It would also be a 'wholly artificial exercise to invite the courts of Australia to make welfare interest decisions in respect of' the older child alone when 'both of these parents had made a clear and reasoned decision to leave Australia and to base their new home back again in the USA'.

applicable[1883]. More importantly, such a conclusion would not fulfill the Convention's objectives to determine a court that is realistically close to the child's best interests, and it would support a fragmented operation of habitual residence in analogous (non-)conventional contexts[1884].

**595.** Authorities should therefore be careful when performing the factual and circumstantial assessment[1885]. In particular, the appreciable period should be that mentioned *supra*[1886]. They should not determine the absence of habitual residence based only on the precarious conditions related to the child's status[1887]. A child seeking asylum might be able to acquire habitual residence if his/ her acclimatization is evident[1888]. In some circumstances, a child was found to be habitually resident in the place where he or she was involuntarily hospitalised[1889]. Thus, a child may change habitual residence very quickly[1890], although on this point national practices are divergent[1891]. Finally, a child may establish a habitual residence after the appreciable period, regardless of its

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1883 Ibid. BUCHER.

1884 According to the UK practice, the presence of the child's habitual residence in a non-Contracting State, in principle, should not preclude the courts from ordering the child's return (ibid., *B (A Child) (Abduction: Habitual Residence),* § 115).

1885 *Cf.* subsection III *supra*.

1886 "Prior to the parental *de facto* separation and in any case before the wrongful act objectively assessed and noticeable for the left-behind parent" (*cf.* subsection III).

1887 Note 1252, BUMBACA. By contrast, courts may decide to stay the return order on the basis that an asylum application was started (*K (A Child) (Stay of Return Order: Asylum Application) (Contact to a Parent in Self-Isolation)*, 2020, EWHC 2394 (Fam), § 24).

1888 US Court of Appeal (2nd cir.), *Angelica Asuncion Mota, Plaintiff–Appellee, v. Jose Luis Rivera Castillo, Defendant–Appellant* [15 August 2012] No. 12–180. In the latter case, the US courts determined that a child, who had entered illegally and lived with her father in the US, had not established habitual residence by reason of, *inter alia*, her lack of acclimatization and uncertain immigration status. Therefore, a return order to Mexico was issued.

1889 *JDTK*, 2019, CSOH 4: "The inability of an infant child to make choices resulted in the intention of the parents as to her residence being a factor but only one of many facets of the case". This was stated in a Scottish judgment in which the courts concluded that a newborn, who was living with her parents in Ireland, had acquired a new habitual residence in Scotland on the basis that she was integrated there. The actual original purpose for her move to Scotland had been to temporarily visit her grandparents in the course of which a tumour was diagnosed. She was then hospitalised.

1890 *BMC v. BGC* [11 May 2020] HKCA 317, § 97-100; *S (Children)* [2020] EWCA Civ 515; BGer 5A_21/2019, 01.07.2019.

1891 Unlike the Scottish courts in '*JDTK*' (*supra*), the courts in Hong Kong maintained, in a similar newborn's context, that a child who was born and initially lived in Hong Kong, and later relocated with both parents to the US, had continued to be habitually resident in Hong Kong based on, *inter alia*, the contradictory settled purpose (§ 101, 102: "On the evidence, there was clearly no agreement or common intention of the couple to relocate to the USA […] As the family had left in ambiguous circumstances on 30 June 2019, B would not lose her habitual residence in Hong Kong for some time and correspondingly would not acquire a new habitual residence in the USA until later"). Arrêt n°462 du 12 juin 2020 (19-24.108) - Cour de Cassation - Première chambre civile - ECLI:FR:CCASS:2020:C100462. According to the latter French case, the Court of Cassation reversed the lower instance's decision and affirmed that a newborn had abandoned the former habitual residence in Greece and, approximately seven months later, acquired a new one in France, irrespective of the common shared intentions ("*qu'il était arrivé l'âge d'un mois en France et y avait séjourné de manière ininterrompue depuis lors avec sa mère, son environnement social et familial et, par suite, le centre de sa vie, ne s'y trouvait pas, nonobstant l'intention initiale des parents quant au retour de la mère, accompagnée de l'enfant, en Grèce*".

absence before that time. In the latter scenario, the child's return under the HC-1980 should not take place[1892].

**596.** In summary, a uniform fact-based determination from a child's perspective, taking into account his/ her age, should considerably reduce the situations of children without habitual residence. However, as in the context of custody[1893], a child may disengage from his/ her former, and not acquire a new, habitual residence[1894]. This situation would exclude the applicability of the HC-1980, allowing instead custody proceedings under the HC-1996[1895]. Despite the absence of a jurisdiction founded on habitual residence, the HC-1996 rule on physical presence, indicating a forum that is timely and geographically close to the child, is preferred to his/ her artificial home.

# Chapter III: Maintenance

**597.** *Section I* deals with the operation of habitual residence[1896] according to the treaty rules[1897] governing financial consequences[1898] towards spouses and children[1899]. *Section II* examines relevant case law, including on interconnected

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1892 *S (A Child - Hague Convention 1980 - Return To Third State)* [2019] EWCA Civ 352, § 57, 65: "It was an order which required the mother to move to a state with which she and A clearly had connections but in which they had not been living and to which there was no existing agreement or arrangement that they would move […] there is no other order which it would now be appropriate to make under the 1980 Convention".

1893 *Cf.* section II *supra*.

1894 Ibid. Swiss Federal Court, 5A_121/2018; US *Monasky v. Taglieri*. In both cases, this Author found that the child may have abandoned his former, and not acquired a new, habitual residence (see notes 1252, 1654 above). This is especially so in the case of parents and/ or children leading peripatetic, nomadic or transient lifestyles (ibid. *NH v. AH*, 30 July 2015, High Court of Justice Family Division; and *AS v. CS (A minor)*, Irish Supreme Court).

1895 We refer to *section II* of this part for the question of the absence of habitual residence within custody proceedings. Essentially, the analysis argues in favour of prospective acclimatization and mere presence as 'replacing rules'.

1896 For purposes of jurisdiction and the applicable law. Issues of recognition and enforcement, as well as on cooperation, are not tackled by the current analysis unless in relation to indirect jurisdiction.

1897 Part I contains an overview of the international legal framework relevant to this study, including in the field of maintenance. In this Chapter, particular attention is given to the 1973 Hague Convention on Maintenance applicable law, the 2007 Protocol on Maintenance applicable law, and to the 2009 EU Regulation on Maintenance. Reference is also made to the 2007 Hague Convention on 'Maintenance Recovery'. The Lugano Convention, together with the 1956 UN Convention on the recovery abroad of maintenance, are instead excluded here. General reference to the role of habitual residence within the latter Conventions can be referred to in part I. We recall that the UN Convention on the recovery abroad of maintenance does not provide the use of habitual residence.

1898 Financial consequences, in this Chapter, refer to the determination of spousal and child maintenance. We examined financial consequences partly in Part II, namely concerning property regimes, which are therefore excluded from this analysis. Pat V (*infra*) is entirely dedicated to inheritance, which also denotes a financial character.

1899 Maintenance involving public authorities is not dealt with, although they may intervene towards an indigent debtor (see M. M. VERWILGHEN, Explanatory Report on the 1973 Hague Maintenance Conventions, HccH publications, 1972, p. 397; and the EU Maintenance Regulation, § 14).

proceedings involving parental responsibility[1900]. *Section III* discusses issues of alternate, and absence of, habitual residence[1901].

## Section I Maintenance Legal Framework

**598.** Habitual residence applies primarily in all the relevant legal instruments, although the interplay is present with traditional connecting factors such as nationality and domicile[1902].

### § I. Hague Convention 1973

**599.** The HC-1973[1903] adopts habitual residence on a primary basis for the determination of the law applicable to cross-border spousal and child maintenance (article 1). In the framework of the Convention, the applicable law refers to the internal law[1904] of the State[1905] of the creditor's habitual residence. The law may be on a subsidiary basis the one of the spouses' common nationality, or failing that the *lex fori*[1906]. The Convention exceptionally[1907] extends the law that governed the divorce towards the determination or modification of spousal support (article 8). It also entitles the debtor, in proceedings involving persons related collaterally or by affinity, to contest maintenance obligation when this is not provided under the law of the spouses' common nationality, or under the law of debtor's habitual residence (article 7). The change of the creditor's habitual residence causes simultaneously the change of applicable law (article 4.2).

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1900 For parental responsibility, see the previous chapter II.

1901 For a complementary analysis on these issues, see part I, chapter IV, sections III and IV of this book.

1902 In the context of the HC-1973, habitual residence supersedes domicile by reason of inconsistent issues related to the meaning of the latter, varying from country to country (ibid. VERWILGHEN, p. 405) – all issues dealt with in Part I of this book.

1903 The HC-1973 governs the aspects relating to the law applicable to maintenance. It is nearly superseded by the 2007 Protocol given that it has been ratified by almost (11) all the HC-1973 Contracting States (15), except for Albania, Japan, Switzerland and Turkey. For a complementary analysis, see part I, chapter I, section II.

1904 Reference to national conflict-of-law rules is therefore excluded.

1905 This refers to Contracting and non-Contracting States. The rules are *erga omnes* (art. 3).

1906 These exceptions apply when the creditor cannot obtain maintenance under the law of his/ her habitual residence (ibid. VERWILGHEN, p. 440).

1907 Although *de facto* primarily. This provision refers to, *inter alia*, a divorce or legal separation, which was granted or recognised. Criticism can be expressed against this rule, not provided in the HP-2007 (*cf.* subsection II *infra*). One main reason is the disconnection between the divorce and the maintenance obligation in circumstances where for instance the law applicable to divorce does not contemplate maintenance obligations (ibid. BONOMI, p. 42).

## § II. Hague Protocol 2007

**600.** The HP-2007[1908] sets out the same general rule adopted in the HC-1973. Accordingly, the applicable law determination is primarily founded on the creditor's habitual residence[1909]. Additionally, the Protocol introduces a new approach[1910]. Compared to its predecessor, it derogates from the rule of article 3, by referring to the *lex fori* when the authorities of the debtor's habitual residence[1911] are seised by the creditor (article 4.3). This rule, even though innovative, may be particularly criticised as it renders the law of the creditor's habitual residence subsidiarily applicable[1912]. Potentially more important is the reference made to the law of the *last common habitual residence* of the spouses or ex-spouses. This may apply if closer to the place of marriage (article 5)[1913]. Absent in the HC-1973, the Protocol adopts, modernly, the possibility of the creditor and debtor to conclude a choice of applicable law[1914].

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1908 For a complementary analysis on the Protocol, see part I, chapter I, section III. This is the only time that a 'Protocol' is examined in the current book. This instrument proves essential when specific aspects or notions introduced in one or more Hague Conventions require further clarification. Therefore, it is argued in this study that a Protocol is necessary for the intradisciplinary operation of habitual residence in international family law (*cf.* part I, chapter IV, section I).

1909 This is again, as in the Convention, the internal law of the Contracting or non-Contracting State (art. 2, 3 and 12). The law of the new creditor's habitual residence applies when a change occurs. The Advocate General's opinion on a CJEU decision that was held recently, concerning art. 4(3) of the 2007 Protocol, appears to confirm that the change of the debtor's habitual residence should also trigger the change of applicable law (Opinion of Advocate General Szpunar, *Mölk v. Mölk* [2 May 2018] C-214/17, § 19: "[…] As is apparent from the wording of that question and the facts set out in the request for a preliminary ruling, this is a situation where there has been no change in the debtor's habitual residence. Furthermore, it is apparent from the wording of that request that there has also been no change in the creditor's habitual residence").

1910 Ibid. BONOMI, p. 37, § 64-65: "Article 4(3) provides that the law of the forum is applicable on a principal basis if the creditor has seized the competent authority of the State where the debtor has his habitual residence […]. Application of the law of the forum is subject to two conditions: first, the authority seized must be that of the State of the debtor's habitual residence and, second, the proceedings must be instituted by the creditor". This provision represents a derogation from art. 3.

1911 With regard to the law of the debtor's habitual residence, this applies to, *inter alia*, maintenance between children and spouses, and not between spouses.

1912 Concretely, the *lex fori*, corresponding to the debtor's habitual residence, is preferred to the law of the creditor's habitual residence even though the latter might be more favourable (see ibid. BONOMI, p. 37; and G. P. ROMANO, Droits et obligations alimentaires entre êtres humains, droits et obligations entre Etats et intérêt de la Suisse à adhérer aux Conventions de La Haye de 2007, *RSDIE*, 2021, p. 28). Furthermore, the law of the forum applies, this time on a subsidiary basis, also in those circumstances where the creditor cannot obtain maintenance under the law of his/ her habitual residence (article 4.2). We recall the recourse to the law of the spouses' common nationality if the creditor is unable to obtain maintenance under the laws previously mentioned (art. 4.4).

1913 This rule relies on the principle of 'closer connection' already discussed in this study (*cf.* chapters I and II *supra*).

1914 This includes, *inter alia*, the law of either party's habitual residence at the time of designation (art. 8.1 lit. b). The explanatory report suggests that the designation of applicable law may take place before or during the marriage. The elected law governs maintenance during marriage and after divorce. The designation cannot involve minor children (under 18) nor vulnerable adults (see part IV *infra*). The conditions to renounce maintenance shall be governed by the law of the creditor's habitual residence at the designation (Ibid. BONOMI, p. 55).

**601.** The explanatory report to the Protocol provides some guidance concerning the interpretation of habitual residence. It refers to the '*legal and factual conditions of the social environment in the country where the creditor lives and engages in most of his or her activities*'[1915]. Additional benefits arising from the use of habitual residence are mentioned in the Report: (a) it secures equal treatment among creditors living in the same country; (b) it is extensively employed for the determination of the competent forum according to treaties and domestic laws applicable to maintenance; and (c) it ensures 'parallelism' between forum and *jus*[1916]. The Report states that habitual residence should indicate a uniform interpretation taking into account the Protocol's objectives, rather than national law references[1917]. It is added that the criterion should denote stability, as opposed to simple residence or temporary stays[1918]. Accordingly, the general principle is that 'temporary stays', alone, do not establish habitual residence[1919].

**602.** The Report clarifies that the change of the creditor's habitual residence for the purposes of international jurisdiction may not find *coincidence* with the creditor's habitual residence to the extent of applicable law. The main reason lies in the relevant date fixed for the change of habitual residence: within the Protocol, it occurs during the proceedings, as opposed to the time of the seisin,

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[1915] Accordingly, habitual residence responds to the proximity between the appreciation of the creditor's right or interest (maintenance) and the 'concrete society' where he or she lives (Ibid. BONOMI, p. 29; VERWILGHEN, p. 441).

[1916] The report, p. 31, refers to, *inter alia*, 'Brussels I' because at that time the Regulation was applicable to maintenance. With the endorsement of the EU Maintenance Regulation (*i.e.* art. 3), uniformity between forum and *jus* founded on habitual residence is also achieved.

[1917] Ibid. BONOMI, p. 31. This conclusion is in line with the proposal conceived in this book (ibid. Introduction): "Habitual residence has been essentially adopted since its origins as a conventional, *quasi*-standardised, connecting factor whose factual operation has been generally linked to treaty-based objectives (*i.e.* Hague Conventions, EU Regulations). Its implementation within national legal orders should therefore be compatible with the binding treaty objectives. The aim and operation of habitual residence have been adapted to the transnational setting, in that a national or international definition is systematically avoided. Thus, habitual residence does not relate to a single national interpretation, although over the years the domestic legislative efforts in conceptualising it within national legal orders have affected its foundations. This study argues that habitual residence should operate as an inter-country concept, fundamentally by endorsing it in a uniform manner, and avoid domestic 'free-standing' legislative adaptations".

[1918] A given example concerns a creditor who lives for a few months in a State for schooling or temporary activities. That State, according to the Report, should not be considered as the place of habitual residence showing the settling of the creditor. In this regard, we agree that activities of temporary duration would not be constitutive of a residence that is habitual in nature if they were lacking stability. Nonetheless, irrespective of the duration as a non-decisive element, school may be a decisive element determining both the child's social environment and the settled purpose (*i.e.* to abandon the former and settle in the new State). Similarly, still apart from the duration, regular visits to the State where the creditor's family lives, creating a principal family home, should possibly exclude habitual residence in the State of temporary presence. A change of habitual residence occurs, despite the short duration, when a creditor relocates for educational or professional activities with a tangible settled purpose (see, by analogy, chapter II *supra*; and HccH, Practical Handbook for Caseworkers under the 2007 Child Support Convention, 2007, p. 37).

[1919] Ibid. p. 33, § 47: "[…] there is in principle no change of habitual residence unless the new residence at some point becomes stable if, for instance, the creditor undergoing training in a foreign State finds a job enabling him to set up residence there on a durable basis".

which is the relevant date for international jurisdiction[1920]. The reason for allowing a change of applicable law[1921] during the proceedings is explained in the future prospect and effects of the judgment in that it would be illogical not to consider the change in the creditor's life circumstances[1922].

**603.** The Report introduces a reason of 'fairness' to justify the recourse to the applicable law of the last common spouses' habitual residence in circumstances involving maintenance between spouses and ex-spouses (article 5)[1923]. The seised judge should consider all the laws possibly connected to the marriage in the anamnesis[1924]. This last point may lead to a meticulous and lengthy tracing of the spouses' and ex-spouses' cross-border movements, throughout their conjugal life[1925]. On this point, reference is made to the following examples.

**604.** An Italian-Russian couple, he, Italian, she, Russian, enters into marriage in Italy where they live for one year. Due to working reasons, the couple relocates to Russia where they live for one year. The husband often travels to Italy to visit his parents and to explore new employment opportunities. Thereafter, the wife moves to work in France, the husband moves to work in Switzerland. The wife files for spousal support in France.

> Let us suppose that the French authorities retain jurisdiction under the EU Maintenance Regulation[1926] and the wife is considered to be the

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1920 The principle of continuing jurisdiction may exclude the parallelism between forum and *jus*.

1921 The Report specifies the relevant time when the change of applicable law should occur, which is when the residence acquires stability, and not before this moment (see ibid. BONOMI, p. 33). Further, the change of habitual residence should produce effects only concerning the law applicable to future claims and judgments, and not for those having acquired force of *res judicata* before the effective change (Ibid.: "The change of applicable law occurs as from the moment when the habitual residence changes, but only for the future (*ex nunc*). The creditor's claims relating to the period prior to the change accordingly remain subject to the law of the former habitual residence").

1922 Another reason also refers to what was previously said: namely that habitual residence reveals proximity between the 'creditor's interest and his/ her concrete society'.

1923 An illustrative scenario is that of the creditor's applicable law relying on his/ her 'current' habitual residence, which may be unfair towards the legitimate expectations the debtor had during the marriage. More precisely, the Report seems to refer to closer connection, between law and marriage, as meaning of the current, last or previous common habitual residence, even the common domicile. It should also incorporate the spouses' common nationality, including their past and present nationalities. The current common habitual residence should indeed be different from the creditor's current habitual residence, which would remain a rare scenario in practice (Ibid. BONOMI, p. 41-43), corresponding to the situation of concurrent habitual residence highlighted in this study.

1924 Ibid. BONOMI, p. 45, § 85: "This implies that the court, pursuant to such a request, will ascertain whether the marriage has closer connections with a law other than that of the creditor's habitual residence. In so doing, it shall have regard to all the connections of the marriage with the various countries concerned, such as the spouses' habitual residence and / or domicile during the marriage, their nationalities, the location where the marriage was celebrated and the location of the legal separation or divorce".

1925 The report, p. 45, states that the reference of art. 5 to the 'last common habitual residence' is a mere indication which might therefore be derogated at any time, even, exceptionally, to the common nationality of a State where the spouses lived at the beginning of their relationship.

1926 *Cf.* subsection IV *infra*.

creditor, article 3 of the Protocol would allow the same authorities to apply French law. In case the husband, as debtor, believes that French law would be unfair, he is entitled to object under article 5[1927] and ask the French courts to determine a law that is closer to the marriage. If the French courts determine that Russian law should apply by virtue of closer connection based on the couple's last common habitual residence, this result might still be unfair to the husband who maintains indirect links through his wife's nationality. Conversely, if Italian law should apply on the basis of the couple's former common habitual residence, this result might likewise be unfair towards the wife who maintains indirect links through her husband's nationality. Furthermore, if the competent courts cannot determine the degree of closer connection, the assessment will have by then entailed significant costs and delays in the proceedings, and the general rule, which in point determined French law, under article 3, should still apply[1928].

**605.** Another example would be the one of an Irish-Swiss couple, he, Irish, she Swiss. They live firstly in Switzerland, and later in Ireland. During their ten-year marital life, several 'temporary stays' occur back and forth between the two countries where the respective families live. After a marital dispute, the couple separates: the husband continues to live in Ireland and the wife settles in Switzerland. The husband seises the Irish courts for divorce, which retain jurisdiction under Brussels IIA (article 3). The wife, as debtor, being wealthier and feeling that Irish law would be more generous with her husband, objects to Irish law over maintenance, relying on the Protocol[1929].

The Irish courts may determine that Swiss law should apply by virtue of the former common habitual residence. Indeed, this would be fairer for the wife. Instead, here both spouses have connections with both States, therefore the *favor creditoris* based on the creditor's weakness

[1927] It is desirable that such moment would be compatible with the one of the final briefs of the merit (BONOMI, p. 43).

[1928] One may argue that the marriage connection is an important connecting factor for the purposes of financial consequences (see the proposals provided in part II of this book, concerning alternate/ concurrent habitual residence). In the meantime, discrepancy is noticed with property regimes where under the 1103 Matrimonial Regime Regulation, art. 26(1)(a), reference is made to the 'first common habitual residence after the conclusion of the marriage'. The different approach potentially lies in the appreciable period: while properties are in principle acquired before, maintenance obligation arises after, divorce. In the latter explanation, the character of fairness towards both parties is altogether convincing. The issue is therefore with the relation between the lengthy assessment of closer connection and the multitude of States that may be linked to the marriage. On this matter, today's marital life may require tracing cross-border movements over many years, as opposed to a couple established in one State only. In addition, despite the little evidence, the debtor's objection may be utilised to cause delays in the procedure, or simply to avoid the law of the creditor's habitual residence – who still remains the weaker party (see C. ISTVAN NAGY, Love and Money: Problems of Characterisation in Matrimonial Property and Maintenance Matters in the EU, p. 418-423; and ibid. ZUPAN, p. 319, in: BEAUMONT *et al.*, note 692).

[1929] Art. 5 would apply through art. 15 of the Maintenance Regulation applicable to Ireland.

> may lose its rationale in favour of the debtor's fairness – a situation which could also amount to 'law shopping'[1930].

**606.** On the above point – in particular for (a) issues of legal certainty and predictability in respect of both parties; (b) delimiting the focus of the judicial analysis on a specific appreciable period; and, ultimately (c) reasons of coherence with the general principle of creditor's weakness – the following is suggested:

> It would be potentially a better solution to provide a *two-step provision* (under the current article 3 of the Protocol) founded on habitual residence. Such should contain an alternative choice between both principles of 'creditor's weakness' and 'marriage connection' upon debtor's objection, clarifying the particular point in time for both the objection and the marriage connection[1931].

## § III. Hague Convention 2007

**607.** The HC-2007[1932] governs the international recovery of maintenance arising from both parent-child relationship and spousal support. It aims at ensuring, *inter alia*, international cooperation[1933], and effective recognition and enforcement of decisions through specific measures (articles 1 and 2). It further deals with the international administrative jurisdiction over maintenance (article 9). The rules on administrative jurisdiction and cooperation (chapters II and III) apply to child support[1934] only[1935] (article 2.1 lit. c). The rules on

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1930 Ibid. ISTVAN NAGY, p. 411-412: "Experience shows that today matrimonial property and maintenance are the most important driving forces in international matrimonial matters and they are also powerful inducements for forum shopping". The same example could have alternatively involved a Swedish-Swiss couple who celebrated their marriage in Sweden, living there for one year and later moving to Switzerland for two years. The wife, Swedish (and naturalised Swiss), settles back in Sweden. The husband, Swiss (and naturalised Swedish), seises the courts for divorce in Switzerland under the SPILA (article 59). The wife objects to Swiss law over maintenance under art. 5 of the Protocol. The Swiss courts may determine that Swedish law (usually more generous) should apply by virtue of the couple's former common habitual residence or one of their common nationalities. The latter example considers that Switzerland may ratify the 2007 Protocol, which would supersede the HC-1973 that Switzerland is currently applying (for more details on the possible future Swiss ratification of the Protocol, see G. P. ROMANO, La Suisse a-t-elle intérêt à adhérer aux Conventions de La Haye de 2007 en matière d'obligations alimentaires ?, in: Société suisse de droit international, Conférence annuelle, 22 novembre, Lucerne, 2019).

1931 The proposal here is the following: 'the law of the State of the creditor's habitual residence at the time of the institution of the proceedings; or upon the debtor's objection at the time of the institution of the proceedings, the law of the closest connection to the marriage at the time of the institution of the proceedings, with exceptional focus on the common habitual residence at the time of the celebration of the marriage'.

1932 For a complementary analysis on the Convention, see part I, chapter I, section III of this book.

1933 The explanatory report to this Convention states that the protection of children is one of the main concerns of international cooperation at the Hague Conference (ibid. BORRAS/ DEGELING, p. 57).

1934 E. JAYME, Cultural Dimensions of Maintenance Law (ibid. in: BEAUMONT) p. 11. See also ibid. BORRAS/ DEGELING, p. 69.

recognition and enforcement, which are also matters covered by this Convention, contemplate spousal support if filed together with a request for child support.

**608.** The HC-2007 employs both habitual residence and residence. The Hague Convention's explanatory report mentions that during the HccH Special Commission, habitual residence was agreed on to be an appropriate connecting factor for the recognition and enforcement of judgments on maintenance[1936]. The Report indicates that article 9 contains a 'definition'[1937] of simple residence. Accordingly, it must be more than mere presence[1938]. Thus, habitual residence is not required for the determination of international administrative jurisdiction, precisely for the filing of an application[1939] (*i.e.* of recognition and enforcement of decisions)[1940] before the Central Authorities[1941]. The Convention provides a rule similar to the one of continuing jurisdiction[1942]. A claim seeking to modify or issue a new maintenance decision, which was already rendered in the Contracting State of the creditor's habitual residence, must be filed before the same authorities if the creditor still holds his/ her habitual residence in the same State[1943].

**609.** Chapter V of this Convention, accentuates the role of habitual residence. The Special Commission agreed that habitual residence in the framework of this Convention should not be glossed with the notion of habitual residence

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1935 Reservation can be made by Contracting States to extend their applicability towards spousal support (art. 2.3, 63).

1936 Ibid. BORRAS/ DEGELING, p. 73: "*In the end, it was decided that 'habitual residence' was still an appropriate connecting factor for the purposes of recognition and enforcement* […]".

1937 In our view this, as other examples mentioned in this study, refers to a 'contextualised reference' rather than a specific definition (note 24: "A definition explains the meaning of a word. This study argues that the national references to habitual residence indicate the contextualised interpretation of the notion in which additional factors should be assessed, without providing a clear or concrete definition. In some circumstances, we refer to *quasi*-definition, which is employed interchangeably with 'contextualised legislative reference', when specific factors are mentioned in the domestic provision, although without fully endorsing a legal definition").

1938 Ibid. Practical Handbook, p. 37. The Hague Protocol's report agrees that 'residence' is neither habitual nor an occasional presence (BONOMI, p. 31).

1939 The application envisaged under art. 10 should be filed before the Central Authorities of the 'requesting State', which does not have to be necessarily the creditor's habitual residence (Ibid. BORRAS/ DEGELING, p. 113).

1940 Art. 10 of the Convention specifies the typology of available applications.

1941 The rationale of using residence is to provide easier access in ensuring the international recovery of child support (BORRAS/ DEGELING, p. 111).

1942 This rule can be derogated through specific exceptions indicated in art. 18(2), and 31(d). The latter provisions refer to the situation where a non-Contracting State is involved and difficulties related to the filing might be encountered. Therefore, the debtor will be allowed to apply at his/ her own habitual residence (ibid. BORRAS/ DEGELING, p. 191).

1943 Ibid. p. 153, § 417: "In the first case, a decision is given in State A where both creditor and debtor are resident. The debtor changes residence to State B. Because of the debtor's changed circumstances, she or he wishes to have the original decision modified. Under Article 18(1), as long as the creditor remains habitually resident in the originating country (State A), the debtor is obliged to bring modification proceedings in that country, and may not do so in any other Contracting State".

employed within the Child Abduction Convention. The main reason for this being the different purposes of the two treaties, more specifically the lower 'conflicting' degree in maintenance applications[1944]. The Report points out that habitual residence, in particular within article 20[1945], reveals a sufficient connection between the individual and the State of origin[1946]. It clarifies that habitual residence is not required for the appeal challenging the declaration of enforceability or registration for enforcement (article 23.6)[1947].

## § IV. EU Maintenance Regulation

**610.** The Maintenance Regulation[1948] represents the most comprehensive piece of legislation providing uniform rules on international jurisdiction, recognition and enforcement, as well as cooperation in the field of child and spousal maintenance[1949]. It introduces the origins referring to the Brussels I Regulation[1950], which used to also incorporate maintenance in line with the Lugano Convention[1951].

**611.** The Maintenance Regulation sets out a similar rule to continuing jurisdiction, mentioned in the HC-2007. In particular, when a judgment is

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[1944] Ibid. BORRAS/ DEGELING, p. 166, § 444: "On the other hand, in the present context 'habitual residence' is a connecting factor for the purpose of recognition and enforcement in a Convention whose purpose is to facilitate the recovery of maintenance in international cases. It has to be added that most applications for recognition and enforcement of maintenance decisions are likely to be uncontested".

[1945] Concerning art. 20, a little incongruence is noticed in the lit. d of paragraph 1, which specifies that a judgment rendered in the child's habitual residence should be recognised and enforced in the Contracting States provided that the respondent was living or has 'resided' there to give support for the child. The term 'resided' might be referring here to simple residence although, in the same provision the child's habitual residence, and previously the creditor's and the respondent's habitual residence, is required. The Report is silent on this point and does not make any distinction concerning the words employed by the provision, mentioning only the requiring nexus between the debtor's residence and the child's habitual residence at the time when the proceedings were instituted (BORRAS/ DEGELING, p. 163).

[1946] This State generally corresponds to the place where the respondent and/ or the creditor, including the child, were habitually resident at the time the proceedings were instituted.

[1947] BORRAS/ DEGELING, p. 175. It is observed that art. 23(6) appears a little inconsistent with art. 32(5) of the 2009 Maintenance Regulation (subsection IV *infra*), which instead applies habitual residence for the appeal against the declaration of enforceability.

[1948] For a complementary analysis on the Regulation, see part I, chapter I, section IV of this book.

[1949] The Regulation applies to 26 EU Member States. All except for Denmark. It is not applicable to the UK since 11 pm of 31 December 2020 (end of the transition period), save ongoing proceedings prior to that date. The UK has applied to join the Lugano Convention, although the process of ratification has not yet ended. The UK conflict-of-law rules, according to the amendments of the 'Jurisdiction and Judgments (Family) (Amendment etc.) (EU Exit) Regulations 2019', will govern jurisdiction until the coming into force of the Lugano Convention.

[1950] Brussels I, art. 5(2), used to provide the rules on child support. Within the 'new' Maintenance Regulation, the domicile or habitual residence of the defendant no longer entail the non-applicability of the Regulation (§ 15).

[1951] Within the Lugano Convention, still applicable to maintenance, we recall that habitual residence applies alternatively to domicile.

rendered in the Member State of the creditor's habitual residence, and he or she still habitually resides in that State, the decision can be subject to a debtor's claim for modification, or the maintenance obligation concerned can be subject to a new judgment, only in that State (recital 17, article 8). This rule should be extended to maintenance involving proceedings arising between HC-2007 Contracting States and Member States of the Regulation, provided that specific conditions apply[1952]. For the determination of the international jurisdiction of the administrative authorities, the Regulation allows the same flexibility that is envisaged in the HC-2007, namely the use of simple residence rather than habitual residence (recital 32, article 55). The Regulation, as for the HC-2007, indicates only a contextualised reference in relation to simple residence (recital 32). It does not offer explanatory guidance on the interpretation of habitual residence, in particular for the determination of general jurisdiction based on the defendant's or, alternatively, creditor's habitual residence (article 3)[1953]. It does not mention the relevant date for the habitual residence determination.

**612.** A choice-of-court agreement is available[1954]. For the relevance here, party autonomy in spousal maintenance refers to either party's habitual residence (article 4 lit. a), or to the spouses' or former spouses' last common habitual residence of at least a year's duration (lit. c (ii)). Unlike article 3, the Regulation clarifies that the relevant date for the habitual residence determination may be either at the time the agreement is concluded or at the seisin[1955]. The rules on applicable law refer to the 2007 Protocol (article 15)[1956].

## Section II Maintenance as a Principal Matter and Ancillary to Parental Responsibility/ Divorce

**613.** The following judgments are taken as a reference for the operation of habitual residence. They incorporate the reasoning of the CJEU and national courts in the implementation of the treaties mentioned in the previous section.

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1952 § 17: "To ensure proper symmetry between the 2007 Hague Convention and this Regulation, this rule should also apply as regards decisions given in a third State which is party to the said Convention in so far as that Convention is in force between that State and the Community and covers the same maintenance obligations in that State and in the Community".

1953 Art. 3(c) and (d) set out the rules governing jurisdiction when maintenance is ancillary to proceedings on personal status (*i.e.* divorce), or parental responsibility. The ancillary jurisdiction should not be based solely on the nationality of one of the parties.

1954 Art. 4(3): "This Article shall not apply to a dispute relating to a maintenance obligation towards a child under the age of 18".

1955 The appreciable period in matters of international jurisdiction, and limited to two specific moments, appears consistent with other EU regulations (*i.e.* Brussels IIA, Property Regimes).

1956 Denmark proceeded with the 'opt-out' from the Regulation and did not ratify the Protocol. UK had decided for the opt-in to the Maintenance Regulation but did not ratify the Protocol.

## § I. CJEU Case Law

**614.** This first case[1957] sets out guiding principles for the habitual residence determination. It involved two couples: (a) a mother, applicant, who was habitually resident in Germany and claimed child maintenance against the father, respondent, who was resident[1958] in Belgium; (b) a wife, applicant, who lived in Germany and claimed maintenance against her husband, respondent, who lived in Barbados. Claims were filed to the German courts. The Courts stayed proceedings and requested the CJEU preliminary ruling concerning the compatibility of the German domestic rules, governing territorial jurisdiction, with the rules of the Regulation, governing international jurisdiction[1959].

> The CJEU reiterated the objectives of the EU Maintenance Regulation. Namely, the proximity between the creditor and the competent forum in that the creditors' interests and the proper administration of justice should be preserved[1960]. In relation to the principle of 'proper administration of justice', the Court held that it aims to optimise the organisation of courts but also to guarantee easier access to justice and predictable rules on jurisdiction for both creditors and debtors[1961]. The Court maintained that the competent jurisdiction (article 3 lit. b contended here) must ensure a 'particular close connection' with the place of the creditor's habitual residence. In examining the issue of territorial jurisdiction, whose organisation is upon each Member State, the Court clarified that the determination of an internal competent court should rely on the *reasonable connection* between that court and the

[1957] CJEU, *Sanders v. Verhaegen*, *Huber v. Huber* [18 December 2014] C-400/13, C-408/13, ECLI:EU:C:2014:2461.

[1958] The Court refers alternatively to 'habitual residence' and 'residence'. In the present context, both terms should be interpreted as *habitual residence*.

[1959] § 16: "The Amtsgericht Karlsruhe takes the view that the national provision in question renders the international recovery of maintenance claims significantly more complicated, contrary to the objective of Regulation No 4/2009, inasmuch as maintenance creditors have to assert their claims before a court other than that for their place of residence, which results in time being wasted". In context, the claim was brought before the courts of the creditor's habitual residence for the purposes of international jurisdiction (art. 3 lit. b of the Regulation). However, in absence of habitual residence of one of the parties in Germany, national law determined the 'centralisation of jurisdiction'. Concretely, German law implied the transfer of jurisdiction from the applicant's habitual residence to a local court generally and centrally competent for the whole district area.

[1960] § 27-28: "Recital 15 in the preamble to the regulation states that the rules on jurisdiction as they result from Regulation No 44/2001 should be adapted in order to preserve the interests of maintenance creditors and to promote the proper administration of justice within the European Union […]. The rules on jurisdiction provided for in Regulation No 4/2009, like the rule set out in Article 5(2) of the Brussels Convention, are intended to ensure proximity between the creditor and the competent court, as indeed the Advocate General has observed at point 49 of his Opinion".

[1961] § 29: "It should also be pointed out that the objective of the proper administration of justice must be seen not only from the point of view of optimising the organisation of courts, but also, as the Advocate General has observed at point 69 of his Opinion, from that of the interests of the litigant, whether claimant or defendant, who must be able to benefit, *inter alia*, from easier access to justice and predictable rules on jurisdiction".

creditor's habitual residence[1962]. The Court concluded that Member States have to take into account the above principles in organising internal jurisdiction[1963].

**615.** The next case[1964] involved a child who was born and lived in Germany. The mother and the child moved to Austria where the child filed a maintenance application against the father. The Austrian District Court rejected the claim by virtue of the 2007 Protocol. It concluded that German law should apply to the arrears incurred during the period when the child was habitually resident in Germany (articles 3 and 4.2). The Regional Civil Court upheld the judgment. The child filed appeal before the Supreme Court, which was contested by the father[1965]. The Court requested the CJEU preliminary ruling.

The Court reiterated that when a maintenance claim is governed by the law of the creditor's new habitual residence following a change (article 3.2), such law cannot apply retroactively to arrears that should be governed by the law of the creditor's former habitual residence. This rule is derogated through the *lex fori* when: (a) it differs from the law that would otherwise apply under article 3(1)[1966]; and (b) the law under article 3, including that of the creditor's former habitual residence, causes the creditor's inability[1967] to exercise his/ her right of maintenance[1968]. The Court stated, in respect of predictability[1969], that

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1962 § 37: "[…] Therefore, the designation of the competent court must be based on there being a reasonable connection between that court and the place where the creditor is habitually resident […]".

1963 § 47: "It follows from all those considerations that Article 3(b) of Regulation No 4/2009 must be interpreted as precluding national legislation such as that at issue in the main proceedings which establishes a centralisation of judicial jurisdiction in matters relating to cross-border maintenance obligations in favour of a first instance court which has jurisdiction for the seat of the appeal court, except where that rule helps to achieve the objective of a proper administration of justice and protects the interests of maintenance creditors while promoting the effective recovery of such claims, which is, however, a matter for the referring courts to verify".

1964 *KP v. LO* [7 June 2018] C-83/17, ECLI:EU:C:2018:408.

1965 § 16: "LO for his part contends that Article 4(2) of the 2007 Hague Protocol does not apply where individual sums claimed by way of maintenance are subject to prescription or are time-barred. In addition, that provision could apply only if the proceedings had been initiated by the maintenance debtor or if the court seised was that of a State in which none of the parties concerned has his residence. In the present case, KP has seized a court in the State of his current habitual residence. Lastly, LO considers that that provision cannot be applied to obtain the payment of maintenance retroactively where the maintenance claim is made after the removal of the maintenance creditor".

1966 The law of the creditor's habitual residence.

1967 § 29: "As is apparent from Article 4(2) of the Hague Protocol, that provision, which makes it possible to apply the law of the forum instead of the law of the State of the maintenance creditor's habitual residence, takes effect only if those laws are different from one another".

1968 § 59: "The answer to the second question is therefore that the phrase 'is unable … to obtain maintenance', in Article 4(2) of the Hague Protocol must be interpreted as also covering the situation in which the creditor is unable to obtain maintenance under the law of the State of his previous habitual residence on the ground that he does not meet certain conditions imposed by that law".

the law designated under the Protocol should guarantee the sufficient connection to the 'family situation at issue'[1970]. The 'connection' between the court and the family situation arises when the debtor is able to satisfy the creditor's needs under the designated law[1971]. The Court maintained, *inter alia*, that the law of the creditor's habitual residence is the most closely connected with the creditor's family situation. Therefore, that law should be considered the best suited to govern the problems related to the creditor's maintenance. The Court concluded that Austrian law should apply over the child's claim, under article 4(2) of the Protocol, where such law shows the required 'connection'[1972].

**616.** The following case[1973] concerned a Romanian married couple whose child was born in Belfast where they lived before separating. The father moved to Romania, the mother and the child stayed in Belfast. The mother filed before the Romanian courts seeking, *inter alia*, marriage dissolution, sole parental responsibility, child's residence with her, and child's maintenance. The courts retained jurisdiction over the divorce petition, in accordance with Brussels IIA, but they separated the claim, opening two new individual cases concerning, respectively, parental responsibility and maintenance[1974]. The courts declined jurisdiction over parental responsibility[1975], in favour of the UK authorities under article 8 of Brussels IIA. The Romanian Court submitted a request for the CJEU preliminary ruling to the extent of maintenance.

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1969 § 47: "The fact that application of the law of the forum would be to the creditor's advantage is not in itself sufficient to justify the application of that provision, since, in the absence of any such connection, it would constitute an unpredictable choice of law from the debtor's perspective". Predictability constitutes an important objective of the Protocol, which would not be fulfilled if the law of the creditor's new habitual residence applied without having any connection with the family situation of the creditor and debtor "concerned by the maintenance obligation as it was at the time to which that obligation relates" (§ 46).

1970 § 41-42: "[…] That system seeks to guarantee the predictability of the applicable law by ensuring that the law designated is not devoid of a sufficient connection to the family situation at issue […]. State of the creditor's habitual residence, which is the most closely connected with the creditor's situation and appears therefore to be that which is the best adapted to govern the specific problems which the maintenance creditor may encounter".

1971 § 44: "[…] That State has a connection with the family situation of the creditor and the debtor, at least in so far as the possibilities of the satisfaction of the creditor's needs by the debtor are concerned […]".

1972 In its conclusions, the Court reiterated the mentioned conditions, namely: the *lex fori* must not coincide with the law of the creditor's habitual residence under art. 3; and the courts should be entitled to the jurisdiction over maintenance (§ 60). The derogation should have practical effect in situations as those at issue in the main proceedings, in that the *lex fori* does not correspond to the law of the (former) creditor's habitual residence during the period for which the creditor is claiming maintenance (§ 33).

1973 *R v. P* [5 September 2019] C-468/18 ECLI:EU:C:2019:666.

1974 § 22: "On 8 June 2017, that court nevertheless decided to separate the head of claim in relation to the exercise of parental responsibility by the mother and the fixing of the place of residence of the child with her from that in relation to the payment of maintenance for the child. It accordingly initiated two new cases concerning those two heads of claim respectively".

1975 On the basis that art. 12 did not satisfy for *prorogatio fori*.

The CJEU reiterated the principle that jurisdiction over parental responsibility should also be extended to maintenance[1976]. However, it specified that when a court declares itself competent over divorce, but not over parental responsibility designating another court, the latter is not the only one to be responsible over maintenance. The Court recalled that the Maintenance Regulation does not set out a rule on 'transfer of jurisdiction' such as under Brussels IIA[1977]. Moreover, the Romanian Court could not proceed with such a 'transfer' in matters involving maintenance[1978]. The CJEU concluded that when the grounds[1979] of jurisdiction under article 3(a) or (b) are satisfied, and jurisdiction over parental responsibility is declined, courts should extend divorce jurisdiction over maintenance[1980], provided that this would be in the child's best interests[1981].

**617.** This last case[1982] involved two Italian children, born and *permanent residents*[1983] in London, with their parents. Parent A applied before the Italian courts to obtain, *inter alia*, declaration of separation, shared custody and

[1976] § 37: "In concluding its reasoning, the Court held in paragraph 48 of that judgment that, where a court of a Member State is seised of proceedings involving the separation or dissolution of a marital link between the parents of a minor child and a court of another Member State is seised of proceedings in matters of parental responsibility involving the same child, an application relating to maintenance concerning that child is ancillary only to the proceedings concerning parental responsibility, within the meaning of Article 3(d) of Regulation No 4/2009". See *A v. B* [16 July 2015] C-184/14, ECLI:EU:C:2015:479.

[1977] *Cf.* chapter II, section II above.

[1978] Further, the CJEU clarified that if the creditor were given the limited choice of applying before one jurisdiction only, in particular that of parental responsibility, such a rule would preclude his/ her opportunities, being contrary to the objective of both Maintenance Regulation and 2007 Protocol (§ 45 to 47).

[1979] The Court referred also to the jurisdiction under art. 5 triggered by the debtor's appearance.

[1980] § 49-50 "In the light of the risk of having to bring his applications concerning maintenance obligations and concerning parental responsibility before two separate courts, that parent may wish, in the child's best interests, to withdraw his initial application concerning maintenance obligations brought before the court ruling on the divorce petition so that the court with jurisdiction in matters of parental responsibility also has jurisdiction to rule on that application concerning maintenance obligations […]. Nevertheless, that parent may also wish, in the child's best interests, to retain his initial application concerning maintenance obligations with respect to the child before the court ruling on the divorce petition, where that court is also the court of the place in which the defendant has his habitual residence".

[1981] The Court (§ 51 of the decision) referred to the elements mentioned in the Advocate General's Opinion (§ 65-71 of the Opinion C-468/18, 29 July 2019): *i.e.* assessing the needs of the child; the creditor's ability to express himself in his native language; the possibility of lower costs in the proceedings; the knowledge by the court seised of the defendant's ability to pay and exemption from the requirement to seek leave to enforce decisions.

[1982] *A v. B* [16 July 2015] C-184/14, ECLI:EU:C:2015:479.

[1983] This case refers to *permanent residence*, although initially it indicates that the children are habitually resident in England. See § 2: "The request has been made in proceedings between A and that person's spouse, B, concerning an application relating to maintenance obligations in respect of their two minor children, filed in a Member State other than that in which those children are habitually resident, concurrently with proceedings for the parents' legal separation".

children's residence at the mother's place[1984]. Parent B filed a counterclaim in Italy seeking declaration of separation and higher allowance amount. Parent B further contested the jurisdiction of the Italian courts over parent A's claim, namely in relation to parental responsibility and maintenance, given that England was the children's place of birth and the family place of living. The Italian courts retained jurisdiction over legal separation under Brussels IIA. Conversely, they declined jurisdiction over parental responsibility indicating the English authorities as more appropriate. Accordingly, parent A filed before the English courts. The courts in Italy retained jurisdiction over spousal support, ancillary to legal separation, pursuant to article 3(c) of the Maintenance Regulation. By contrast, they declined jurisdiction on child support, being ancillary to parental responsibility. Parent A's claim reached the *Corte di Cassazione*. The latter stayed proceedings to obtain the CJEU preliminary ruling.

> The CJEU maintained that child support is intrinsically linked to parental responsibility. In particular, the courts of the child's proximity are in the best position to determine the child's best interests[1985]. Namely, courts should examine *in concreto* maintenance issues, for instance adjusting the allowance amount based on the typology of custody (sole or shared), access rights, and further elements relating to the exercise of parental responsibility. Ultimately, such an assessment would satisfy the Maintenance Regulation's objectives in that the creditor's interests would be guaranteed[1986]. The Court stated that it is vital to take into account the best interests of the child. It concluded that when two courts are seised of matters involving divorce, parental responsibility and maintenance, and one has retained jurisdiction over divorce and the other over parental responsibility, maintenance should be ancillary to parental responsibility.

**618.** The CJEU rulings examined provide important indicators for the habitual residence assessment. Habitual residence denotes a particular close connection in respect of proximity and proper administration of justice, preserving the creditor's interests. The law of habitual residence should be the most closely

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[1984] § 16: "By application of 28 February 2012, A brought, before the Tribunale di Milano (District Court, Milan), proceedings against B, seeking a declaration of separation on the basis of the latter's fault and that custody over their two children be shared between them, and fixing their place of residence with their mother. A proposed to pay, by way of contribution to the children's education and healthcare costs, the monthly sum of EUR 4 000".

[1985] § 45: "Second, the court with jurisdiction to entertain the application concerning such a maintenance claim is designated in accordance with the rules on jurisdiction under EU law laid down by Regulation No 2201/2003 in order to determine the court that can be validly seised of proceedings concerning parental responsibility, which are shaped, as has been recalled in paragraph 37 of this judgment, in the light of the best interests of the child".

[1986] § 44: "The interests of maintenance creditors is therefore also guaranteed, in that, first, the minor child will easily be able to obtain a decision relating to his maintenance claim from the court with the best knowledge of the key elements for assessing his claim".

connected with the creditor's family situation. In interconnected proceedings involving children, their best interests are crucial. Thus, the child's habitual residence interpretation for the purposes of the Maintenance Regulation and the Brussels IIA Regulation should be uniform.

## § II. National Case Law

**619.** The following judgments will complete the analysis on the practical operation of habitual residence. This case[1987] involved a French couple. The parties initially lived in France and later moved to Switzerland. Following separation, the husband filed for divorce, including maintenance, before the courts in France. The wife challenged the French jurisdiction. She argued that the Swiss courts and applicable law should have governed maintenance. The French courts retained jurisdiction over divorce in accordance with Brussels IIA, and over maintenance under the Lugano Convention, article 5(2)(b)[1988]. The case reached the French *Cour de Cassation*.

> The Court upheld the appeal judgment in relation to international jurisdiction under the Lugano Convention, confirming the reasoning of the lower court[1989]. With regard to the applicable law[1990], the Court dismissed the wife's claim based on lack of procedural rules[1991], *de facto*

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1987 Cour de cassation, civile, Chambre civile 1, 25 mars 2015, 13-23.377.

1988 A person domiciled in a State bound by this Convention may, in another State bound by this Convention, be sued: "[…] in the court which, according to its own law, has jurisdiction to entertain proceedings concerning the status of a person if the matter relating to maintenance is ancillary to those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties […]".

1989 "*les dispositions de cet article 5.2, successivement repris dans différents instruments internationaux, n'excluent en rien, en raison de la réunion des qualités de demandeur et de débiteur de l'obligation alimentaire sur la tête du demandeur, cette option de compétence spéciale concernant une mesure accessoire de la demande en divorce. La qualité de demandeur de l'un des époux, susceptible de lui permettre d'attraire son conjoint devant une juridiction autre que celle de l'État dans lequel le défendeur a son domicile, s'apprécie au regard de l'acte de saisine du juge du divorce et non au regard de sa qualité de débiteur ou de créancier de cette obligation ainsi que le soutient arbitrairement Mme Caroline Y.... L'option de compétence spéciale est ainsi ouverte à l'un ou l'autre des époux* […] *Mais attendu que la règle prévue à l'article 5, paragraphe 2, sous b), de la Convention de Lugano, du 30 octobre 2007, ayant pour finalité la concentration des compétences juridictionnelles, le demandeur en divorce est en droit de s'en prévaloir, que celui-ci soit créancier ou débiteur d'aliments ; que le moyen n'est pas fondé*".

1990 "*Les relations entre la Communauté Européenne et la Suisse quant à la loi applicable aux pensions alimentaires relèvent de la convention de la Haye du 2 octobre 1973 ainsi que le soutient Mme Caroline Y... qui revendique la mise en œuvre de la loi suisse conformément à l'article 4 de cette convention aux termes duquel : La loi interne de la résidence habituelle du créancier d'aliments régit les obligations alimentaires. En cas de changement de résidence habituelle du créancier, la loi interne de la nouvelle résidence habituelle s'applique à partir du moment où le changement est intervenu*".

1991 "*D'où il suit qu'en l'absence de dispositions spéciales de la loi, le pourvoi, pris en son second moyen, qui se borne à contester la décision sur ce point, n'est pas recevable*".

rejecting the appeal[1992]. The Court of Appeal held that, under the 2007 Protocol[1993], to the extent of the interplay between articles 3 and 5, the 'escape' rule contained in article 5 must be interpreted in relation to the closeness of applicable law with the marriage at the time of the seisin (in context "*lors de l'introduction de l'instance en divorce en France fondant l'obligation alimentaire litigieuse*"). Further, the interpretation of *closeness*[1994], according to the Court, cannot derogate from the creditor's habitual residence (under article 3) when both creditor and debtor habitually reside in the same place at the filing. The Court of Appeal concluded that French law should govern spousal support.

**620.** The following case[1995] involved a French-Senegalese unmarried couple, she, French, he, Senegalese, living in Italy at the time of the proceedings. A child was born from this relationship. The family was cohabiting until disputes arose. The mother filed before the Italian courts to obtain, *inter alia*, joint custody, contact arrangements, the child's habitual residence at her new domicile in France, and child's maintenance.

The Court ('*Tribunale di Roma*'), exercised jurisdiction and applicable law over parental responsibility by virtue of article 8 of Brussels IIA, articles 15 (custody) and 17 (exercise of parental responsibility) of the HC-1996, all founded on the child's habitual residence. The Court fixed the child's habitual residence in France for the reason that when the

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1992 "*Outre son opposition à l'application de l'article 3 du Protocole, M. Thierry DE X... se prévaut de l'existence d'un lien plus étroit de la loi française avec leur mariage. Les liens de leur mariage avec la loi française sont en effet caractérisés par la nationalité commune des époux, leur mariage en France sous contrat de droit français, leur résidence en France avec leurs enfants jusqu'en décembre 2007, soit durant 11 ans, la permanence de leurs liens avec leurs famille respectives qui résident en France, et leurs séjours périodiques réguliers en France. En novembre 2011, lors de l'introduction de l'instance en divorce en France fondant l'obligation alimentaire litigieuse, le seul lien de rattachement à la Suisse où leur couple et leurs enfants vivaient depuis janvier 2008, soit depuis près de 4 ans, était leur maintien avec leurs enfants dans ce pays mais dans des résidences séparées malgré leur absence d'activité professionnelle, alors que leur installation en Suisse 4 ans plus tôt ne répondait qu'à un impératif professionnel ponctuel, et connu comme tel dès le départ, résultant de l'embauche de M. Thierry DE X... par un contrat limité à une durée de quatre années et auquel il a été mis fin alors que la séparation du coupe dans des conditions conflictuelles devait être judiciairement organisée en considération de leur résidence en Suisse. Ces éléments de vie commune et de dernière résidence habituelle commune en Suisse ne constituent, au regard de leur mariage, qu'un lien très précaire avec la Suisse. Il s'ensuit que les liens de rattachement de leur mariage sont plus étroits avec la loi française et autorisent à déroger au principe de détermination de la loi applicable sur le critère de la résidence habituelle du créancier. M. Thierry DE X... est en conséquence fondé à se prévaloir de l'application de la loi française à l'obligation alimentaire due au titre du devoir de secours entre époux. L'ordonnance est en conséquence confirmée sur ce point*".

1993 Applied through art. 19 of the HC-1973: "This Convention shall not affect any other international instrument containing provisions on matters governed by this Convention to which a Contracting State is, or becomes, a Party".

1994 The reasoning of the French Court of Appeal implied that the spouses' common nationality, place of marriage, marriage property regime agreement, family residence, regular contacts after relocation to Switzerland and continuing attachments through the presence of the spouses' respective families, were decisive indicators of closeness.

1995 Trib. Roma, sez. I civ., decreto 7 luglio 2017.

parents are in disagreement, as in the present circumstances, the Court decides over it in the child's interests[1996]. In this regard, the Court qualified the mother as the child's primary carer. Accordingly, the mother's search for employment to abandon the current rented apartment in Italy, live with her parents in France, and benefit from the support of her parents in the child's interests, were determining for the child's residence order. However, the Court also reiterated that the child's habitual residence should be fixed upon agreement between both parents. The Court retained jurisdiction and applied its own law over child's maintenance by virtue of article 3(a) and (b) of the Maintenance Regulation, and article 4(3) of the 2007 Hague Protocol (through article 15 of the Regulation).

**621.** This last case[1997] is relevant as to the assessment of a family habitual residence in interconnected proceedings. The case involved an American couple. A child, Varvara, was born from this relationship in Florida. The family moved to Delaware, where the husband's parents lived, and later to Lyon for the husband's employment at the World Health Organisation. Around four months after, the mother and the child returned to the US (Michigan), where the maternal grandparents lived. The mother was hospitalized. The maternal grandparents filed before the Michigan courts for Varvara's temporary custody, which was granted. The father petitioned for divorce before the courts in Lyon. Afterwards, the Michigan courts awarded custody to the father on a temporary basis. Before the same courts, the mother filed for *ne exeat* order, which was approved. The French Ministry of Justice seised the American Central Authority[1998] for child return under the HC-1980. The father seised the courts in Delaware for the removal of the *ne exeat* order. He also submitted a child return application on the basis that he and Varvara were living in Delaware. The Delaware courts declined jurisdiction in the absence of Varvara's domicile proof at the time of the filing. Thereafter, the Michigan's courts granted custody to the mother. The courts in Lyon retained

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1996 "*In merito alla domanda della ricorrente di essere autorizzata a trasferite al residenza abituale del minore in Francia, in presenza di dissenso del padre, la stessa deve essere accolta. La residenza abituale del figlio deve essere concordemente determinata dai genitori, tuttavia nel caso di dissenso tra i genitori sulle questioni di maggiore rilevanze per la vita del figlio l'art. 337-ter c.c. rimette al giudice la decisione. Nel caso di specie, a fronte delle legittime motivazioni della ricorrente, di dover trasferire la residenza del figlio in Francia per poter accettare una proposta di lavoro, per essere esonerata dei costi di locazione (trasferendosi a vivere nell'abitazione dei genitori), e per poter essere coadiuvata dai genitori nell'accudimento del minore, il resistente non costituendosi né comparendo non ha indicato le ragioni dell'opposizione al trasferimento. Da quanto emerso nel corso del procedimento è stato accertato che è la sola madre a provvedere al mantenimento del figlio, pertanto deve essere autorizzato il trasferimento della residenza abituale del minore in Francia al fine di permettere alla madre di continuare a far fronte alle necessità del minore*".

1997 Cour d'appel de Lyon, du 29 juin 2004, 2004/00094. The judgment was rendered by the French Court of Appeal ('*Cour d'Appel de Lyon*') before the entry into force of the EU Maintenance Regulation, the 2007 Protocol, and the Lugano Convention, but not of Brussels I and the HC-1973.

1998 With no evidence of its location, implicitly referring to the US Department of Justice.

jurisdiction over, *inter alia,* spousal support, custody[1999], and mother's visiting right with related contact arrangements. The same courts dismissed the mother's request for *ne exeat* order and requested a social assessment[2000]. Afterwards, the mother's *ne exeat* application was accepted. The father and the child allegedly moved to Switzerland. On appeal brought by Varvara's father, the courts in Lyon ceased the *ne exeat* order. The mother filed before the same courts to determine, *inter alia*, jurisdiction[2001] over the amount for child and spousal support. The father opposed the French jurisdiction[2002], the mother contested Swiss jurisdiction[2003].

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1999 Ordering shared parental responsibility and fixing Varvara's residence at her father's domicile.

2000 "*L'audience de conciliation en France a eu lieu le 4 mars 2003. Par ordonnance de non conciliation du 8 décembre 2003, le juge aux affaires familiales du Tribunal de Grande Instance de LYON s'est déclaré compétent, a fixé à 1 500 à par mois la pension alimentaire que le mari doit à l'épouse, débouté Madame X de sa demande de provision sur sa part de communauté, constaté que les parents exercent en commun l'autorité parentale sur Varvara, fixé la résidence habituelle de l'enfant chez le père, a organisé le droit de visite et d'hébergement de la mère aux frais du père, débouté Madame X de sa demande d'interdiction de sortie du territoire national sans son autorisation, a ordonné une enquête sociale, a débouté Monsieur Y de sa demande au titre de l'article 700 du nouveau code de procédure civile*".

2001 The question of applicable law is also matter of this judgment. It will not be examined though as the financial issues, including maintenance, were not considered on a primary basis ("*Sur la loi applicable il doit être souligné au préalable que la compétence du Tribunal de Grande Instance de LYON n'entraîne pas nécessairement l'application de la loi française. Il doit être également souligné qu'il est possible d'appliquer une loi différente au divorce et à la garde de l'enfant. Il est manifeste que le différend entre Monsieur Y et Madame X porte essentiellement sur la garde de Varvara, les dispositions financières n'apparaissant pas déterminantes*").

2002 "*Au soutien de ses demandes, il fait valoir notamment que les tribunaux helvétiques doivent être déclarés compétents en application de l'article 1 070 du nouveau code de procédure civile; qu'au jour de la requête initiale Madame X se trouvait dans l'Etat du MICHIGAN; que lui-même est actuellement domicilié en Suisse; qu'aucune des parties n'a la nationalité française; subsidiairement, qu'il doit être fait application de la loi des parties et non de la lex fori; qu'aucune des conditions prévues par l'article 310 du code civil n'est remplie pour que soit appliquée la loi française; qu'il ne justifie plus que d'un revenu de 32 311 $ par an; que l'OMS a mis fin à ses fonctions; que Madame X a enlevé l'enfant au mépris de la Convention de LA HAYE du 25 octobre 1980; qu'elle n'est pas en état de s'occuper de son enfant; que toutes les procédures devant les juridictions américaines ont fait l'objet d'un désistement compte tenu de la compétence des juridictions françaises; qu'il existe donc des motifs graves justifiant la suppression du droit de visite et d'hébergement de la mère; qu'une ordonnance a été rendue par le juge aux affaires familiales le 19 janvier 2004 interdit la sortie du territoire français à Varvara sans l'accord exprès de Madame X; qu'il a engagé une action en rétractation de cette ordonnance sur requête; qu'il a respecté le droit de visite et d'hébergement de Madame X conformément à l'ordonnance de non conciliation; que Madame X réside à nouveau en France; que la justice française a condamné Madame X pour enlèvement d'enfant; que ses changements de résidence étaient dus à ses missions pour l'OMS; qu'il a toujours informé Madame X de son changement de résidence*".

2003 "*Au soutien de ses demandes, elle fait valoir notamment qu'aucun élément ne permet de rattacher le litige à la Suisse; que Monsieur Y a écrit au juge d'instruction pour lui dire qu'il vit désormais en Grèce; que Monsieur Y a expressément sollicité l'application de la loi française dans le cadre de la procédure de divorce; que la loi applicable aux mesures provisoires est celle de l'Etat saisi du litige; que le tribunal du comté d'OTTAWA a décliné sa compétence; que selon l'acte unique américain applicable la résidence de la famille à la date de l'introduction de la demande en divorce a été déterminée en France; que le tribunal précité a également refusé l'application de la loi de l'Etat du MICHIGAN ( USA ) et qu'il a désigné la loi applicable comme étant la loi française; que Monsieur Y a amplement démontré son incapacité à s'occuper de sa fille; qu'elle n'a pas revu sa fille depuis novembre 2002; que ses conditions de vie sont totalement inconnues; que l'intérêt de l'enfant n'est*

> The Court of Appeal in Lyon retained international jurisdiction, relying on the notion of family residence ('*résidence de la famille*')[2004]. It considered as decisive elements: the place of performance of the father's employment contract; the mother's settled purpose in accompanying her husband; the renting of an apartment; Varvara's school enrolment. Accordingly, the family residence was in France at the time of the institution of the proceedings concerning divorce, including over the related support claims. The Court excluded relevance, in absence of settled purpose, of the mother's relocation immediately before the filing[2005].

**622.** The reported national cases give additional guidance. Habitual residence, and the closer connection to the marriage under the 2007 Protocol, should be determined at the time of the institution of the proceedings. With regard to interconnected proceedings involving child support, the settling of a family residence may be determining. In this regard, the change of family residence should consider the family settled purpose. In the event of parental disagreement, the primary carer's and the child's needs are paramount in the anamnesis.

## Section III Alternate and Absence of Habitual Residence

**623.** With regard to international jurisdiction, distinction shall be made between maintenance as a principal matter or ancillary to parental responsibility/ divorce. In relation to the absence of habitual residence, jurisdiction over the principal matter (*i.e.* custody or divorce) would likely be extended to the ancillary proceeding (*i.e.* child or spousal support)[2006]. Albeit,

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*pas de vivre cachée, ni dans le mensonge; que les capacités éducatives de la mère ne sont mises en cause; que l'enlèvement international d'enfant s'il n'a pas déjà eu lieu représente un réel danger*".

2004 This notion is provided by French domestic law, namely within the Code of civil procedure (art. 1070). It triggers the internal grounds of jurisdiction over family law, which also govern international jurisdiction ("*En matière de droits non disponibles, le justiciable n'a pas la faculté de choisir le tribunal qu'il considère comme compétent, la compétence résultant de critères définis par la loi. Il est constant que l'article 1070 du nouveau code de procédure civile également revendiqué par les deux parties, transpose en matière internationale les règles de compétence interne, y compris en ce qui concerne la hiérarchie entre les chefs de compétence retenus. Il est constant que les deux parties se réfèrent à la notion de résidence de la famille*". It was the case before the entry into force of Brussels IIA and the HC-1996, which France is today implementing.

2005 "*Monsieur Y ayant signé un contrat de travail s'exécutant en France, Madame X l'a volontairement accompagné, manifestant auprès de ses parents sa volonté de s'adapter à la France. Les époux ont loué un appartement et il est justifié de démarches pour scolariser Varvara à LYON. Le domicile familial était donc bien situé en France le 11 septembre 2002 lorsque Monsieur Y a déposé sa requête en divorce et non dans le MICHIGAN aux USA où habitent ses parents et où le couple n'a jamais vécu quand il était aux USA. Le fait que Madame X ait quitté la France quelques jours auparavant, soit le 5 septembre 2002, sans savoir ce qu'elle allait faire ni où elle allait s'installer, n'y change rien*".

2006 In this scenario, to complement this analysis, we also refer to chapters I and II *supra*.

this principle applies within the framework of the treaty rules[2007] examined in this Chapter. More complex is the question dealing with the applicable law. In this respect, the multiple laws available under the 2007 Protocol should largely solve the potential vacuum driven by the absence of habitual residence. Namely, concerning spousal support, the scenario where both the debtor and the creditor hold neither a habitual residence nor 'close connection' to the marriage at the relevant time should be rare, but not impossible. The applicability of the 2007 Protocol relies on the ratification though. States are therefore encouraged to join the Hague Maintenance instruments in order to provide harmonised rules and uniform connecting factors in the field of maintenance[2008]. The issue of alternate habitual residence may instead be more common, at least in the context of spousal support. In relation to interconnected proceedings with custody/ divorce, the previous proposals should apply[2009]. Lastly, but not less important, with regard to both issues, it is reiterated that under the Maintenance Regulation and the Protocol, multiple opportunities founded on party autonomy exist with specific limitations[2010].

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2007 An example of such interconnection is also found under UK law (*Villiers (Appellant) v. Villiers (Respondent)*, 2020, UKSC 30, § 125).

2008 In analysing the Protocol and the Convention, Professor Romano concludes, *inter alia*, that their ratification would be beneficial for both States and their communities holding transnational family ramifications. The reciprocity principle would ensure better security, efficiency and effectiveness towards subjective rights such as the recovery of spousal and child support (ibid. ROMANO). In line with that analysis, a wider ratification of the two instruments would equally be important for the endorsement of uniform and modern connecting factors aimed to avoid conflicting, including denial of, justice. An example is the reference in art. 8 of the HC-1973 to the applicable law governing divorce and extended to spousal maintenance. The applicable law to divorce under the Swiss PILA is the *lex fori* (art. 61), through the grounds of jurisdiction founded on the domicile or nationality of one of the parties (*cf.* chapter II, section IV above). The result arising out of this approach is typically divergent from the one under art. 3 of the 2007 Protocol, primarily founded on the creditor's habitual residence with the meaning of 'concrete society'. A couple, he Italian, she French, working on a principal basis in Switzerland, holds respective extended family in Italy and France. Two children were born from this relationship and live in France with their maternal grandparents. The mother regularly visits her family and children in France. According to the SPILA, art. 59(a), the couple would potentially be able to file for divorce before the Swiss courts based on their respective domicile. Clearly, the courts in Switzerland would be entitled to apply their own law for the granting of divorce, and later to spousal support according to art. 8 of the HC-1973/ SPILA, art. 61. This solution would not be taking into consideration, realistically, the 'family situation' that may potentially locate the mother's habitual residence (as the creditor) in France under art. 3 of the 2007 Protocol. Further, if the mother and the children acquire a new habitual residence in England, and the father holds a new habitual residence in Belgium, *de facto* severing all relations with Switzerland, Swiss law would still govern the revision of the divorce decision, including to the extent of maintenance, as opposed to art. 3(2) of the Protocol that would trigger a change in favour of the English law based on the creditor's new habitual residence.

2009 For the proposals to solve alternate habitual residence under custody/ divorce jurisdiction, see chapters I and II of this part. This study essentially referred there to principal habitual residence and continuing physical presence.

2010 We recall that the 2007 Protocol, art. 8, excludes children under 18/ vulnerable adults from the choice of applicable law. Children under 18 are likewise excluded from choice-of-court agreements (art. 4.3 of the Maintenance Regulation). That said, they may fall under the scope of article 7 of the Protocol, which allows a choice of applicable law in favour of the *lex fori,* with some limited effects (BONOMI, p. 51).

## § I. Absence of Habitual Residence

**624.** An example should serve as illustration. An Italian child was born and lived in Russia. The parents are not married and both hold Italian citizenship. At the age of 14, the child moves to visit his sister in the UK, and later moves to Italy where his aunt lives. Following a dispute with her partner, the mother moves to UK to stay with her daughter, who in turn relocates to New Zealand. Afterwards, the mother travels to Italy to join her son with whom she has a huge fight. The local authorities in Italy apply a child temporary care placement. The mother files for custody, supplemented by the child's maintenance application, before the Italian courts. The father contests the Italian jurisdiction. In this scenario, the habitual residence of the child, as the creditor, may not be determined given his nomadic lifestyle.

In the context of interconnected proceedings, the Italian authorities, competent over custody by virtue of the child's physical presence[2011] should extend their jurisdiction towards child support. This conclusion should be the result of the CJEU reasoning[2012] under article 3(d) of the Maintenance Regulation. In absence of habitual residence and choice-of-court agreements, when dealing with maintenance as to the substance, article 6 of the Maintenance Regulation may find application when the parties hold common nationality[2013]. Under the latter rule, Italian jurisdiction should be competent in the current hypothetical[2014]. Subsidiarily, article 7 would govern maintenance when the claim is sufficiently connected[2015] with the Member State, and it cannot

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2011 Under art. 13 of the Brussels IIA Regulation, and 6 of the HC-1996 (*cf.* chapter II *supra*).

2012 We recall that in case the maintenance claim were ancillary to divorce, art. 3(c) provides the same possibility for the prorogation of the divorce jurisdiction (*cf.* section I *supra*). The same reasoning should apply in the framework of art. 5(2)(b) and (c), of the Lugano Convention.

2013 It is to be noted that this provision applies if no court of a State party to the Lugano Convention, which is not an EU Member State, can exercise jurisdiction. This is precisely the case in the current example, namely the debtor is not domiciled in a Contracting State to the Lugano Convention (art. 2, 5: "A person domiciled in a State bound by this Convention may, in another State bound by this Convention, be sued […]").

2014 This rule applies in the same way for a claim concerning spousal support, including towards unmarried couples.

2015 Unlike the Succession Regulation (see part V *infra*) and the Property Regimes' Regulations (see part II *supra*), the Maintenance Regulation (§ 16) specifies that the EU Member State nationality of one of the parties may determine sufficient connection. It is observed that a child or an adult who does not hold an EU Member State nationality would be potentially excluded from the scope of art. 6 and 7. Specifically concerning art. 7, beyond wars, the unreasonableness of the claim before the courts of a third State may be difficult to prove or require lengthy determinations. In this regard, the UK practice (*Baldwin v. Baldwin*, 2014, EWHC 4857, § 59) showed that a child's residence order may also be an indicator of 'closer connection' in one jurisdiction more than in another. Some authors have argued that an English-based pension (D. HODSON, The Eureka Moment of English Creativity from EU Law: English pension sharing after a foreign financial settlement, *Family Law Week*, 2017), would also determine sufficient connection. Others have mentioned the use of former residence as a concurring element (M. REQUEJO ISIDRO, On 'Habitual Residence' under the EU Regulations on Family Matters: Once and for All?, EAPIL, 2020). The recourse to the 'closer connection to the marriage or

reasonably be brought before the courts of a third State[2016]. In relation to the applicable law, in both proceedings involving maintenance as a principal matter or ancillary to custody, the *lex fori* under the 2007 Protocol, article 4(2), would remain a valid option[2017]. In the current example, Italian law would apply based on article 15 of the Maintenance Regulation and article 4(2) of the Protocol[2018].

**625.** It is noted that, outside the legal framework of the treaties examined in this Chapter, national conflict-of-law rules would apply. For instance, if instead of Italy, England were the place of the child's physical presence, English conflict-of-law rules, which is likely to be English internal law[2019], should govern child support.

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partnership' with an EU Member State, when dealing with spousal support under the general jurisdiction of art. 3, would reduce the length of jurisdiction determinations, encourage a common and more realistic degree of proximity, and avoid possible denial of justice (*cf.* chapters I and II *supra*). The degree of marriage or partnership connection should nevertheless be better clarified in this context, in line with what was argued in relation to the 2007 Protocol, art. 5. In particular, nomadic lifestyles may potentially not concur to the establishing of a common habitual residence at the celebration of the marriage (ibid. *Baldwin v. Baldwin*). Thus, the current or last common prospective acclimatization, or alternatively the prospective acclimatization at the celebration of the marriage/ registration of partnership in an EU Member State, should also be considered factors assessing closer connection in the context of peripatetic cross-border movements. The notion of prospective acclimatization would also have the advantage of applying in the context of child support, therefore outside 'marriage connection', in that his/ her prospective acclimatization at the time of the filing should be sufficient to determine jurisdiction. According to this study, prospective acclimatization should correspond, on a non-cumulative basis, to 'family connections, cultural ties, knowledge of the language, the possession of a residence permit, the applicant's previous period of common residence, and any other connections that would expedite or enhance the prospects of common integration' at an appreciable period, to wit, those mentioned above. On a last point, *Baldwin v. Baldwin* indicates that art. 7 of the Maintenance Regulation should be interpreted as an 'exceptional', as opposed to an 'extraordinary', ground. In this proposal it is simply stated that close connection should determine general jurisdiction in order to preserve the creditor's interests on a continuing basis, especially if the creditor is a child (*cf.* chapter II *supra*).

2016 The opportunity remains available to conclude a choice of court governing spousal support based on the grounds provided under article 4(1)(c). Some Member States recognising civil unions may also extend this opportunity to them.

2017 This rule excludes spousal support. In absence of habitual residence, art. 5 of the 2007 Protocol would be applicable (Bonomi, p. 45) – art. 8 HC-1973 applies to divorce. The parties would be entitled to elect a law applicable to spousal, but not child, support under art. 8 of the Protocol. Interestingly, in respect of applicable law, we notice that under Chinese conflict-of-law rules (28 October 2010, art. 29), as an alternative or in absence of the party's habitual residence and nationality, the law of "*the place where the main property locates, which better protects the rights and interests of the person being supported*" would govern maintenance – although we doubt that this would apply to civil unions.

2018 Under the HC-1973, art. 5, the common nationality would take precedence over the *lex fori.* The 2007 Protocol attributes subsidiary importance to the law of the common nationality (Bonomi, p. 35).

2019 The Matrimonial Causes Act 1973, and the Civil Partnership Act 2004, determine the UK jurisdiction in cross-border maintenance cases, until the Lugano Convention is ratified. The Maintenance Regulation was blocked, therefore the Jurisdiction and Judgments (Family) (Amendment etc.) (EU Exit) Regulations 2019 provide the amendments to the said 1973 Act. In relation to the applicable law, the UK internal law currently governs maintenance.

## § II. Alternate Habitual Residence

**626.** Reference is made to the following example involving spousal support. A Polish-Belgian couple celebrated their marriage in the Netherlands. A child was born from this relationship. The wife, Belgian, works in Belgium where her extended family, including a child from a previous marriage, live. The husband, Polish, works in the Netherlands where the family holds its marital home and the child's school is. Following marital disagreements, the wife files for spousal support before the courts in Belgium. The husband contests the Belgian jurisdiction.

**627.** The Explanatory Report to the 2007 Protocol has not excluded firmly that a creditor may hold his/ her own habitual residence in one State and a common habitual residence showing marriage connection in another[2020]. In this regard, the wife, who may be considered as the creditor, would hold regular family ramifications in two States, but at a different time close to the seisin. The context should be solved through the determination of a principal habitual residence[2021] at the time of the institution of the proceedings. Such a residence should be located at the creditor's *home base*. The latter may correspond to the notion of '*résidence de la famille*' invoked by the French courts[2022], and supported here. In the current hypothetical, the said residence should be in the Netherlands.

**628.** With regard to jurisdiction, the Maintenance Regulation provides two mechanisms to solve the potential conflict: *lis pendens*[2023] or related actions[2024]. Concerning the applicable law, the 2007 Protocol identifies the 'marriage connection' as a modern connecting factor[2025].

> In the current hypothetical, the father and husband may object to the Belgian applicable law under article 5 of the 2007 Protocol, by virtue of the family habitual residence located in the Netherlands. Concerning international jurisdiction, the courts in Belgium, first seised, should

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2020 Ibid. BONOMI, p. 41-43.

2021 For instance, in relation to the HC-2007, it is said that habitual residence should be determined, taken into account the individual facts in each case, where the person holds his/ her primary (or main) residence (HccH, Practical Handbook for Competent Authorities: the 2007 Hague Child Support Convention, the 2007 Hague Protocol on Applicable Law (Maintenance) and the 2009 European Union Maintenance Regulation, 2013, p. 48).

2022 The creditor's home should be assessed through his/ her physical presence, the owned or rented accommodation, the child's school, the settled purpose from a marriage and/ or family perspective (similarly, Cour d'Appel de Lyon, du 29 juin 2004, 2004/00094). This reasoning should also cover child support (*cf.* chapter II *supra*).

2023 In relation to the general aspects of *lis pendens*, see part I, chapter IV, section V of this monograph.

2024 Art. 12 and 13 of the Regulation. In this regard, the UK courts held, in '*Villiers (Appellant) v Villiers (Respondent)*', § 79 and 162, that the articulation and consequent implementation of art. 13 in matters involving divorce and maintenance are unsatisfactory.

2025 *Cf.* HP-2007 *supra*.

> locate the family habitual residence at the time of the institution of the proceedings under articles 3 and 12 of the Maintenance Regulation. The proceeding concerning a maintenance application possibly filed in the Netherlands, involving the same subject matter, cause of action and between the same parties as in the present case, should be stayed until the Belgian courts establish or decline jurisdiction.

**629.** Regrettably, unlike the transfer of jurisdiction under Brussels IIA, the Maintenance Regulation does not provide a similar rule[2026]. In this perspective, such collaborative mechanism would be beneficial in the whole area of international family law, including spousal and child support, in order to avoid supplementary costs and procedures relating to the filing of a new claim before the courts in the Netherlands. Furthermore, it would enable a possible derogation from habitual residence[2027] in favour of a better placed jurisdiction, for instance founded on the closer connection to the marriage or on the child's best interests. Mainly, transfer of jurisdiction would allow direct coordination between the authorities of the two States concerned.

# Conclusions

**630. Summary.** This analysis has referred to a significant bulk of treaty rules governing divorce, parental responsibility and maintenance, which are closely interrelated fields within matrimonial and parental disputes. Reference was also made to property regimes in connection with divorce proceedings. Habitual residence holds a primary role in the determination of international jurisdiction and applicable law in all the examined treaties. Its interplay with modern connecting factors was likewise considered. Namely, close connection and physical presence were valued in this analysis. The place of closest connection to the marriage was subject to specific proposals. In the context of divorce, an international convention contemplating coordinated rules on international jurisdiction and applicable law would foster, *inter alia*, wider cross-border uniformity in the use of connecting factors. With respect to the parent-child relationship, specific national legislations were identified where habitual residence operates primarily for the determination of jurisdiction. However, the absence of international or regional instruments acknowledges the presence of national fragmentation in relation to the applicable law. The use of modern coordinated mechanisms was encouraged. An example is transfer of jurisdiction in the field of parental responsibility. A prospective model of super partes adjudication was recommended in order to tackle

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2026 *Cf.* section II *supra*.

2027 Derogation should likewise comprise those situations where habitual residence cannot be determined.

conflicting habitual residence determinations. A thorough case law analysis provided important indicators for the habitual residence determination.

**631. Proposal I.** Habitual residence shall correspond to the place of integration of a specific person, taking into consideration his/ her family. A person's and family interests may be interconnected. Integration shall correspond to the person's own acclimatization in a family and social environment. Acclimatization shall refer to the person's regular rooting, for which duration is only an indicator.

**632. Proposal II.** For children: Acclimatization shall require a sufficient degree of maturity to make meaningful connections in a given society[2028]. A four-year old child may already acquire such maturity[2029], in which case the parental settled purpose shall be secondary. The determination of maturity requires a child-centred approach. The child's best interests shall guide factual proximity. In relation to newborns: the family environment and society in which the child lived with both parents from birth to de facto parental separation, and in any case before the application for custody, visitation or child return following abduction, is determining. The child's habitual residence may often coincide with the one of the primary carer. Accordingly, a fact-based settled purpose[2030] from a child's perspective is principally indicative. Concerning unborn children: physical presence is a prerequisite. The preceding elements applicable to newborns are by analogy extended to unborn children.

**633. Proposal III.** According to the two-fold test approach, and the corresponding case law examined, decisive elements are: physical presence[2031]; principally occupied matrimonial/ family home[2032]; family and social environment[2033]; closer degree of marriage connection; settled purpose. Additionally, for children: appropriate child welfare protection; school; language skills; age. Complementary, non-decisive, elements shall be: intent; duration; nationality; professional life; tax residency or analogous administrative evidence.

**634. Proposal IV.** Peripatetic life shall not enable the acquiring of habitual residence. Visa requirements, occasional stay, asylum status, are not indicative,

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2028 *I.e.* making friends easily, enjoying numerous activities inside and outside school, improving skills.

2029 This includes the child's views if compatible with his/ her best interests.

2030 *I.e.* pursuing a normal life, making long-term friends and plans, developing routines with a sense of environmental normalcy, putting down roots in a country and culture to which the individual was familiar prior to the relocation, the purchase or rent of a house, an application for social housing.

2031 Exceptionally, in the context of intercountry adoption, a child may hold a continuing habitual residence without continuing physical presence, if his/ her best interests so require. In such a scenario, a child should at least once be physically present in, and maintain regular contacts with, his/ her continuing habitual residence.

2032 The presence of daily and personal possessions is also indicative of such occupation.

2033 *I.e.* regular contacts, circle of friends, actual pre-planning, de-integration from the previous family and social environment, anchored lifestyle, cultural links.

except in certain cases determined by nomadic lifestyles. In this regard, they will be indicators for the purposes of a prospective acclimatization[2034] which, albeit useful in assessing proximity in the said contexts, does not provide certainty for the acquiring of habitual residence.

**635. Proposal V.** Habitual residence shall be determined at a relevant point in time and assessed during an appreciable period. Where not already mentioned, the point in time should correspond to the seisin[2035]. The latter identifies, in many circumstances[2036], the realistic and immediate nexus with the competent jurisdiction and applicable law, in line with the objectives of the referred treaty rules[2037]. In international child abduction, such moment should be the filing of the return application. An appreciable period of one year/ six months[2038] before the seisin would support the fact-based assessment[2039].

**636. Proposal VI.** An effective change of habitual residence shall occur at any person's own acclimatization, which is in principle unique. Physical presence triggers acclimatization. Decisive elements mentioned in proposal III shall determine the degree of such presence. Acclimatization in the current State should indicate the disengagement in the former one. Despite the duration, temporary absences[2040] such as vacation, hospitalisation, a provisional order fixing residence, maintaining regular contacts with the previous family and social environment, would in principle not entail an effective change of habitual residence. A parental agreement, of any form, concluded prior to the relocation, shall not alone suffice to determine an effective change of habitual residence, in particular when based on discordant intentions and/ or on parental alienation. Additionally, for children: the place of abandoned habitual residence may still correspond to the State where the parent holding visiting

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2034 Prospective acclimatization shall be determined through the following, non-cumulative, elements: 'family connections, cultural ties, knowledge of the language, the possession of a residence permit, the applicant's previous period of common residence, and any other connections that would expedite or enhance the prospects of common integration'.

2035 This time should be considered interchangeable with 'the time of the institution of the proceedings', 'the time of the commencement of the proceedings', 'the time of the application', 'the time of the filing'.

2036 Some exceptions were indicated under the Hague Convention 1996. In the framework of the Hague Convention 1993, the point in time is the adoption application.

2037 This proposal applies principally, but not exclusively, to the treaty rules referred to in this part.

2038 The time-based factor shall take inspiration from the US concept of home state (*cf.* chapter II, section II above).

2039 In parental responsibility, and similarly in child abduction, a specific appreciable period should be located from the child's birth until the parental *de facto* separation/ wrongful act. In child abduction, the general period is extended until the date of the filing for return, as opposed to the general period for parental responsibility which should last till the seisin for custody/ visitation. In intercountry adoption, the specific period should be from the child's birth until the adoption application, and the general period should be extended till the adoption decree.

2040 In order to better coordinate and delimit temporary jurisdiction under the HC-1996 and the Brussels IIA Regulation, inspiration should be taken from the US UCCJEA (*cf.* chapter II, section II above).

rights lives, including where a home containing a child's room and possessions is, where limited contacts occur, or where medical care is accessed.

**637. Proposal VII.** Modern coordinated rules, if not already adopted, shall be introduced. It is reiterated that the recourse to the transfer of jurisdiction be provided in the whole area of international family law. Transfer of jurisdiction should accompany the lis pendens rule. Accordingly, when the courts first seised determine, through a fact-based assessment, that habitual residence is located in another State, they should be entitled to operate the transfer[2041]. Furthermore, when the courts first seised determine, through a fact-based assessment[2042], that better placed courts exist in another State, they may proceed with the transfer[2043]. Specifically, concerning parental responsibility under the Brussels IIA Regulation, continuing jurisdiction[2044] should apply as a general rule and not only to visiting rights. Intercountry child assessments[2045] should be mandatory under the Hague Convention 1996 in the broader field of, but not limited to, child protection. Similarly, a collaborative approach shall guide the child's habitual residence determination in the field of intercountry adoption under the Hague Convention 1993.

**638. Proposal VIII.** Modern remedies shall solve conflicting habitual residence determinations arising out of alternate habitual residence[2046]. In the context of divorce, a principal habitual residence should be determined at the seisin founded on the centre of common family interests. Alternatively, when such determination proves so complex that the efficiency and effectiveness of justice would be compromised, the spouses' current or last continuing common physical presence should operate as tie-breaker rule[2047]. In the context of

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2041 The courts of two States should be entitled to request the incoming or outgoing transfer. In cases other than those concerning the collaborative determination of habitual residence, the transfer shall take place upon a party's initiative or *ex officio*.

2042 In the context of parental responsibility, this includes the child's best interests as a guiding principle. In relation to divorce, the family interests should be taken into account. Concerning maintenance, other than the child's best interests in child support applications, the marriage closer connection may trigger the transfer.

2043 Reference shall also be made to the US UCCJEA coordinated rules for the determination of the child's welfare and effective care in the place of significant connection (*cf.* chapter II, section II above).

2044 The operation of this rule should also take inspiration from the US UCCJEA (*cf.* chapter II, section II).

2045 This process shall evaluate, *inter alia*, parental capacity, housing, school environment, social relations in the community, family relations perhaps even with the grandparents, economic stability, health and care.

We recall the following proposal: 'Such obligation could be introduced in art. 32(a) of the HC-1996:

On a request made with supporting reasons by the Central Authority or other competent authority of any Contracting State with which the child has a substantial connection, the Central Authority of the Contracting State in which the child is habitually resident and present ~~may~~ shall, directly or through public authorities or other bodies, a) provide a report on the situation of the child'.

2046 This proposal applies principally, but not exclusively, to Brussels IIA.

2047 The following interpretation of art. 3(1)(a), first and second indents is recommended: 'the spouses' current, or last, continuing common physical presence should be assessed within one year prior to

parental responsibility, a factual and circumstantial assessment[2048] shall identify a child's principal habitual residence[2049] at the seisin[2050] in the place of his/ her family and social bonds[2051]. In the context of maintenance as a principal matter[2052], reference should be made to the creditor's '*résidence de la famille*', which shall be determined where his/ her home is[2053].

**639. Proposal IX.** Replacing rules shall operate when a person does not hold any habitual residence. The impossibility of returning to the State of prior nationality and/ or habitual residence and/ or presence, severing the relations with that State, shall be de facto indicating the current absence of habitual residence. With regard to divorce jurisdiction[2054], it is suggested to introduce article 3(3)[2055] and (4)[2056] to the Brussels IIA Regulation. Concerning parental responsibility jurisdiction, the child's mere presence shall replace habitual residence[2057]. Where the child's mere presence may lead to inconsistent judgments and lack of long-term care plans under the Hague Convention 1996 and the Brussels IIA Regulation, prospective acclimatization should operate as a modern connecting factor[2058]. In reference to spousal support[2059] jurisdiction, the 'marriage close connection'[2060] should apply primarily.

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the institution of the proceedings'. This proposal refers to a qualified degree of physical presence (*cf.* chapter I, section VI above).

2048 Concerning newborns or unborn children, their family and social environment may likely be shared with the one of the primary carer with some exceptions (*cf.* chapter II, sections II and III above).

2049 The child's continuing physical presence also operates as a tie-breaker rule when it would be artificial or impossible to determine a principal habitual residence. This rule would not apply in the context of alternate habitual residence falling under abduction, obviously, because the child's physical presence may be used to trigger an unlawful habitual residence.

2050 In international child abduction, the time refers to parental *de facto* separation/ wrongful act.

2051 *I.e.* school, friends, hobbies, housing, culture, language, effective family care.

2052 This proposal applies principally, but not exclusively, to the treaty rules referred to in chapter III. In relation to maintenance as ancillary to custody/ divorce, the proposals on custody and divorce shall apply.

2053 This should be assessed through *i.e.* his/ her physical presence, the owned or rented accommodation, the child's school, the settled purpose from a marriage and/ or family perspective.

2054 With reference to the applicable law, the EU Regulation Rome III (art. 8 lit. d) provides a valid alternative based on the *lex fori*.

2055 Art. 3(3), adding two indents, should be read as follows: '1. Where spouses' habitual residence cannot be established and jurisdiction cannot be determined on the basis of the previous paragraphs, the courts of the Member State where the spouses are present at the time of the institution of the proceedings, or where they were last present within one year prior to the relevant time and one of them is still present there, shall have jurisdiction. 2. Paragraph 1 shall also apply to refugee spouses or spouses internationally displaced because of disturbances occurring in their country'.

2056 Art. 3(4) should provide that: 'When it is clear from the circumstances of the case that the couple's attachments to one Member State, at the time of the institution of the proceedings, qualify for prospective acclimatization, jurisdiction should be exercised in that Member State'.

2057 *I.e.* under the HC-1996 and Brussels IIA. This rule also governs the law applicable to child protection (*i.e.* custody, visitation), but not the exercise of parental responsibility (*cf.* chapter II, section II above).

2058 Concerning the applicable law, in accordance with the HC-1996, this rule would also aim to specify the meaning of substantial connection under art. 15(2), and would replace habitual residence under art. 16.

**640. Proposal X.** Concurrent habitual residence should in principle be excluded[2061]. In any event, when conflicting habitual residence determinations arise, a super partes model of adjudication shall be explored. In the field of divorce[2062], reference is made to the proposal issued in the related context of property regimes[2063]. In matters of parental responsibility[2064], a special mandate should be given to the UN Child Rights Committee[2065].

[2059] It was proposed that 'the current or last common prospective acclimatization, or alternatively the prospective acclimatization at the celebration of the marriage/ registration of partnership in an EU Member State should also be considered factors assessing closer connection in the context of peripatetic cross-border movements. The notion of prospective acclimatization would also have the advantage of applying in the context of child support, therefore outside *marriage connection*, in that the child's prospective acclimatization at the time of the filing should be sufficient to determine jurisdiction'. In relation to the applicable law, the *lex fori* of the Hague Protocol 2007 (art. 4.2) is a valid option. This proposal also applies to unmarried couples with limited exceptions (*cf.* chapter III, section III above).

[2060] A proposal of amendment was indicated in relation to art. 3 of the Hague Protocol 2007: Maintenance obligations shall be governed by 'the law of the State of the creditor's habitual residence at the time of the institution of the proceedings; or upon the debtor's objection at the time of the institution of the proceedings, the law of the closest connection to the marriage at the time of the institution of the proceedings, with exceptional focus on the common habitual residence at the time of the celebration of the marriage'.

[2061] This proposal applies principally, but not exclusively, to the treaty rules referred to in this part.

[2062] This proposal shall comprise spousal support.

[2063] Part II, conclusions, proposal VII (jurisdiction and applicable law): '[…] In presence of two concurrent habitual residences, a super partes entity should be entitled to adjudicate directly over potential conflicts. In this regard, a relevant connecting factor should be the place of closest connection to the marriage at the seisin, with exceptional focus on the common habitual residence at the time of marriage celebration'.

[2064] This proposal shall also be applicable to child support.

[2065] Chapter II, section II: 'It is argued that the UN Child Rights Committee could intervene in solving conflicting determinations, such as in the context of concurrent habitual residence. The UN Committee on the Rights of the Child (UNCRC) currently holds quasi-judicial power over communications filed by individual children purporting to implement the standards and safeguards of the UN Convention on the Rights of the Child of 20 November 1989. In particular, the UNCRC guidance would encourage a uniform interpretation of habitual residence in the child's bests interests founded on article 3 of the 1989 Convention'. In the short term, it was said that 'Such an interpretation could be initially rendered as a form of general comment, or general recommendation, at the UNCRC on the thematic issue of *habitual residence and child best interests*. The endorsement of a general comment at the UNCRC would encourage greater uniformity in the operation of habitual residence, including in non-Contracting States to the HC-1996'.

# Part IV: Incapacitated Adults

**641.** This Part examines the current evolution of private international law facing modern societal changes and challenges[2066]. Habitual residence has been chosen as a prevalent connecting factor to determine international jurisdiction and applicable law within the Hague Convention on the Protection of Adults 2000. The Convention is the only existing treaty on this matter. Further reference is made to national conflict-of-law rules[2067] and case law[2068].

**642.** This Part is composed of two chapters. *Chapter I* deals principally with the Hague Convention 2000. The analysis also addresses the EU activity. *Chapter II* tackles habitual residence outside the Hague Convention 2000, extending the analysis towards national conflict-of-law rules. The *Conclusion* refers to a short list of proposals relating to this Part.

## Chapter I: The 'New' International Protection of Adults

**643.** This Chapter is composed of four sections. *Section I* introduces the EU perspective on the protection of Adults. *Section II* examines habitual residence and its interplay with other connecting factors under the Hague Convention 2000. *Section III* focuses on the issue of two habitual residences. *Section IV* faces international Adult abduction.

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2066 Ibid. Lagarde Report to the HC-2000, p. 41: "Since then, the human life span in the developed States has continued to lengthen, accompanied by a corresponding increase in the illnesses attaching to old age. The Secretary General of the Conference noted forecasts made by the Economic and Social Council, according to which the number of persons over sixty years would rise from 600 million in 2001 to 1.2 billion in 2025, and the number of persons aged eighty or above, now at 50 million, would increase to 137 million by 2025. Awareness of these problems has already led in certain States to a complete recasting of internal systems for the protection of adults who are suffering from an impairment or an insufficiency in their personal faculties".

2067 The Convention has presently received little success. The current context leads this study to focus also on habitual residence outside the Convention, namely under the Chinese conflict-of-law rules where habitual residence plays a key role. In addition, similarly to the UCCJEA (*cf.* part III, section II), specific reference is made to the US Uniform Adult Guardianship And Protective Proceedings Jurisdiction Act (UAGPPJA), and to the Canadian conflict-of-law rules for the interplay between habitual residence and similar connecting factors.

2068 In line with the two-fold test approach adopted in this study, consideration is given to the case law of the specific jurisdictions under the Convention (France, Germany, Scotland, Switzerland) and outside the Convention (Canada, England and Wales, Italy and the US).

## Section I The EU Protection of Adults

**644.** The EU has not introduced uniform rules in this field of international family law. In fact, the current evolution in EU national practices, in particular where the Convention does not yet apply[2069], requires further EU legislative action. In absence of an EU uniform 'protection' framework[2070] governing jurisdiction and applicable law in the field of vulnerable adults[2071], EU conflict-of-law rules would vary from State to State[2072]. This fragmentation may cause legal uncertainties[2073] when it comes to intra-EU cross-border protection situations falling outside the Convention[2074].

**645.** Consequently, the European Parliament has repeatedly called for a uniform coordination and cooperation legal framework[2075]. The Council of

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2069 The Convention entered into force in ten Member States. The UK also ratified the Convention while it was an EU Member State, even though the Convention applies to Scotland only. Greece, Ireland, Italy, Luxembourg, Poland and the Netherlands have signed the Convention, but not accessed or ratified it. For specific information on the EU Member States' Adult protection system, please refer to <http://www.the-vulnerable.eu/>.

2070 In context, protection framework refers to the rules determining the exercise of protective jurisdiction and applicable law, as opposed to the protective measures which vary with each legal system (ibid. LAGARDE, p. 46, 59).

2071 European Added Value Assessment: C. SALM, Protection of Vulnerable Adults, European Parliamentary Research Services, EU publications, 2016, PE 581.388, 2016. The assessment suggests a *quasi*-definition of vulnerable adults. See p. 3 of the assessment: "persons lacking the personal capacity to protect their interests and who are in particular need of a reliable legal framework". The Council of Europe's Recommendation No. R (99) 4, Part I, gives further guidance: "The following principles apply to the protection of adults who […] are incapable of making, in an autonomous way, decisions concerning any or all of their personal or economic affairs, or understanding, expressing or acting upon such decisions, and who consequently cannot protect their interests. The incapacity may be due to a mental disability, a disease or a similar reason".

2072 Namely, the use of uniform connecting factors determining international jurisdiction, transfer of jurisdiction, coordinated rules providing *lis pendens*, a system of cross-border information exchange between national authorities, parallelism between forum and jus, uniform connecting factors determining the applicable law especially governing the mandate for incapacity and the protection of the Adult's properties. Some were already indicated in the past (G. P. ROMANO, La Convention de La Haye du 13 janvier 2000 sur la protection de l'adulte - Eventuelle initiative législative de l'Union européenne en droit international privé de la protection de l'adulte, Parlement Européen, PE 408.328, 2008, p. 239) and again more recently (M. DRVENTIĆ, The Protection of Adults in the European Union, EU and Comparative Law issues and challenges, 2019, p. 811; European Law Institute, Council Decision CD 2020/2 of 20 February 2020 on the ELI Project on 'Protection of Adults in International Situations').

2073 In the above Assessment, it was highlighted that both financial and emotional costs linked with legal uncertainty in cross-border proceedings involving vulnerable adults amount to €11 million per annum (p. 16).

2074 Ibid. SALM, p. 6: "*Consequently, the lack of uniformity across the EU Member States may result in cases of inadequate protection of vulnerable adults in cross-border situations*".

2075 *I.e.* Resolution (2008/2123(INI)) 'Cross-border implications of the legal protection of adults', 18 December 2008: "Calls on the Commission to assess the option of the accession of the Community to the Hague Convention; suggests that this could be an area of enhanced cooperation between Member States"; Resolution (2015/2085(INL)) 'Protection of vulnerable adults', 1 June 2017: "Notes that the proposal for a regulation which is the subject of the recommendations set out in the Annex would not replace the Hague Convention; it would support the Convention and encourage Member

Europe and the European Law Institute have advocated for the protection of Adults and the adoption of a regional instrument. In particular, the Council of Europe endorsed specific principles[2076], prior to the entry into force of the Hague Convention, putting emphasis on the protection of Adults' freedoms and capacities from a human rights perspective, and taking into account the preparatory work of the Hague Conference[2077]. The European Law Institute, alongside the HC-2000, suggested the adoption of an EU Regulation, inspired by Brussels IIA[2078], and falling under the scope of article 81[2079] of the Treaty on the Functioning of the European Union[2080]. Accordingly, the Regulation should principally aim at enhancing cross-border cooperation in line with the scope of the HC-2000. Additional proposals were made[2081].

**646.** In September 2016, the European Parliament published an added value assessment[2082] on the protection of vulnerable adults, which highlighted the need for uniform legislation. It further submitted a request for legislative proposal before the European Commission[2083] in accordance with article 225[2084] of the TFEU[2085]. The above assessment suggests the adoption of

States to ratify and implement it; […] Notes that the protection of vulnerable adults, including those with disabilities, requires a comprehensive set of specific and targeted actions […]".

2076 Ibid. Recommendation No. R (99) 4. In particular, this instrument provides general principles for: (Parts I, IV and V) the definition of certain concepts such as 'incapable adult' (ibid.), 'adult', and 'intervention in the health field'; (Part II) the delimitation of the causes of incapacity; (Part III) the indication of the type of measures falling under the scope of these principles.

2077 Recommendation CM/Rec(2009)11 of the Committee of Ministers to member states on principles concerning continuing powers of attorney and advance directives for incapacity.

2078 In relation to Brussels IIA, see part III of this monograph.

2079 Judicial Cooperation in Civil Matters: "The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States […]".

2080 Specific reference to the history of the EU family law in relation to habitual residence is made in part I, chapter I, section IV of this book.

2081 Ibid. Council Decision CD 2020/2, p. 32 ff (*i.e.* choice of court in favour of the law applicable under art. 15 of the HC-2000, European Certificate of Powers of Representation, direct judicial communication, further clarification on the habitual residence determination possibly providing a model reference as the one of the EU Succession Regulation).

2082 Ibid. SALM. All European Parliament legislative initiative must automatically be accompanied by a detailed European Added Value Assessment (EAVA).

2083 The European Commission, in response to the European Parliament, stated that the current need at stake is for Member States to ratify the HC-2000 before taking action at a regional level (European Commission, Follow up to the European Parliament resolution of 1 June 2017 with recommendations to the Commission on the protection of vulnerable adults, SP(2017)510).

2084 "The European Parliament may, acting by a majority of its component Members, request the Commission to submit any appropriate proposal on matters on which it considers that a Union act is required for the purpose of implementing the Treaties. If the Commission does not submit a proposal, it shall inform the European Parliament of the reasons".

2085 In accordance with art. 10 of the 2016 Inter-institutional Agreement on Better Law-Making, the European Commission should respond to a request for proposals for Union acts upon initiative of the European Parliament by adopting a specific communication. If the Commission decides not to submit a proposal, it should inform the European Parliament of the detailed reasons, including a response to the analysis of the potential 'European added value' for the requested measure.

habitual residence on a primary basis and the implementation of continuing jurisdiction under the model of the Brussels IIA Regulation[2086]. The assessment states that the habitual residence interpretation should remain fact-based, without a definition being provided[2087]. Finally, it supports the ratification of the HC-2000, which coordinates parallel proceedings, '*simplifying the legal landscape by laying down an internationally uniform body of rules to govern jurisdiction in the Contracting States*'[2088].

**647.** In summary, the EU Member States perspective, and their interconnected activity with other European Institutions, show that important efforts have been made for the promotion of an EU protection of Adults. Importantly, the coordinated activities with the Hague Conference should currently aim for, and speed up, the widest ratification of the HC-2000. Such coordination and the adoption of an EU Regulation, which should be complementary to the Convention, are encouraged.

## Section II Hague Convention 2000

**648.** The principal role of habitual residence under the Convention shows the current trend inside and outside Europe[2089] to favour proximity and (best) interests determination in the State of habitual residence, especially when involving vulnerable persons[2090]. This is an important guiding point. The legal framework set out in the Convention was already introduced[2091]. Therefore,

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2086 The assessment, p. 11, indicates a few weaknesses arising from the HC-2000, which will not all be dealt with. Concerning 'continuing jurisdiction' which relates directly to the scope of this analysis, see p. 15: "It would allow the authorities of the State of an adult's former habitual residence - assuming that the representative of an adult is still in that former State - to retain jurisdiction for some time following the habitual residence change and to modify the existing measures ".

2087 However, it is mentioned that a contextualised reference, such as in the case of the Succession Regulation (*cf.* part V *infra*), may guarantee uniform guidance, legal certainty and adaptability towards its best implementation (see ibid. SALM, p. 63: "This Regulation [Succession] also fails to provide a legislative definition of the concept of habitual residence, however, the recitals to the Regulation do provide for indications as to those criteria that can play a role in determining the habitual residence of the deceased. In this way, flexibility is retained in the Regulation itself, but the recitals assist in ensuring a uniform interpretation of the concept". See also ibid. Council Decision CD 2020/2).

2088 Ibid. SALM, p. 152.

2089 R. FRIMSTON/ A. RUCK KEENE/ C. VAN OVERDIJK/ A. D. WARD, The International Protection of Adults, 2015.

2090 This point is debated among Hague States, whether the adult's interests should be interpreted in the same tenor of the principle of 'child's best interests'. See in this sense A. R. KEENE, Hague 35: Overview and Measures of Protection, in: R. FRIMSTON *et al.*, p. 98; and J. LONG, Rethinking Vulnerable Adults' Protection in the Light of the 2000 Hague Convention, *Int J Law Policy Family*, Vol. 27, 2013, p. 59.

2091 See part I, chapter I, section III.

the analysis directly refers to general jurisdiction[2092], concurrent jurisdiction[2093], transfer of jurisdiction towards a better placed court, and the applicable law.

## § I. Vulnerability, Interests and Proximity: An Adult-centred Approach

**649.** The Convention, articles 1 and 3, indicates 'vulnerability' as the situation in which Adults cannot protect their interests. In case of impairment and/ or insufficiency of personal faculties, according to the Convention, Adults may require both legal and administrative representation, assistance and charge[2094]. Emeritus Professor Paul Lagarde refers to the relevance of better organising and managing the protection of adults affected by diseases, including but not limited to Alzheimer's. To that end, for cross-border movements of people, who require specific measures by reason of health[2095], international protection should be guaranteed and secured both in States of origin[2096] and habitual residence[2097]. In this regard, the qualified degree of protection required by adults, temporarily or permanently, in situation of vulnerability, demands an equally qualified degree of factual proximity, as it was argued in matters of children[2098]. Accordingly, the authorities that are most familiar with the Adult's situation should be considered more appropriate, and better equipped, in protecting the Adult's *own* interests[2099]. Under the Convention, such authorities are those of the Adult's habitual residence[2100].

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2092 This includes both the jurisdiction on habitual residence (art. 5) and on physical presence (art. 6). The jurisdiction on nationality under art. 7 is to some extent also considered a general one (ibid. LAGARDE, p. 58), even though we will consider it under concurrent subsidiary jurisdiction (*cf.* subsection VII *infra*).

2093 With particular regard to: (a) the interplay with subsidiary jurisdiction founded on nationality; (b) the interplay with general 'in rem' jurisdiction; (c) temporary jurisdiction. In relation to the latter jurisdiction under art. 10 and 11, the same considerations that were made in Part III (*cf. supra*), in the framework of the HC-1996, are applicable to the HC-2000. It will therefore be dealt with briefly under this Chapter.

2094 Ibid. LAGARDE, p. 44.

2095 Including both illness and/ or age.

2096 This refers to the Adult's nationality.

2097 Ibid. FRIMSTON *et al.,* Foreword, p. vii.

2098 Reference to the guiding operation of best interests for the habitual residence determination was made in part III.

2099 Ibid. LONG, p. 59: "The principle of the (best) interests of the vulnerable adult also inspires *in abstracto* the choice of the grounds of jurisdiction and applicable law, as well as the automatic recognition of the protective measures abroad. Habitual residence is chosen (Article 5) because the State of residence is better placed to assess the factual life situation of the vulnerable person since it is 'physically closer' to her or him".

2100 In this sense, the Italian Supreme Court of Cassation held that, according to the objectives pursued by the Convention, the Adult's habitual residence should be considered the most suitable forum for the protection the Adult's interests (Corte di Cassazione, Sezione 6 civile, Ordinanza 17 aprile 2013, n. 9389).

**650.** One may argue that the Adult's own interests do not constitute a principle because they are not enshrined in a treaty[2101]. Reversely, the UNCRC, article 3, clearly sets out the universal principle of best interests towards the ultimate protection of children. This argument should not preclude the existence of that particular link under which the authorities concerned, in principle those in the State where the *realistic nexus* is present, would be better placed to ensure and protect the Adult's own personal and property rights[2102]. This rationale lies, importantly, in the principle enshrined in the Convention on the Rights of Persons with Disabilities and Optional Protocol[2103], according to which the human rights of persons with disabilities, including those requiring more intensive support, shall be protected according to the Adult's will and preferences[2104]. An Adult centred-approach is therefore required to determine his/ her habitual residence.

**651.** Neither the explanatory report to the Convention nor the EU study assessment[2105], on the above point, appear to take a direct position by alternating reference to the Adult's (best) interests[2106]. Therefore, with no need to compare the tenor of the child's best interests to the Adult's own interests, in our view both representing a guiding element in the habitual residence determination, and despite their different contextualised role, ground and

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2101 Ibid. KEENE, Overview and Protective Measures, p. 98; and General comment No. 1 (2014) of the UN Committee on the Rights of Persons with Disabilities, § 21: "Where, after significant efforts have been made, it is not practicable to determine the will and preferences of an individual, the 'best interpretation of will and preferences' must replace the 'best interests' determinations".

2102 Ibid. LONG, p. 53-59: "An in depth analysis of the 2000 Hague Convention shows that the 'interests of the adults' play a vital role, (a) *in concreto*, as a tool to ensure 'practical' justice and (b) *in abstracto*, as a guiding principle".

2103 Preamble, lit. j, art. 1 and 12.

2104 The UN Committee on the Rights of Persons with Disabilities has stated in its General Comment No. 1 (2104) that best interests shall not be objectively perceived (§ 29 lit. b). According to the Committee's guidance on art. 12(4) of the Convention, the Adult's will and preferences must take precedence to ensure that "persons with disabilities enjoy the right to legal capacity on an equal basis with others" (§ 21). In this sense, reference is sometimes made to the subjective best interests (G. SZMUKLER, "Capacity", "best interests", "will and preferences" and the UN Convention on the Rights of Persons with Disabilities, *World Psychiatry,* Vol. 18, 2019, p. 37) or to a judicious use of best interests (B. D. KELLY, Best interests, mental capacity legislation and the UN Convention on the Rights of Persons with Disabilities, *BJPsych Advances*, Vol. 21, 2015, p. 194). The UNCRPD's statement has been considered controversial among the experts (P. SKOWRON, Giving substance to 'the best interpretation of will and preferences, *International Journal of Law and Psychiatry*, 62, 2019). In this regard, it was observed that in the context of disabled children, the objective assessment of the child's best interests is found to be compatible with the child's will and preferences (ibid. SKOWRON, fn. 16; General Comment, § 36, above). The approach of the Hague Convention 2000, having regard to the Committee's statement, shall be read considering that the Adult's situation should be tangibly assessed at the time of the Adult protection proceedings, pursuing the objectives of the Convention, firstly to determine a place of qualified degree of proximity in which the effective protection of the Adult's own personal and property interests would be guaranteed. To that end, the Adult's settled purpose shall indeed be part of the tangible assessment. Therefore, this study opts for the continuing use of Adult's *own* interests as an important element for the habitual residence determination.

2105 Ibid. SALM.

2106 Ibid. LAGARDE, § 92, 114, 125; and SALM, p. 126.

history, it should not be wrong to conclude that the protection of vulnerable persons *tout court* requires jurisdiction of proximity founded on their own interests[2107]. This reasoning applies also to the issue of applicable law, which is strictly dependent on the determination of jurisdiction under the Convention[2108].

**652.** The following example may better clarify the above statement: A daughter, four years old, was born in France, her father's country of origin and habitual residence. Following parental separation, she relocates with her mother to Scotland, the latter's country of origin, without the father's consent. The daughter could not choose at the time of the relocation where to live because she had not reached a sufficient degree of maturity to express her views. The father seises the authorities in France and files for custody based on his daughter's habitual residence, according to article 5 of the 1996 Hague Convention[2109]. The mother contests the French jurisdiction. The daughter is principally French-speaking and she claims to be unhappy at the Scottish school where her mother enrolled her, and in her family life because she misses her father and her elder brother. The father is unwell, with the beginnings of a depressive disorder that has affected his capacity for decision-making, in particular concerning his health and properties. The elder child, who is willing to detain his father's fortunes, places the father in a clinic in Scotland, against his will, and seises the Scottish courts pursuant to article 5(1) of the HC-2000, to remove him from legal capacity[2110]. The father's parents, living in France, contest the Scottish jurisdiction.

**653.** In the above hypothetical, both the daughter and her father are incapable of protecting their own interests by reason of an (in)sufficient degree of maturity, and an insufficient capacity of decision-making, respectively. Consequently, the authorities first seised, both in France and Scotland, should primarily consider the existence of a realistic nexus conforming with the daughter's and father's own (best) interests, in order to determine international jurisdiction and applicable law.

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2107 Ibid. LONG, p. 59: "In England and Wales, the Mental Capacity Act of 2005 authorizes substitute decision making in the 'best interests' of the person lacking capacity. The same Act, similarly to the approach with regard to the 'best interests of the child', lists the factors to be (and not to be) taken into consideration for the specific assessment of the best interest of the incapable person".

2108 *Cf.* subsection II *infra*.

2109 This Convention was analysed in part III, chapter II.

2110 It is to be noted that Scotland is part of those jurisdictions providing a more paternalistic/ restrictive approach with regard to the measures towards the removal of legal capacity (ibid. LONG, p. 53).

## § II. General Jurisdiction and Applicable Law

**654.** General jurisdiction over the Adult's protection[2111] is allocated to the courts of his/ her habitual residence[2112]. The change of habitual residence causes the ceasing of the *former* habitual residence jurisdiction in favour of the *new* habitual residence jurisdiction[2113]. In this regard, the explanatory report specifies that the loss of habitual residence triggers the acquisition of a new one. A '*certain lapse of time*' may nevertheless occur between the two moments[2114]. A clarificatory point refers to the measures adopted prior to the Adult's relocation. These remain in force until a later decision[2115] is taken by the authorities of the new habitual residence (article 12)[2116]. The change of habitual residence triggers likewise a change of the applicable law governing the conditions of application of the said measures[2117].

**655.** The law applicable to the Adult's protection is the *lex fori* of the Adult's habitual residence[2118]. There are three exceptions to the general rule: (a) a first general exception given under article 13(2), essentially founded on the Adult's best interests[2119]; (b) a second general exception refers to the case considered in article 14, where a measure rendered in State A is implemented in State B and the law of State B will govern the conditions of its implementation[2120]; and (c) a last specific exception provided by article 15 dealing with the mandate for

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2111 Reference shall be made to art. 1 and 3 of the Convention. Art. 1 reflects the overall objective to ensure international protection over vulnerable adults through the protective measures mentioned under art. 3. According to the Convention preamble, vulnerability is given by, *inter alia*, the fact that adults are incapable to protect their interests due to the 'impairment' or 'insufficiency' relating to their personal faculties.

2112 Ibid. LAGARDE, p. 57.

2113 Absence of continuing jurisdiction.

2114 Ibid. LAGARDE, p. 56.

2115 Ibid. p. 68, § 86: "[…] even when the bases for the jurisdiction of this authority have subsequently disappeared as a result of a change of circumstances, so long as the authorities which have jurisdiction following this change have not modified, replaced or terminated them. […] This maintenance in force is necessary to ensure a certain continuity in the protection of the adult".

2116 Ibid. LAGARDE, p. 56, § 50: "True still to the Convention on the Protection of Children, the Commission with equal unanimity accepted that, in the event of a change in the habitual residence of the adult to another Contracting State, jurisdiction passes to the authorities of the State of the new habitual residence. The question of the continuance in force of measures taken in the first State is governed by Article 12".

2117 Ibid. LAGARDE, p. 68, § 88: "The measures taken will remain in force in accordance with Article 12, but their conditions of application will be governed, from the time of the change, by the law of the State of the new habitual residence".

2118 We recall that this can be the law of a non-Contracting State (art. 18) and that the renvoi is excluded (art. 19).

2119 Ibid. LAGARDE, p. 70. Professor Lagarde clarifies that here 'substantial connection' can also be referred to as *close connection.* It is added that this may also be the law of a non-Contracting State (ibid. ROMANO, p. 179).

2120 Ibid. LAGARDE, p. 70; and ROMANO, p. 179.

incapacity[2121]. The mandate[2122] should be governed by the law of the Adult's habitual residence at the time the agreement or act is concluded, unless one of the laws designated under article 15(2)[2123] is chosen by the Adult[2124]. The manner of exercise of the power of representation contained in the agreement or act shall be governed by the law of the State in which it is exercised according to article 15(3)[2125].

## § III. Determination of Habitual Residence

**656.** Some scholars argued in favour of a clear distinction between the child's and the adult's habitual residence, in particular when the adult does not hold capacity of decision-making. With regard to the adult's habitual residence, such a distinction refers in particular to *intent* and *integration*, both elements that may not be employed as determining when involving Adults in situations of vulnerability[2126]. The following judgments reject this distinction, providing further guidance with respect to what decisive and non-decisive elements should be considered in the Adult's habitual residence determination.

**657.** This case[2127] involved a Scottish lady aged 36, who was born in Scotland. She suffered from a mental illness which required her to be placed in a rehabilitation facility. Placement proving complex in Scotland, she moved to a

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2121 This mandate envisages the situation in which the Adult organises in advance his/ her protection for the time when he or she will not be in the position to protect his/ her own personal or property interests. He or she confers a power of attorney in favour of another person. The mandate can be voluntarily done by agreement or unilateral act; both shall be in writing. It is clarified that this mandate should not be glossed with the ordinary mandate falling under the Convention of 14 March 1978 on the Law Applicable to Agency, which is not discussed here.

2122 The 'existence, extent, modification and extinction of powers of representation'. The powers of representation are varied according to the person or the property of the Adult. They are enacted after the removal of capacity (ibid. LAGARDE, p. 71, 72). These powers may be withdrawn at any time after by new measures taken by the competent courts whose *lex fori* is entitled to apply (art. 16). Additionally, if the mandate is not valid under the elected law, it should be considered void and the general applicable law would apply (ibid. ROMANO, p. 180).

2123 This provision contains the laws that can be included in the agreement or act. Namely, 'the State of which the adult is a national', 'the State of a former habitual residence of the adult', 'the State in which property of the adult is located with respect to that property'. The choice of applicable law shall be made in writing.

2124 It seems that this law may also be the one of a non-contracting State (ibid. DRVENTIĆ, p. 822).

2125 In this regard, the French Court of Cassation held in the case '*Arrêt n°101 du 27 janvier 2021 (19-15.059) - Cour de cassation - Première chambre civile - ECLI:FR:CCAS:2021:C100101*' that the authorities of the State where the power of representation is exercised cannot subject the validity of the mandate for incapacity concluded in another State to the conditions provided under their own law. In the French case, a lady concluded in Switzerland a mandate for incapacity in favour of one of her sons, electing Swiss law as applicable under art. 15(2). Subsequently, prior to death, she acquired a habitual residence in France where her son tried to implement the mandate. The French courts, as a part of the contestation ('*second moyen*'), assessed the validity of the mandate. The French Court of Cassation reversed the lower decision.

2126 Ibid. KEENE, p. 112.

2127 *An English Local Authority v. SW and Another* [2014] EWCOP 43.

supported accommodation in England[2128]. The lady's mother and stepfather later moved her back to Scotland in absence of adequate prospective care. The English local authorities filed before the UK courts for the determination of substantive jurisdiction. The application was supported by the conclusions of the psychologist in that the lady lacked the capacity to decide where to live. The lady's habitual residence was the disputed matter before the courts[2129].

> The Court of Protection of England and Wales examined the lady's current intent and social environment at the time of the institution of the proceedings. The Court referred principally to the psychologist's report, but the following elements were also highlighted: (a) the current activity and the positive degree of participation within the accommodation and the local community[2130]; (b) the absence of regular contacts with her immediate family in Scotland; (c) the lady's change of mind with regard to her place of living[2131]; (d) the support that she needed and that she was refusing. The Court maintained that, irrespective of the beneficiary[2132], the habitual residence interpretation should be uniform and consistent through the international family law treaties applying this notion[2133]. Reference was especially made to the 1996 Hague Convention and Brussels IIA[2134]. The Court considered 'integration' as an overarching summary as opposed to a legal construct. In particular, the degree of integration should be fact-based. It cannot be a single decisive factor, as integration may sometimes not, or tenuously, occur within the Adult's family and social environment[2135]. The Court retained principally the duration, the lawful

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2128 § 8: "It is clear from the evidence that SW wanted to move to this facility, although formally it was undertaken pursuant to treatment orders as I have described".

2129 § 15: "Interim orders have been made, but the issue remains as to whether substantive jurisdiction rests with the English court or with the Scottish court. Proceedings before the Scottish court have been stayed pending the determination of this issue by the English court. The interim orders provide that it is in SW's best interests for her to reside in her current home and that members of staff may take reasonable and proportionate measures to prevent her from leaving and to return her there. It also declared that any deprivation of liberty is authorised under the MCA".

2130 Including the relationship with someone met in the supported accommodation.

2131 For instance, her wish to move from her actual accommodation because she disliked the environment and desired more independence, but basically her wish to remain in England as she felt her home and life settled there.

2132 Children or Adults.

2133 § 64: "Given the close links, in particular between the 2000 Convention and the 1996 Child Protection Convention, as explained in the Lagarde Report; given the relationship between the 2000 Convention and the MCA; and for general policy considerations as referred to by Lady Hale in A v A, it is clear to me that the definition of 'habitual residence' under the MCA should be the same as that applied in other family law instruments, including BIIa. Further, BIIa is also closely linked to the 1996 Convention, as explained in Proceedings brought by A".

2134 § 66: "If a different approach was to be taken as between adults and children, habitual residence would not even be applied consistently within BIIa".

2135 § 70: "It is not difficult to think of examples of an adult who is not integrated at all in a family environment and only tenuously integrated in a social environment but who is undoubtedly habitually resident in the country where they are living […]".

voluntariness, the state of mind, and the accommodation considered as home[2136]. These factors all determined the lady's effective stability in England. The Court concluded that the lady was habitually resident in England since her arrival.

**658.** The next case[2137] was already cited[2138]. A Swiss Adult was living and working in Switzerland. Following professional and financial troubles due to a mental disorder, he travelled to Bulgaria, Ukraine and Czech Republic. He maintained regular contacts with Switzerland, in particular through the visiting of his daughters. During a journey in Switzerland, the local authorities implemented a guardianship measure. The Adult challenged the Swiss jurisdiction on the basis that his habitual residence was in Czech Republic where he rented a flat. The case reached the Swiss Federal Court.

The Court held that, pursuant to article 5 of the Convention[2139], the Adult's habitual residence was in Switzerland by virtue of his actual centre of life/ focus of his social relationships. The court retained as decisive elements the presence of the Adult's family and his own regular presence in Switzerland compatible with his state of mind. According to the Court, the required degree of integration should generally be assessed through personal relationships, interest in political and social life, living conditions and housing, family and professional ties, language skills. A certain length of stay as a presumption for expected integration may also play a complementary role.

**659.** The two cases under examination provide that the Adult's habitual residence should be circumstantially-based. The perspective is that of an adult lacking capacity whose degree of personal integration should be considered through an overall analysis of the facts[2140] at the time of the institution of the proceedings[2141]. Habitual residence should be interpreted in a uniform manner, pursuing the objectives of the Convention and by referring to analogous family law instruments, irrespective of the beneficiary. Decisive elements of the assessment should be the Adult's physical presence, the regular contacts with a stable environment that is fact-based, conducive to an actual home (*i.e.* through personal relationships, language, participation in the

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2136 § 61: "[…] when asked by her solicitor 'Where is home?', she replied I would have to say here".

2137 ATF 5A_68/2017 [21 June 2017].

2138 At fn. 210 to which we refer for a more detailed analysis of the facts.

2139 The Court also made reference to the 'analogous system and objective' under the HC-1996 (§ 2.2).

2140 In this sense, also the German case law (*'Soziale Integration/ Daseinsmittelpunkt'*, 'Tatsächlichen Lebensmittelpunkt'), which has excluded administrative proofs or declarations as decisive elements (LG Augsburg, 5. Zivilkammer, 30.01.2018 - 054 T 161/18; and LG Cottbus, 7. Zivilkammer, 09.05.2018 - 7 T 28/17).

2141 The UK courts have also referred to the *date of the hearing* (*JO v. GO & Ors*, 2013, EWHC 3932).

local community), his/ her state of mind. Duration should be a complementary element accompanying the preceding factors.

## § IV. Change of Habitual Residence

**660.** The explanatory report to the Convention suggests that there may be a lapse of time between the loss of the former and the acquisition of a new habitual residence – '*one year might be an appropriate rule of thumb*'[2142]. Conversely, the change may likewise be instantaneous if accompanied by a long-term settled purpose[2143].

**661.** The UK practice shows that an Adult, for the purposes of the Convention, may have only one habitual residence, or may have none. The establishing of a new, and loss of the former, habitual residence may occur on the same day[2144]. A change in the Adult's habitual residence may depend on whether, before losing the capacity of decision-making, he or she had acquired habitual residence in a State which he or she intended to maintain after the loss of capacity. A change could certainly occur if the caregiver would later move with the Adult, unless that is against the Adult's own interests. Accordingly, a wrongful removal or retention[2145] should not trigger a change in the Adult's habitual residence lawfully constituted before the abduction.

**662.** The determination of the effective change of habitual residence should occur at the time of the institution of the proceedings. Habitual residence may change also during the proceedings before they are brought to a close[2146]. The earlier relocation arrangement, or its subsequent endorsement, concluded between the local authorities and the family members responsible for the Adult's care[2147], may also be complementary for the determination, if in the Adult's own interests[2148]. However, the existence or absence of a relocation agreement should not preclude the acquiring of a new habitual residence[2149]. This further judgment should clarify the preceding reasoning.

**663.** This case[2150] involved a French mother, who is the respondent, and her daughter, who is the applicant. While the respondent was in Scotland during a

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2142 Ibid. KEENE, p. 118.

2143 Ibid. LAGARDE, p. 56.

2144 Ibid. *JO v. GO & Ors*.

2145 *Cf.* section IV *infra*.

2146 Ibid. p. 117-118; and F. GUILLAUME in: A. LEUBA/ M. STETTLER/ A. BUCHLER/ C. HAFELI, Commentaire du Droit de la Famille, Protection de l'Adulte, 2013, p. 1195.

2147 Ibid. p. 117-118.

2148 Ibid. *JO v. GO & Ors*.

2149 Ibid.

2150 *A.F. v. M.S. (first respondent)+PGS (Second Respondent)* [20 December 2011] Sheriffdom of Lothian & Borders At Selkirk, AW6/11.

short visit, she concluded a Power of Attorney in favour of her stepson and an another individual. The applicant, who lived in Belgium, applied before the Scottish courts for the recognition and enforcement of two protective measures adopted in France, still under appeal. So, she contended the invalidity of the agreement. The respondent sought reassessment of the merits before the same courts.

> The Scottish Court recognised the French measures and revoked the Power of Attorney. It declined jurisdiction by reason of, *inter alia*, the Adult's habitual residence established in France[2151]. The Court held that domicile is not relevant for the determination of habitual residence. It stated that the Adult's move to Scotland had not triggered a change of habitual residence. Namely, the Adult had been removed not for any other purposes than a visit, which would not have amounted to an effective change of habitual residence[2152].

## § V. Absence of Habitual Residence

**664.** According to the Convention, article 6[2153], physical presence fills in the jurisdictional vacuum caused by the absence of habitual residence. This rule typically concerns the situation of refugee and asylum migration[2154], or the one where, irrespective of the status, habitual residence is not established. In the latter case, a reasonable time should lapse[2155] to ensure that the former habitual residence is abandoned. Under the Convention, physical presence also determines the applicable law under article 13(1) unless substantial connection applies according to article 13(2).

**665.** As it was mentioned in reference to child protection[2156], there might be a case where, by reason of a precarious lifestyle, the Adult is present in different States not allowing long-term protection[2157]. In this scenario, the rule on mere presence would not satisfy the objectives of the Convention, but potentially

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2151 The Court also stated that the appeal proceedings in France involved the very matters sought to be reviewed in Scotland.

2152 "Her initial intent on travelling here was for a visit".

2153 The scope of this provision is the same in art. 6 of the HC-1996 (*cf.* part III, chapter II, section II above).

2154 On the interchangeable use of refugee/ asylum terminology in this study, see fn. 87. See also ibid. LAGARDE, p. 57: "The adults contemplated by this paragraph [6.1] often need, apart from situations of urgency, their protection to be organised on a long-term basis. They may indeed, for example, be led to apply for asylum […]".

2155 Ibid. LAGARDE. See also OLG Koblenz (13. Zivilsenat), Beschluss vom 14.02.2017 - 13 UF 32/17, § 41.

2156 We refer to part III, chapter II, section II.

2157 Ibid. LAGARDE.

lead to a situation of conflicting judgments and lack of protection[2158]. It may be solved through the recourse to prospective acclimatization. In particular, the authorities of the Contracting State, in which the adult holds meaningful links[2159] at the seisin, should be entitled to exercise international jurisdiction and apply their own law[2160]. In order for this solution to be efficient, the rule on transfer of jurisdiction[2161] should operate whenever the Adult is currently present in a Contracting State and holds meaningful links in another.

**666.** An example[2162] may be useful to briefly analyse this context[2163]: An Adult, who suffers from bipolarism, fled war in Syria together with his father and sister. After a short stay in a refugee camp in Istanbul, someone smuggles them to Ukraine, prior to crossing Europe as far as Latvia. There, the family lives together for six months, pending asylum application under the Dublin III Regulation and awaiting a supported accommodation for the Adult. The latter also enrolls in a language course. Afterwards, although the father and sister are willing to remain in Latvia, the Adult moves to Estonia, with the intent to reach Finland. In Estonia, he submits a second asylum application. A

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2158 In particular because the Adult's change of physical presence triggers the change of both jurisdiction and applicable law (Ibid. KEENE, p. 124).

2159 These may comprise the following, non-cumulative, factors: family connections; cultural ties; knowledge of the language; the possession of a residence permit; the applicant's previous period of residence in the other State; and any other connections that would expedite or enhance the prospects of integration (ibid. LEGOMSKY). In line with the HC-2000 where particular importance is given to the Adult's nationality, it is argued that, outside the refugee/ asylum context for obvious reasons often related to the impossibility of returning to the State of nationality (*cf.* subsection VII *infra*), the latter may also be an indicative element for prospective acclimatization if considered in the Adult's own interests. In particular, the welfare of an Adult with no habitual residence, who may still be entitled to return to his/ her State of nationality, would in some circumstances be more effectively protected in that State rather than in the one of mere presence. In this regard, the UK courts, in the case '*Re Clarke* [2016] EWCOP 46', retained inherent jurisdiction over a British lady and mother, who since 2008 had spent the great majority of her time outside England, based on her nationality and appropriateness (§ 9: "*The next and ultimately more important question is whether those powers, should in fact be exercised. In considering that, the court has to have regard to Mrs Clarke's welfare, the rights of all concerned, the likelihood that orders would be effective and all the surrounding issues in this unhappy case*"). We recall though that in the case where, irrespective of the status, an Adult left his/ her country of origin for lack of stability, without establishing any habitual residence, and is found to be in need in the State of physical presence, reference to his/ her nationality may not entail a solution. In particular, an Adult with a nomadic lifestyle, national of one of the EU Member States that is also a Contracting State, physically present in Switzerland, may have severed all connections with his/ her country of origin. The allocation of jurisdiction to the latter State, which would be entitled to apply its own law, may not be compatible with the Adult's own interests. Thus, in our view, the place of physical presence remains a more suitable general rule.

2160 In this case, the applicable law should be determined according to art. 13(2) in that prospective acclimatization would essentially identify substantial connection, currently left with no meaning under the Convention.

2161 *Cf.* subsection VI *infra*.

2162 This example took inspiration from the following article: A. ISLAM, Untold Stories: A Study of Sudanese and Syrian Refugees in Estonia, International and Multidisciplinary Journal of Social Sciences, 9(1), 2020.

2163 Reference is principally given to art. 6(1), which might be a more common scenario.

guardianship measure on his behalf is requested by the local administrative authorities.

> In this scenario, it is difficult to retain specific elements that would determine the Adult's habitual residence. The authorities in Estonia should exercise jurisdiction under article 6(1) of the HC-2000 relying on the Adult's physical presence at the time of the seisin. They would be entitled to apply their own law under article 13(1), perhaps with no continuity with the accommodation request filed in Latvia. The language course, the request for supported accommodation and the presence of the family in Latvia may determine that State as the Adult's place of prospective acclimatization. Accordingly, the authorities in Estonia should submit a request for transfer of jurisdiction to the authorities in Latvia[2164]. The guardianship measure taken in Estonia should be recognised and enforced in Latvia, according to article 22[2165]. Concerning the asylum procedure, the authorities in Estonia may also file a take-back request under Dublin III, article 23[2166], in order to transfer international responsibility towards the authorities in Latvia[2167]. Ultimately, this result would lead to concentration of jurisdiction over the Adult's protection proceedings and asylum procedures, a solution that should be more suitable for the Adult's own interests.

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2164 In practice, the authorities in Latvia may likewise submit a request to the authorities in Estonia in order to obtain jurisdiction (ibid. GUILLAUME, p. 1196).

2165 Save exceptions set out in art. 22(2). In addition, art. 23 may also apply if the Adult, or in context his guardian, decides to submit a request for recognition before the authorities in Latvia, prior to the (non-)recognition by operation of law, under art. 22(1). Such a request would be governed by Latvian law (ibid. LAGARDE, p. 80).

2166 It is observed that the Dublin III Regulation also provides similar rules concerning the transfer of an asylum request (*cf.* part III, chapter II, section II for a complementary analysis). In particular, the Regulation states that the Dublin Member State of the asylum seeker's first physical presence should be internationally responsible over the asylum application. Where no asylum decree is obtained (or no application is yet filed) in the 'first-seised' State (or State of first arrival) and the same asylum seeker applies for asylum (or no application is yet filed) before the authorities of a 'second seised' State (or State of second arrival), the two States should establish cooperation in order to initiate a transfer of responsibility so-called 'take-back and take-charge request' (art. 21-25). In this regard, the Member State of the asylum seeker's second physical presence may be considered internationally responsible over the asylum application (*Tsegezab Mengesteab v. Bundesrepublik Deutschland*, 26 July 2017, C-670/16 ECLI:EU:C:2017:587; *Bundesrepublik Deutschland v. Aziz Hasan*, 25 January 2018, C-360/16 ECLI:EU:C:2018:35).

2167 For more details on the Dublin III procedure, please refer to V. BUMBACA, Défis actuels pour le droit international privé : focus sur la protection des migrants, Blogue / Société québécoise de droit international, 8, 2020.

## § VI. Transfer of Jurisdiction

**667.** The Adult's own interests[2168] may play a seminal role to derogate from habitual residence when it is determined that a *better appropriate* forum exists. Reference is especially made to the transfer of jurisdiction under article 8 of the Convention[2169].

**668.** The following example illustrates this scenario: Jean Marc is a French national who lives in Switzerland. At some point, he is found addicted to drugs and made redundant. He relocates to Portugal where he lives for a year. There, he rented an apartment and started a new relationship with a Portuguese woman. He is unemployed and lives on his previous savings. He regularly visits Switzerland where he receives redundancy payments. While he is going to the Lisbon airport, he suffers a precarious state of mind. The Portuguese local authorities for the protection of Adults apply a temporary guardianship. Jean Marc challenges the measure, arguing that the Swiss authorities are still competent over his protection.

**669.** The assessment of specific elements may show that an alternate habitual residence[2170] exists close to the seisin[2171]. In particular, the physical presence at the relevant time, the renting of an apartment principally occupied, and the beginning of new connections with the Portuguese community should determine a sufficient degree of current integration in Portugal. Other elements may instead be *conclusive indicators* that Jean Marc's own interests would be better protected in Switzerland. Namely: the maintaining of regular contacts with the Swiss local community; the access to unemployment benefit in Switzerland[2172]; the absence of work in Portugal. The Swiss authorities should therefore be considered better placed under the Convention[2173]. According to article 8(2)(b) of the Convention, the courts in Portugal may proceed with the transfer of jurisdiction towards Jean Marc's preceding habitual residence[2174].

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2168 *Cf.* subsection I above.

2169 Ibid. LAGARDE, p. 60.

2170 *Cf.* section III *infra*.

2171 This point in time was indicated in the case law examined under this Section (*cf.* subsections III and IV above). It is likewise the result from the analogy made with the HC-1996.

2172 Including the support received from the authorities to reintegrate the Adult on the Swiss job market.

2173 We recall that the Swiss authorities, if second seised on a claim involving the same cause of action, are not under obligation to stay proceedings, given the absence of *lis pendens* under the Convention (ibid. LAGARDE, p. 55; and BEAUMONT/ MCELEAVY, p. 878). They would do that if the conditions under art. 9 of the SPILA were satisfied.

2174 The transfer may also be made to France, country of nationality, even though the Swiss community determines better appropriateness founded on Jean Marc's own interests. In this regard, the preceding habitual residence refers to the Adult's last former one (ibid. LAGARDE, p. 62).

## § VII. Concurrent Subsidiary Jurisdiction: Nationality and In Rem

**670.** The Convention provides two grounds of jurisdiction founded on the Adult's nationality (article 7) and on the property location (article 9). Both jurisdictions are concurrent, subsidiary[2175] to the one of habitual residence[2176]. In particular, the authorities of the Adult's nationality[2177] or of the property location[2178] may take protective measures if the Adult's own personal or property interests so require. With regard to the jurisdiction on nationality, a duty of coordination and information should be fulfilled. Namely, the authorities of the Adult's nationality should advise those of the Adult's habitual residence (article 5) or physical presence (article 6.2)[2179]. They should not implement inconsistent measures with those adopted by the State of habitual residence[2180]. The latter requirement also applies to the in rem jurisdiction. Jurisdiction on nationality should not be exercised, or its measures would cease[2181], as soon as the authorities of the Adult's habitual residence[2182] deal with the situation[2183]. To this end, the authorities of the Adult's habitual residence[2184] should inform those of the Adult's nationality[2185]. The following case illustrates this scenario.

**671.** In this case[2186], the guardianship and care of a French-Australian lady, suffering from Alzheimer's, were attributed to her former spouse and her child, all living in Australia, on the basis of an Australian judgment. The lady concluded a Power of Attorney in favour of both guardians. Thereafter, they submitted a request before the French authorities for the release of funds generated from a life insurance contract concluded by the lady prior to the removal of her decision-making capacity. The funds were destined to the care of her mental deterioration. The request was rejected in first instance. On this matter, the French judge estimated that a protective measure over the lady's

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2175 Ibid. LAGARDE, p. 42, 63; and KEENE, p. 119.

2176 *Cf.* subsection II above.

2177 In case of multiple nationalities, each of them may exercise concurrent jurisdiction (ibid. LAGARDE, p. 58).

2178 This jurisdiction is likewise concurrent to the one of nationality.

2179 This excludes refugees or analogous situations under art. 6(1).

2180 In addition to the measures taken under art. 6(2) and 8.

2181 This rule applies also to in rem jurisdiction. The measures implemented under art. 9 of the Convention prior to those taken under art. 5 to 8, should cease in order to avoid incompatibility (ibid. LAGARDE, p. 64).

2182 In addition to those under art. 6(2) and 8.

2183 Namely, the authorities under art. 5, 6(2) and 8 have taken measures, or have decided that no measures should be implemented.

2184 In addition to those under art. 6(2) and 8.

2185 This duty of information does not apply to art. 9 (ibid. LAGARDE, p. 66).

2186 Cour d'appel de Rennes, 15 octobre 2013, 13/02113.

properties had to be first adopted under French law in order to access the funds[2187]. The request was instead accepted with regard to the jurisdiction. The lady filed before the *Cour d'Appel de Rennes*.

> The Appellate Court confirmed the French international jurisdiction. It maintained that in the event the French authorities were seised for the question of the applicable law, they should apply Australian law for the administration, conservation and disposal of the properties located in France[2188]. According to the Court, the Australian protective measures were sufficient to produce immediate effects in the French legal order, regardless of the exequatur[2189], by virtue of the Convention and of the French civil procedure, article 509. Therefore, the Court reversed the judgment, by reason of its incompatibility with the objective of the Convention, being contrary to the measures previously taken in Australia, place of the Adult's habitual residence[2190].

## § VIII. Concurrent Temporary Jurisdiction

**672.** This jurisdiction of temporary nature[2191] involves that particular situation requiring concurrent, provisional or urgent measures[2192] in the Contracting State of the Adult's physical presence[2193]. Unlike urgent measures, those of provisional character are not subject to recognition and enforcement[2194]. The following case illustrates this jurisdiction.

**673.** This English case[2195] concerned a court's declaration, not subject to appeal[2196], involving an urgent application filed by the English medical legal entity, NHS trust[2197], before the English Court of Protection. The declaration

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2187 "*En revanche le prononcé d'une mesure de protection par le juge français n'est pas le préalable à toute demande d'actes sur les biens de la personne protégée*".

2188 Art. 13(2) and 18.

2189 *Arrêt Hainard* (Cass. req., 30 mars 1930).

2190 "*Cette compétence des autorités de l'Etat de situation des biens de l'adulte s'exerce pour autant que les mesures sont compatibles avec l'incapacité constatée et les mesures déjà prises par les autorités compétentes en vertu des articles 5 et 8*".

2191 Analogy is made with the HC-1996 (part III, chapter II, section II of this monograph).

2192 In case of urgent measures, the authorities exercising temporary jurisdiction shall inform those holding general jurisdiction founded on the Adult's habitual residence (art. 10.4).

2193 This jurisdiction should be distinguished from the general jurisdiction of art. 6 (ibid. LAGARDE, p. 64).

2194 Ibid. LAGARDE, p. 67; and DRVENTIĆ, p. 819.

2195 *Re AA* [2012] EWHC 4378 (COP).

2196 "Although no-one has sought to appeal the judgment dated 23 August 2012 during the last 15 months, or to have it transcribed for any other purpose, I have decided to authorise its release together with the verbatim transcript of the proceedings and the order made so as to inform and clarify recent public comments about this case".

2197 "It will be seen that the application to me was not made by the local authority or social workers. Rather, it was an urgent application first made at 16:16 on 23 August 2012 by the NHS Trust".

aimed to state that it was lawful and in the lady's best interests to deliver the baby via caesarean section. The case involved an Italian woman, who was habitually resident in Italy and temporarily present in England. While heavily pregnant, she was subjected to temporary measures in England by reason of her significant mental disorder[2198]. Thereafter, the lady was subjected to caesarean section. The latter measure was found to be in her best interests[2199].

## § IX. Party Autonomy

**674.** Previously, it was mentioned that the Convention allows the Adult to choose the applicable law that should govern the mandate for incapacity[2200]. This is one of the main innovations brought by the Convention[2201]. The question arises if it would not have been beneficial for the Adult, allowing him/ her greater freedom, to provide additional laws such as the one of the primary carer's habitual residence or of his/ her direct family members (*i.e.* spouse, child). For instance, an Adult may be willing to elect the law of the spouse's or primary carer's habitual residence established at the time of the Adult's incapacity; or the law of the spouse's or child's habitual residence at the time of the agreement or act.

**675.** Along with the above, a more efficient choice-of-court clause should have been introduced[2202]. Currently, an Adult may decide that the courts of any contracting State[2203], other than those of his/ her habitual residence at the time of the proceedings, would be more appropriate to exercise jurisdiction over the protection of his/ her own cross-border interests. However, the Convention provides that this autonomy should be subject to the control of the authorities under articles 5 and 6[2204]. The intervention of the said courts of general jurisdiction should be avoided, in that the chosen courts would be capable of

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2198 It is not clear whether the temporary measure included an urgent character. The explanatory report suggests that, as opposed to temporary jurisdiction of urgent nature pursuant to art. 10, which should not be used as a general ground for medical surgical operations (*i.e.* pregnancy termination), art. 11 should include medical purposes, but to a limited extent only (ibid. LAGARDE, p. 64, 67).

2199 "On behalf of AA the Official Solicitor did not oppose the application and agreed that the proposed delivery by caesarean section was in the best interests of the patient herself who risked uterine rupture with a natural vaginal birth (the risk was expressed as 1%)".

2200 *Cf.* subsection II above.

2201 Ibid. ROMANO, p. 179.

2202 The possibility of introducing a more comprehensive choice-of-court rule was also one of the ELI's proposals in the framework of a possible new future EU Regulation on the protection of Adults. In this regard, it was suggested that the scope of such a rule should include "*the power to supervise guardians, persons appointed by a court or by the adult concerned (by way of a power of attorney), or having power ex lege to take care of the adult's affairs*" (CD 2020/2 of 20 February 2020, p. 33).

2203 The scope of the current 'choice of court' is unlimited under the Convention (art. 8(2)(d): "the State whose authorities have been chosen in writing by the adult to take measures directed to his or her protection").

2204 Ibid. LAGARDE, p. 62.

determining the Adult's own interests with no need for concurrent jurisdiction. With a view to avoiding manipulations of autonomy, the clause should be concluded prior to the Adult's incapacity. It is further recommended to exclude the choice of court from the scope of article 8(3)[2205]. Such a solution would be more expeditious and efficient. On the other hand, it would be advisable to better delimit the scope of the clause to specific grounds, similarly to those under article 8(2) of the Convention, *inter alia*: the Adult's nationality; the Adult's former habitual residence; the situs; the spouse's habitual residence; the child's habitual residence; the primary carer's habitual residence at the time of the conclusion or incapacity. More importantly, the conclusion of a choice of court in favour of the applicable law governing the Adult's protection should be allowed.

**676.** The ultimate advantage of providing both choice-of-court and choice-of-applicable law clauses would be that of enabling parallelism between forum and *jus*, to reduce potential issues related to the public policy of the forum and non-recognition of judgments. Additionally, in line with an Adult centred-approach founded on the effective protection of his/ her own interests advocated for in this part, the Adult would be able to freely choose in advance, even though restrictively, the jurisdiction and the applicable law governing his/ her fundamental personal and property rights[2206].

## Section III Two Habitual Residences

**677.** The situation of alternate habitual residence concerns the Adult's regular connection with two States at a different point in time close to the seisin. Conversely, concurrent habitual residence involves the scenario in which the Adult is regularly settled in two States on a relevant date.

### § I. Alternate Habitual Residence

**678.** With regard to alternate habitual residence, the two solutions proposed here[2207] should also be applicable to the protection of incapacitated adults. Particularly, in such a scenario, the Adult should in principle hold a principal habitual residence.

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2205 The required acceptance of the designated authority may hinder the Adult's autonomy.

2206 Ibid. p. 34: "Providing the adult concerned with the right to make choices relevant to his or her interests translates the principle according to which people with disabilities ought to be empowered to enjoy their rights on an equal basis with others. This is a key objective of the UNCRPD and the main focus of the European Disability Strategy 2010´2020, adopted by the European Commission (COM(2010) 636 final)".

2207 These refer essentially to the determination of the Adult's principal habitual residence or his/ her continuing physical presence (see part I, chapter IV, section III).

**679.** The recommended factors helpful in determining such a residence, for both purposes of jurisdiction and applicable law, should be: The Adult's physical presence at the seisin; the settled purpose[2208]; the state of mind; the existence of a home environment and the most effective protection of his/ her own interests. By contrast, as opposed to what was supported in other parts of this book, the family environment would not be considered a determining element in that the Adult might be settled in an accommodation located in a State other than that where his/ her family lives[2209].

**680.** The case law examined in this Section[2210] showed that the supported accommodation, including the primary carer's habitual residence, may primarily determine the Adult's personal home environment. Clearly, in the case where the Adult lived with his/ her family at the relevant time, a common centre of life interests may be determined. The same goes for the family home, which could also be employed as a complementary factor if the Adult were to occupy it at the relevant time.

**681.** When the determination of a principal habitual residence proves so complex that its assessment would appear artificial, the Adult's physical presence, considered a prerequisite of qualified proximity, should operate as a 'tie-breaker' rule[2211]. In this regard, the Adult's continuing physical presence may coincide with the one of his/ her primary carer.

## § II. Concurrent Habitual Residence

**682.** In reference to concurrent habitual residence, we argue[2212] that such a situation should generally be excluded, save for a few exceptions[2213]. These exceptions should not include the incapacitated adult if an 'Adult centred-approach' were adopted as the primary method to determine habitual residence. Accordingly, the fact-based assessment should principally rely on the Adult's own personal and social degree of integration. For instance, when the Adult's habitual residence is essentially determined by virtue of his/ her own acclimatization, irrespective of the family place of living and/ or of a relocation agreement[2214], concurrent habitual residence would *de facto* be obviated. An appreciable assessment period should likewise support the

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2208 This element should gain increasing importance if achieved prior to the Adult's incapacity.

2209 *Cf.* section II, subsection III above.

2210 *Cf.* section II, subsections III and IV above.

2211 This rule should not apply to alternate habitual residence in the context of wrongful removal or retention where the Adult's physical presence may be used to constitute an unlawful habitual residence (*cf.* section IV *infra*).

2212 See part I, chapter IV, section III.

2213 See in particular parts II and III.

2214 *Cf.* section II, subsection IV above.

determination of one habitual residence. This period was indicated under the UK practice as the time between the Adult's arrival in one given State and the date of the hearing where the courts should consider the presence or absence of specific factors, firstly the Adult's regular presence[2215].

**683.** In any event, conflicting habitual residence determinations may become a true reality, namely when the Adult's own acclimatization inevitably comprise both his/ her social environment, essentially established in the Contracting State of the supported accommodation, and his/ her family environment located in another Contracting State. In this regard, taking into account the specific context of vulnerability similar to the one of child protection[2216], the recourse to intercountry assessments would be recommended, in particular under the Convention, articles 30 and 32[2217]. This process, based on a collaborative and multidisciplinary approach carried out between the authorities of two States, should determine, *inter alia*, the Adult's state of mind, effective care, supported accommodation, social relations in the community, family relations and health.

**684.** The result of such an assessment would ensure the Adult's home environment determination in his/ her own interests[2218]. On this matter, reference shall also be made the Committee on the Rights of Persons with Disabilities (UNCRPD)[2219]. The approach indicated in this part, based on the habitual residence assessment founded on the Adult's *own* interests[2220], would possibly require the intervention of the Committee[2221]. Surely, other than

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2215 Ibid. *JO v. GO & Ors*, § 21.

2216 See part III, chapter II, section II above.

2217 This process may also concern non-conventional cases through the network of the International Social Service.

2218 An example concerns a Swiss-UK case which the present author dealt with at the International Social Service. It involved two brothers from Angola who had been separated for years. The Swiss brother, who was residing in Switzerland, filed a request before ISS Switzerland to assess the whereabouts and care situation of his brother, who was placed under care in the UK. ISS Switzerland transferred the request to ISS UK, submitting specific questions on the Adult's evaluation (*i.e.* effective care, health, state of mind) in order to determine his home environment. ISS UK performed the assessment in collaboration with the UK local authorities. The result of the assessment allowed the two brothers to establish direct contacts with a view of a joint family care plan and a possible transfer of jurisdiction towards the Swiss authorities. Although the case fell outside the geographical scope of the HC-2000, the Swiss authorities were still able to apply the Convention on the basis of art. 85(2) of the SPILA. The latter provision provides for direct effective implementation of the Convention in the Swiss legal system (ibid. GUILLAUME, p. 1183).

2219 "The Committee is a body of 18 independent experts which monitors implementation of the Convention on the Rights of Persons with Disabilities. The members of the Committee serve in their individual capacity, not as government representatives. They are elected from a list of persons nominated by the States at the Conference of the State Parties for a four year term with a possibility of being re-elected once (cf. Article 34 of the Convention)" (<https://www.ohchr.org/en/hrbodies/crpd/pages/crpdindex.aspx>).

2220 *Cf.* section II, subsection I above.

2221 According to the Optional Protocol (GA resolution A/RES/61/106), art. 1 and 6, the Committee is entitled to receive and examine individual complaints, as well as undertake inquiries in case of systematic violations of the Convention on the Rights of Persons with Disabilities. In this respect, the Committee's jurisprudence would additionally support a uniform Adult-centred interpretation of

potentially solving the conflicting habitual residence determination, its mandate *super partes* would support a harmonised standardisation of habitual residence in respect of an Adult centred-approach advocated for here[2222].

## Section IV International Adult Abduction

**685.** The Adult's wrongful removal or retention[2223] is not dealt with in the Convention. We acknowledge the importance of providing in the near future specific rules, similarly to the HC-1980[2224], governing international Adult abduction. The following cases should highlight the increasing multi-layered issue.

**686.** This case[2225] involved a British-Saudi vulnerable[2226] daughter who was born and lived in Wales until the age of 17, later relocating with her father to Saudi Arabia. She claimed before the English courts ill-treatment by her father[2227] and requested mandatory orders determining, *inter alia*, her return to the UK[2228].

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habitual residence founded on proximity with the Adult's *own* interests (see UN, OHCHR, IPU, Handbook for Parliamentarians, No. 14, 2007, p. 35). The intersection of proximity and Adult's own interests should refer to, *inter alia*, equal enjoyment of all human rights and fundamental freedoms, including access to effective justice in the home environment and community in which the Adult is personally integrated according to his/ her own state of mind, in line with art. 12(4) and 19(a) of the UN Convention on the Rights of Persons with Disabilities and its General Comment No 1, § 29.

2222 On a short term, a General Comment jointly adopted between the UNCRPD and the UNCRC would enable a universal child-focused and Adult-focused interpretation of habitual residence by virtue of a special protection, which shall be granted to both children and vulnerable adults. Such protection includes, *inter alia*, access to justice, equal recognition before the law, liberty of movement and international co-operation, all principles enshrined in the Convention on the Rights of Persons with Disabilities, art. 13 and 32, and recalled in the Hague Convention 2000 (<https://assets.hcch.net/docs/a3920f8f-ee66-470e-943b-cf6865af8226.pdf >). An example can be found in the 'General Comment (JGC) No. 4 (2017) and No. 23 (2017)' adopted by the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) and the Committee on the Rights of the Child (CRC) on the human rights of children in the context of international migration.

2223 For the terminology, we refer to the international child abduction context (part III, chapter II, section II).

2224 Ibid. BEAUMONT/ MCELEAVY, p. 882.

2225 *Al-Jeffery v. Al-Jeffery* [2016] EWHC 2151 (Fam).

2226 English law has referred to a vulnerable adult as a person who "even if not incapacitated by mental disorder, is, or is reasonably believed to be, either: (i) under constraint; or (ii) subject to coercion or undue influence" (*Re SA (Vulnerable adult with capacity: marriage)* [2005] EWHC 2942 (Fam), § 77, reiterated in the case under analysis (§ 38)). In relation to the UK jurisdiction over an Adult under constraint, it was said that "The jurisdiction is exercisable whenever a vulnerable adult is confined, controlled or under restraint … It is enough that there is some significant curtailment of the freedom to do those thing which in this country free men and women are entitled to do […] the court exercises what is, in substance and reality, a jurisdiction in relation to incompetent adults which is for all practical purposes indistinguishable from its well-established jurisdiction in relation to children" (ibid. *Re SA*, § 78, 84).

2227 § 34: "On the father's own account, the purpose of both these structures was to restrict Amina, whether from access to parts of the flat and the front door, or from simply looking or calling out of the window. Further, the father does admit that when he himself leaves the flat to go to his part

The High Court of England and Wales, retained 'protective jurisdiction'[2229] based on the daughter's nationality and the (potential) deprivation of her capacity[2230]. The Court affirmed that the daughter's habitual residence was in Saudi Arabia at the time of the proceedings[2231]. Thus, the UK jurisdiction was founded on nationality. In this regard, the Court held that recourse to the jurisdiction of nationality should be made only in very exceptional circumstances[2232].

**687.** The following case[2233] concerned a British lady, aged 89, who lived in her matrimonial home in the US, California. She had an agent, her niece, appointed according to English law and habitually resident in the UK. Afterwards, the lady encountered a deterioration of her faculties. She was removed, through Canada, to the UK. The removal was essentially organised by her niece. The US Public Guardian was made caretaker over the lady's estate. On that basis, a return order was rendered by the US courts in California. An application for recognition and enforcement of that order was filed in the UK jurisdiction.

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time work he does lock her in. I conclude that Amina was not literally in a cage, but that her freedom of movement was, and is, admittedly constrained in a way that I would regard as severe, having regard to her age and full capacity. She was, and, so far as I am aware, still is, deprived of her liberty and could be described as 'caged', although not 'in a cage'".

2228 § 2: "But Amina still strongly asks through her lawyers here that I should exercise the inherent jurisdiction and make mandatory orders ordering her father to permit and facilitate, including by paying the air fare, that she can now travel unhindered to Wales or England, being part of the United Kingdom of which she is a citizen".

2229 § 39: "The court exercises a "protective jurisdiction" in relation to vulnerable adults, just as it does in relation to wards of court. Munby J elaborated and made good that proposition by reference to a series of authorities which he then cited at paras.38 to 43. These authorities and others cited in them leave me in no doubt that if the facts alleged by Amina are true, and assuming they were all taking place here, the court has ample inherent jurisdiction and power to make protective orders for her protection, exercising a *parens patriae* jurisdiction indistinguishable from that in relation to children".

2230 § 40-42: "[…] the jurisdiction can be invoked wherever an adult is, or is reasonably believed to be, for some reason deprived of capacity […] Reasonable grounds for belief is the trigger for the exercise of the jurisdiction, not the ultimate finding of fact, although that, of course, will profoundly affect what order is finally made […] the inherent jurisdiction for the protection of vulnerable adults is engaged and I have a very wide range of powers".

2231 The conclusion of the High Court points out the current need of uniform rules governing international Adult abduction. Namely, recourse should be made to an approach similar to the one under the HC-1980. In the present case, such an approach would have potentially determined the daughter's return to the UK by virtue of her habitual residence at the time of the wrongful relocation or retention, irrespective of the time of the proceedings. Again in the present case, the UK jurisdiction founded on nationality is supported anyway having the daughter's welfare in mind and the fact that the authorities in Saudi Arabia, hypothetically competent to order the return as per the HC-1980 scheme, would have potentially retained jurisdiction over the daughter (ibid. TGI Paris, ord., *Ahnine c/ Al Saud*, 12 janvier 2012, No. 11/38839). In other circumstances, however, the Adult's (multi-)nationality may lead to conflicting justice and judgments, which underlines the importance of providing uniform rules and connecting factors (§ 45: "It is inconsistent with and potentially disruptive of the modern trend towards habitual residence as the principal basis of jurisdiction; it may encourage conflicting orders in competing jurisdictions").

2232 § 46: "[…] jurisdiction based on nationality alone should only be exercised with extreme circumspection or great caution and where the circumstances clearly warrant it".

2233 *Re MN (Recognition and Enforcement of Foreign Protective Measures)* [2010] EWHC 1926.

The High Court of England and Wales gave careful consideration to the lady's long-term best interests concerning her habitual residence[2234]. It retained the lady's views provided in the Advance Health Care Directive[2235] prior to the degeneration of her state of mind. In the directive, she stated, *inter alia*, her wish to live near her primary residence, either in her home or supported accommodation in the US, where her social relationships were established[2236]. The Court maintained that a passage of time, sufficiently long, could trigger a change of habitual residence, even in the context of abduction[2237]. However, it excluded the latter scenario in the present case and held that in all other cases of wrongful removal the Adult should be returned to the State of habitual residence prior to that removal[2238]. The Court concluded that the wrongful nature of the removal would be strictly dependent on the niece's authority[2239] as agent and her good faith in taking decisions conformed to the lady's best interests[2240].

**688.** This next case[2241] involved a man aged 60, suffering dementia. He lived in Spain with his second wife and later travelled to the UK with the two children of his first marriage, without his wife's knowledge. The Adult's children filed before the UK courts for welfare orders determining home care in England, non-return to Spain and supervised contacts with their father's wife. The latter contested the UK jurisdiction.

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2234 § 11: "Amongst the matters considered, Dr. Jefferys is of the view that MN is capable of making the journey to California but has serious reservations as to whether her longer term best interests could be served by her so doing […]"; § 28: "It is worth observing that on any view best interests are to some extent a relevant consideration. Reference has already been made to paragraph 12. Clearly best interests have to be considered in the context of implementing the enforcement of an order. That raises the difficult question of how far does one take best interests […]; § 32: "The trouble is that this may lead both to hardship and artificiality" […]; § 36: "I think I am bound to assume, on the basis of habitual residence in California, unless and until Judge Cain indicates to the contrary, that her best interests are served by being in her own home in California".

2235 An act that determines the Adult's advance decisions in relation to his/ her medical care, living conditions and death.

2236 § 17: "I wish to live in my home for as long as that is reasonably possible […] I further request that I live as near as possible to my primary residence in order that I may visit with friends and neighbours […]".

2237 § 21: "Although there was general acceptance of the fact that the mere passage of time if sufficiently long could effect a change of habitual residence even if the original removal were wrongful, such it was accepted on the facts of this case that no length of time had elapsed".

2238 § 22: "It seems to me that the wrongful removal (in this case authority under the Directive whether because Part 3 is not engaged or the decision was not made in good faith) of an incapacitated adult should have the same consequence and should leave the courts of the country from which she was taken free to take protective measures. Thus in this case were the removal 'wrongful', I would hold that MN was habitually resident in California".

2239 § 23: "Hence my view that authority to remove is the key consideration".

2240 § 39: "I am confident that that is sufficient at the first instance stage and will allow parties to consider the future for MN and to seek to act in her best interests".

2241 *Re QD (Jurisdiction: Habitual Residence)* [2019] EWCOP 56.

> The Court of Protection of England and Wales reiterated that habitual residence is a fact-based, as opposed to a legal, concept. No distinction occurred in relation to the child's or adult's habitual residence[2242]. Reference was made to the habitual residence interpretation under the HC-1996 and Brussels IIA[2243]. The Adult was found to be habitually resident in Spain prior to the wrongful act[2244]. Decisive elements for the Court were: the Adult's choice to live in Spain when he had capacity; the evidence that Spain was his permanent home; the years he lived there; the property he held there; the health care received there; his social integration into the life and community in Spain; the country in which his wife lived.

**689.** This last case[2245] relates to a British lady, aged 88, lacking capacity. Two of her children were appointed as caretakers in England where she lived and held properties. A third child removed her to Scotland. There, she was initially living with her son and later placed in a care home. An interim welfare guardianship order was made by the Sheriff Court in Scotland. The children seised the Court of Protection of England and Wales in order to obtain the lady's return to England.

> The Court recalled that no definition of habitual residence is given under the HC-2000. A circumstantial fact-based determination should be employed. It reiterated that a former and new habitual residence can be abandoned and acquired respectively on the same day. A court order or similar formal process do not influence the habitual residence of an adult lacking capacity. Courts should assess if the decisions, including on habitual residence, made by a relative or a carer are taken in good faith and in the Adult's best interests[2246]. The Court concluded that

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[2242] § 10: "is 'the place which reflects some degree of integration by the [child/adult] in a social and family environment in the country concerned'".

[2243] Ibid.: "Given the pivotal significance of the concept of 'habitual residence' in family law statutes and instruments".

[2244] § 29: "I am further influenced by the fact that, as an agreed fact, QD's move to this country was achieved by stealth. I do not find that TD and BS can avail themselves of the 'doctrine of necessity', to convert what was a wrongful act on their part into a justified act […] it seems to me that there were options open to TD and BS other than QD's summary removal from the jurisdiction of Spain, in circumstances for which he had no chance of being prepared. For instance, it would have been a far more reasonable course for them to have notified the police or social services in Spain of their concerns; they could/should have raised their concerns directly with KD".

[2245] *In the matter of PO* [2013] EWCOP 3932.

[2246] § 18: "Put shortly, what the doctrine of necessity requires is a decision taken by a relative or carer which is reasonable, arrived at in good faith and taken in the best interests of the assisted person […]"; § 20: "Of course, the doctrine of necessity is not a licence to be irresponsible. It will not protect someone who is an officious busybody. And it will not apply where there is bad faith or where what is done is unreasonable or not in the best interests of the assisted person. Thus there will be no change in P's habitual residence if, for example, the removal has been wrongful in the kind of circumstances with which Hedley J was confronted in Re MN or if, to take another example, the removal is, as in Re HM (Vulnerable Adult: Abduction) [2010] EWHC 870 (Fam), [2010] 2 FLR 1057, in breach of a court order".

neither the removal to Scotland was wrongful[2247], nor the Adult's habitual residence was in England and Wales at the date of hearing[2248]. The Court declined jurisdiction[2249].

**690.** The cases under analysis in this Section have shown that the Adult's habitual residence determination in the context of wrongful removal or retention should consider a uniform approach founded on the family and social integration. Its assessment should consider the fact-based settlement of the Adult prior to the wrongful act. In this regard, decisive factors should be: The Adult's views prior the *de facto* incapacity; his/ her best interests and effective welfare protection; the social life in the local community; the continued family presence with and care of the Adult; the presence of properties with particular attention attributed to the principal occupied home. The nationality should be considered a replacing rule, but not a factor inherent in the establishing of habitual residence. Court's orders or analogous measures should not be retained. The time-based factor is not consistently applied. A long duration would in principle be required for the change of habitual residence in the context of abduction.

# Chapter II: Beyond the Treaty Rules

**691.** The three national legal orders under examination provide specific insights for the operation of habitual residence in the field of Adult protection. The interplay of habitual residence with similar connecting factors, such as the US home state and the Canadian domicile of choice and ordinary residence, is also referred to under this analysis.

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2247 § 26: "[…] This was not a kidnapping. It was not some high-handed action undertaken for some ulterior motive. It was, on the contrary, something reasonably and sensibly undertaken by, or in agreement with, three of PO's four children in what they saw as her best interests. They had authority – the authority conferred on them by the doctrine of necessity – to act as they did, and the fact that JO was of a different opinion did not rob them of that authority. Nor did they need the concurrence of or need to involve either Worcestershire County Council or Inverclyde Council: see Re A and C (Equality and Human Rights Commission Intervening) [2010] EWHC 978 (Fam), [2010] COPLR Con Vol 40, especially paras 51-53. I reject the assertion that PO was wrongfully removed to Scotland".

2248 § 28: "I conclude, therefore, that PO is not habitually resident in England and Wales and that accordingly I have no jurisdiction under paragraph 7(1)(a). That does not, as will be appreciated, conclude the question so far as relates to the jurisdiction I undoubtedly have under paragraph 7(1)(b). I turn therefore to the question of discretion".

2249 § 38: "There is no longer any need to determine the issue of wrongful removal and all the other issues are, as Mr Ruck Keene submits, plainly better suited to decision by the Sheriff Court, being the court of the country where PO is living and where most of the relevant witnesses are. Moreover, in the event of the Sheriff Court deciding that PO should return to England, appropriate steps, including the involvement of the Court of Protection, can, no doubt, be taken at that stage to ensure that the arrangements put in place for PO are properly monitored. Scotland is the *forum conveniens* and there are no special circumstances requiring the Court of Protection nonetheless to assume jurisdiction".

**692.** This Chapter comprises three sections. *Section I* faces the US conflict-of-law rules. *Section II* deals with the national conflict-of-law rules of Ontario and China. *Section III* shares some remarks on the interplay of connecting factors.

# Section I US Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act

## § I. Primary Home-state Jurisdiction

**693.** The US has adopted the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA)[2250]. This Act applies in 49 states of the US[2251]. It adopts the concept of home state, similarly to the one operating under the UCCJEA applicable to children[2252]. Home state determines original jurisdiction over guardianship[2253] and protective proceedings. Original jurisdiction continues to apply for six months after the Adult's relocation[2254] according to the rule on continuing jurisdiction[2255]. The UAGPPJA provides a three-level priority, adopting replacing rules when home-state is not established or its courts decline jurisdiction[2256].

**694.** It seems that a person may have only one home state at the relevant time[2257]. A uniform definition of home state is contained in the Act[2258], which is not identical to the one of the UCCJEA home state. The distinction lies in the sole presence of the Adult who remains the only person under assessment, as

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2250 The UAGPPJA was approved in 2007 and repealed the Uniform Guardianship and Protective Proceedings Act (UGPPA) 1997.

2251 A court in the United States may apply this Act as if the foreign country were an American state (s. 103 UAGPPJA).

2252 See part III, chapter II, section II.

2253 Guardianship refers more properly to 'conservatorship' when dealing with the protection of the Adult's properties (s. 102 UAGPPJA; ibid. HAY *et al.*, p. 1388).

2254 Comment on s. 203.

2255 See part III, chapter II, section II.

2256 General Comment to the UAGPPJA, jurisdiction: "[…] creating a three-level priority; the home state, followed by a significant-connection state, followed by other jurisdictions […]".

2257 L. A. STIEGEL/ E. F. WOOD/ AMERICAN BAR ASSOCIATION, Nine Ways to Reduce Elder Abuse Through Enactment of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act, ABA Commission on Law and Aging's Joint Campaign for Uniform Guardianship Jurisdiction, Vol. 30, 2009.

2258 Section 102(6): "Home state means the state in which the respondent was physically present for at least six consecutive months immediately before the filing of a petition for the appointment of a guardian or protective order. A period of temporary absence counts as part of the six-month period". The term 'respondent' does not seem to provide full clarity, even though a definition follows within the Act: "Respondent means an adult for whom a protective order or the appointment of a guardian is sought" (s. 102 (14)). This should cover the scenario in which a person files to obtain a measure towards the Adult's protection. Conversely, when is the Adult directly who applies for his/ her own protection, he or she should be considered the 'petitioner'.

opposed to the child, in which case the presence of the primary carer is jointly required. One may argue that in the case of an Adult who lives with a member of his/ her family, who will potentially be appointed as guardian, US law may have also required this person to fulfill the six-month living period before the petition.

**695.** Home state is under this Act time-based[2259], particularly referring to the Adult's physical presence during six consecutive months before *the date of the filing of a guardianship petition*. In this regard, it is observed that, as opposed to the UCCJEA, the period suggested in the UAGPPJA may in some circumstances be aleatory. Namely, where an Adult was 'capable' six months before the filing, but not three months prior to it, this last moment should be excluded for the assessment of an effective change in the Adult's home state. This would typically concern the scenario in which the Adult is wrongfully removed or retained after his/ her *de facto* incapacity. The lack of the Adult's consecutive presence in the former home state would thus trigger a change of jurisdiction in the place where he or she is abducted, constituting an unlawful home state. Unlike the UCCJEA, this issue is particularly important in relation to the UAGPPJA where only the Adult's presence is retained for the establishing of home state.

**696.** The UAGPPJA specifies that the Adult's home state should be established both at the moment of the filing and prior to it[2260]. The Adult's physical presence should therefore occur both at the date of the filing and six months before it[2261] to establish home state. However, the combined reading of sections 201/ 203 UAGPPJA should be read differently. By contrast to what is argued in section 201, under section 203[2262] the Adult's home state could also be located where he or she was *formerly* present within the six consecutive months before the petition, without being *actually* present at the date of the petition[2263].

**697.** Lastly, the UAGPPJA does not essentially deal with the applicable law. Nonetheless, section 102, provides that guardianship should be governed by the substantive law of the competent courts.

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2259 The same is provided in the UCCJEA (see part III, chapter II, section II).

2260 Section 201-203.

2261 Or at least some effective time prior to it, given that temporary absences are incorporated within the six-month period.

2262 Comment: "Under the definition of 'home state', the six-month physical presence requirement is fulfilled or not on the date the petition is filed".

2263 This aspect substantially differs from the UCCJEA where a physical attachment at the time of the commencement of the proceedings is required at least by the presence of the primary carer.

## § II. Primary Significant-connection Jurisdiction

**698.** In absence of home state, or when home-state authorities decline jurisdiction in favour of a more appropriate forum[2264], the substitute connecting factor refers to significant connection. As opposed to the EU Regulations and Hague Conventions mentioned in this study concerning the notion of 'closest connection', the UAGPPJA provides a specific meaning of *significant connection*. In particular, it refers to something more than mere presence that should be assessed through specific elements mentioned in the Act[2265]. Contrary to home state, a person may hold multiple significant-connection States[2266], although as for 'concurrent habitual residence'[2267] they may rarely be determined at the same time.

**699.** Home state and significant connection encounter specific differences namely: (a) the six-month physical presence, before the commencement of the proceedings, as the *only* requirement to establish home state; (b) *only* when home state is not established, the significant-connection assessment should be initiated; (c) when home-state jurisdiction is not seised, significant-connection jurisdiction can be exercised *only* if more appropriate; (d) when home state is established and seised, significant connection applies *only* if the home-state authorities decline their jurisdiction. In absence of jurisdiction founded on either home state or significant connection, or when the courts have all declined jurisdiction in favour of a more appropriate forum[2268], another State may retain jurisdiction.

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2264 Section 206 contains important elements to determine the character of 'appropriateness', *i.e.* abuse, expressed preference of the Adult, length of time of the Adult's presence, ability to decide the issue expeditiously, familiarity of the court, *etc.* In addition, it should be noted that when the proceedings are started in the place of significant connection, and there is no objection to that jurisdiction, which grants itself more appropriate, jurisdiction should be frozen in the significant-connection state despite the establishing of a home state. The rationale here is to avoid *lengthy proceedings* in situations where disputes on jurisdiction are not raised.

2265 'The location of the respondent's family and others required to be notified of the guardianship or protective proceeding; the length of time the respondent at any time was physically present in the state, indicating the duration of any absences that should not count; the location of the respondent's property; and the extent to which the respondent has other ties to the state such as voting registration, filing of state or local tax returns, vehicle registration, driver's license, social relationships, and receipt of services'. These factors appear likewise useful in the determination of prospective acclimatization proposed in this study (see section II, subsection V above).

2266 Ibid. STIEGEL/ WOOD/ AMERICAN BAR ASSOCIATION.

2267 *Cf.* chapter I, section II above.

2268 In the case '*Matter of J.D.S. NY Slip Op 20303 Decided on October 1, 2020*', the New York County Surrogate's Court held that a 35-year-old respondent daughter, whose guardianship was requested in parallel before the courts of New York and North Carolina, although North Carolina was seised first, had significant connection with the courts in North Carolina. The New York Surrogate's Court declined jurisdiction and transferred it to the courts of North Carolina based on, *inter alia*, the daughter's wish to continue staying in North Carolina, absence of abuse by her mother with whom she lived most of her life, the daughter's physical presence and its length of time in both states, the expeditiousness in dealing with the proceeding. These factors indicated that the courts of North Carolina were more appropriate.

### § III. Special jurisdiction

**700.** The UAGPPJA, section 204, contains rules for special circumstances triggering emergency jurisdiction[2269]. The measures implemented under this jurisdiction are directed by the courts of the Adult's home state and they should elapse after no longer than 90 days[2270]. This rule differs from the one under the UCCJEA, insofar as under the UAGPPJA, emergency jurisdiction clarifies the timeframe of implementation and it should not purport to become the Adult's home state. This jurisdiction also involves the Adult's properties[2271].

## Section II National Conflict-of-law Rules of Canada and China

### § I. Canada (Ontario)

**701.** The authorities in Canada may apply different conflict-of-law rules depending on the provinces, particularly Quebec which adopts a civil law system. Federal legislation indicates general provisions governing the protection of Adults[2272]. For the purposes of this analysis on the interplay with habitual residence and other connecting factors, reference is made to the Ontario practice.

**702.** This is a Canadian case[2273] involving Father Michele Perrella, a retired Roman Catholic priest, who lived in Canada, Ontario, in a long-term care facility. The Archdiocese of Toronto, and two old friends of Fr Perrella's, were acting for the care of his person and property, by virtue of a Power of Attorney concluded under Canadian law. A guardian was further appointed in Ontario. An interim guardian, who had previously been appointed in Italy, through the filing of Fr Perrella's family, petitioned before the Superior Court of Justice of Ontario contesting jurisdiction over Fr Perrella's person and property. The

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2269 S. 201: "Emergency means circumstances that likely will result in substantial harm to a respondent's health, safety, or welfare, and in which the appointment of a guardian is necessary because no other person has authority to or is willing to act on the respondent's behalf".

2270 Comment on s. 201.

2271 Ibid.: "This section lists the special circumstances whereby a court without jurisdiction under the general rule of Section 203 has jurisdiction to appoint a guardian or issue a protective order. The three circumstances are (1) the appointment of a guardian in an emergency for a term not exceeding 90 days for a respondent who is physically located in this state; (2) the issuance of a protective order for a respondent who owns real or tangible personal property located in this state; and (3) the grant of jurisdiction to consider a petition requesting the transfer of a guardianship or conservatorship proceeding from another state".

2272 For more information, ibid. FRIMSTON *et al.*, p. 466.

2273 *Cariello v. Father Michele Perrella*, 2013 ONSC 7605.

Archdiocese of Toronto and Fr Perrella's Canadian guardian opposed[2274]. The case reached the Ontario Supreme Court.

> The Court applied its own conflict-of-law rules, in absence of treaties applicable to Canada for the matter. Under the said rules, the Canadian courts referred, for international jurisdiction and applicable law[2275] over Adult protective measures, to *ordinary residence* and *domicile*[2276]. The Court specified that domicile of choice, pertinent in the current proceeding, should correspond to the place where the person intends to live indefinitely[2277]. In context, the Court looked at: the return flight ticket to Italy when Fr Perrella last came to Toronto prior to his illness; the location of his assets in Italy, excluding the amount present in Toronto (*i.e.* 80,000 dollars); registered residence in Italy; extended family resident in Italy, excluding part of his family in Canada (*i.e.* cousins); the period of time between his birth and his incapacity which was spent longer than anywhere else in Italy; his intention to return to Italy through a declaration of repatriation before the Italian Consulate; lack of capacity while he was in Canada possibly not being able to form an intention to re-establish domicile there. The Court maintained that Fr Perrella was domiciled and ordinarily resident[2278] in Italy at the relevant time, referring to the place where he was domiciled and resident prior to his incapacity[2279]. Accordingly, the Italian Superior Court of Campobasso were competent to exercise jurisdiction over Fr Perrella's person and properties[2280], ensuring the protection of his interests[2281].

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2274 They argued that Fr Perrella's 'many real and substantial connections' were located in Ontario, and that he was incardinated under the Roman Catholic 'Canon' law in that the Diocese was responsible for him spiritually and financially till death. In reference to Fr Perrella's properties, both Italian and Canadian guardians were supportive of the Italian jurisdiction, concerning the appointing of a caretaker, by reason of Fr Perrella's main assets located in Italy.

2275 The Court maintained that the Power of Attorney concluded under Canadian law should be set aside due to the incapacity of Fr Perrella at the time of its conclusion (§ 24: "I infer it is more likely than not Fr. Perrella was similarly incapable and suffering from advanced dementia at the time he executed the powers of attorney in favour of Ms. Rogucki and Mr. Costantino. I must conclude he had no capacity to grant the powers of attorney and they must therefore be set aside and declared invalid").

2276 § 53: "As a general rule, matters of a person's status are determined by the law of place in which the person is domiciled"; § 54: "Declarations of mental incompetence and appointments of those responsible for making decisions on their behalf are questions of status and are normally made by the court where the person is domiciled or ordinarily resident […]".

2277 The court likewise considered the possibility of re-acquiring a *domicile of origin* when the intention to leave a State, in this case referring to Canada, is permanent and no subsequent domicile of choice is established (§ 65-66).

2278 For the *similarities* and *differences* between ordinary residence and habitual residence, as well as with domicile of choice, we refer to part I, chapter III of this monograph.

2279 § 62: "[…] Since Fr. Perrella is incapable, this means he has no capacity to change whatever domicile he had prior to his becoming incapable".

2280 § 77: "I therefore conclude that Fr. Perrella is and remains domiciled in Italy. I also conclude that at the time Italy took jurisdiction, Fr. Perrella was also ordinarily resident in Italy. The court where a person is domiciled has the jurisdiction to deal with question of that person's status. Capacity is a

## § II. China

**703.** Under the conflict-of-law rules of China[2282], habitual residence applies for the determination of international jurisdiction and applicable law in matters involving incapacitated adults. The approach employed refers alternatively to, *inter alia*, either the defendant's or the plaintiff's habitual or current place of residence[2283]. The application for a declaration of full absence or limited capacity – therefore an action determining the incapacity – of an Adult should be filed before the courts of his/ her habitual residence. The determination of (in)capacity is governed by the law of the Adult's habitual residence. Guardianship is governed by the law of the Adult's habitual residence or nationality, alternatively according to which better protects his/ her rights and interests[2284]. When an act (*i.e.* a contract) is performed and for the law of the State where the act is performed the Adult is capable, the law of performance shall apply, even if the law of the Adult's habitual residence determines his/ her incapacity to engage in civil activities[2285]. In absence of habitual residence, the law of the present residence, which should imply *mere presence,* shall apply.

**704.** The act of agency is governed by the law of the place where the act of agency, including the Power of Attorney, occurs. In addition, the law of the place where the agency relationship is established is also applicable to the civil relation between the principal and the agent. An agreement may be concluded to choose the law applicable to the relation of commissioned agency[2286].

# Section III Lessons Learned from other National Connecting Factors

**705.** The time-based element characterising home state may be important for the assessment of specific factors concurring to determine habitual residence at the time of the institution of the Adult protection proceedings. Concentrating the habitual residence assessment, under the HC-2000, at an appreciable period would increase legal certainty and reduce conflicting determinations.

question of status. Thus, since Fr. Perrella is domiciled in Italy it is the Italian court that must take the jurisdiction to determine his capacity and ancillary matters arising from that determination".

2281 § 91: "I am satisfied the Italian court has assumed jurisdiction on an appropriate basis, and will ensure, as would this court, that Fr. Perrella's interests as a vulnerable person will be properly protected".

2282 PIL Act 2010.

2283 Ibid. FRIMSTON *et al.*, p. 505.

2284 Ibid. GUO, Personal Status in China (ibid. in: BASEDOW/ PISSLER) p. 278.

2285 Save for marriage, family or succession (PIL Act 2010, art. 12). The rationale of this rule is to secure transactions (Z. HUO, Highlights of China's New Private International Law Act: From the Perspective of Comparative Law, *R.J.T.*, 45, 2011, p. 660).

2286 PIL Act 2010, art. 16.

The period of presence during six consecutive months, would nevertheless not always be recommended, especially if the Adult is subject to wrongful removal or retention. In such circumstances, only the period prior to the wrongful act should be taken as a reference. The Adult's nationality or simple residence at the relevant time, according to the Chinese legislation, may be used as factors to determine substantial connection[2287] for the purposes of the applicable law under the Convention[2288]. The recourse to domicile of choice as per the Canadian practice, or its reference as a habitual residence component, should be avoided as it may not indicate a realistic nexus with the Adult's immediate and regular physical presence at the relevant time.

## Conclusions

**706. Summary.** The use of habitual residence founded on proximity with the Adult's own interests under the Hague Convention 2000 shows the desire of some Hague Contracting States, including EU Member States, to provide continuity and uniformity between connecting factors for the protection of both children and adults. Similarly, the interplay of traditional and modern connecting factors within the Convention ensures greater coordination in the protection of the Adult's person and properties. The absence of specific rules on lis pendens and on international abduction are, instead, regretted. Reference to the Adult's own interests as a guiding element for the assessment of habitual residence does not seem to pose problems in its implementation. It actually enables a fact-based determination that is Adult-centred. The Adult's own interests and the child's best interests should overcome a strict comparison, save for their common objective to effectively protect vulnerable persons. The European Union would have the opportunity within the framework of a potential new Regulation to, inter alia, better elucidate the role of the adult's own interests. National case law, involving both Contracting and non-Contracting States, has given useful elements for the habitual residence assessment in line with the two-fold test approach.

**707. Proposal I.** Habitual residence shall determine the realistic nexus founded on the proximity of the forum and the *jus* with the Adult's own interests. The latter require an objective determination, which shall be compatible with the Adult's state of mind at a relevant time. The Adult's state of mind shall support the degree of his/ her personal and stable integration. The Adult's integration shall consist in his/ her own acclimatization in a home environment. The personal relationships shall be primarily considered for the

[2287] Reference is also made to prospective acclimatization (*cf.* chapter I, section II above).

[2288] Art. 13(2).

establishing of such an environment. In principle, there should only be one habitual residence at a relevant point in time. There can be alternating habitual residences at different points in time close to the institution of the proceedings. Habitual residence may not be established.

**708. Proposal II.** According to the two-fold test approach, in line with the case law examined in this part[2289], decisive and non-decisive elements shall determine habitual residence. Decisive elements are: physical presence[2290]; connections with the local community[2291]; effective care of the Adult's welfare; the Adult's own views and settled purpose prior to his/ her incapacity; the Adult's state of mind; the primary caregiver's habitual residence; the location of the Adult's properties and especially his/ her main occupied property. The family environment shall be considered a complementary, non-decisive, element, unless the Adult lives in the same State and maintains regular contacts with his/ her family[2292]. Further complementary, non-decisive, elements, shall be the duration and the nationality.

**709. Proposal III.** Administrative proof, court orders, asylum status, relocation arrangement[2293], shall not be considered as relevant for the habitual residence determination. Short visiting periods not supported by a settled purpose shall not be indicative for the establishing of habitual residence, in particular when occurring after the Adult's removal of decision-making capacity. The Adult's intent, when he or she is incapacitated, shall not be retained for the assessment unless it shows continuity with the Adult's settled purpose occurring before his/ her incapacity. Peripatetic lifestyles shall not determine habitual residence.

**710. Proposal IV.** Habitual residence shall be determined at the relevant time corresponding to the institution of the proceedings[2294]. An appreciable assessment period[2295] should consider the six months preceding the relevant time[2296]. Reference to the continuing jurisdiction rule is advised[2297].

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2289 *Cf.* chapter I, section II, subsection III above.

2290 This may be located at a specific appreciable period prior to the Adult's wrongful removal or retention.

2291 *I.e.* personal activities, personal relationships, regular and stable connections, language. The local community shall comprise the supported accommodation.

2292 In the context of wrongful removal or retention, the family environment may also play a decisive role.

2293 Except if in the Adult's own interests.

2294 The 'seisin', the 'filing', the 'date of the application', the 'commencement of the proceedings', shall hold the same meaning.

2295 A general appreciable period refers to the Adult's date of arrival in one State until the date of the hearing.

2296 This proposal mainly, but not only, concerns the Hague Convention 2000. Inspiration shall be taken from the US UAGPPJA home state.

2297 Reference should be made to the US UAGPPJA.

Accordingly, once habitual-residence jurisdiction is founded, it should last six consecutive months after the Adult's relocation.

**711. Proposal V.** The effective change of the Adult's habitual residence shall occur at his/ her own acclimatization[2298]. Such a change shall correspond to the acquiring of a new and loss of a former habitual residence[2299]. Jurisdiction should be frozen in the State first seised, although habitual residence might have effectively changed during the proceedings[2300]. A change of habitual residence shall not occur in case of the Adult's wrongful removal or retention[2301]. An international legal instrument shall provide specific rules on international Adult abduction[2302].

**712. Proposal VI.** The choice of court shall be better delimited under the Hague Convention 2000[2303]. The scope of the choice of applicable law shall be extended[2304].

**713. Proposal VII.** In the context of alternate habitual residence, the Adult's principal habitual residence[2305] shall be established. When such an assessment appears so artificial that it might result in ineffective and inefficient justice, the Adult's continuing physical presence[2306] shall be considered the tie-breaker rule. In the event of conflicting habitual residence determinations, recourse to intercountry assessments shall be made in HC-2000 and non-conventional cases[2307].

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2298 According to proposals I and II *supra.*

2299 The two may coincide on the same day, except in the context of wrongful removal or retention (chapter I, s. IV).

2300 This proposal mainly, but not only, concerns the Hague Convention 2000.

2301 Limited exceptions comprise: (i) the absence of the Adult's habitual residence prior to the wrongful act; (ii) and the better protection of the Adult's welfare in the Hosting State, in which case the return would not be in the Adult's *own* interests.

2302 *Cf.* chapter I, section IV *supra*.

2303 The following choice-of-court grounds are recommended: The Adult's nationality; the Adult's former habitual residence; the situs; the spouse's habitual residence; the child's habitual residence; the primary carer's habitual residence at the time of the conclusion or incapacity. It should also be possible to make a choice-of-court in favour of the law applicable to the Adult's protection. The choice of court shall take place before the Adult's incapacity.

2304 Including also the spouse's or primary carer's habitual residence established at the time of the Adult's incapacity; or the law of the spouse's or child's habitual residence at the time of the agreement or act.

2305 The Adult's physical presence at the seisin, the settled purpose, the state of mind, the existence of a home environment and the most effective protection of his/ her own interests shall be decisive elements.

2306 Physical presence refers to a prerequisite of qualified proximity (*cf.* chapter I, section III above).

2307 This assessment shall also apply under art. 85(2) of the Swiss Private International Law Act, which is an innovative provision ensuring uniformity of connecting factors applicable to a same family context in conventional and non-conventional cases. Similarly, the activity of the International Social Service concerns both conventional and non-conventional cases. It was said that this assessment aims to evaluate "the Adult's state of mind, effective care, supported accommodation, social relations in the community, family relations and health" (*cf.* chapter I, section III).

A special mandate should be attributed to the UN Committee on the Rights of Persons with Disabilities[2308].

**714. Proposal VIII.** In the absence of habitual residence, mere presence shall apply according to the HC-2000[2309]. Prospective acclimatization[2310] shall be considered a useful and modern connecting factor in situations where the general jurisdiction on mere presence, as one of its main prerogatives, may not effectively protect the Adult's welfare across borders.

**715. Proposal IX.** The endorsement of an EU Regulation would be beneficial for both the interpretation of the HC-2000, through the intervention of the CJEU, and for the establishing of an EU protective framework involving intra-EU cross-border movements of incapacitated adults. In that event, specific mechanisms and guidance supporting the habitual residence determination shall be provided[2311].

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2308 In chapter II, section III, subsection II, it was said: "The approach indicated in this part, based on the habitual residence assessment founded on the Adult's own interests, would possibly require the intervention of the Committee. Surely, other than potentially solving the conflicting habitual residence determination, its mandate *super partes* would support a harmonised standardisation of habitual residence in respect of an Adult centred-approach advocated for in this study […] On a short term, a General Comment jointly adopted between the UNCRPD and the UNCRC would enable a universal child-focused and Adult-focused interpretation of habitual residence by virtue of a special protection, which shall be granted to both children and vulnerable adults (fn. 2222)".

2309 This rule shall also be valued within national conflict-of-law rules (*cf.* chapter II above).

2310 Prospective acclimatization shall be determined through the Adult's meaningful links. These may comprise the following, non-cumulative, factors: family connections; cultural ties; knowledge of the language; the possession of a residence permit; the applicant's previous period of residence in the other State; and any other connections that would expedite or enhance the prospects of integration. It was said that: "In line with the HC-2000 where particular importance is given to the Adult's nationality, it is argued that, outside the refugee/ asylum context for obvious reasons often related to the impossibility of returning to the State of nationality, the latter may also be an indicative element for prospective acclimatization if considered in the Adult's own interests. In particular, the welfare of an Adult with no habitual residence, who may still be entitled to return to his/ her State of nationality, would in some circumstances be more effectively protected in that State rather than in the one of mere presence […] We recall though that in the case where, irrespective of the status, an Adult left his/ her country of origin for lack of stability, without establishing any habitual residence, and is found to be in need in the State of physical presence, reference to his/ her nationality may not entail a solution. In particular, an Adult with a nomadic lifestyle, national of one of the EU Member States that is also a Contracting State, physically present in Switzerland, may have severed all connections with his/ her country of origin. The allocation of jurisdiction to that State, which would be entitled to apply its own law, may not be compatible with the Adult's own interests".

2311 *I.e.* (a) indicative habitual residence factors as those proposed in this study (*cf.* proposals I and II above); (b) continuing jurisdiction supported by an appreciable assessment period; (c) the relevant time determining international jurisdiction; (d) a mechanism supporting the resolution of conflicting jurisdiction, founded on the *lis pendens* rule; (e) rules replacing habitual residence such as physical presence and prospective acclimatization.

# Part V: International Successions

**716.** This is the last *thematic Part*, incorporating aspects and questions related to the operation of habitual residence in international successions[2312]. *Chapter I* examines jurisdiction and applicable law[2313] under the EU Succession Regulation[2314]. This Regulation provides uniform private international law rules in 25 Member States[2315]. *Chapter II* analyses specific national conflict-of-law rules[2316], with particular focus on the Swiss national legislation and its current private international law Act's reform. *Chapter III* confronts EU property regimes and successions[2317]. *Chapter IV* discusses selected topics such as alternate, and absence of, habitual residence. The *Conclusion* refers to a short list of proposals relating to this Part.

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[2312] In matters of children, as we have seen in part III, the international trend is to rely on habitual residence as a *primary connecting factor founded on proximity with the child's best interests*. In relation to this introductory note, it is curious to find a similar approach in relation to successions, more precisely within the EU Succession Regulation. Habitual residence is primarily employed to determine international jurisdiction and applicable law, in absence of *professio juris*, based on the factual life assessment and interests of the deceased. Greater interest is shown further in the fact that neither the child nor the deceased are the main parties to the cross-border proceedings involving their rights and interests – even though, indeed, unlike the deceased, the child might be able, and is even encouraged to express his/ her views during the proceedings.

[2313] Other aspects such as the rules on recognition and enforcement of judgments, as well as the European Certificate of Succession, are briefly touched upon. The reason for their non-extensive analysis lies in the lesser relevance to habitual residence, and due to the need of an articulated study that would require substantial space here.

[2314] The EU Succession Regulation is the main legal instrument under analysis given its recent implementation (2015). The operation of habitual residence in international successions refers to two different points in time: (i) The initial succession planning, including the pre-determination of international jurisdiction and applicable law. Legal certainty and predictability require that the *de cujus* should be entitled to plan in advance, in respect of his/ her interests, the forum and the *jus* for the opening of his/ her succession. Specifically, in relation to the succession planning for the purposes of applicable law, some important legal consequences arise (*i.e.* the validity of dispositions of property, reserved share), hence predictability is particularly important at this stage. (ii) The later cross-border proceeding involving the beneficiaries (*i.e.* heirs, legatees, creditors) of the succession, possibly triggering issues of international jurisdiction and applicable law.

[2315] The Hague Convention pertaining to testamentary dispositions (1961) is not examined, save for its interrelated operation with the Succession Regulation and the Swiss private international law Act. The Hague Convention on the law applicable to the estate of deceased persons (1989) is excluded from this analysis, as it did not enter into force (*cf.* part I, chapter I, sections I and II).

[2316] Reference is made to the respective legislation in the US and the UK. The UK had decided for the opt-out of the EU Regulation, which consequently did not apply to England and Wales, Scotland and Northern Ireland, regardless of Brexit.

[2317] The intersection of the EU Property Regimes' Regulations and the Succession Regulation is examined to the extent of the concentration of jurisdiction over proceedings involving the deceased's estate and the liquidation of his/ her property regime.

# Chapter I: EU Succession Regulation

**717.** The Succession Regulation promotes, *inter alia*, uniformity and harmonisation of conflict-of-law rules[2318] determining jurisdiction and applicable law in 25 Member States (EU25). It is innovative with reference to habitual residence, providing 'explanatory guidance' – a combination of general indicators – towards a *uniform contextualised reference* of habitual residence within the EU25. It will firstly be dealt with this guidance, followed by an analysis of the rules laid down in the EU Regulation.

## Section I Habitual Residence: Guiding Indicators and Derogations

### § I. Assessment for Jurisdiction and Applicable Law

**718.** The Succession Regulation provides that international jurisdiction and applicable law are determined primarily through the (last) habitual residence of the deceased – the *deceased's habitual residence at the time of death*. Proximity between the succession and jurisdiction should therefore be ensured by the operation of habitual residence, which represents the predetermined, genuine, connecting factor.

**719.** Recital 23 indicates two important objectives that should be achieved through habitual residence[2319], while facing the *increasing mobility of citizens*[2320]: (i) genuine connection; and (ii) the proper administration of justice. In line with such objectives, the Regulation sets out a uniform *contextualised reference*[2321], valid for both international jurisdiction and applicable law. Such a reference responds to a logic of ensuring *legal certainty* and predictability, in particular at the time of the succession planning (§ 48-52).

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[2318] § 37: "In order to allow citizens to avail themselves, with all legal certainty, of the benefits offered by the internal market, this Regulation should enable them to know in advance which law will apply to their succession. Harmonised conflict-of-laws rules should be introduced in order to avoid contradictory results. The main rule should ensure that the succession is governed by a predictable law with which it is closely connected. For reasons of legal certainty and in order to avoid the fragmentation of the succession, that law should govern the succession as a whole, that is to say, all of the property forming part of the estate, irrespective of the nature of the assets and regardless of whether the assets are located in another Member State or in a third State".

[2319] For the determination of international jurisdiction and applicable law.

[2320] Citizens refer to the EU25, even though the Regulation applies to any person habitually resident in the EU25.

[2321] The same reference should be utilised for the determination of habitual residence in relation to the substantive and formal validity of the testamentary dispositions.

**720.** Recourse to nationality is allowed as a prevalent connecting factor in situations where a *professio juris* occurs. Nationality plays as an alternative connecting factor when dealing with the validity of testamentary dispositions (§ 51)[2322]. The Regulation provides that the State of nationality[2323] should represent 'some' connection between the deceased and the chosen law (§ 38). The connection attributed to nationality is different from the 'particular degree' of connection referred to above for habitual residence[2324].

**721.** Principally, the authorities dealing with the succession should determine the deceased's habitual residence through an '*overall assessment of the circumstances of the life of the deceased during the years preceding his death and at the time of his death, taking account of all relevant factual elements*'. Decisive elements, according to the Regulation, should be the *duration* and the *regularity* of the deceased's *presence*, as well as the *conditions* and *reasons* of such *presence* (§ 23). The authorities *first seised* should perform this assessment for the purpose of retaining or declining jurisdiction by virtue of *lis pendens* (article 17). The assessment should show a *close* and *stable* connection taking into account the aims of the Regulation (§ 23).

**722.** On a subsidiary basis, habitual residence may be located in the deceased's 'State of origin'[2325]. This is precisely the case when the deceased lived in a State for professional or economic reasons but maintained close and stable connections with his/ her State of origin. In this scenario, habitual residence should be the centre of the deceased's 'family interests' and 'social life' (§ 24). Thus, in context, *family interests* and *social life* would be considered as 'tie-breaker rules'.

**723.** Exceptionally, the deceased's habitual residence may correspond to the State of which he or she was a national or where his/ her main assets are located. This situation covers those circumstances whereby the deceased lived in or travelled to different States on an alternate basis, without settling permanently[2326] (§ 24). *Nationality* and *place of location* of the main assets may also be considered as 'tie-breaker rules', *special factors*, in this specific context.

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[2322] Nationality is also a 'special factor' in contexts where the habitual residence determination proves complex or is established in a third State (§ 24, art. 10).

[2323] With regard to the issue of multiple nationalities, this is resolved as a preliminary question, in particular the *de cujus* being allowed to choose any of his/ her nationalities – at the time of making the *professio juris* or at the time of the testamentary disposition.

[2324] It is noticed that the two objectives of 'genuine connection' and 'proper administration of justice' previously referred to are not indicated for the determination of nationality, which would therefore confirm the singular attention given to the operation of habitual residence by the EU legislator – as in other fields of family law examined here.

[2325] 'State of origin' does not essentially refer to the deceased's State of nationality.

[2326] The *permanent degree* required for the determination of the 'deceased's settlement' may lead to confusion, in particular in national jurisdictions where one day, or a short duration, may even suffice to establish habitual residence.

**724.** The relevant time indicated by the Regulation for the determination of the deceased's habitual residence should be the *deceased's death* (article 4). Where neither the deceased's last habitual residence was in a Member State, nor he or she was a national of a Member State, the relevant time should be the seisin for the determination of the deceased's habitual residence *in a Member State* 'within the five years preceding his/ her death' (10.1 lit. b)[2327]. In relation to the substantive validity of testamentary dispositions, the relevant time should be that of the *deceased's (hypothetical) death* as provided under article 21 (article 24.1). For the formal validity, when the criterion of habitual residence applies (article 27.1 lit. d), the time is that of the *conclusion of the testamentary disposition,* or *the time of death.*

**725.** With specific regard to applicable law, the above factual *assessment* also applies by virtue of article 22(1), which indicates that the law of the 'deceased's habitual residence at the time of death' should govern his/ her succession. On this matter, it is stated under the Regulation that for the purpose of avoiding *fragmentation* and ensuring *legal certainty*, the applicable law should govern the succession *as a whole*, irrespective of whether the assets are located in Member States or third States (§ 37).

**726.** On an exceptional basis, when the determination of the deceased's habitual residence proves complex for the purposes of the applicable law, a 'last resort' rule should apply. This rule consists in assessing *closest connection* between the deceased and the law of a State *other* than that of his/ her last habitual residence. The typical situation provided by the Regulation is that of the deceased who established habitual residence in a State to which he or she moved 'fairly recently' before death[2328]. In this regard, the degree of close connection should be *manifestly closer* than that with the State and law of his/ her habitual residence at the time of death (§ 25).

## § II. Debated Rules and Excluded Factors

**727.** The Succession Regulation clarifies that, as a principal rule, succession[2329] should be governed by the law of *close connection* in order to ensure *legal certainty* and *predictability* (§ 37). The primary connecting factor determining 'close connection' is habitual residence, through the combination of recitals 37 and 23. On the other hand, the term 'closest connection', with reference to the

[2327] The 'freezing time' indicating the *seisin*, as opposed to the *time of death* as generally provided by the Regulation, has been subject to criticism (ibid. BONOMI/ WAUTELET, p. 238).

[2328] The closest-connection exception founded on the sole fairly recent move prior to the deceased's death, focusing primarily on the duration of the settlement, is not supported in this study.

[2329] The Regulation advocates for the principle of unity, referring to succession as "all of the property forming part of the estate, irrespective of the nature of the assets and regardless of whether the assets are located in another Member State or in a third State".

'escape rule' (§ 25), appears here of limited impact, reducing the potential overlaps with habitual residence, unlike other EU Regulations examined here. Concretely, if habitual residence is (potentially) assessed, through the *guiding factors* mentioned in the recitals 23 and 24, the exceptional assessment of 'closer connection', through recital 25, should not take place[2330].

**728.** Some concerns still arise from the reading of the guidance provided by the Regulation, in particular:

(i) The assessment of habitual residence 'at the time of death' should take into consideration factors during the years preceding the deceased's death, therefore relating to an 'indefinite' *appreciable period*.

(ii) The Regulation gives very few examples, or indicators, concerning the contexts in which the 'indefinite or life assessment' should occur, as well as which *conditions* and *reasons* should be determinative in assessing that a presence is durable and regular. Such conditions and reasons may refer, alternatively or cumulatively, to professional, matrimonial, family, and retirement contexts.

(iii) Nationality and the main location of assets would in some circumstances play a determinative role even if *other* relevant factors are present.

**729.** With regard to point (i), the relevant time at which the assessment shall take place is principally at the 'deceased's death'. The *duration* of the deceased's physical presence is not determining, on its own, in the establishing of habitual residence[2331]. A 'change of habitual residence', according to the Regulation, is therefore allowed as soon as the deceased's relocation occurs, even immediately before death[2332]. In this regard, a *lengthy determination* of habitual residence attributed to the authorities first seised, indefinite in its scope, does not prove essentially helpful. In particular, the CJEU[2333] did not exclude the possibility for the deceased to establish an alternate habitual residence at two different points in time during his/ her life[2334]. In such a scenario, a 'life assessment' may cause unpredictable, potentially conflicting, results relating to both international jurisdiction and applicable law[2335].

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2330 This aspect concerning the determination of applicable law is debatable. See ibid. BONOMI/ WAUTELET, p. 197; *a contrario* Conclusions de l'Avocat Général M. Campos Sánchez-Bordona, C-80/19 [26 March 2020] § 59. The Advocate General's Opinion suggests that even when assessing habitual residence proves complex, but still possible, *closest connection* should not apply.

2331 V. BUMBACA, CJEU on the deceased's habitual residence, in: Conflictoflaws.net, 2020, n° July, 30.

2332 Ibid. BONOMI/ WAUTELET, p. 197.

2333 CJEU, *E.E. & K.-D. E.* [16 July 2020] C-80/19.

2334 Ibid. BUMBACA.

2335 The appreciable assessment period could refer to the six months, or one year, preceding death, similar to the proposals issued in other parts of this study. Such an amendment would better delimit the judicial assessment.

**730.** Concerning point (ii), specifically for the assessment of the conditions and reasons determining the deceased's settlement, scholars have clarified that administrative documents[2336] should not be determinative for the assessment, in particular where the '*centre de vie*' proves to be located in a different State[2337]. It is said that *personal* and *family* attachments should generally prevail. The typical scenario is the one of commuters who, despite their *centre of professional interests* being located in one State, have their *centre of family and personal interests* established in the State of origin corresponding to their habitual residence[2338]. In this regard, one main indicator should be the *regular contacts* maintained through family visits[2339]. Subsidiary attention should be given to *patrimonial, economic, interests*[2340] in exceptional situations where family, personal, and professional interests are not, or are hardly, traceable[2341]. It is added elsewhere that the *intent*[2342] of an individual to fix his/ her (permanent) centre of interests in a stable manner should be considered as a key element[2343]. However, the intent to establish (or to abandon) habitual residence should always correspond to *fact-based evidence*[2344].

**731.** In relation to point (iii), it may be encountered – increasingly more in practice[2345] – that the deceased was a *multi-citizen* who owned *principal properties in more than one State*[2346]. It may also be that none of these States represents the deceased's '*centre de vie*'. Additionally, it may be that such States

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2336 Such as residency documents or declarations proving tax residency.

2337 The example given is the one of international civil servants employed in international organisations who may be considered as habitual residents, but not as tax residents, of one State. The rationale is that they maintain strong attachments with their State of origin, especially when involving diplomats (ibid. BONOMI/ WAUTELET, p. 193).

2338 Ibid. p. 194. See also A. FUGLINSZKY/ O. SZEIBERT/ B. TŐKEY, Prelude to the GoInEUPlus Papers: The Hungarian Perspective on the EU Succession Regulation - Prognoses and the Very First Experiences, *ELTE Law Journal*, 2019, p. 13.

2339 This is true also when the State of return is not the deceased's State of origin. See U. BERGQUIST *et al.*, in: Commentaire du règlement européen sur les successions, Dalloz, 2015, Art. 4, No. 10. See also C. KOHLER, The EU Succession Regulation Before The German Courts 2016-2019, in: Yearbook of Private International Law, Vol. 21 (2019/2020), p. 42.

2340 *I.e.* principal and/ or main investments in one State.

2341 Ibid. BERGQUIST *et al.*

2342 So far, it seems that the subjective element does carry some specific weight within the Regulation, which refers to the *reasons* of the deceased's presence.

2343 Ibid. BONOMI/ WAUTELET, p. 196. Some concerns are raised with reference to the 'permanent character' of the intention, to the extent of the interplay between the notions of habitual residence and domicile (*cf.* part I of this monograph). See in this sense: J. C. GONZÁLEZ, El Concepto de Residencia Habitual del Causante en le Reglamento Sucesorio Europeo, *Revista Castellano-Manchega de Ciencias Sociales*, No. 19, 2015, p. 5.

2344 Ibid. BONOMI/ WAUTELET, p. 196; and ibid., KOHLER, p. 45.

2345 See G. P. ROMANO, Successions internationales et (semi-)loi fédérale sur le droit international privé : quelques défis, *SRIEL*, Vol. 28, 2018, p. 185. See also ibid., KOHLER, p. 44, in particular for the notion of '*nomadischer Lebensstil*'.

2346 Professors Bonomi and Wautelet consider possible that an individual may live during his/ her retirement in an apartment in Spain and regularly return to his/ her house in Germany, and both immovables possibly be regarded as main assets.

do not reflect the deceased's intention to settle before his/ her death, but especially that they do not conform with the deceased's succession planning. Consequently, the concentration of the deceased's habitual residence in the place of *nationality*, or location of main assets, with no additional factors, may lose the rationale behind the qualified proximity of habitual residence[2347]. Conversely, nationality and, more importantly, the place of main assets would be relevant elements during the assessment of habitual residence, or 'replacing rules' in circumstances involving the *absence of habitual residence*[2348].

## § III. The Principle of (Specific) Coincidence on Habitual Residence

**732.** One of the Succession Regulation's aims[2349] is to provide harmonised conflict-of-law rules and a uniform operation of connecting factors, including through the recourse to a *professio juris*, based on the *generally* supported 'coincidence' between forum and *jus* (§ 27, 43 and 56). This principle is certainly not founded only on the deceased's habitual residence, as the reference to a *professio juris* designating the law of the deceased's nationality indicates. That said, given the primary relevance of habitual residence in the Regulation, we will focus on this specific degree of 'coincidence'.

**733.** It should be recalled that, in principle, under the Regulation the authorities of the deceased's (last) habitual residence should not transfer or decline their jurisdiction by virtue of mechanisms such as *forum non conveniens*[2350]. However, some exceptions derogating from the specific 'coincidence' relating to habitual residence are laid down in the Regulation when, *inter alia*: (a) the parties conclude a *professio fori* in favour of the deceased's *professio juris*[2351]; (b) the seised authorities under general jurisdiction decline it in favour of the Member State authorities of the deceased's *professio juris*, (b.i) either upon one of the parties' request and the

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2347 In particular, as opposed to habitual residence, nationality and the location of assets may not be considered adaptable connecting factors in transnational relations. In addition, it was mentioned (*cf.* section I *supra*) that habitual residence and nationality are founded, respectively, on a different degree of 'close connection'.

2348 For the issue of absence of habitual residence, see chapter IV, section I *infra*.

2349 The principal aim is to reduce conflicting successions, provide peaceful opening and transfer of inherited assets.

2350 BONOMI/ WAUTELET, p. 199. For more details relating to *forum non conveniens*, please refer to part I, chapter I, section V of this book.

2351 This point has received some criticism concerning the 'prorogation of jurisdiction' (currently excluded for the deceased) possibly agreed by the parties in favour of the courts in the Member State of the law elected by the deceased (ibid. BONOMI/ WAUTELET, p. 202). In relation to the parties' agreement, see specifically B. HESS/ C. MARIOTTINI/ C. CAMARA, Regulation (EC) n. 650/2012 of July 2012 on jurisdiction, applicable law, recognition and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, European Union Publication, 2012. The transfer of jurisdiction, under art. 5 to 8, does not apply if the deceased's *professio juris* was made in favour of the law of a third State (BONOMI/ WAUTELET, p. 214 ff).

Member State authorities *prove better placed*[2352] or (b.ii) upon agreement by the parties[2353].

**734.** An important exception(-*derogation*) concerns the applicable law. In this regard, although the better clarity of 'closest-connection' under this Regulation is noticed, discrepancies may arise in the habitual residence assessment. In particular, closest connection should be assessed by the courts first seised, upon which *full discretion* is left in absence of current enlightenments from the CJEU[2354].

**735.** An example should clarify the issue: A French lady has over the years established personal, family, as well as professional, interests in Italy, where she lives in her owned villa. Her husband, British citizen, from England was a naval commodore and he died several years before. The lady purchases a villa in England in memory of her husband and spends regular time with her deceased husband's sisters[2355]. Six months after her arrival, she dies in a car accident there. Prior to her death, she drew up a Will[2356], in English, in which she nominated as sole heir one of her sisters in law. Her intention was to avoid the Italian reserved share because her children, living in a house owned by their mother in France, had already received consistent donations over the past years. The result of the habitual residence assessment lies upon the seised authorities[2357].

**736.** This lady may have effectively changed habitual residence relying on her *reasons* to abandon Italy for the UK, as well as *conditions*, according to the Regulation. In addition to the deceased's *physical presence at the relevant time*, the family relationship with her sisters-in-law and the house in England would represent the *personal, family and patrimonial interests*, showing *a close and stable connection* with that country – the deceased's '*centre de vie*'. This reasoning, from an Italian perspective applying the Succession Regulation should be conducive to allocating international jurisdiction to the UK courts. The Italian courts may still retain jurisdiction by virtue of article 10(1)(b) of the Regulation based on the location of the Italian villa and the deceased's former habitual residence[2358].

**737.** In the current hypothetical, it is likely that the deceased's children would decide to better seise the French courts of their habitual residence and of the

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[2352] Better appropriateness, in this scenario, corresponds to the habitual residence of the parties and the location of the assets concerned by the succession.

[2353] Ibid. BONOMI/ WAUTELET, p. 213.

[2354] Ibid. BUMBACA.

[2355] Those who "understand and care about her more than her children", she says.

[2356] The two terms 'Will' and 'testament' will be used interchangeably.

[2357] *E.E. & K.-D. E*, § 59 and 97.

[2358] 'Subsidiary jurisdiction' is discussed in the next section, to the extent of the deceased's former habitual residence.

deceased's nationality. Under the Regulation, the place of the deceased's nationality, where the deceased's assets are located[2359], *takes precedence* over both the deceased's last habitual residence in a third State and former habitual residence in a Member State[2360]. Thus, the French courts may retain international jurisdiction according to article 10(1)(a).

**738.** For the purposes of applicable law, given all the circumstances of the case indicating that the deceased moved to the UK 'fairly recently' before death, *closest connection* should be located in Italy based on article 21(2)[2361]. Italian law, as French law, provides for a reserved share that would be contrary to the deceased's Will.

## § IV. Closest Connection and the '*Situation de Précarité Economique ou de Besoin*'

**739.** Closest connection should align with the Regulation's objectives of legal certainty and predictability[2362], above all in the deceased's (best) interests[2363]. Reference to closest connection is useful to guarantee the respect of the beneficiaries' rights whenever the deceased's habitual residence determination proves impossible, or it appears so complex that lengthy and costly assessments would ultimately lead to *inefficiency of justice*. In this regard, it would be important to better delimit its scope. Specifically, it would be fundamental to indicate in which restrictive circumstances closest connection should apply[2364], derogating from the rule of habitual residence[2365].

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2359 Even if such assets are not the main ones owned by the deceased.

2360 This rule is regretted here, in particular based on the ultimate objective of the Regulation, which is precisely to favour the *genuine connection* between the succession and the international jurisdiction (as well as applicable law) through habitual residence. Under this provision the principal recourse to nationality, although it is clear from the other provisions of the Regulation that its operation is *secondary* (in absence of *professio juris*), may question the role of habitual residence based on a *qualified degree of proximity*. In fact, the deceased's former habitual residence may express greater proximity than his/ her nationality.

2361 This might apply even if the 'effective change of habitual residence' concretely occurred in England at death, and regardless of the deceased's French nationality.

2362 Ibid. BONOMI/ WAUTELET, p. 418, 315: "*Le plus grave défaut de la clause d'exception est lié à l'insécurité qu'elle engendre. En effet, son application repose sur une appréciation au cas par cas de la part de l'autorité, ce qui rend la détermination de la loi applicable peu prévisible, contrairement à l'objectif énoncé au considérant 37*". See also CJEU, C-80/19, § 37.

2363 Taking into account the interests of vulnerable beneficiaries (*i.e.* minor children, adult children in need).

2364 Reference to a 'fairly recent' presence being a somewhat ambiguous indication. A Spanish man who lives in France for fifteen years with his wife and child, who subsequently relocates to Spain for ten years with his wife and child, then returns to France with his wife and child where he dies one month after, may encounter issues under such an indication. It would prove artificial for the authorities first seised to assess the elements indicating that the law of one State is more closely connected with the succession than the law of the deceased's habitual residence at death. The deceased's 'fairly recent move' from Spain to France, prior to death, would not be relevant in the present circumstances where the deceased spent significant time in France and had probably

**740.** For instance, if the situation of '*précarité économique ou de besoin*'[2366] of minor children were encountered, this should be a primary element for both the derogating from, or establishing of, habitual residence. An example will further illustrate this scenario: Let us imagine a Swiss-Italian-English couple, living in England and adopting a minor child from the Philippines. The mother, British, holds various assets in England and Northern Ireland. After the death of her husband, Swiss-Italian national, she moves to Italy with her child. While in Italy, she enters into a second marriage with an Italian man and adopts her husband's two adult children from a previous marriage. After more than a year from her settling in Italy, the lady discovers a disease that will cause her death rapidly. She then moves back to England for medical reasons, where she draws up a Will indicating her adopted minor child as sole heir. She also transfers her assets under a trust[2367] in favour of her first husband's sister, who lives in England, to administer them on behalf of the adopted minor child[2368]. The child is meanwhile enrolled in school in England, while his mother dies.

**741.** The authorities in Italy may be considered internationally competent, and Italian law should be applicable, by virtue of the deceased's '*centre de vie*', prior to her stay in England for medical reasons. Concretely, the principle of '*précarité économique*', and the *minor child's habitual residence*, might be considered as decisive factors, specifically for the determination of English applicable law[2369]. Thus, closest connection may play an important role to derogate from the deceased's last habitual residence. This is relevant not only

established regular attachments which supported his return – despite the similar attachment with the Spanish social context. The same conclusion should be reached if we were to imagine an Italian lady who lived her life in Italy until the end of her University degree, who does not intend to live there any longer, and who moves to Austria with her Austrian husband whom she met in Italy. She is in love with the Austrian society, and she finds employment there, but she dies in Austria after three months. It would be again a controversial task that of determining if, for instance, the Italian law should be considered more closely connected to the succession rather than the Austrian law of her habitual residence where she was willing to live. In particular the 'fairly recent move' would only acknowledge the duration of her stay but essentially not her attachments with that country. In the current examples, the courts first seised would hold discretional power in the applicability of such an *exceptional* rule.

2365 Reference shall be made to the use of significant connection under the US UAGPPJA (*cf.* part IV *supra*).

2366 A situation typically provided under French law. See on this subject Paris High Court (TGI), Court of Appeal, and Court of Cassation, judgments issued on 2 December 2014, 11 May 2016 and 27 September 2017, Nos. 10/05228, 14/26247 and 1005 (16-17198).

2367 Trusts are excluded from the scope of the Succession Regulation, art. 1(2)(j).

2368 On this point a relevant doctrine argues that habitual residence may *effectively change* even in the event of the intention to circumvent the reserved share (ibid. BONOMI/ WAUTELET, p. 314).

2369 In particular given that the Italian law may be claimed by the Italian husband and the deceased's adopted adult children in order to oppose the English absence of reserved share.

for the deceased's interests, but also concerning the relation between the child in need[2370] and the law applicable to the succession[2371].

## § V. EU Uniform Interpretation

**742.** The CJEU has only delivered one judgment on the deceased's habitual residence at the time of this study. Some elements interpreting adults' habitual residence were already provided in proceedings involving parental responsibility when dealing with the *primary carer's habitual residence*. Habitual residence will be examined as a uniform concept from an adult's perspective[2372]. Ultimately, it is said that the interpretation of the primary carer's habitual residence in the field of parental responsibility, by analogy extended to the *deceased's habitual residence*, proves to be in line with the uniform operation of habitual residence under EU private international law[2373].

**743.** In the judgment *Mercredi*[2374], the Court stated that, in determining whether physical presence is not temporary or intermittent, the *intention*[2375] to settle permanently[2376] in the host Member State, may constitute an indicator for the change of habitual residence[2377]. The Court also clarified that, for such *change* to arise, the person concerned should have *beforehand*[2378] the intention to establish the permanent or habitual centre of his/ her interests with a *lasting character*[2379]. The Court did not grant determinative character, instead, to the 'durable' element[2380].

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2370 It is said that '*précarité économique*' should refer to the lien of dependency with the deceased or with the surviving spouse, for instance if he or she is the primary carer. See J-L VAN BOXSTAEL/ E. FONGARO, Successions internationales, droit de prélèvement et exception d'ordre public. À propos des arrêts Kazan et Colombier, see Cour d'appel de Paris (pôle 3, ch. 1), 16 décembre 2015, p. 214.

2371 Ibid. BONOMI/ WAUTELET, p. 315: "*L'avantage de la clause d'exception est de permettre une correction du rattachement à la résidence habituelle lorsque celle-ci conduit à des résultats surprenants ou du moins peu satisfaisants à l'égard des intéressés. En effet, s'il est vrai que le critère de la résidence habituelle conduit généralement à l'application d'une loi ayant des liens significatifs avec la succession, tel n'est pas toujours le cas*".

2372 The choice of comparing two different decisions in two different contexts lies in the proposal according to which habitual residence in international family law could be interpreted in a uniform manner based on the beneficiary's perspective.

2373 Ibid. KOHLER, p. 56.

2374 CJEU, *Mercredi v. Chaffe* [2011] C-497/10.

2375 With reference to the parent holding parental responsibility.

2376 The permanent settlement, according to the decision, should be manifested by certain tangible steps such as the purchase or rental of an accommodation.

2377 *Mercredi*, § 50.

2378 Prior to the relocation.

2379 According to the judgment, this analysis should occur in order to distinguish habitual residence from mere temporary presence.

2380 *Mercredi*, § 51.

> The Court named other relevant factors, specifically: the integration within the social and family environment; family and social connections; reasons for the move; languages[2381]; geographic and family origins[2382].

**744.** In the judgment *E.E. & K.-D. E.*[2383], a Lithuanian mother and her son moved to Germany to live with her husband. Prior to her death in Germany, she drew up a testament in Lithuania, naming her son as her sole heir. The mother owned an apartment in Lithuania. When she died (in Germany), her son approached a notary in Lithuania concerning the apartment and in order to obtain a Certificate of Succession. The notary refused both requests as a consequence of the deceased's last habitual residence, which was in Germany at the time of death. The deceased's son appealed against such a decision. Afterwards, the proceedings reached the Lithuanian Supreme Court ('*Lietuvos Aukščiausiasis Teismas*'), which decided to stay proceedings and request the preliminary ruling of the CJEU[2384].

> According to the Court, *key elements* for the habitual residence assessment were the duration and regularity of the deceased's settlement at the two relevant points in time[2385]. Such a settlement should be assessed cumulatively through both conditions (*objective element*) and reasons (*subjective element*). Particular regard should be given to the deceased's family and social integration, showing proximity, unlike the limited relevance attributed to the duration of his/ her settlement (*temporal element*)[2386]. The Court maintained that, according to recital 24, in those situations[2387] where the assessment proves complex[2388], *the nationality and/ or location of assets should become determining* (§ 39)[2389]. According to the Court, the authorities should consider the deceased's habitual residence as established in one State (§ 40, 41, 45)[2390]. In relation to the applicable law, the Court held that the

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2381 In the context of succession, it is said that the *language* cannot hold decisive relevance unless in particular circumstances (see BONOMI/ WAUTELET, p. 195). On the contrast pertaining to the 'linguistic element', ibid. KOHLER, p. 43.

2382 *Mercredi*, § 55, 56.

2383 CJEU, *E.E. & K.-D. E.* [16 July 2020] C-80/19. This summary is reproduced from *Conflictoflaws.net, 2020, no. July, 30* where the present author commented on this decision.

2384 For the analysis made by the Court, concerning the relevant provisions of the Regulation, we refer to *Conflictoflaws.net, 2020, no. July, 30.*

2385 The deceased's death and the years preceding it.

2386 Conclusions de l'Avocat Général M. Campos Sánchez-Bordona, § 54. See also ibid. BUMBACA.

2387 Such situations, according to the Advocate General's opinion (§ 55-57) are: (i) the scenario involving *expats*; (ii) that concerning cross-border movements *lacking life stability*.

2388 On a subsidiary basis only.

2389 In particular if it is shown that the deceased has maintained a close and stable connection with the State of origin.

2390 The reasoning of the Court excludes concurrent habitual residence, as incompatible with the objectives of the Regulation, in particular with the principles of predictability and legal certainty.

'manifestly closest connection' under article 21(2) of the Regulation should be interpreted strictly (§ 45)[2391]. It should apply only when the deceased *moved fairly recently* to one State before death.

**745.** The two judgments examined here showed that habitual residence should be considered as an autonomous EU connecting factor, requiring a uniform interpretation. The habitual residence assessment should therefore take into account the perspective of the individual concerned, in this case the adult, rather than, or not limited to, each single Regulation or instrument. The intention should be considered as relevant only if accompanied by decisive fact-based elements[2392]. Such elements should be principally the adult's family and social integration, revealing a particular degree of genuine proximity, a close and stable connection. Concurrent habitual residence should be excluded[2393].

## Section II Relevant Legal Framework

### § I. Provisions on Jurisdiction and Applicable Law

**746.** International jurisdiction within the EU25 is allocated to the Member State authorities[2394] of the deceased's habitual residence at death (article 4). Some exceptions are indicated in the Regulation, namely: (a) when habitual residence is in a *third State* (article 10); (b) when the parties agree on a *professio fori* in favour of the *Member State* authorities of the deceased's *professio juris* (article 5); (c) when the *Member State* authorities seised of the matter decline jurisdiction upon specific conditions[2395]; (d) when the parties reach an

[2391] This is an exception that should apply on an extraordinary, rather than subsidiary, basis. The recourse to closest connection should be excluded even when the habitual residence determination proves complex.

[2392] However, in *Mercredi*, the intent seems to be particularly relevant according to the CJEU analysis.

[2393] This has been stated only in the framework of the Succession Regulation.

[2394] CJEU, C-80/19, § 47: "*Aux termes de l'article 3, paragraphe 2, premier alinéa, du règlement no 650/2012, une autorité non judiciaire ou un professionnel du droit, compétents en matière de successions, relèvent de la notion de « juridiction », au sens de cette disposition* […]". Accordingly, *notaries* may fall under the scope of art. 3(2) of the Regulation, but in strict circumstances. § 56: "[…] *l'article 3, paragraphe 2, du règlement no 650/2012 doit être interprété en ce sens que, sous réserve d'une vérification par la juridiction de renvoi, les notaires lituaniens n'exercent pas des fonctions juridictionnelles lors de la délivrance d'un certificat national d'hérédité. Toutefois, il appartient à la juridiction de renvoi de déterminer si ces notaires agissent par délégation ou sous le contrôle d'une autorité judiciaire et, en conséquence, peuvent être qualifiés de « juridictions », au sens de cette disposition*".

[2395] Section I *supra*.

amicable out-of-court agreement in favour of the *Member State* authorities of the deceased's *professio juris* (articles 6, 8)[2396].

**747.** The *former habitual residence* of the deceased plays a limited role only in the following *cumulative* circumstances: (i) he or she was last habitually resident in a *third State*; (ii) he or she has had in the past 'close and stable connections' with a *Member State* where he or she owned assets, which are still located there at the time of death; and (iii) he or she did not hold an EU25 *nationality, more or less effective*, at the time of death (article 10.1 lit. a). Only in this specific scenario, the former habitual residence may apply over the last habitual residence (article 10.1 lit. b)[2397]. In such circumstances, the assessment should focus on a *five-year period of time*, at most, occurring between the seisin and the effective change of habitual residence. On this point, however, it is said that only the *most recent* former habitual residence should be considered[2398]. The authorities of the former habitual residence will be competent over the deceased's succession *as a whole*.

**748.** Concerning applicable law, habitual residence applies primarily (article 21.1), save for the closest-connection exception (article 21.2), or in presence of a *professio juris* in favour of the deceased's nationality (article 22). The two aspects were already abundantly referred to in section I.

**749.** An example should illustrate the above rules: A Portuguese-Danish couple, she, Portuguese, he Danish, live and work in Portugal for some years with their child. The husband owns assets in Portugal mainly and a few in Denmark. Within his professional activities principally based in Portugal, the husband performs 40% of his contractual activities in Switzerland where he rents an apartment. Consequently, other than the week ends and three days per week in Portugal with his wife and their child, he spends the rest of the week in Switzerland. During a trip to Switzerland, he meets another woman with whom he starts a relationship. He decides to divorce from his current wife, but he continues to work principally for the same company in Portugal. Thereafter, he permanently relocates to Switzerland. After 3 months, he dies in the Swiss mountains, while he was climbing beyond 2000m a.s.l. Prior to his death, and after the divorce decree obtained from his former wife, he had

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[2396] Art. 7 of the Regulation summarises the grounds of jurisdiction according to which the courts in the *Member State* of the law designated within the choice of applicable law shall exercise jurisdiction. Art. 9 provides that when jurisdiction under art. 7 is not founded on the agreement of both parties and there is not 'jurisdiction on appearance', that court should decline jurisdiction in favour of art. 4 or 10.

[2397] And over nationality.

[2398] Ibid. BONOMI/ WAUTELET, p. 238: "*On peut se demander si par « résidence habituelle antérieure » il faut comprendre toute résidence habituelle que le de cujus a eu pendant les cinq ans précédant la saisine du tribunal ou seulement celle immédiatement antérieure à sa dernière résidence.* […] *la seconde interprétation est préférable* […]".

concluded a succession agreement[2399], in particular to provide for equitable succession rights and donations[2400] to both his minor child and his new partner. The deceased's former wife challenges the succession agreement[2401] before the Portuguese courts.

**750.** The Regulation would apply to the current hypothetical by virtue of articles 1 and 83. The Portuguese courts should assess the deceased's habitual residence at his death and the *years preceding it* (article 4, § 23). The decisive element triggering the assessment is the deceased's *physical presence* at death that should be durable and regular (§ 23). The courts should consider the deceased's intentions (*reasons*) to live in Switzerland. Such intentions should be accompanied by tangible steps (*conditions*). In context, they would be: the shared *family* life with his Swiss partner[2402]; the *personal* contacts with the Swiss community[2403]; the place of the succession agreement; and the rented apartment in Switzerland[2404]. The same courts should likewise take into account the deceased's previous marital life in Portugal. For instance, the child's habitual residence[2405], the location of *main owned assets,* the *social* and professional interests in Portugal[2406].

**751.** The courts in Portugal should decline jurisdiction, concluding that Switzerland was the deceased's habitual residence at death under article 4. Therefore, the claim should be brought before the Swiss courts. The courts in Portugal might still retain jurisdiction based on the deceased's *former habitual residence* in Portugal under article 10.1 lit. b[2407]. Their jurisdiction would be

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2399 Regulation, § 49: "*An agreement as to succession is a type of disposition of property upon death the admissibility and acceptance of which vary among the Member States. In order to make it easier for succession rights acquired as a result of an agreement as to succession to be accepted in the Member States, this Regulation should determine which law is to govern the admissibility of such agreements, their substantive validity and their binding effects between the parties, including the conditions for their dissolution*".

2400 *Inter vivos* donations are in principle excluded from the scope of the Regulation (see ibid. BONOMI/ WAUTELET, p. 76). However, they might ultimately fall under its ambit *to the extent of the calculation of the legal shares* (art. 23.2 lit. i), in particular concerning the reserved share. See also D. A. POPESCU, Guide de droit international privé des successions, Ministère de la Justice, Magic Print, 2014, p. 24.

2401 Under Portuguese law the succession agreement may be void. Portuguese Civil code, art. 2028: "1. *Há sucessão contratual quando, por contrato, alguém renúncia à sucessão de pessoa viva, ou dispõe da sua própria sucessão ou da sucessão de terceiro ainda não aberta. 2. Os contratos sucessórios apenas são admitidos nos casos previstos na lei, sendo nulos todos os demais, sem prejuízo no disposto no nº 2 do artigo 946*". See also J. RODRIGO RODRÍGUEZ, Article 25 - Agreements as to Succession, in: A-L. CALVO CARAVACA/ A. DAVÌ/ H-P. MANSEL, The EU Succession Regulation - A commentary, 2016, p. 383. We observe that the invalidity of the agreement would not automatically cause the nullity of the choice of applicable law (ibid. RODRIGO RODRÍGUEZ, p. 385).

2402 In particular during the three months preceding his death.

2403 Integration should be achieved through his regular professional and social relationships.

2404 Principally occupied during the three months preceding his death.

2405 This should be considered as part of the deceased's family interests.

2406 These elements should also lead to acknowledging the maintaining of regular contacts with Portugal despite the deceased's physical presence in Switzerland at death.

2407 In context, art. 10(1)(a) cannot apply given the lack of the deceased's EU25 *nationality.*

founded on the deceased's owned assets in Portugal and his habitual residence within the five years preceding the seisin. The courts in Portugal may exceptionally apply their own law based on the deceased's 'fairly recent move' to Switzerland prior to his death. The courts should prove that a 'closest connection' exists between the succession and the Portuguese law (article 21.2). The jurisdiction of the Portuguese courts and their law would govern the succession *as a whole*, including the assets located in third States (article 20).

## § II. Validity of the Testamentary Dispositions

**752.** Additional aspects are relevant for the purposes of applicable law[2408]. Namely, capacity to make a disposition or to conclude a succession agreement, as well as the formal validity of property dispositions upon death (articles 24 to 27).

**753.** The law applicable to the substantive validity of the property disposition upon death[2409] refers to the *hypothetical* succession law (article 21)[2410]. The testator is also entitled to conclude a choice of applicable law by virtue of articles 24(2) and 25(3) which both refer to article 22[2411]. Concerning the formal validity (article 27), the law of the testator's habitual residence, or of at least one of the persons whose succession is concerned by an agreement as to succession[2412], alternatively applies[2413].

**754.** The applicable law of the testator's habitual residence at the time of the property disposition – *the last habitual residence of the hypothetical death* – continues to apply despite the testator's change of habitual residence occurring after the property disposition. This is true even when the applicable law of the testator's new habitual residence[2414] might invalidate the property disposition[2415].

**755.** Further examples should illustrate the above rules. An example involves an Italian minor of 17 years old, habitually resident in Germany, who would

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[2408] The declaration of acceptance or waiver made by the beneficiary of the succession (art. 28) is not examined.

[2409] Substantive validity (art. 26) refers in particular to the *capacity of the testator* to dispose through a Will (art. 24) or an agreement (art. 25), as opposed to his/ her general legal capacity.

[2410] This is the law of the deceased's last habitual residence or closest connection at the time of the property disposition.

[2411] This is the law of the deceased's nationality or one of his/ her nationalities at the time of the property disposition.

[2412] Habitual residence should be held either at the time when the disposition was made or the agreement concluded, or at the time of death.

[2413] An exhaustive list of laws is available under the Regulation (ibid. BONOMI/ WAUTELET, p. 473, fn. 29). The pertinent provisions of the HC-1961 have essentially been transposed into the Regulation.

[2414] The deceased's last habitual residence *after* the conclusion of the property disposition.

[2415] Ibid. BONOMI/ WAUTELET, p. 417.

like to dispose of his succession in favour of his parents. The substantive and formal validity should be governed by the law of his habitual residence at the time of the concluded Will (articles 24 and 27.1 lit. d). Another example involves a German minor of 17 years old, habitually resident in Italy, who would like to dispose of her succession through an agreement with her parents and her boyfriend, also aged 17, German nationals and habitually resident in Italy. The parties choose German law as applicable to the substantive validity (article 25.3). The latter, in absence of choice of applicable law, would be governed by the law of the German minor's habitual residence (Italian law), which would render void the agreement[2416]. Conversely, by reason of the choice of applicable law, the agreement should be valid under German law. The formal validity might be governed by Italian law (article 27.1 lit. d).

## § III. Party Autonomy: A Proposed Model

**756.** The EU regulation provides the only possible choice of applicable law in favour of the *de cujus*' nationality. Additional laws founded on a qualified proximity at a given time may favour a more efficient predictability and legal certainty. The *de cujus*, who would like to plan his/ her succession in advance, should rely on a greater autonomy which is currently limited to the law of his/ her nationality[2417]. In this regard, the deceased's last or former habitual residence should be valid alternatives in those situations where the law of nationality may be of limited satisfaction[2418] and the last habitual residence may not be determined.

**757.** According to the proposal conceived here, a foreign national living in (EU25) Member State A would be able to elect the law of that State as applicable to his/ her succession by virtue of a qualified proximity at a specific point in time[2419]. Ultimately, this alternative would allow the *de cujus* considerable discretion in the managing of his/ her assets according to the

[2416] Art. 591, para. 2, of the Italian Civil code.

[2417] In today's mobile society, some people may not be willing, or it would still be impossible, to make a choice of law in favour of their national State/s. We refer to expats, nomads, recognised refugees, asylum seekers and stateless persons (*cf.* part II, chapter I, for the notions of recognised refugee, asylum seeker and statelessness). Individuals, who are not nationals of a State in which they live, may be willing to choose the law of that State where their life is settled at a specific point in time (*i.e.* time of marriage celebration, time of concluding the choice of law, time of death). The latter is a personal view of the author of this monograph.

[2418] Also of limited proximity. On the relation between nationality and absence of, or limited, proximity see G.P. ROMANO, L'avant-projet de réforme des dispositions de la LDIP en matière de successions internationales : questions choisies, in: A. BONOMI/ D. PIOTET/ P. FRÉSARD, Droit successoral international, 2018, p. 24.

[2419] This is the time of making the choice or the time of death, in line with art. 22 of the Succession Regulation.

chosen law that suits his/ her interests best. It may finally reduce the recourse to judicial authorities[2420].

**758.** The Regulation does not allow choice-of-court clauses concluded by the deceased[2421]. Again, it is argued that a choice of court would favour greater predictability. It would also reduce potential conflicts of jurisdiction arising out of habitual residence determinations[2422] and/ or lack of coordination between EU25-third States[2423]. Reference to the proposal concerning the choice of applicable law should also be made with regard to the choice-of-court clauses[2424], in accordance with the principle of parallelism between forum and *jus*.

# Chapter II: EU jurisdiction over Property Regimes and Successions

**759.** The scope of this Chapter[2425] is composed of two short sections. *Section I* deals with the principle of coincidence between forum and *jus*[2426]. *Section II* outlines the rule of 'concentrate jurisdiction'[2427].

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2420 This affirmation is principally based on the legitimate expectations according to which individuals should be aware of this alternative in order to apply it. The consequences of a frequent use of this alternative would logically reduce the recourse to the habitual residence determination under art. 4 of the Regulation (ibid. ROMANO, p. 35).

2421 This is found to be contradictory with the common area of freedom, security and justice. Conversely, the Swiss practice favours greater autonomy (*cf.* chapter II *infra*).

2422 In this regard, the transfer of jurisdiction *ex officio* from (EU25) Member State A of the last deceased's habitual residence to (EU25) Member State B of the former habitual residence should be usefully introduced in the Regulation (*cf.* part I, chapter III, section V of this book). According to BONOMI/ WAUTELET: "*L'utilisation dans des instruments européens d'une règle de coordination inspirée de la doctrine du forum non conveniens ne constitue pas une nouveauté, une première application de ce mécanisme se trouvant à l'article 15 du Règlement Bruxelles IIbis*".

2423 Under art. 96 of the SPILA, *pre-* and *post-* reform (*cf.* chapter II *infra*), a judgment rendered in an EU25 jurisdiction by virtue of the deceased's nationality *may* not be recognised by the Swiss authorities. This may also be true when the EU25 is the State of the deceased's former habitual residence (ibid. ROMANO, p. 25). See also B. CHAPPUIS/ J. PERRIN, Le Règlement (UE) N° 650/2012 du Parlement européen et du Conseil du 4 juillet 2012 relatif à la compétence, la loi applicable, la reconnaissance et l'exécution des décisions, et l'acceptation et l'exécution des actes authentiques en matière de successions et à la création d'un certificat successoral européen, 2014, p. 3.

2424 Proposed grounds of jurisdiction for the choice of court may be: (i) the deceased's nationality; (ii) the deceased's last or former habitual residence; (iii) the habitual residence of the surviving spouse and/ or of adult children; (iv) and the habitual residence of the child's primary carer when the *de cujus* is willing to provide for his/ her minor or adult children in need. The applicability of these connecting factors should rely on the time of the election or the time of death.

2425 The international dimension of such 'interconnection' will not be dealt with – outside the EU legal framework – with the consequent absence of comparative analysis. Such a study would require a further articulated analysis, given the interest in examining other approaches beyond the EU one, which is unfortunately not possible at this stage of the study.

2426 Respectively within the Succession Regulation and the EU Property Regimes' Regulations.

2427 Under article 4 of the EU Property Regimes' Regulations.

## Section I Coincidence of Forum and *Jus*

**760.** The EU Succession Regulation advocates explicitly for the importance of *coincidence* between forum and *jus* towards utmost legal certainty and predictability[2428]. To achieve this practically, the deceased's last habitual residence has been favoured as the prevalent connecting factor[2429], ensuring proper administration of justice and facing the increase of cross-border mobility[2430]. Coincidence allows the competent courts to apply their law[2431], avoiding the potential difficult access to foreign laws which may also engender significant costs and lengthy procedures[2432]. Additionally, this principle provides opportunity to set aside the recourse to public policy restrictions against decisions governed by foreign law[2433]. Under the Property Regimes' Regulations, particularly under the 1103 Regulation, *coincidence* between forum and *jus* does not seem to be the priority, and often proves practically impossible to achieve[2434]. This same conclusion was achieved elsewhere here[2435].

**761.** Non-coincidence under the 1103 Regulation inevitably affects also *concentrate jurisdiction*[2436] over property regimes in connection with succession proceedings. In this regard, the different 'formulas' of habitual residence are one of the main causes of the dissociation between forum and *jus*[2437].

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2428 Ibid. BONOMI/ WAUTELET. See also ibid. HESS *et al*.

2429 Chapter I, section I *supra*.

2430 Succession Regulation, § 23.

2431 Coincidence between forum and *jus* may also be achieved in circumstances involving art. 6, 7, 8 and 10(1)(a), in presence of a *professio juris* in favour of the deceased's nationality. It may, instead, not be possible in presence of a *professio juris* and in absence of a respective *professio fori* according to art. 5; and when art. 4 applies (unless the place of the deceased's last habitual residence coincides with the place of the deceased's nationality).

2432 Ibid. HESS/ MARIOTTINI/ CAMARA, p. 6.

2433 A given example is the one of Muslim communities living in Europe whose succession is subjected to the Sharia law, potentially causing discriminatory effects, incompatible with the law of the competent forum (ibid. BONOMI/ WAUTELET).

2434 According to the 1103 Regulation, jurisdiction is frozen in the State of the spouses' last common habitual residence at the seisin, and applicable law is that of the State of the first common habitual residence after the conclusion of the marriage (*cf.* part II, chapter II).

2435 Ibid. part II, chapter II. We just recall that in matters relating to 'concentrate jurisdiction', including succession and property regimes, the recourse to a choice of court coincident with a choice of applicable law is excluded. Art. 7(1), 1103 and 1104 Regulations: "*In cases which are covered by Article 6* […]".

2436 According to the Property Regimes' Regulations, this rule entitles the courts dealing with the succession, under the Succession Regulation, to extend their jurisdiction over the liquidation of property regimes. This rule does not involve the applicable law, which remains governed under the Succession and the Property Regimes' Regulations.

2437 Non-coincidence between forum and *jus* also arises in those circumstances involving a *professio juris* under the Succession Regulation. For instance, this is the case when the courts of the general jurisdiction, under the Succession Regulation, transfer jurisdiction (chapter I *supra*) towards the courts of the deceased's national State according to his/ her *professio juris*. In such a scenario, the competent courts, under the Succession Regulation, entitled to exercise concentrate jurisdiction

Specifically, this is the case between the *last habitual residence* of the deceased with reference to jurisdiction, and the *first common habitual residence* after the conclusion of the marriage in respect of applicable law[2438]. It is observed that whenever couples live all their life in one Member State, coincidence should generally be found[2439]. However, the reversed scenario appears more and more common within a constant globalised society[2440].

## Section II Concentrate Jurisdiction

**762.** Concentrate jurisdiction logically excludes the applicable law. The latter remains subject to the rules of the Succession Regulation for matters of succession[2441]. On the other hand, the law governing property regimes is determined according to the provisions of the Property Regimes' Regulations[2442]. In this respect, the question[2443] relating to which property relations[2444] should fall under the rules governing succession, and which other property relations should fall under the rules governing property regimes, represents an open issue subject to debate[2445].

**763.** The following example should be illustrative of concentrate jurisdiction. A married couple, he British, she Dutch, were settled in the Netherlands during their whole working life. Following their retirement, the couple relocates to Italy (Sardinia), with the idea to sever their 'routine life' to which they were accustomed in the Netherlands. After two years, the husband dies in Italy.

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under the 1103 Regulation, would often not coincide with the Member State of the law applicable to the property regime. This is true especially when the applicable law governing property regimes refers to the spouses' first common habitual residence after the conclusion of the marriage unless this was also the deceased's national State.

2438 Art. 4 of the Succession Regulation and 26(1)(a) of the 1103 Regulation.

2439 See ibid. GRIECO, p. 466.

2440 See note 27, ROMANO, p. 38: "*Car, aujourd'hui, les couples dont la vie conjugale, professionnelle et patrimoniale, se déploie multi-territorialement sont, tout comme leurs biens, assujettis, au sein de l'Union Européenne, à une pléthore de règles de conflit et de compétence*".

2441 For the property relations falling under succession (article 1.2 lit. d).

2442 The property relations falling under matrimonial or registered partnership regimes (article 1.2 lit. d).

2443 For the purposes of applicable law in 'interconnected' proceedings.

2444 To the extent of the proceedings brought by parties after the deceased's death.

2445 This issue does not appear relevant for the operation of habitual residence. It relates, especially, to the absence of harmonised conflict-of-law rules providing coordination of provisions governing applicable law for both succession and property regimes. See opinion of Advocate General Szpunar, *Mahnkopf* [13 December 2017] C-558/16, ECLI:EU:C:2017:965, § 56: "In situations having links with the law of more than just one State, the law on the succession and the law applicable to matrimonial property regimes are identified by various conflict-of-law rules. Therefore, determining the applicable law under conflict-of-law rules can lead to the operation of provisions derived from two different legal systems. Those approaches do not have to be coordinated with one another. This can be the source of numerous complications". To the extent of Swiss private international law, see F. GUILLAUME, L'extension de la portée de l'élection de droit en matière successorale, *Successio*, Vol. 3, 2019, p. 229-230. See also CJEU, *Kubicka* [12 October 2017] C-218/16, ECLI:EU:C:2017:755; *Mahnkopf* [1 March 2018] C-558/16, ECLI:EU:C:2018:138.

Prior to death, he used to alternate one week stay, every three months, in the Netherlands and in England. The Netherlands corresponds to the place of the couple's main assets, where their children and grandchildren are settled. England is the place of the husband's ancestral estate. The couple had purchased a principally occupied home in Italy under shared ownership. They had concluded a pre-nuptial agreement electing English law[2446]. According to the surviving spouse, the movables decorating the house in Italy, representing very expensive paintings owned by the deceased, were gifted to her. Their children challenge such gifting[2447].

**764.** Let us assume for the sake of this hypothetical that the donation is a matter falling under the jurisdiction of the 'succession judge', article 4 of the Succession Regulation[2448] would apply for matters of *concentrate jurisdiction*. If the deceased's last habitual residence is in Italy[2449], the Italian courts should exercise international jurisdiction over the deceased's succession and the property regime, including the contended claim over the donation.

**765.** The question relating to the applicable law proves more complex. Let us suppose that the *professio juris* is valid, English law should apply over the proceedings involving the liquidation of the property regime[2450]. However, English law should *not* apply over the 'property interests' of the heirs, legatees and creditors involved in the succession, which should be governed by the rules of the Succession Regulation. The law of the last habitual residence of the deceased at the time of death should govern such interests under articles 20 (*erga omnes*) and 21(1), consequently designating Italian law[2451]. The

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2446 Equivalent of 'property regime of separation' (*i.e.* under article 22.1 lit. b of the 1103 Regulation).

2447 The issue of whether a claim concerning donations falling under property regimes should be considered as interconnected to a succession proceeding remains debatable. According to ROMANO (note 27) p. 65, it should.

2448 Applicable to both Italy and the Netherlands, but not to the UK. Reference to art. 4 is made through art. 4 of the 1103 Regulation.

2449 We recall that the English courts, if seised, may still determine that the deceased did not hold a domicile of choice and retain jurisdiction based on his domicile of origin (*cf.* part I, chapter III, section II). In this scenario, the rule of concentrate jurisdiction would not apply. From the viewpoint of the English judge, English law would potentially govern the couple's property relations as a whole (*AR v. AR* [2011] EWHC 2717 (Fam), § 46). This situation may lead to a conflict of concurrent jurisdiction in which the English and the Italian courts may, respectively, exercise jurisdiction by virtue of domicile (of origin) and the last habitual residence of the deceased. As a result, also the determination of the applicable law may be affected. For instance, a valid *professio juris* would not be binding under English law (*cf.* part II, chapter II, section IV). Difficulties dealing with coordination, in particular when uniformity of connecting factors is absent, may negatively affect the de *cujus*' succession planning.

2450 According to the 1103 Regulation, art. 20 (*erga omnes*), 21 (unity of applicable law), 22(1)(b) and 32 (exclusion of the renvoi). From the viewpoint of the Italian courts, English law should apply over all the 'property interests' of the surviving spouse involved in the regime, including movables and immovables located in Italy, Netherlands and England.

2451 The question of applicable law is seminal concerning the legal share. Under English law, the donation made between the spouses, or any kind of lifetime gifts, may be excluded from the succession, subject to English judicial discretion. On the contrary, under Italian law, the reserved share would be preserved. In this regard, donations should be redistributed within the deceased's succession, allocating them to the heirs and

assessment of the deceased's habitual residence under concentrate jurisdiction should refer to the Succession Regulation. The deceased's *durable* and *regular presence* at death was in Italy. Relevant factors should be the purchasing of a principally occupied home, the place of principal family interests with primary importance allocated to the surviving spouse[2452], and the location of a settled purpose[2453].

# Chapter III: Remarks on the EU25- Swiss, UK and US Contexts

**766.** The Swiss PILA, chapter 6, provides rules, *inter alia*, on jurisdiction and applicable law over successions of individuals[2454] having a link with Switzerland. Currently under review[2455], the main subject of scrutiny is the role of habitual residence in the *pre-* and *post-* ongoing reform of the SPILA[2456]. In addition, the EU25/ -Swiss[2457]/ -UK / -US contexts are examined.

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legatees according to the legal share (art. 23.2 of the Succession Regulation). On this subject falling outside of this inquiry, ibid. CARRUTHERS, p. 905; *Ilott (Respondent) v. The Blue Cross and others (Appellants)* [2017] UKSC 17; *AR v. AR* [2011] EWHC 2717 (Fam), § 2: "*This case raises the issue of the manner in which the court should exercise its discretionary jurisdiction when determining an application by a wife when most of the wealth consists of or reflects resources received by the husband by way of gift and inheritance*". For restrictive exceptions applicable to the law of England and Wales, which differs from the law of Scotland, see P. BEAUMONT/ J. HOLLIDAY, Some Aspects of Scots Private International Law of Succession Taking Account of the Impact of the EU Succession Regulation, *Working Paper Series*, 2015, p. 10 (fn. 47).

2452 The appreciable period that should be taken into account for the assessment corresponds to the *de cujus*' lifetime with his/ her *actual* spouse or partner, representing the *principal* and *actual* family interests at death. This is particularly relevant in situations where the *de cujus* is married more than once and/ or he or she holds fragmented multi-national family interests.

2453 This should be compatible with tangible steps (*conditions*), such as those we mentioned, and with the spouses' common intent (*reasons*) to spend their retirement in a State other than that of their routine life.

2454 Holding international ramifications with different States, including EU Member States.

2455 The 2018 '*Avant-projet*' should be subject to a national referendum.

2456 Modification de la loi fédérale sur le droit international privé (Successions), Rapport explicatif à l'Avant-projet, 14 février 2018, <www.ejpd.admin.ch/dam/data/bj/aktuell/news/2018/2018-02-14/vn-ber-f.pdf>, p. 2: "*Dans sa réponse du 18 février 2015, le Conseil fédéral a reconnu que le règlement européen sur les successions internationales aurait des conséquences considérables pour les ressortissants suisses dont le dernier lieu de résidence habituel se trouve dans un État membre de l'UE et pour les personnes qui résident en Suisse et possèdent des biens dans un État membre de l'UE*".

2457 Switzerland has concluded a few bilateral conventions in matters involving succession, which will not be discussed, precisely because the notion of habitual residence is either not directly, or only marginally, mentioned. Traité 25 novembre 1850 conclu entre la Confédération suisse et les Etats Unis d'Amérique du Nord, Convention d'établissement et consulaire du 22 juillet 1868 entre la Suisse et l'Italie, Convention d'établissement et de protection juridique entre la Suisse et la Grèce du 1er décembre 1927, Convention d'établissement du 25 avril 1934 entre la Confédération suisse et l'Empire de Perse. For the purposes of applicable law, nationality applies primarily in the Swiss-Italian Treaty (art. 17), in the Swiss-Iranian Treaty (art. 8) and in the Swiss-Greek Treaty (art. 10). Domicile applies primarily for movables, and for immovables the *situs* applies, in Swiss-US Treaty (art. VI). See also ibid. ROMANO, p. 201.

## Section I Swiss PIL Rules Before the 2018 Ongoing Reform

**767.** Habitual residence does not hold a primary role in relation to succession under the current version of chapter 6. Its use occurs on a subsidiary basis by virtue of article 20[2458]. Domicile is the primary connecting factor governing international successions from a Swiss viewpoint. For the rules on international jurisdiction[2459] and applicable law[2460], provided under the current version of chapter 6, reference to their English translation[2461] is made.

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2458 Ibid. MASMEJAN, p. 118.

2459 Art. 86: "1. Swiss judicial or administrative authorities at the last domicile of the deceased have jurisdiction to take the measures necessary to deal with the inheritance estate and to entertain disputes relating thereto. 2. The above provision does not affect the exclusive jurisdiction claimed by the state where real property is located". Art. 87: "1. Judicial or administrative authorities at the deceased's place of origin have jurisdiction to deal with the inheritance estate of a Swiss national domiciled in a foreign country at the time of death to the extent that the foreign authorities do not deal with such estate. 2. The authorities at the place of origin always have jurisdiction when a Swiss national having his or her last domicile in a foreign country submits, in a will or an inheritance agreement, his or her entire estate or the portion thereof located in Switzerland to the jurisdiction or to the law of Switzerland. This provision does not affect Article 86, paragraph 2. 1". Art. 88: "1. If a foreign national domiciled in a foreign country at the time of death had property in Switzerland, Swiss judicial or administrative authorities at the place where such property is located have jurisdiction to deal with the portion of the estate located in Switzerland to the extent that the foreign authorities do not deal with such portion of the estate. 2. If there is property located in different places, the Swiss authority before which the matter was first brought has jurisdiction". Art. 89: "If the deceased had his or her last domicile in a foreign country and had property in Switzerland, the Swiss authorities at the place where such property is located shall take the measures necessary to the interim protection of such property".

2460 Art. 90: "1. The inheritance estate of a person who had his or her last domicile in Switzerland is governed by Swiss law. 2. A foreign national may, however, submit by will or inheritance agreement his or her estate to the law of one of his or her national states. Such submission is void if, at the time of death, the deceased no longer had such nationality or had acquired Swiss nationality". Art. 91: "1. The inheritance estate of a person who had his or her last domicile in a foreign country is governed by the law referred to by the private international law rules of the state in which the deceased was domiciled. 2. To the extent that Swiss judicial or administrative authorities have jurisdiction pursuant to Article 87, the inheritance estate of a Swiss deceased who had his or her last domicile in a foreign country is governed by Swiss law, unless the deceased expressly provided by will or inheritance agreement for the application of the law of his or her last domicile". Art. 92: "1. The law applicable to the inheritance estate determines what is included in the estate, who is entitled to inherit and for what share, who is liable for the debts of the estate, which legal institutions of inheritance law may be relied upon, and which measures may be ordered and subject to which requirements. 2. The implementing details are governed by the law of the state whose authority has jurisdiction. Such law governs *inter alia* conservatory measures and the distribution of the estate, including the administration by an executor". Art. 93: "1. The validity of wills as to form is governed by the Hague Convention of 5 October 1961 on the Conflict of Laws Relating to the Form of Testamentary Dispositions. 2. This Convention applies by analogy with the form requirements in respect of other provisions made for the event of death". Art. 94: "A person is capable of disposing for the event of death if, at the time of making the disposition, he or she has the capacity to do so under the law of the state of his or her domicile or habitual residence, or under the law of one of the states of which he or she is a national". Art. 95: "1. Inheritance agreements are governed by the law of the state in which the disposing party is domiciled at the time of entering into the agreement. 2. If a disposing party submits, in the agreement, his estate to the law of the state of which he or she is a national, such law applies in lieu of the law of the domicile. 3. Reciprocal provisions for the event of death are valid if they are consistent with the law of the domicile of each disposing party or, if the disposing parties are nationals of the same state,

## § I. Current Operation of Swiss Domicile and the EU25 Habitual Residence

**768.** For the differences between the Swiss notion of domicile and the inter-country habitual residence, the reading of part I[2462] is recommended.

**769.** An example should illustrate the different operation between the Swiss domicile and the EU25 habitual residence in the field of succession: A Bulgarian man lived in Sofia until he was 28 years old. Bulgaria is the country of his sole nationality, where his brothers and sisters live. Originally, his wealth was invested in Bulgaria by his ancestors, representing the main bulk of his estate. He later moves to Switzerland (Geneva), where he invests in company shares and immovables, with the intention to live there "*for all his life*", he says. After one year, he falls in love with a Tunisian lady who lives in the small French medieval town, Yvoire, near Geneva. The couple enters into marriage in Geneva. He purchases a villa in Yvoire, where he runs for the administrative elections. He regularly visits Geneva, where his *centre of economic interests* is located, even though he spends most of his lifetime with his wife, in France, following French-Tunisian traditions. Yvoire seems to represent his *centre of family and social interests*. Afterwards, he moves to live in his own immovable in Geneva, for the purpose of negotiating his taxation agreement with his Swiss lawyer and the Swiss authorities. Based on the results of this agreement, he will decide whether to live with his wife in Geneva, abandoning Yvoire. After two weeks, he dies in a car accident in Geneva, while going to visit his wife, currently settled in their marital home in Yvoire.

**770.** Under Swiss law, the deceased may have acquired his last[2463] domicile in Switzerland according to article 20(1)(a) SPILA[2464]. His original intent, on a

with the law of that state if they have chosen such law. 4. The above provisions do not affect the rules of this Act regarding form requirements and the capacity to dispose (Art. 93 and 94)".

2461 Ibid. BUCHER.

2462 Chapter III, section II above.

2463 This is presumably the domicile at the time of death. The Swiss Federal Court, in relation to jurisdiction, has clarified the relevant time for the domicile determination (5A_758/2007, 3.6.2008; 5A_681/2017, 7.02.2018). The Succession Regulation, by expressly indicating the 'relevant time' in the pertinent provisions for both international jurisdiction and applicable law, better ensures legal certainty and predictability. In fact, a person may have been domiciled in Switzerland two years before death, but not one year before death. In case he or she may have acquired neither domicile nor habitual residence elsewhere during the last year of his/ her life, according to the reading of art. 86 and 91 SPILA, his last domicile in Switzerland should operate. We believe that this result would be artificial, as for the habitual residence assessment of the years preceding the deceased's death under the Regulation (chapter I *supra*).

2464 We recall the Swiss *quasi*-definition of domicile under Swiss law: "Within the meaning of this Act, an individual: a. has his or her domicile in the state where he or she resides with the intent of establishing *permanent* residence".

permanent basis[2465], the centre of his economic interests, and his last physical presence may be important indicators[2466]. The Swiss courts, if seised, may exercise jurisdiction and apply their law under articles 86(1)[2467] and 90(1). Under the EU Succession Regulation, the deceased may have established his habitual residence in France. Relevant factors should be the deceased's family and social integration[2468] at death[2469] determining his '*centre de vie*' in France. The French authorities, if seised for the opening of the succession, should exercise international jurisdiction and apply their own law over the *whole* succession by virtue of articles 4, 20, and 21. The French authorities may still exercise jurisdiction under article 10(1)(b) of the Regulation, by virtue of the *deceased's former habitual residence*[2470]. Additionally, they may still apply their own law according to article 21(2), by virtue of the deceased's *fairly recent move* to Switzerland prior to death, and his *closest connection* with France.

[2465] Place of main assets, interaction with the Swiss authorities, may be elements indicating his permanent intent.

[2466] 5A_270/2012 [24 September 2012]: A French national lived for sixty years in France with his three children, and first spouse who died. He made a Will nominating two of his children universal legatees. Subsequently, he married a second woman to whom he reserved a legal share. The couple decided to live in Switzerland. To this end, the husband signed a contract with an estate agent in Geneva intending to rent accommodation with urgent need. The agent submitted a request on the man's behalf for a villa in the Swiss Canton of Vaud. The same day the husband signed a power of attorney in favour of the agent planning to rent the villa. Furthermore, the couple's lawyer established contacts with the Swiss taxation authorities in view of their relocation. The renting contract was, meanwhile, concluded. The couple's movables were brought to their house in Switzerland, a house insurance was concluded, and the couple had communicated to the Swiss immigration authorities their arrival within the Swiss territory. The husband died in France before his effective relocation. Various parallel proceedings were started in France and Switzerland dealing with the opening of succession and to assess the deceased's domicile at death. The French TGI had retained jurisdiction. The Swiss cantonal (district) Court had declined it. The case reached the Swiss Federal Court. The latter maintained that the establishing of domicile, under art. 20(1)(a), does not require durable settlement as long as the intention is permanent. A person may establish domicile as soon as he or she is physically present in the State of arrival. According to the Court, this reasoning applies also to habitual residence (Swiss notion). The Court clarified that the intention to establish domicile must be compatible with tangible steps, even though physical presence is not required to be durable. The Court concluded that since the deceased had never been physically present in Switzerland before his death, he had not been able to establish domicile. According to the Federal Court, the Swiss authorities had correctly declined jurisdiction in favour of the French ones where the deceased was domiciled.

[2467] The Swiss jurisdiction may not apply to the deceased's succession as a whole (art. 86.2). This is typically the case where the authorities of the immoveable location retain jurisdiction.

[2468] The continuous settlement of his wife in France, his participation in the French administrative elections, the lack of regular presence in Geneva (irrespective of the duration and the intent), should be decisive elements.

[2469] The analysis focuses on this specific point in time and not on the years preceding his death.

[2470] Within the five-year period of time prior to the seisin from the effective change of habitual residence.

## § II. Current Operation of the Swiss and the EU25 Habitual Residences

**771.** In absence of domicile[2471], the deceased's habitual residence[2472] should apply for international jurisdiction and applicable law over succession. The Swiss courts have given guidance in the interpretation of habitual residence under Swiss law.

**772.** This first case[2473] involved a business man holding three nationalities. He was a politician and the owner of a bank in one of his countries of nationality. He relocated to Geneva, in 2010, where he lived in a rented apartment with his sister, wife and children. He obtained a residency permit without professional purposes[2474]. While in Geneva, he regularly visited one of his countries of nationality where he was actively and politically involved[2475]. Thereafter, he filed against Google Switzerland GmbH before the Swiss courts for the removal of specific terms attributed to his name from Google search[2476]. The case reached the Swiss Federal Court.

> The Court maintained that habitual residence, under the meaning of article 20(1)(b), is the place of personal relations[2477], where a person is physically present[2478]. The place of habitual residence and domicile usually overlap[2479]. Relevant factors are the personal, social and

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2471 Art. 20(2): "If an individual does not have a domicile anywhere, the habitual residence is the relevant place".

2472 We recall the *quasi*-definition of habitual residence under art. 20(1)(b): "Within the meaning of this Act, an individual: b. has his or her habitual residence in the state where he or she lives during a certain period of time, even if this period initially appears to be of limited duration".

2473 ATF, 5A_812/2015 [6 September 2016].

2474 "*Sans activité lucrative*".

2475 "*Un article de la Tribune de Genève du..., intitulé "... ", indique que A._____ réside à V._____ depuis 2000 et y bénéficie d'un forfait fiscal depuis 2010. Il est précisé qu'il consacre désormais l'essentiel de son temps à motiver ses troupes et à soutenir financièrement les actions de l'armée de l'État S._____, se déplaçant sans cesse entre W._____ et X._____. Il ressort en outre de cet article que A._____ a financé dans l'État S._____ un complexe culturel et religieux destiné à la communauté juive pour un montant d'environ 70 millions de dollars et qu'il y possède un club de football. A._____ a été interviewé le... par la Radio télévision suisse (ci-après: RTS). Il est décrit dans cette émission comme l'une des personnalités politiques les plus influentes* […]".

2476 "*Par acte déposé au Tribunal de première instance du canton de Genève (ci-après: Tribunal de première instance) le 18 novembre 2014, A._____ a déposé à l'encontre de Google Switzerland GmbH et Google Inc. une requête de mesures provisionnelles, concluant à ce que le Tribunal de première instance ordonne à ces sociétés de supprimer du moteur de recherche Google les termes " D._____ " en relation avec son nom sur les noms de domaines qu'elles détiennent, notamment www.google.chet www.google.com*".

2477 "*Selon la jurisprudence, elle correspond à l'endroit où la personne intéressée a le centre de ses relations personnelles et se déduit, non de sa volonté subjective, mais de circonstances de fait extérieurement reconnaissables attestant de sa présence dans un lieu donné*".

2478 "*L'accent est ainsi mis sur la présence de la personne physique au lieu ou dans le pays de séjour*".

2479 "*Il peut néanmoins exister une divergence entre ces deux réalités, à savoir lorsqu'une personne conserve son lieu de vie dans un pays donné, tout en étant présent dans un autre État pendant une*

professional life[2480]. Administrative papers are not determinative[2481]. The intent should not be relevant.

**773.** This second case[2482] concerned a French citizen who died in Germany, whose domicile at death[2483] was registered in Switzerland (Vaud). He was not married, and did not have any children. His brothers and sister challenge the succession. An appeal was brought before the Geneva Court of Justice[2484].

The Court concluded that the deceased did not hold any domicile or habitual residence[2485]. Swiss jurisdiction was, therefore, retained according to article 88(1) SPILA, by virtue of the location of the assets in Switzerland and the inactivity of the foreign authorities[2486]. The Court noted that the EU Succession Regulation and the SPILA, article 20(1)(b), require the same factors for the determination of habitual residence[2487]. The Court excluded the deceased's nationality and the location of assets in France as indicators[2488].

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*certaine durée : les saisonniers, les étudiants étrangers ou encore les expatriés résident en effet habituellement en Suisse tout en conservant leur centre de vie et donc leur domicile dans l'État où leur famille vit, où leur maison se trouve*".

2480 Unlike the family settlement and the home location, which are typical elements of the Swiss domicile (*ibid.*).

2481 "*Le lieu où les papiers d'identité ont été déposés ou celui figurant dans des documents administratifs, comme des attestations de la police des étrangers, des autorités fiscales ou des assurances sociales constituent des indices qui ne sauraient toutefois l'emporter sur le lieu où se focalise un maximum d'éléments concernant la vie personnelle, sociale et professionnelle de l'intéressé*".

2482 Cour de Justice de Genève, Arrêt DAS/139/2020.

2483 He had also been temporarily present in Belgium. "*Selon les dires de ses frères et soeur, feu F_____ se serait fait héberger en 2011 par une amie de A_____ à U_____ (Belgique)*".

2484 "*Il a notamment retenu que le de cujus avait un mode de vie nomade, qu'il n'était jamais resté durablement dans aucun lieu et n'avait pas fixé le centre de ses intérêts à un endroit donné. Il ne possédait ainsi aucun domicile au sens de la LDIP, ni de résidence habituelle en Suisse ou à l'étranger. En l'absence de domicile ou de résidence habituelle sur leur territoire au moment du décès, les autorités étrangères n'étaient pas compétentes, respectivement ne pouvaient pas prendre des mesures susceptibles d'être reconnues en Suisse. Les autorités suisses étaient en conséquence compétentes pour assurer la dévolution de la succession en raison de la présence de biens en Suisse et à défaut de compétence d'un autre Etat. Ces décisions ont fait l'objet d'appels, actuellement pendants devant la Chambre civile de la Cour de justice*".

2485 "*Il a cependant passé la première partie de sa vie essentiellement en Suisse, où semble encore vivre la majeure partie de sa famille, à tout le moins ses frères et sœur. Par la suite, il a vécu selon un mode de vie nomade, se déplaçant dans plusieurs pays (Suisse, France, Belgique, Allemagne)* ". It seems that the Court carried out a lifetime assessment.

2486 "*Il doit être retenu que l'Etat étranger ne s'occupe pas suffisamment de la succession si les décisions prises ou les mesures ordonnées ne sont pas reconnues à l'étranger*".

2487 "*Que ce soit sous l'angle de la LDIP ou du droit européen, comme allégué par l'appelant, les critères de rattachement applicables pour déterminer le domicile, respectivement la résidence habituelle d'une personne sont similaires dès lors qu'ils se réfèrent, dans un cas comme dans l'autre, à la volonté, au centre d'intérêts, ainsi qu'à la présence physique de l'intéressé, étant précisé qu'il doit être tenu compte de l'ensemble des circonstances de vie de ce dernier*".

2488 "*S'il dispose certes d'un bien immobilier sur la commune du P_____ en France, il est établi que celui-ci est vide de tout mobilier et inhabitable* […] *Quant au véhicule de marque N_____ détenu en France par le défunt, il ne permet pas non plus d'établir un rattachement particulier avec ce pays au moment de son décès*".

**774.** The above decisions conclude that important factors for the establishing of habitual residence under Swiss law should be physical presence and its more or less durable perspective. The administrative documents[2489] should not be considered determinative. The role of the intent is not clearly defined[2490].

## Section II Swiss PIL Rules After the 2018 Ongoing Reform

**775.** The current reform, also known as the '*Avant-projet*', was released in 2018[2491]. Reference to habitual residence was expressly excluded within the reform[2492]. The aspects touched upon by the '*Avant-projet*' are the main subject of this analysis to the extent of the Swiss-EU25 coordination.

### § I. Habitual Residence Exclusion

**776.** The place of habitual residence has been said *unanimously* to coincide with the place of domicile in the majority of cases[2493]. It is however the last part of the sentence '*dans la plupart des cas*' within the Explanatory Report to the '*Avant-projet*', which leads to the possible and realistic scenario in which domicile and habitual residence may be located in two different States at the same point in time. According to the Swiss scholars, this should happen in a minority of cases[2494].

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2489 Such as declarations, residency permits.

2490 Ultimately, we partly disagree with the reasoning of the Geneva Court of Justice concerning the Swiss-EU25 habitual residence assessment. From the judgment, it is not clear whether the deceased's 'family interests' were located in Switzerland. The deceased, according to the Swiss decision, had nominated another person as universal heir, rather than his brothers and sister. According to the EU Succession Regulation guidance (recital 24), the deceased's habitual residence may have still been determined according to his nationality as a 'special factor' (*cf.* chapter I *supra*). The nationality and the location of main assets are of equal importance under the Regulation. The Geneva Court's reasoning based on the fact that the decisions taken under art. 10 of the Regulation would not be recognised in Switzerland not sufficiently grounded. Lastly, it appears from the decision that the deceased's principal settled purpose in Switzerland was his hospitalisation (p. 3 of the decision), after which he moved to Germany.

2491 RS 291 <www.ejpd.admin.ch/dam/data/bj/aktuell/news/2018/2018-02-14/vorentw-f.pdf>.

2492 Save for marginal references that will be mentioned in the next subsection.

2493 Ibid. Rapport explicatif, p. 5.

2494 Ibid. p. 6: "*La résidence habituelle au sens du règlement européen et le domicile au sens de la LDIP coïncident en général, comme on l'a dit plus haut. Il existe cependant des cas dans lesquels les autorités suisses estimeront que le dernier domicile est en Suisse et les autorités d'un État européen, que le dernier lieu de résidence habituelle est dans cet État. Un des avis rendus lors de la consultation écrite d'experts (voir ch. 1.2) cite le cas de couples de retraités suisses qui passent une grande partie de leur temps dans leur résidence secondaire de Majorque. Si tant la Suisse que l'Espagne se déclarent compétentes, il y a risque de conflit de compétence positif*".

**777.** One of the main reasons not to replace domicile, was the vagueness of habitual residence[2495]. On this aspect, one may argue that the notion of domicile for physical persons in private international law is neither defined uniformly[2496]. Further, the Swiss courts have also interpreted domicile in a fragmented manner[2497].

**778.** Principally, habitual residence and domicile operate differently. This argument applies to both the Swiss notion of habitual residence[2498] and, more accentually, the inter-country habitual residence[2499]. Proof is that the Swiss Federal Court has targeted seasonal workers, students and expats[2500], who live in Switzerland, as specific categories of people falling under the ambit of habitual residence. This reasoning, in our view, would allocate a somewhat degree of artificiality to both habitual residence and domicile. In particular, under Swiss law, domicile should be legally categorised as the place of family settlement and home. Conversely, habitual residence would systematically correspond to the place of educational and professional interests[2501]. This

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2495 Ibid. p. 11: "*De plus, les intervenants ont souligné que le lieu de résidence habituel peut être éphémère et, dans certains cas, difficile à déterminer, sans compter que la notion est relativement floue et que chaque État l'interprète différemment*".

2496 See in particular Brussels I Recast, the Lugano Convention, the Hague 'Post-Wars' Conventions and their related explanatory reports which highlight the difficulty in uniformly interpreting the notion of domicile, especially between common law and civil law countries. See *i.e.* Verwilghen, De Steiger, Pocar, and Bonomi (note 230, § 139: "*Il arrive cependant que pour leur régime matrimonial, les époux jouissent de certaines options additionnelles, non prévues par le Protocole, comme par exemple la loi du domicile (qui ne coïncide pas nécessairement avec la résidence habituelle)*").

2497 Cour de Justice de Genève, Arrêt DAS/139/2020: "*Les dispositions du code civil suisse relatives au domicile et à la résidence ne sont pas applicables (art. 20 al. 2 in fine LDIP)*". ATF, 5A_30/2015 [23 March 2015]: "*La notion de domicile - qui correspond à celle de l'art. 23 CC*". ATF, 5A_270/2012 [24 September 2012]: "*Le domicile est déterminé selon les critères prévus par l'art. 20 al. 1 let. a LDIP, dont la teneur correspond à celle de l'art. 23 al. 1 CC*". These are all cross-border cases.

2498 ATF, 5A_812/2015 [6 September 2016]: "*Il peut néanmoins exister une divergence entre ces deux réalités, à savoir lorsqu'une personne conserve son lieu de vie dans un pays donné, tout en étant présent dans un autre État pendant une certaine durée: les saisonniers, les étudiants étrangers ou encore les expatriés résident en effet habituellement en Suisse tout en conservant leur centre de vie et donc leur domicile dans l'État où leur famille vit, où leur maison se trouve*".

2499 Part I, chapter III, section II.

2500 We recall that, in 2018, 5-12% of the Geneva population was composed of international civil servants and related families, falling potentially under the notion of 'expat' (<https://www.ge.ch/statistique/tel/publications/2019/informations_statistiques/autres_themes/is_population_06_2019.pdf>). Some international students (38,069 in 2018) are considered no longer domiciliary under the law of their country of origin, while they live for two or three years with student status before settling in Switzerland (<https://nccr-onthemove.ch/wp_live14/wp-content/uploads/2019/01/Policy-Brief-nccr-on-the-move-10-RianoPiguet-EN-Web.pdf>). Such legal categorisation based on the status or duration of a stay proves artificial.

2501 This seems to be ultimately incoherent with other decisions of the Swiss courts. 5A_270/2012: "*la constitution d'un domicile peut se produire dès l'arrivée dans le nouveau pays de séjour; en d'autres termes, pour déterminer si l'intéressé s'y est créé un domicile, ce n'est pas la durée de sa présence à cet endroit qui est décisive, mais bien la perspective d'une telle durée* (arrêts 5A_432/2009 du 23 décembre 2009 consid. 5.2.1, 5A_398/2007 du 28 avril 2008 consid. 3.2, 5C.163/2005 du 25 août 2005 consid. 4.1, 5C.99/1993 consid. 3a […] *idem, pour la résidence habituelle*". 5A_432/2009, 23.12, 2009, with reference to domicile: "*Elle n'a aucune attache en Grèce en dehors de la famille de son époux* […]. *Au vu de ces éléments, il apparaît que, dès le jour de son arrivée en Suisse,*

legalistic interpretation, non-factual, of domicile and habitual residence under Swiss law would conclude in their intrinsic divergency.

**779.** Habitual residence should be (at least) expressly provided as an alternative connecting factor in chapter 6. It may ultimately replace domicile, in line with the EU Succession Regulation. In this regard, a new contextualised reference of habitual residence under article 20(1)(b)[2502] would find better compatibility with the inter-country habitual residence.

> '*Au sens de la présente loi, une personne physique :* (1)(b) *a sa résidence habituelle dans l'État dans lequel elle vit de façon régulière et stable au sein d'une période de temps appréciable, indépendamment de la durée et de son intention*'[2503].

## § II. Jurisdiction and Applicable Law under the 'Avant-projet'

**780.** Essentially, the amendments introduced by the reform aim to, *inter alia*, provide for: (i) individuals holding Swiss and/ or foreign nationalities, domiciled in Switzerland, to submit their estate[2504] to the jurisdiction and applicable law of the State of one of their nationalities[2505]; (ii) Swiss authorities to exercise subsidiary jurisdiction over the succession of a Swiss citizen or foreigner domiciled abroad; (iii) parallelism between forum and *jus* over the succession of both Swiss citizens and foreigners, domiciled in Switzerland or abroad[2506]. Such changes should allow a more efficient coordination of the

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*l'intimée a manifesté d'une manière objectivement reconnaissable pour les tiers son intention de s'établir dans ce pays* […] *Peu importe ainsi qu'au moment où la demande de divorce a été déposée devant le tribunal bernois, l'intimée venait tout juste d'arriver en Suisse. La compétence des tribunaux suisses pour juger du divorce et des effets accessoires est ainsi donnée en vertu des art. 59 let. b* […]. 5A_432/2009, 23.12, 2009, concerning habitual residence: *La résidence habituelle d'un enfant se détermine d'après le centre effectif de sa propre vie (ATF 110 II 119 consid. 3). Celui-ci peut résulter soit de la durée de fait de la résidence et des relations ainsi créées, soit de la durée envisagée de la résidence et de l'intégration attendue*". Geneva Court of Justice [16 October 2008] C/26308/2007: "*une personne physique a son domicile* […] *ce qui suppose qu'elle fasse du lieu en question le centre de ses intérêts personnels et professionnels*".

2502 For the interpretation of domicile under art. 20(1)(a), we also suggest a slight change: "*Au sens de la présente loi, une personne physique: (1)(a) a son domicile dans l'Etat dans lequel elle réside habituellement, conformément à son intention*". With regard to its translation, we propose: "has his or her domicile in the state where he or she habitually resides in accordance with his/ her intent ~~of establishing permanent residence~~".

2503 In this study we have argued in favour of an international contextualised reference for the uniform interpretation of habitual residence: '*le lieu régulier de vie établie et stable*'. Ultimately, in relation to the Swiss notion of habitual residence, we believe that the current legislative focus on the potential (limited) *duration* of the settlement – which is not essential in the determination of habitual residence *as an intercountry concept* – does not lead to a clear-cut distinction with the Swiss notion of domicile.

2504 Wholly or in part.

2505 Other than Swiss nationality.

2506 Ibid. Rapport explicatif, p. 8.

rules governing international jurisdiction, applicable law[2507] and recognition in Swiss-EU25 cross-border successions.

**781.** In substance, the changes[2508], affecting chapter 6, are the following[2509]:

- Article 86(3)[2510] and (4). (3) It provides that when a person holds one or more nationalities, this does not preclude the *de cujus*, even when he or she is a Swiss national, from submitting (wholly or in part) his/ her estate, through a Will or a succession agreement, to the jurisdiction of the authorities of one of his/ her foreign national States. (4) The jurisdiction of the Swiss judicial and administrative authorities of the deceased's last domicile shall remain available when the authorities competent under paragraphs 2[2511] and 3 do not deal with the succession.

- Article 87(1)[2512] and (2). (1) It provides that when the judicial and administrative authorities of the State of the deceased's domicile at the time of death, of the last habitual residence, of one or more of the foreign nationalities, or of the location of the properties, do not deal with the succession of a Swiss citizen domiciled abroad, Swiss authorities shall be entitled to exercise jurisdiction. (2) Swiss authorities should always be entitled to exercise jurisdiction over the estate of a Swiss citizen last domiciled abroad, who submitted, through a Will or a succession agreement, his/ her estate, wholly or the portion located in Switzerland, to the Swiss jurisdiction by virtue of a

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2507 According to the provisions of the '*Avant-projet*', as an example, the courts in the EU25 may be internationally competent, in the view of the Swiss courts, based on the deceased's foreign nationality under art. 86(3). The EU25 jurisdiction should be extended to the properties located in Switzerland and elsewhere according to the same provision, and more precisely to the provisions of the Succession Regulation, unless the EU25 authorities decide not to deal with the succession (art. 86.4). In addition, there may be a presumption of applicable law under art. 90(2) in favour of the EU25 law by virtue of a choice-of-court clause made under art. 86(3). This presumption is applicable only if the EU25 authorities were to retain jurisdiction, because the Regulation does not allow choice-of-court clauses (see ibid. BONOMI/ WAUTELET, p. 201-203).

2508 Art. 93 repealed. Art. 92(2). The *lex fori* governs the conservatory measures and devolution, including procedural aspects of the administration of the succession or the execution of a Will, as well as the rights and powers of the administrator of the succession or executor of a Will. Art. 96(1)(a)(c)(d). (1) Judgments and documents, including rights arising from the opening of a succession abroad, shall be recognised in Switzerland when they: (lit. a) are issued by the authorities of the State of the deceased's last domicile, or they are recognised in that State; (lit. c) are issued in one of the deceased's national States and the *de cujus* submitted wholly or in part his/ her succession to the jurisdiction or applicable law of the State concerned; (lit. d) are issued in the State of the deceased's last habitual residence, of one of his/ her nationalities, of the property location, provided that he or she had his/ her last domicile abroad and that the authorities of that State do not deal with the succession.

2509 The translation is the author's one.

2510 For a commentary on this provision see ibid. G.P. ROMANO, L'élection de for par le de cujus, *Successio*, 2019.

2511 "[…] the exclusive jurisdiction claimed by the state where real property is located".

2512 For a commentary on this provision see ibid. ROMANO.

*professio fori*, or to the Swiss law according to a *professio juris*, unless recourse to Swiss law was excluded by the deceased[2513].

- Article 88(1). It provides that when the judicial or administrative authorities of the State of the deceased's last domicile, of one or more of the foreign nationalities, or of the last habitual residence, of a deceased foreigner domiciled abroad, do not deal with the portion of his/ her succession located in Switzerland, Swiss judicial and administrative authorities of the property location shall be entitled to exercise jurisdiction.

- Article 90(2) and (3). (2) It provides that when a person holds one or more nationalities, this does not preclude the *de cujus*, even when he or she is a Swiss national, from submitting his/ her estate, through a Will or a succession agreement, to the law of one of his/ her foreign national States. When a *professio fori* occurred under article 86(3) in favour of the jurisdiction of the authorities of one of the deceased's foreign national States, the succession is presumed to be subject to the law of that State, provided that he or she had no reserve in this regard[2514]. (3) The *professio juris* does not lapse, even if the deceased did not hold that nationality at the time of death.

- Article 91(1) and (2). (1) In case the private international law rules of the State of the deceased's last domicile abroad provide a 'renvoi' to Swiss private international law, the substantive law of the State of the deceased's last domicile shall apply[2515]. (2) Insofar as the Swiss authorities are competent under article 87, the succession of a Swiss citizen last domiciled abroad is governed by Swiss law unless, by Will or succession agreement, the deceased has submitted it to the law of his/ her last domicile or of one of his/ her nationalities.

- Article 94[2516]. It provides that a Will shall be governed by the law of the State in which the testator is domiciled at the time he or she made it, with the exception of aspects relating to the reserved share[2517]. If the testator

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[2513] The *de cujus* will have to have in mind that, according to the Swiss experts, a choice of law would likewise trigger a choice of forum. In the event such were not wished, the *de cujus* should exclude ('*opt out*') the implicit '*prorogatio fori*' through a *separate clause* ('*clause contraire*') within the property disposition. See ibid. Rapport explicatif, p. 15-16.

[2514] Ibid. Rapport explicatif, p. 18. The exclusion should occur in the same manner as indicated in the note above, but in the reversed scenario concerning the applicable law.

[2515] Relevant examples relating to this issue are provided in the 'rapport explicatif' (ibid.), p. 19-20.

[2516] The law applicable to the *formal validity* of the Will should not be extended to the formal validity of the choice-of-court clause. The law applicable to the validity of such clause should be that of the chosen court – the *lex fori*. In this sense, ibid. ROMANO (ibid. in: Bonomi *et al.*) p. 20.

[2517] The Rapport explicatif is silent on the major reasons of this *exclusion*, although it states that some criticism is raised under art. 95 (p. 29). In sum, the decision of the Swiss legislator, and experts, coordinates with the EU Succession Regulation, which also subjects the reserved share to the applicable law provided under art. 21 and 22, in particular in order to avoid any prejudice as a consequence of applicable laws other than those of the State of the last habitual residence or of the nationality of the deceased (§ 38 and 50). See in this sense, ibid. RODRIGO RODRÍGUEZ, and the same

submits, in a Will, his/ her succession as a whole to the law of one of his/ her national States, that law governs the Will in place of the law of domicile. The testator may submit his/ her Will to the law of one of his/ her national States. The HC-1961 shall apply to the formal validity of the Wills.

- Article 95(1) to (4). (1) The succession agreement shall be governed by the law of the State in which the testator is domiciled at the time he or she concluded it, with the exception of aspects relating to the reserved share. (2) If the testator submits, in a succession agreement, his/ her succession as a whole to the law of one of his/ her national States, this law governs the succession agreement in place of the law of domicile. (3) A succession agreement to which two, or more, testators are parties shall be valid, provided that it is concluded in accordance with the law of the State of domicile or, when applicable, with the law of the State of nationality designated within the agreement (2) of each of the parties. Two or more Wills founded on a mutually binding agreement between the parties are also succession agreements. (3bis) Parties may submit the succession agreement to the law of one of the national States of the testator, or one of the testators. This choice of applicable law shall apply even if, at the time of death, the testator concerned no longer held that nationality. (4) The HC-1961 shall apply by analogy with the formal validity of the succession agreements and to all other property dispositions upon death not included in the Convention.

## Section III UK and the US Conflict-of-law rules

**782.** As seen with the Swiss legislation (section II *supra*), the EU Regulation[2518] may trigger impacts towards third States. We will focus on the EU25- UK and US succession contexts. Particular attention is given to the rules governing jurisdiction and applicable law.

### § I. UK-EU25

**783.** The UK[2519] had decided not to opt in the Regulation, regardless of Brexit. One of the main reasons seems to be the refusal to recognise and enforce

author on 'Article 24 - Dispositions of Property upon Death Other Than Agreements as to Succession' published in the same book.

[2518] With regard to the rules on applicable law, the Regulation does not determine the domestic law applicable to each territorial unit within a State (art. 36 of the Regulation). The rationale is that in States such as England and Wales, Scotland, Northern Ireland, Spain and the US, national conflict-of-law rules shall determine the law applicable to matters of succession for each territorial unit (J. A. McLEAN, The UK and the European Succession Regulation: fog over the channel - potential pitfalls for the unwary, *Edinburgh Law Review*, Vol. 22, 2018, p. 87).

[2519] The decision of the UK (as well as of Ireland and Denmark) to opt-out of the Regulation was a drawback with respect to the area of freedom, security and justice sought via the implementation of

foreign judgments requiring restitution of lifetime gifts (*i.e.* clawbacks)[2520]. Among the important rules[2521] set out in the UK legislation, for which coordination with the EU Regulation is sought, the following should be observed: (a) domicile applies primarily[2522]; (b) *professio juris* would have no legal effects towards the devolution[2523]; (c) applicable law is founded on the principle of scission[2524].

**784.** The Civil Jurisdiction and Judgments Act 1982 provides, exceptionally, the rules governing jurisdiction over successions and related matters[2525] claimed before the Scottish courts[2526]. Additional Acts set out specific rules for the determination of financial provisions arising out of the estate of a deceased domiciled in the UK. For instance, in England and Wales, these rules are found under the Inheritance (Provision for Family and Dependants) Act 1975[2527]. In

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the Succession Regulation (§ 1) – which became more pronounced after Brexit. However, cross-border proceedings involving UK citizens habitually residing in the EU25 at death may bring *indirect effects* towards the UK jurisdiction. In addition, such effects may be encountered in the following examples: (a) when an EU25 citizen/ resident detained properties in the UK prior to death; (b) when a UK citizen/ resident has established habitual residence in the EU25 within five years before the seisin for the opening of his/ her succession, even if the last habitual residence at death was established in the UK; (c) when a UK resident has set up 'proprietary connections' (*i.e.* ownership of immovables) with one or more EU25.

2520 Therefore diminishing the estate falling into heirship (ibid. MCLEAN, p. 86).

2521 For detailed information, ibid. p. 88 ff.

2522 This indicates, in contrast with habitual residence, the establishing of a permanent lien which means forever (*cf.* part I, chapter III, section II).

2523 Although in matters of trust UK (EIF 1992) is bound by the Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition, which provides in art. 6 the possibility for the settlor to choose the law governing the trust.

2524 Unlike the 'unity of succession' promoted by the Regulation, UK law provides the law of domicile, as applicable to movables, and the law of the situs, as applicable to immovables. In relation to movables, the deceased's last domicile should apply.

2525 *I.e.* ante-nuptial and post-nuptial settlements. We neither deal with the latter nor with the administration of estates, separated from the devolution of succession. On this subject see ibid. BEAUMONT/ MCELEAVY, p. 999.

2526 According to BEAUMONT/ MCELEAVY, p. 1025, successions are generally excluded from the scope of this Act, with the exception of Scottish law. On this point, see also ibid. BEAUMONT/ HOLLIDAY, p. 15. Such an exclusion has been confirmed in EWHC, (Chancery Division) Decisions, *Winkler v. Shamoon* [2016] 217. Interestingly, section 41 of this Act refers to 'domicile' as the place where a person is *resident* and his/ her residence shows *substantial connection*, or where a person has been resident for *at least three months* or more. The general jurisdiction rule under this Act refers to the defendant's domicile. The special jurisdiction rule, in absence of domicile within the UK, relies on the immovable location or the place where the movable is arrested. In matters of succession, such rules should be applicable to the Scottish context only.

2527 For the general implementation of this Act, please refer to *Ilott (Respondent) v. The Blue Cross and others (Appellants)* [2017] UKSC 17. The English and Welsh Law Commission stated, in 2011, that a *habitual residence test* should conceivably replace a 'domicile of choice test' under the 1975 Act. See in this sense ibid. TRAKMAN, p. 323: "Domicile cases become challenging due to the emphasis that is placed on intentionality in determining a person's domicile of choice, in contradistinction to that person's substantial physical connections to another place […] Habitual residence is a test which, as far as possible, ought to be certain in nature, predictable in operation, and not marginalised by a potentially contradictory domicile test that is grounded principally in intentionality as distinct from habitual residence". To this same extent, the Wills Act 1963, S. 1, applicable to all the UK jurisdictions refers to the *habitual residence* of the testator at the time of his/ her death or

Northern Ireland, it is the Inheritance (Provision for Family and Dependants) (Northern Ireland) Order 1979 that governs such provisions. Lastly, for Scotland, these rules are specified under the Succession (Scotland) Act 1964 and the Family Law Act 2006[2528].

**785.** An example should illustrate the UK-EU25 cross-border context: A Danish widowed woman, who tested positive for Covid-19 with consequent severe pneumonia, died after a few weeks following her arrival in Edinburgh for the purpose of signing a new employment contract (100% on a remote basis). Prior to her death, she was unsure about settling in Denmark. She was thinking of alternating her residence between Denmark and Scotland, given the professional flexibility. In the meantime, she had concluded a one-year tenancy agreement for a flat that she had intended to primarily occupy, in Edinburgh, in which she had kept her daily clothes, as well as personal possessions. She had opened a bank account into which she had transferred a significant amount of money. Three years previously, she had been settled in her co-owned marital home in Germany with her German husband who died there. While in Germany, she had chosen Danish law in her testament, by virtue of her nationality, as applicable to her succession as a whole. She owned immovables located in both Denmark and Germany, and movables situated in Scotland.

**786.** The Succession Regulation should apply based on articles 1 and 83. In the view of the German authorities, if seised for the opening of the succession, they may retain international jurisdiction under article 10(1)(b)[2529]. The German jurisdiction should be founded on the *deceased's durable and regular presence* in Germany, which also represents the place of *property location*. Relevancy should be given to her *family life* and *marital home*, revealing a *stable and close connection* with Germany during that particular *appreciable period*[2530]. In relation to the law applicable to the *succession*, Danish law should apply according to articles 20 and 22(1).

**787.** Let us suppose here that the authorities in Scotland are seised for the opening of the succession under the Civil Jurisdiction and Judgments Act 1982[2531]. They may retain jurisdiction based on the defendant's actual

at the time of the execution of the Will, in order to determine the valid execution of the Will under the UK internal laws.

2528 The Scottish law of succession is, since 2009 (Succession Scotland Bill), undertaking ongoing reform steps (<https://www.gov.scot/policies/family-law/succession/>), which led to the 'new' Succession (Scotland) Act 2016 amending the 1964 Act.

2529 This is despite the establishing of the deceased's last habitual residence in Scotland (third State), or of the attachments with Denmark (national third State) having also decided for the opt-out from the Regulation.

2530 In context, three years preceding the seisin for the opening of the succession.

2531 With regard to the rules of England and Wales, governing the devolution of succession, it is observed that these are multiple ones. The situs rule should apply primarily for the establishing of jurisdiction over movables and immovables. However, concerning movables as a whole, the English courts may decline jurisdiction based on the deceased's last domicile abroad (not habitual

residence showing substantial connection[2532], which corresponds to the UK notion of domicile under this Act (section 41). Concerning the applicable law, the effects of a potential *professio juris* would be void under Scottish law[2533]. Thus, scission would likely apply[2534].

## § II. US-EU25

**788.** In matters of succession[2535], the US follow the rules laid down in the Restatements (first and second)[2536] under which the determination of the competent court and applicable law is based on the principle of 'scission'. The latter refers to the *most significant relationship*[2537] through the *lex situs* for immovables and the law of the deceased's last domicile (or *domicile at the time of death*)[2538] for movables[2539]. In the US, a *professio juris*, as intended under EU law, would not be available. Nonetheless, the testator's intent is considered important to determine the law that will govern both movables and

residence). Furthermore, in relation to both movables and immovables, the English courts may decline jurisdiction based on the rule of *forum conveniens* (*cf.* part I, chapter IV, section V). On this subject, see E. LEIN, Legal consequences of the Decision by the UK Not to Take Part in the Adoption of an EU Regulation on Succession, European Parliament, PE 419.626. p. 13.

2532 Ibid. LEIN, p. 19. In this regard, the jurisdiction of the Scottish courts may be crystallised therein also by reason of the *location of the properties*, or of the *applicability of Scottish law* (BEAUMONT/ HOLLIDAY. p. 19).

2533 The election should be given legal effect based on the will expressed or implied (BEAUMONT/ MCELEAVY, p. 1050).

2534 In principle, according to this rule, the devolution of succession concerning immovables located in Denmark and Germany should be governed by their respective laws; the movables located in Scotland, by Scottish law.

2535 For a detailed analysis, we refer to ibid. HAY *et al.*, p. 1286.

2536 Restatement First, § 245-250; Restatement Second, § 236-242, 260-265.

2537 The principle of 'most significant relationship' indicates also that if the authorities of another state hold a *stronger connection* with the case, they would be entitled to exercise jurisdiction and apply their own law. This aspect is important also in matters (*not dealt with herein*) involving the possible establishing of concurrent *federal* and *state* ('probate') jurisdiction. In fact, under US law, successions fall under state jurisdiction, although on some occasions *federal jurisdiction* may be exercised, provided that it will not cause *interference* with the probate courts (state jurisdiction). To the specific extent of the interplay between federal and state jurisdiction, see US Supreme Court, *Hayes B. Milliman Petitioner, V. Timothy. L. Randall, Respondent*. [15 March 2019]. For the assessment of 'stronger connection' falling outside and inside federal jurisdiction, see *Doolin v. American Optical*, U.S. Dist. Lexis 83733 [27 June 2016], and <https://www.law.cornell.edu/constitution-conan/article-4/section-1/probate-decrees>.

2538 The US notion of domicile (*cf.* part I, chapter III, section II) may refer to residence or 'home'. The notion of 'home', developed under US practice, refers to: (a) place of dwelling; (b) physical presence; (c) duration; (d) activities and personal relations; (e) intention to settle, to abandon or return (*Texas v. Florida,* U.S. Supreme Court, 398, 1939).

2539 The law of the place of the property situation (immovables) and the law of domicile (movables) govern the formal validity of the Will and its revocation, as well as the substantive validity, including the capacity of the testator and that of the heir. The construction of the Will should be made according to the law designated by the testator (*professio juris*), in absence of such, according to the law of the situs (immovables) or law of domicile (movables).

immovables[2540]. Some limits[2541] towards specific rights of the surviving spouse are applicable though[2542].

**789.** The following hypothetical will illustrate the US-EU25 cross-border context: A French citizen, retiree, was registered as tax resident in Portugal where he died. He lived most of the time in California over the past three years. He owned assets in Louisiana, California, and Lisbon. In California, he was living with his wife and minor children, all French-Portuguese. He had one adult child from a previous marriage, who lived in Portugal. Prior to his death, he made a Will in which he submitted his entire estate to a trust[2543] in favour of his current wife, settled under the law of California. The succession is contested between the wife in California and the adult child from his previous marriage in Portugal. The assumption made here is that the courts in Portugal are seised first[2544].

**790.** The courts in Portugal should exercise international jurisdiction if they were to assess that at the time of death the deceased was habitually resident in Portugal (article 4 of the Regulation). They would still be entitled to exercise international jurisdiction based on *any assets* located in Portugal and by virtue of the deceased's former habitual residence within the five years preceding the seisin from the relocation to California (article 10.1 lit. b). The latter rule applies irrespective of the deceased's last habitual residence potentially located in the US. Concerning the applicable law, the law of California may likely apply, provided that the deceased was last habitually resident in the US[2545]

# Chapter IV: Potential Issues Arising Out of Habitual Residence Determinations

**791.** Issues of legal (un)certainty and (un)predictability may be encountered in those circumstances where the deceased's habitual residence *cannot be determined* at death; or when the deceased has established an *alternate habitual*

[2540] In specific contexts, the US courts have permitted given legal effect to the testator's choice-of-court clause (ibid. HAY *et al.*, p. 1310).

[2541] Uniform Probate Code, § 2-703.

[2542] The same protection is not provided for children, particularly due to the absence of reserved share, save for Louisiana.

[2543] The Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition does not apply between Portugal and US (the US has signed but not ratified it, consequently the Convention is not in force). Art. 7 of the Convention, otherwise, may have applied in determining the law applicable to the trust.

[2544] The rule on *lis pendens*, under art. 17 of the Succession Regulation, does not oblige the courts in Portugal to stay proceedings. To the same extent, the courts in California, if seised second, are not obliged to stay proceedings. In this regard, their own conflict-of-law rules would apply.

[2545] California law should result from the implementation of art. 36 of the Regulation. According to the latter provision, US internal rules shall determine the territorial unit whose law must apply.

*residence* in two or more States at the time of, and the years prior to, death[2546]. This Chapter is composed of three sections. *Section I* deals with the absence of habitual residence. *Section II* tackles the issue of the deceased's alternate habitual residence. *Section III* underlines the importance of providing a rule on transfer of jurisdiction.

## Section I Absence of Habitual Residence

### § I. EU25 Legal Context

**792.** The Succession Regulation identifies specific 'special' factors[2547] applicable to complex determinations of habitual residence. It is observed, however, that their operation should not include situations of *absence of habitual residence*[2548]. In the latter event[2549], the Regulation allows access to justice only through the forum *necessitatis* under article 11[2550]. This provision finds applicability where it *is not possible* to bring proceedings before the courts of a third State with which the succession has close connection (§ 31)[2551]. Under the latter circumstances, the courts in the EU25 would be entitled to exercise international jurisdiction by virtue of a *sufficient connection* established between the succession and that Member State[2552]. This implies that no other grounds of jurisdiction contained in the Regulation would be satisfied, hence, that neither habitual residence, nor nationality, nor the assets concerned by the succession would be located in the EU25[2553].

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[2546] The situation of alternating habitual residences, within the context of successions, is the scenario where the *de cujus* may believe that his/ her habitual residence is established in Member State A, but following his/ her death, the judicial assessment may locate it in Member or third State B. The situation of absence of habitual residence is that of the *de cujus* who had not acquired habitual residence, or whose habitual residence was lost, at the time of death and the years preceding it. Both situations may lead to conflicts of jurisdiction and applicable laws, triggering negative effects on the deceased's succession planning. A testate succession including a choice-of-law clause is always advisable. However, as showed in this part, some laws may not necessarily attribute legal effect to the *professio juris*. Thus, a complementary choice-of-court clause on behalf of the deceased would add greater certainty and predictability (chapter I, s. II above).

[2547] *Supra* chapter I, section I.

[2548] Even in circumstances allowing the recourse to 'closest connection' for the applicable law, habitual residence is in principle established (§ 25).

[2549] Excluding those situations involving choice-of-court, including out-of-court agreements, and a *professio juris* (*cf.* chapter I, section II above).

[2550] Excluding, logically, applicable law (ibid. BONOMI/ WAUTELET, p. 247).

[2551] For more details in relation to such *impossibility*, please refer to F. M. BUONAIUTI, Forum Necessitatis (ibid. CALVO CARAVACA *et al.)* p. 204-206.

[2552] Ibid. BONOMI/ WAUTELET, p. 246: "*Compte tenu du caractère subsidiaire de l'article 11 et de l'étendue des compétences ordinaires prévues par le Règlement, il n'est pas facile d'envisager un tel lien*".

[2553] Ibid. BONOMI/ WAUTELET, p. 244; and BUONAIUTI, p. 201.

**793.** Overall, the *nationality* and the *place of assets*, may operate as 'tie-breaker rules' for the determination of the deceased's habitual residence. In practice, when habitual residence cannot be located in the EU25, according to the appreciable period provided in the Regulation, these two factors would not be applicable to contexts involving non-EU25 nationals[2554]. They may instead prove relevant in absence of habitual residence, which is not their current scope under the Regulation. Ultimately, a scenario involving a *multi* -national and -estate ownership dimension of the deceased's life may exclude their relevance as 'tie-breaker rules'. Therefore it is argued that in absence of habitual residence, the only applicable provision would be that of article 10(2). Conversely, the scope of article 11 does not seem to cover the issue of this Section.

## § II. Swiss-EU25 Current Remedies

**794.** The following hypothetical should delimit the scope of this analysis: A Swiss-Thai national lives and works in France for four years. After his anticipated retirement, he abandons France for Portugal where he lives for one year, establishing mere connections. Later, he moves to Spain where he draws up a testament, without including a *professio juris*, bequeathing part of his assets to his recent partner, who lives in Thailand. The other part of his wealth is destinated to his sister living in Liechtenstein. He dies in Spain, while he lived in a hotel, alone. He had not purchased immovables either in Spain, in Portugal, or even in France, and not in Switzerland that he had abandoned six years preceding his death. He did own a considerable store of assets composed of movables (*i.e.* paintings, bank accounts, intellectual property rights, life insurance policies, cars) distributed in Spain, Portugal and France. He held one summer house in Thailand, where he spent, yearly, three month holidays, during the last three years of his life.

**795.** In context, *close connection* under article 11 of the Regulation was not established with a third State, referring to Switzerland and Thailand. It is likely that *sufficient connection* was not reached in the Member States where he last lived[2555]. One should therefore conclude that article 11 does not cover this scenario. In absence of regular, as well as stable, connections and interests, France[2556], Portugal and Spain would not represent the deceased's last habitual

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[2554] With the exception of art. 10(2).

[2555] The assessment of a *sufficient connection* with a Member State is the result of a significant multitude of circumstances, including the links with the heirs of the succession (ibid. BONOMI/ WAUTELET, p. 246).

[2556] Recital 23 of the Regulation would allow a lengthy assessment during the years preceding the deceased's death (*cf.* chapter I, section I above). Accordingly, France may be determined as the deceased's last habitual residence if that resulted from a close and stable connection, which is excluded in this hypothetical.

residence. Neither would they represent his former habitual residence, by reason of the absence of habitual residence in a third State, and Spain being the last Member State in which he *peripatetically* lived[2557]. Moreover, given that neither was he citizen of the three Member States concerned, articles 4 and 10 would not apply. According to article 10(2), the authorities in France, Portugal and Spain should exercise jurisdiction over the assets located in each of their territories. This provision *excludes* the assets present in third States[2558], for instance in Thailand.

**796.** Closest connection under article 21(2) of the Regulation may be an exceptional solution. Even so, this would apply only in relation to the applicable law. It operates only when the relocation occurred fairly recently *before* death[2559]. More importantly, the scope of article 21(2) requires a close connection that is a 'manifestly closest one'[2560] other than that establishing habitual residence[2561].

**797.** The Swiss PILA, may find applicability in this specific scenario by virtue of the deceased's Swiss nationality[2562]. In particular, the Swiss authorities may exercise jurisdiction under article 87(1)[2563]. If that were the case, Swiss law should apply under article 91(2). In this regard, the Swiss authorities should prove that the *connection* with the Swiss nationality is more effective than that with Thailand[2564].

## § III. Proposed Rules

**798.** The following proposal is complementary to that concerning a choice-of-court clause[2565]. Ultimately, with regard to international jurisdiction, the deceased's last mere presence, within the six months, or a year at most,

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2557 Under article 10(1)(b), only the former habitual residence should be considered, which would be Portugal where mere connections were established.

2558 Ibid. BONOMI/ WAUTELET, p. 241.

2559 One year, and even six months may not be considered 'fairly recently'.

2560 Ibid. BONOMI/ WAUTELET, p. 316.

2561 The situation envisaged in recital 25 and art. 21(2) further assumes that at least one habitual residence was established (Ibid. p. 318-319; and PFEIFFER, p. 576).

2562 Under the SPILA, art. 23(2), to the extent of applicable law, the deceased's nationality should be considered the most effective. In relation to jurisdiction, the Swiss nationality prevails, under art. 23(1).

2563 2020 DAS/139/2020, § 3.3.1.2 : "*Les motifs d'inaction peuvent être de nature juridique, tels que l'absence de compétence des autorités étrangères d'après leur droit - par exemple lorsqu'elles ne sont compétentes que pour les biens situés sur leur propre territoire -, ou purement factuelle lorsque les autorités étrangères seraient certes compétentes, mais en fait restent inactives* […]" (*cf.* chapter III, section II above).

2564 This leads to further difficulties in this hypothetical whereby the deceased was *de facto* maintaining attachments with Thailand, as opposed to Switzerland which he had abandoned. For issues related to effective nationality, see part I, chapter III, section I of this monograph.

2565 *Supra* chapter I, section II.

preceding his/ her death, may reveal some degree of actual proximity[2566]. This rule appears to us more effective in presence of multi- national or -estate ownership. In relation to the applicable law, a predictable moment should be available. This is, in our opinion, the place where the actual spouse/ partner/ family lives at the time of death. For those individuals living alone, with no family attachments, the *lex fori* according to the place of mere presence should apply.

**799.** A connecting factor whose scope should be better delimited, which would reveal a more qualified proximity than mere presence, is closest connection[2567]. In absence of habitual residence, jurisdiction and applicable law may be concentrated at the place of the deceased's closest connection at death[2568].

**800.** A last complementary rule, supporting the operation of the previous ones, is transfer of jurisdiction. This rule, conceived under EU law in a slightly different manner than *forum conveniens*[2569], should determine the forum that is more appropriate in the deceased's interests. His/ her 'actual' family relations and succession planning should be taken into account. This rule should be founded on specific connecting factors, such as closest connection/ mere presence as proposed above[2570].

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2566 Part I, chapter III, section IV.

2567 *Supra*, chapter I, section I. This rule may also cover 'prospective acclimatization' (*cf.* part I, chapter III, section IV). For instance, a person who had not acquired habitual residence closely prior to death, still may have established specific attachments with the place of last physical presence. Indicators should be meaningful links including family connections, cultural ties, knowledge of the language, the possession of a residence permit, period of residence, and any other connections that had expedited or enhanced the prospects of integration prior to death. In matters concerning both minor and adult children in need, the place of their habitual residence should also be an indicator.

2568 The significant-connection rule under the US UAGPPJA (*cf.* part IV, chapter II, section I) would also serve as a valid interpretation of the EU rule of closest connection. We recall the relevant factors determining 'significant connection', with some slight contextualised changes: the location of the deceased's family; the length of time the deceased at any time was physically present in the state, indicating the duration of any absences that should not count; the location of the deceased's property; and the extent to which the deceased had other ties to the state such as voting registration, filing of state or local tax returns, vehicle registration, driver's license, social relationships, and receipt of services.

2569 Part I, chapter IV, section V.

2570 An individual, national of third State A, dies in Member State B, where he or she had been physically present six months prior to death for harvest. Member State B is seised for the opening of the succession. However, the deceased had purchased a small studio in Member State C, which he or she was letting throughout the year. He or she was regularly visiting Member State C, with no specific degree of personal integration. Closest connection should be determined in Member State C, despite the deceased's mere presence in Member State B prior to death (and his/ her nationality in third State A). An actual and stronger degree of proximity should prevail. Thus, even if the deceased held the nationality of Member State D, which he or she had no specific connections with, in presence of a stronger proximity in Member State C, Member State B should transfer jurisdiction to Member State C.

## Section II Alternate and Concurrent Habitual Residence

**801.** The issue of alternate habitual residence *should not be glossed* with the other similar issue of 'concurrent habitual residence'[2571]. The latter has been finally excluded by the CJEU[2572]. This issue is less encountered in circumstances involving access to justice pertaining to one individual[2573]. Ultimately, the Succession Regulation seems to envisage the possibility of only one habitual residence at a specific point in time[2574]. Therefore, concurrent habitual residence is excluded from this Section[2575].

### § I. The Context and the Current Remedy

**802.** An individual may have established regular and stable connections with more than one Member State during the appreciable period referred to in the Succession Regulation[2576]. An example should clarify this context: A German-French-Swiss citizen lives in the German-French-Swiss 'Border Triangle' of the Rhine. He studies in Basel-Stadt (Switzerland), commuting every day to Rheinfelden (Germany), place of family and home. During week-end, he lives with his maternal grandparents in Saint Louis (France). Thereafter, he graduates in law at the Basel University, carrying on the same life routine. He is admitted to the Swiss bar, advising clients from all three States. He is also appointed as legal advisor at the Council of Europe (COE). Furthermore, he marries a French lady, who works as a lawyer in Strasbourg. The couple buys a house in Strasbourg, which he occupies two days per week. Two days per week he works in Basel. He spends long week-ends, with his wife in his own immovable in Rehinfelden, where he dies.

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2571 This scenario provides that the deceased is habitually resident in two or more States at the same specific point in time (*cf.* part I, chapter IV, section III).

2572 CJEU, *E.E. & K.-D. E.* [16 July 2020] C-80/19.

2573 *Cf.* part III, chapter II (*i.e.* child custody and abduction).

2574 Ibid. BONOMI/ WAUTELET, p. 198.

2575 The scenario involving 'concurrent habitual residence' would be significantly avoided if consensus were to be reached over the issue of alternate habitual residence, whereby accordingly it should be recognised that a person may have only one habitual residence, although established alternately, and not concurrently. For the question of concurrent habitual residence, this study identified two solutions leading to arbitration and to the establishing of an impartial instance within the CJEU (*cf.* part II, chapter II, section V). See also note 30, ROMANO; and D. HODSON, Globalisation of Adjudication in International Family Law: Serving International Families by Producing International Solutions, in: G. Douglas/ M. Murch/ V. Stephens, International and National Perspectives on Child and Family Law. Essays in Honour of Nigel Lowe, 2018, p. 160; and L. R. HELFER/ A. SLAUGHTER, Towards a Theory of Effective Supranational Adjudication, *Yale Law Journal*, Vol. 107, 1997-1998.

2576 "*Assessment of the circumstances of the life of the deceased during the years preceding his death and at the time of his death*" (§ 23).

**803.** The assumption made here is that the deceased had established habitual residence during his life and at the time of death. He had established attachments with all three States, France, Germany and Switzerland. The centre of his *patrimonial interests* was located potentially in France and Germany. His *educational and professional interests* were strongly connected to Switzerland. He had greater *family interests*, with his wife, in France and Germany. His *social life* was divided between the three States. The *deceased's intention* is difficult to assess, which should therefore be avoided in the anamnesis.

**804.** From the French-German perspective, the States concerned may all be objectively considered as the deceased's alternate habitual residence under article 4 of the Succession Regulation. The rule of *lis pendens*, provided under article 17 of the Succession Regulation, should ultimately favour the first-in-time rule[2577]. In this regard, the authorities of the Member States second seised should decline jurisdiction, as opposed to the Swiss authorities[2578]. The SPILA contains its own *lis pendens* rule under article 9 SPILA[2579]. From the viewpoint of the Swiss courts, if seised, they may retain jurisdiction according to article 86 SPILA[2580]. Swiss jurisdiction may be subsidiarily retained under article 87, in case of inactivity by the other concerned jurisdictions. It is recalled that the *lis pendens* rule does not concern the applicable law.

**805.** In the current context, a conflict of applicable laws may arise. According to article 21(2), closest connection would be more indicated in this context. However, closest connection should not cover this scenario where a last habitual residence is established during life[2581], alternately or consecutively, by virtue of the *de cujus* multiple and varied connections. Thus, it would prove complex to determine a residence that is more habitual, or a connection that is closer, than another.

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2577 Part I, chapter IV, section V.

2578 Some authors have regretted the absence of rules governing *lis pendens* with third States, such as the provisions provided under the Regulation 1215/2012 (Brussels I-bis). See in this sense, ibid. F. M. BUONAIUTI, Article 17 - Lis pendens (ibid. in: CARAVACA *et al.*) p. 252. Again, according to BUONAIUTI (p. 253), the authorities first seised that lack general jurisdiction should decline it.

2579 The tenor of art. 9 is for certain aspects different in that the Swiss judge, second seised, always has the 'obligation' to relinquish jurisdiction when the proceedings pending before the court first seised end and/ or the foreign judgment is likely to be recognised in the Swiss legal order. Under this rule, the Swiss judge should perform a 'real prognosis'. On this point, please refer to the Swiss judgment ATF 5A_223/2016, 28.07.2016, § 5.1.1.

2580 In absence of permanent prospective intention, it might not be concluded that the deceased's last domicile was in Switzerland (*cf.* part I, chapter III, section II).

2581 Unlike 'fairly recently' under recital 25 of the Regulation.

## § II. Proposed Rules

**806.** The recourse to physical presence[2582], as mentioned in section I, may be envisaged also in this context. This time, it should refer to the deceased's continuing physical presence at the time of death. In context, differently from the absence of habitual residence[2583], the last physical presence aims to freeze jurisdiction and the applicable law in the place where durable and regular connections are established. It plays a role that is similar to *lis pendens*, even though here it is the 'last-in-time rule' that applies.

**807.** Concerning the applicable law, it may still be argued that physical presence might be an unpredictable rule[2584] with regard to diverse domestic legislation effects[2585]. It is also true that an individual who has a globalised lifestyle, should be knowledgeable about specific legal remedies available under private international law[2586].

**808.** A rule that appears better suited to legal certainty and predictability, for both jurisdiction and the applicable law, is the deceased's family habitual residence or principal habitual residence founded on family interests[2587]. Its assessment might prove challenging in those situations where the deceased was married or partnered more than once, and holds children, adults or minors, from different marital or partnership relationships. To solve this 'conflict of family interests', two considerations are raised: (i) the centre of family interests should involve the *de cujus*' 'actual' family at the time of, and/ or closely prior to, death; (ii) in situations involving children, particularly minors, falling under a situation of *'précarité économique'*[2588], the centre of

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2582 Part I, chapter III, section IV.

2583 Section I of this Chapter.

2584 Is the scenario under article 21(2) predictable? For instance, the *de cujus* concluded a succession agreement according to the legislation of Member State A in which he or she retired three months before death. However, the courts seised in Member State B, whose legislation prohibit succession agreements, determine that he or she held closest connection with their State.

2585 For a comparative perspective concerning the legal share, see G.P. ROMANO, Inheritance Rights and Entitlements of the Surviving Spouse - Some Comparative Insights, in: Civil Codification in China and in Europe, Suzhou (China), 2018. Ibid. FUGLINSZKY *et al.,* p. 15. See also I. NÉMETH, The Successions in Europe A Contribution to the Classification and Unification of the Succession Systems in Europe, *ELTE Law Journal*, 2015, p. 117.

2586 This is the 'presumption of responsibility' that was referred to in this study (part II, chapter II, section V): "the presumption of responsibility finds its rationale in the 'safeguards' that each spouse should have taken through party autonomy to avoid forum shopping".

2587 The Succession Regulation allocates particular relevance to the location of the deceased's centre of family interests (ibid. BONOMI/ WAUTELET, p. 194 "*En principe les liens personnels et familiaux devraient l'emporter sur l'activité professionnelle*"). It may generally refer to the 'family home' – 'foyer familial' – which the deceased held regular and stable connections with, prior to his/ her death. Family home may also represent the place where the actual spouse/ partner/ primary carer and children, even grandchildren, of the deceased are settled at the deceased's death.

2588 *Supra* chapter I, section I.

family interests may, when the child's best interests so require[2589], be located at the place of their habitual residence, comprising the primary carer's. The rationale in support of this second consideration lies in the fundamental importance of ensuring the protection of the children's best interests[2590] in the State whose authorities are better placed[2591], by virtue of proximity.

## Section III Transfer of Jurisdiction

**809.** It was said that the EU Succession Regulation does not provide a specific rule on transfer of jurisdiction[2592]. Some proposals were indicated with regard to the previous sections[2593].

**810.** In our view, when the courts of the EU25 Member State A, first seised[2594], conclude that the courts of the EU25 Member State B are better placed to determine the deceased's interests in accordance with his/ her planning, they should proceed with a transfer of jurisdiction *ex officio* or upon application from the parties concerned. The courts of EU25 Member State B may also request such jurisdiction, upon a party's initiative or *ex officio,* from the courts

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2589 H. FULCHIRON, Réserve et ordre public : protection nécessaire ou protection du nécessaire?, Droit et patrimoine, avril 2015, n° 246: *"il conviendrait de vérifier au préalable si les intérêts des personnes dont le droit français assure la protection par l'institution de la réserve n'ont pas, par ailleurs, été préservés* […]".

2590 Such interests might refer, in the succession context, to the patrimonial and economic interests of the surviving spouse, including the children's property interests, which should be considered and preserved as fundamental rights. On this point see J. J. FAWCETT/ M. NI SHÚILLEABHÁIN / S. S. SHAH, Human Rights and Private International Law, 2017, p. 827 ff. See also Buturlinsky District Court (Nizhny Novgorod Region), case No. 2-93 / 2018: "*При достижении совершеннолетия Яшунин Ю.А. вправе сам распорядиться своими правами, оформить наследственные права и право собственности на причитающуюся ему долю в квартире отца Яшунина А.В. и при вселении в нее вправе зарегистрироваться в квартире по месту жительства*" (unofficial translation into English provided by this Author: "*Upon reaching the age of majority Yashunin Yu.A. has the right to dispose of his* […] *inheritance rights and ownership of the share attributed to him in relation to the apartment inherited from his father A.V. Yashunin, and upon moving into it has the right to register in this apartment his place of residence*").

2591 In this context, the rule on transfer of jurisdiction may once again be useful (*cf.* section I *supra*). The Succession Regulation would not cover this scenario of 'better placed' courts for the protection of children in situation of '*precarité économique*'. The scope of appropriateness under the Regulation is to ensure coincidence between forum and *jus* rather than to protect weaker parties such as minor children (ibid. BONOMI/ WAUTELET, p. 212-215). An individual died in Member State A where he was professionally integrated. Prior to death, he was regularly visiting and financially supporting his/ her divorced spouse, who lived with their minor child in Member State B. Neither of the former spouses entered into a new marriage. Member State B was the family home prior to divorce, still representing the *de cujus*' centre of social interests. In this scenario, the courts in Member State A, seised first, should transfer jurisdiction to Member State B based on the deceased's principal/ family habitual residence at death.

2592 Exceptions were indicated in chapter I *supra*.

2593 These include the collaborative assessment, and resolution of conflicting determinations, of habitual residence.

2594 Transfer of jurisdiction should be complementary to the *lis pendens* rule under art. 17.

of the EU25 Member State A if they judge themselves more appropriate[2595]. Such a transfer should also occur in respect of the interests of a deceased's child in need. Valid alternatives of better placed courts may correspond to those provided under the proposal of choice-of-court agreement[2596].

# Conclusions

**811. Summary.** The coincidence of forum and *jus* allows greater certainty and predictability to the succession planning. This inquiry showed that in the EU25 parallelism may be well achieved, either through the operation of habitual residence as a primary connecting factor, or via the implementation of subsidiary rules[2597]. The guidance provided by the Succession Regulation for the interpretation of habitual residence, albeit innovative, may not favour a clear-cut assessment. In particular, the 'years preceding the death of the deceased', the 'conditions and reasons of the settlement', the 'absence of permanent settlement', ultimately triggering the 'tie-breaker rules' of nationality and location of main assets over habitual residence, may cause overlapping of connecting factors. In this regard, the two-fold test approach proved useful to assess decisive and non-decisive elements, as well as replacing rules, aimed at solving the conflicting determination, or absence, of habitual residence. The interplay of EU25-third States has highlighted a multitude of non-uniform connecting factors. Coordination may be achieved when the EU25 authorities are seised, allowing for alternative uniform connecting factors and the universal applicable law. In this respect, the attempts of the Swiss legislator to ensure a coordinated reform of the Swiss private international law Act with the EU25 is greatly encouraged. Further comparative analysis of non-EU25 legal orders is recommended for a potential treaty solution. The latter may refer to a new Hague Convention on international coordination of jurisdiction, applicable law and estates.

[2595] When dealing with the transfer of proceedings arising from a collaborative habitual residence determination, this would in principle occur *ex officio*.

[2596] (i) The deceased's nationality; (ii) the deceased's last or former habitual residence; (iii) the habitual residence of the surviving spouse and/ or of adult children; (iv) and the habitual residence of the child's primary carer when the *de cujus* is willing to provide for his/ her minor or adult children in need. The applicability of these connecting factors should rely on the time of the election or the time of death.

[2597] Nonetheless, it was also shown that the 'closest-connection' rule, in matters of applicable law, may often lead to discretional applicability, in particular given the absence of a delimited scope of implementation.

**812. Proposal I**[2598]**.** The deceased's last habitual residence should coincide with his/ her centre of vital interests[2599].

**813. Proposal II.** The relevant time for the determination of habitual residence shall be the time of death. An appreciable assessment period of six, or twelve at most, consecutive months prior to the time of death should be introduced for the habitual residence fact-based assessment[2600].

**814. Proposal III.** The deceased's former habitual residence within six, or twelve at most, consecutive months prior to the time of relocation[2601], shall be a subsidiary connecting factor under article 4[2602].

**815. Proposal IV.** Transfer of jurisdiction shall be adopted when it is clear from the circumstantial factors that the de cujus' interests and planning should be determined in a Sate other than that of his/ her last habitual residence and/ or otherwise provided would cause detrimental consequences to a minor child. Such a rule should also support a collaborative habitual residence determination.

**816. Proposal V.** The deceased's closest connection[2603] at death shall be considered as a tie-breaker rule, supporting parallelism of forum and *jus* in situations involving the absence of habitual residence[2604].

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2598 Proposals I to VII apply principally, but not exclusively, to the treaty rules referred to in this part.

2599 In accordance with the two-fold test approach followed here, key elements shall be: physical presence; the actual personal and family interests; regularity of the settlement and/ or of re-settlement; principal occupied home; societal connections with the local community; settled purpose; principal investments directed to achieve the settled purpose (*i.e.* purchase of principally occupied accommodation). Complementary, non-decisive, elements shall be: the intent of lasting character; the location of domicile (common or civil notions); the presence of tax residency; the nationality; the location of main assets (with the exception of the principally occupied home); duration; language; cultural and family origins (unless with proven degree of factual proximity); previous family relationships ended through divorce or legal separation (unless with regard to children, especially if found in situation of precariousness, and the primary carer with whom the deceased maintains regular contacts at death). The professional/ student status, the intent and the duration, alone, shall not be considered relevant for the habitual residence determination.

2600 The assessment should refer to the time closely preceding death *in place of* the years preceding death.

2601 The change of habitual residence shall be effective, based on a factual, rather than temporal (duration), assessment.

2602 The assessment should refer to the time closely preceding the relocation to the last habitual residence *in place* of the five-year period assessment.

2603 Closest connection shall correspond to both prospective acclimatization and significant connection. Prospective acclimatization should be determined through meaningful links including family connections, cultural ties, knowledge of the language, the possession of a residence permit, period of residence, and any other connections that had expedited or enhanced the prospects of integration prior to death. In matters concerning children in need, both minors and adults, the place of their habitual residence should also be an indicator. The significant-connection rule, under the US UAGPPJA (*cf.* part IV, chapter II, section I), shall be determined through the location of the deceased's family; the length of time the deceased was at any time physically present in the state, indicating the duration of any absences that should not count; the location of the deceased's property; and the extent to which the deceased had *other ties* to the state such as voting registration, filing of state or local tax returns, vehicle registration, driver's license, social relationships, and receipt of services.

**817. Proposal VI.** The deceased's principal habitual residence at death should coincide with his/ her centre of family interests. It shall refer to the actual family interests of the deceased[2605]. This rule shall be used to solve conflicts of (potentially) alternating habitual residences. The deceased's continuing physical presence shall operate whenever a principal habitual residence is not established or such an assessment appears so artificial that it might result in ineffective and inefficient justice.

**818. Proposal VII.** Choice-of-court clauses shall be provided[2606], supporting parallelism with the choice-of-law clauses[2607].

**819. Proposal VIII.** For the Swiss private international law Act, article 20(1)(b) should read: "*Au sens de la présente loi, une personne physique a sa résidence habituelle dans l'État dans lequel elle vit de façon régulière et stable au sein d'une période de temps appréciable, indépendamment de la durée et de son intention*"[2608].

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[2604] The deceased's mere presence within the six months, or a year at most, preceding his/ her death, shall apply as a subsidiary rule for jurisdiction. In this case, the law of the place of the deceased's family base at death or, subsidiarily, the *lex fori* shall govern the succession.

[2605] In situations involving children, particularly minors, falling under a situation of '*précarité économique*', the centre of family interests may, when the child's best interests so require, be located at the place of their habitual residence, comprising the primary carer's.

[2606] The deceased's last or former habitual residence should be valid alternatives. Additional grounds may be: (i) the deceased's nationality; (ii) the habitual residence of the surviving spouse and/ or of adult children; (iii) the habitual residence of the child's primary carer when the *de cujus* is willing to provide for his/ her minor or adult children in need.

[2607] The law of the proposed grounds of jurisdiction for the choice-of-court clauses shall be available for election.

[2608] For the interpretation of domicile under art. 20(1)(a), it is also suggested a slight change: "*Au sens de la présente loi, une personne physique a son domicile dans l'Etat dans lequel elle réside habituellement, conforment à son intention".* With regard to its translation, it is suggested: *"has his or her domicile in the state where he or she habitually resides in accordance with his/ her intent*".

# Part VI: The Future Prospect: Conclusive Remarks

**820.** This Part concerns general conclusions. It is divided in to conclusions only. No further proposals are indicated herein.

## Conclusion I

**821.** Habitual residence corresponds to a regular place of settled and stable dwelling within an appreciable period. This is a contextualised reference reflecting the uniform family law operation of habitual residence as an inter-country concept[2609]. It determines the beneficiary's place: of personal integration, of vital interests, of rooting. Such a place should be located in a family environment[2610]. By contrast, a definition, should not be provided, avoiding legalistic interpretations. The aim and operation of habitual residence have been adapted to the transnational setting, in that a national or international definition is systematically avoided.

## Conclusion II

**822.** A child-centred or adult-centred perspective approach shall guide the habitual residence uniform intradisciplinary implementation. The said approach would not exclude that habitual residence may be functional to specific family contexts and objectives governed by multilateral instruments[2611].

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[2609] (ibid. Introduction): "Habitual residence has been essentially adopted since its origins as a conventional, *quasi*-standardised, connecting factor whose factual operation has been generally linked to treaty-based objectives (*i.e.* Hague Conventions, EU Regulations). Its implementation within national legal orders should therefore be compatible with the binding treaty objectives. The aim and operation of habitual residence have been adapted to the transnational setting, in that a national or international definition is systematically avoided. Thus, habitual residence does not relate to a single national interpretation, although over the years the domestic legislative efforts in conceptualising it within national legal orders have affected its foundations. This study argues that habitual residence should operate as an inter-country concept, fundamentally by endorsing it in a uniform manner, and avoid domestic 'free-standing' legislative adaptations".

[2610] In specific contexts, reference was made to *family habitual residence* as a principal habitual residence (*cf.* part II, Property Regimes; part III, Divorce, Maintenance; part V, Successions).

[2611] *I.e.* Hague Conventions, EU Regulations.

# Conclusion III

**823.** The residence of an individual must be regularly settled, in a stable manner, to be considered habitual. It should denote a qualified degree of proximity. The physical presence of an individual at a relevant point in time is a prerequisite for the potential establishing of residence and, further, for it to become habitual. Physical presence is therefore the primary element that triggers the residence assessment which, in addition to other factors, allows the determination of its habitual character.

# Conclusion IV

**824.** Habitual residence, and physical presence, hold the equitable degree of pragmatism and modernity required today for the determination of international jurisdiction, and applicable law, in cross-border family relationships. Relevant characteristics are the adaptable and actual, realistic, proximity that habitual residence and physical presence effectively reveal at a relevant time. It is not excluded that, in the future, if additional pragmatism and expeditiousness of justice were required to face modern issues, habitual residence may simply correspond to the place of habitual presence. This solution would accentuate the fact that a qualified degree of physical presence is sufficiently and essentially determining.

# Conclusion V

**825.** The two-fold test approach is founded on the practical evidence that specific decisive elements shall be primarily sufficient for the determination of habitual residence in topical cases. On a subsidiary basis, where the habitual residence assessment does not prove clear-cut, other complementary, non-decisive, elements should support the anamnesis, still referring to topical cases. The functionality of the two-fold test approach lies also in the interplay with replacing rules applicable to exceptional cases where habitual residence may not be determined. Where the rule on habitual residence is not applicable[2612], other factors should be employed for the determination of international jurisdiction and applicable law. One refers to mere presence, the

[2612] Part I, chapter III, section IV. This scenario is typically that involving the issue of the *absence of habitual residence*.

other is prospective acclimatization[2613]. It was recommended that the two-fold test approach be adopted in a Handbook[2614] on the operation of habitual residence conceived at the Hague Conference on Private International Law, possibly through coordinated activities with the UN Child Rights Committee[2615], the European Commission (DG Justice)[2616] and the Council of Europe Committee on Legal Co-operation[2617]. The endorsement of a Hague Protocol to the international family law conventions was also advised. Such an instrument would ensure a contextualised interpretation of habitual residence, of binding character, although its endorsement requires a more complex process rather than a soft-law guide.

# Conclusion VI

**826.** Habitual residence has been conceived as a *quasi*-standardised concept, which should be tailored considering each cross-border civil relationship involving families in analogous contexts. Such prerogatives should enable a more effective determination of international jurisdiction and applicable law in modern societies where cross-border family ramifications are increasingly encountered. Therefore, this connecting factor shall neither be glossed with domicile and nationality, conceived in a mono-national societal context, respectively, nor shall it be misled by domestic notions of habitual residence. Ultimately, considering its fact-based operation, common factors utilised for the habitual residence assessment may also be domicile, nationality, as well as

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[2613] It was argued that *closest connection* (*cf.* part II, Property Regimes; part III, Maintenance; and part V, Successions) or *significant connection* (*cf.* part IV, Protection of Adults) would cover prospective acclimatization. Closest connection should be *better contextualised* in the whole sphere of international family law.

[2614] Reference, though in the ambit of a different context, was made to the 'Guidelines on jurisdiction' endorsed in 2016 by the European Union Agency for Criminal Justice Cooperation (EUROJUST). These guidelines provide *key guiding principles determining jurisdiction* over criminal matters in respect of the EU Area of Freedom, Security and Justice.

[2615] Reference was made to a general comment, or general recommendation, at the UNCRC on the thematic issue of '*habitual residence and child best interests*'. The latter should underline the importance of adopting in specific contexts a child-centred approach for the determination of the child's habitual residence in respect of universal principles, namely, best interests and access to justice. The general comment may also be jointly adopted with the UNCRPD in accordance with the fundamental right of special protection granted to both children and vulnerable adults.

[2616] The handbook may also provide support to the EU Regulations in specific contexts such as successions and property regimes. Vice versa, the Hague Conference activity in the field of adult protection would inspire the work done in the EU.

[2617] Reference was made to a Resolution on the 'new standardisation of the legal concepts of habitual residence and domicile', potentially including modern family law connecting factors, namely physical presence and prospective acclimatization. "*Resolutions embody decisions by the Assembly on questions, which it is empowered to put into effect or expressions of view for, which it alone is responsible*". See as an example the Resolution (72) 1.

other degrees of residence[2618], especially when they reveal qualified proximity, which is the ultimate objective of habitual residence.

## Conclusion VII

**827.** The moment triggering the determination of habitual residence guides the assessment of specific factors. It adapts differently whether for the determination of jurisdiction or applicable law. It allows parallelism between forum and jus[2619], depending on the family context. A freezing time for the habitual residence determination is fundamental in the name of better predictability and legal certainty[2620]. Inspired by the US home-state jurisdiction over children's and vulnerable adults' contexts, an appreciable assessment period[2621] would reduce lengthy and costly habitual residence determinations.

## Conclusion VIII

**828.** Modern rules should be provided to assess the change of habitual residence, and to derogate from it in accordance with the principle of better appropriateness. Its operation should be uniform, applicable to contexts involving both children and vulnerable adults, as well as interconnected fields of family law[2622]. The beneficiary's interests shall guide both the determination of, and derogation from, habitual residence. The rule on transfer of jurisdiction shall be endorsed in the whole area of international family law. Its scope should be limited by specific connecting factors[2623]. The rule on continuing jurisdiction is a valid mechanism to trace the effective change of habitual residence[2624]. Intercountry assessments are a valuable socio-legal tool for the determination of habitual residence in conformity with the (best) interests principle.

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2618 Reference is made in particular to the Canadian ordinary residence, the UK permanent residence, and generally to *residence simpliciter* (*cf.* part I, chapter III).

2619 Supported in this study.

2620 In favour of both individuals and authorities.

2621 Six months or one year, depending on the family context.

2622 Parts II, III, IV and V.

2623 In particular: principal marital/ family residence, including the spouse's, child's, or primary caregiver's habitual residence, depending on the family context; continuing physical presence; (best) interests; former habitual residence; prospective acclimatization (see also each 'thematic part' II to V).

2624 This rule is particularly relevant in child protection proceedings.

## Conclusion IX

**829.** Specific tie-breaker rules should operate in the event of conflicting habitual residence determinations. Continuing physical presence and principal habitual residence founded on marital/ family interests shall solve this potential conflict. Lis pendens[2625] should apply within the whole area of international family law. It serves the first-in-time rule and should be complementary to the rule on transfer of jurisdiction[2626].

## Conclusion X

**830.** In particular circumstances involving concurrent habitual residence[2627], recourse shall be made to a super partes entity. The latter indicates a special instance attached to the mandate of the UN Child Rights Committee, the UN Committee on the Rights of Persons with Disabilities, and the Court of Justice of the European Union, respectively, ensuring direct intervention over family issues. It may also envisage arbitration schemes through the support of the International Hague Network of Judges. The intervention of a regional instance such as the CJEU, that is equidistant from the cross-border jurisdictional conflict, would enable a more efficient handling of justice in the parties' interests. The arbitration agreement, based on a collaborative approach between the parties, would ensure the respect of the bi-national dimension of the relationship, equally requiring an effective bi-national justice.

[2625] Part I, chapter IV, section V: "The court in State A, first seised, should primarily assess habitual residence based on the first-in-time rule. Should appropriateness require it, State A may transfer jurisdiction to State B".

[2626] *Cf.* conclusion VIII.

[2627] This situation involves an individual who holds two habitual residences at the same time. The latter was generally excluded from this study, unless under special circumstances (part III, chapter II; part IV). It also refers to two individuals who hold separate habitual residences at the same time, which may lead to 'forum and law shopping' (part II, chapter II; part III, chapter I). This last situation was examined in detail.

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# Appendix 1 Conferences and Workshops

LERU exchange, University of Cambridge, Research topic accepted (postponed for Covid-19 reasons), 2020.
Visiting Scholar, University of California Davis, Research topic accepted (postponed for Covid-19 reasons), 2020.
Workshop sur la protection des mineurs dans les mouvements familiaux transfrontières : aspects juridiques et sociaux, University of Geneva (co-organiser).
Journée doctorale transnationale de Droit international privé et Droit comparé, Lausanne, 2019 (presenter).
Comparative Migration Law: Methodological Challenges and Future Horizons, Swiss Institute of Comparative Law, Lausanne, 2019 (attendee).
Children and Family Law Seminar, University of Geneva, 2019 (presenter).
International Protection of Children and Adults, Migrations, Russian Presidential Academy, Moscow, 2019 (presenter).
Families Beyond Borders: Migration with or without Private International Law, University of Ghent, 2019 (attendee).
Ciclo di incontri sulle migrazioni in Europa, University of Verona, 2018 (presenter).
Civil Codifications in China and Europe, Suzhou, Renmin Campus, 2018 (presenter).
Children's Rights Research Symposium, Queen's University, Belfast, 2018 (presenter).
Update zu den drei Revisionen des IPRG: Schiedsgerichtsbarkeit, Insolvenzrecht, Erbrecht, St Gallen, 2017 (attendee).

# Appendix 2 Interviews

Professor Mr Philip Jaffé, Member of the UN Child Rights Committee, on the proposals of this study concerning the adoption of a General Comment and/ or the creation of a super partes entity in the field of child protection.
First Secretary, Professor Ms Gérardine Goh Escolar, and Secretary, Ms Laura Martinez-Mora, of the Hague Conference on Private International Law, on the proposals of this study concerning the adoption of a Protocol and/ or of an international handbook.
Mr David Goldman, father and left-behind parent, in relation to his experience and views dealing with habitual residence and the child's best interests in abduction contexts.
Ms Joëlle Schickel-Küng, Head of the Swiss Central Authority, concerning the Swiss practice relating to the absence of habitual residence.
Representatives of the Council of Europe Committee on Legal Co-operation regarding a potential update to the Resolution No. 72, 18 January 1972.
Ms Heidi Brennan, Deputy District Attorney in Sacramento, with respect to the practice of the US courts regarding different matters of parental responsibility and child abduction.
Various oral discussions with experts and individuals concerned on the subject of habitual residence.

# Appendix 3 Curriculum Vitae

Vito John Bumbaca (1990), Anglo-Italian, holds a Master in International and European Law, as well as a certificate in Transnational Law, from the University of Geneva, and a Bachelor of Laws from the University of Florence. He acted as Lecturer at the Swiss School for International Relations, Assistant Lecturer at the Faculty of Law, University of Geneva (Uni Mail), Assistant Editor for the Yearbook of Private International Law and Sui Generis, and, prior to that, worked as Legal Advisor Regulatory Affairs at the International Social Service (ISS), whose General Secretariat is based in Geneva. Within the ISS mandate, Vito has successfully pleaded, together with the ISS International President, at the Council of Europe (European Committee on Legal Co-operation) towards the obtainment of the ISS observer status. For the purpose of this study, some practical cases relating to his professional activity are

referred to, although real names of the persons involved could not be mentioned. Vito is currently a member of the European Law Institute, of the Société Suisse de Droit International, and of the Société Suisse des Juristes. He has also fulfilled legal internships and working experiences in Brussels, Florence and Ufa (Bashkortostan, Russia). He was a visiting PhD student in Belfast, and a visiting scholar in Suzhou, Moscow, Verona and Dundee. Vito's publications are available at: <https://archive-ouverte.unige.ch/authors/view/108149>.

# Derniers ouvrages parus

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http://www.unige.ch/droit/CG.html

## Droit international

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