Burkhard Hess
Prof. Dr. Dres. h.c. at Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law, Luxembourg
ORCID: 0000-0002-1409-5456

Towards a Uniform Concept of Habitual Residence in European Procedural and Private International Law?

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1. Introduction

At present, European private international and procedural law is deeply fragmented with almost 20 different instruments exerting an effect – sometimes in a more general[1], sometimes in a very sectorial way[2]. It appears that the EU lawmaker is not following a general strategic plan but addresses different issues whenever there is a need for legislative action[3]. Nevertheless, the Union strives for a coherent and systematic interpretation of the instruments as recital no 7 of the Rome I Regulation demonstrates[4]. However, the fragmentation of the legal landscape impedes legal practice. In this regard, it is a truism that cross-border cases are still a rare exception (amounting to less than 5 % of all cases) and not routine in the everyday business of courts and parties (the situation of businesses operating in cross-border settings might be different to some extent)[5]. The EU lawmaker

[1] Pertinent examples in this respect are the Brussels I bis and Rome I and II Regulations (although the latter are fairly limited by only addressing conflict of laws in contractual and tortious relationships). This example demonstrates that the fragmentation in European private international law (conflicts of law) even transgresses the situation regarding the procedural instruments.

[2] The most sectorial instrument is Regulation (EU) 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters (OJ L 181, p. 4).

[3] B. Hess, *Europäisches Zivilprozessrecht*, Berlin 2021, para 3.7.

[4] D. Coster-Waltjen, *Einige Überlegungen zum Gebot der übergreifenden systematischen Auslegung nach Erwägungsgrund 7 der Rom I-VO*, „IPRax" 2020, p. 385, 386 ff.

[5] F. Gascon Inchausti, M. Requejo Isidro [in:] *The Luxembourg Report on European Procedural Law*, eds. B. Hess, P. Ortolani, 2019/1, p. 5 ff.

should be (and is) aware of that unsatisfactory situation. The EU Parliament in particular has raised these issues on several occasions[6].

One way to overcome this fragmentation would be to consolidate all existing legal instruments into one codifying instrument. Many scholars, especially in the French and German doctrine, have been proposing this solution[7]. In this regard, the legal doctrine has been discussing the idea of a so-called "0-Regulation" for almost 10 years[8]. The idea is to establish a general framework regulation that provides uniform definitions and establishes concepts in a transversal way for all EU instruments of private international and procedural law thus giving coherence and guidance to legal practice[9]. This idea of a 0-Regulation corresponds largely to German doctrinal thinking where the idea of a "general part" of a codification has long-standing in tradition. However, it must be noted in this regard that the (famous) general part of the German Civil Code has been criticized by many scholars as impossible to teach to students since 1900 (when it entered into force). Scholars denounced the abstraction of general terms and concepts that they could not explain adequately to their students. Legal practice has been facing the same deficiencies. Despite this long negative experience which has impeded legal education for more than 120 years, German doctrine brought up the idea of formulating a parallel "general instrument" of European private international and procedural law[10].

One of the overarching concepts and definitions which such a general instrument could clarify is "habitual reference". This concept appears to be a transversal one[11]. Although Articles 62 and 63 of the Brussels Regulation do not build on the habitual residence of parties but on their domicile[12], the situation in other EU instruments is different: most of them use the term "habitual residence" as a main connecting factor[13]. This is especially so for the Brussels II ter Regulation but also applies to all other EU instruments in family matters (infra 2.1). The concept is also found (and largely explained[14]) in the Succession

6 B. Hess, *Europäisches Zivilprozessrecht...*, paras 14.9 ff with further references.

7 The most prominent proponent in France is the volume of *Quelle architecture pour un code de droit international privé?*, eds. M. Fallon, P. Lagarde, S. Poillot-Peruzetto, Bruxelles 2011; *General Principles of European Private International Law*, ed. S. Leible, Alphen aan den Rijn 2016.

8 The concept has not lost its attractiveness in legal science. The GEDIP is working on a project of a 0-Regulation and the European Association of Private International Law has established a working party to explore the possibilities of a uniform concept (following the model of the Swiss Law on Private International Law).

9 R. Wagner, *A Rome-0 Regulation from a Political Point of View* [in:] *General Principles...*, ed. S. Leible, pp. 61 ff.

10 It must be noted that most German scholars refine the project to conflict of law rules, excluding therefore European procedural law.

11 M.P. Weller, B. Rentsch, *Habitual Residence: A Plea for 'Settled Intention'* [in:] *General Principles...*, ed. S. Leible, pp. 171 ff.

12 In the Brussels I bis Regulation, habitual residence is used to protect the weaker party, cf. Articles 15(3) and 19(3) against unilateral jurisdiction agreements.

13 Article 5(1) of the 2019 Hague Judgments Convention refers to the habitual residence of the persons against whom recognition and enforcement are sought, cf. H. Jacobs, *Das Haager Anerkennungs- und Vollstreckungsübereinkommen vom 2. Juli 2019*, Tübingen 2021, p. 206–209.

14 By recitals 24 and 25 see infra text at footnotes 33 and 34.

Regulation (infra 2.2) but it also appears in articles of the Rome I and II Regulations (infra 2.6). In insolvency proceedings, the centre of main interests of the debtor provides for a similar concept (infra 2.4). Still, the question remains whether the EU law maker would consolidate the fragmented provisions in order to develop a coherent concept.

This paper takes up the present state of affairs and explores whether habitual residence is based on a basic or even uniform concept. Starting from its application in different EU instruments of private international and procedural law, the paper reviews and assesses recent CJEU case law on the topic that has been growing rapidly during the last years. Without anticipating too much the outcome of this paper, it seems fair to state at the outset that the working out of a uniform concept of "habitual residence" does not appear to be a realistic task because it appears to be too closely linked to the specific context of particular circumstances of each case in its practical application[15]. Furthermore, this result also entails a more general statement about the present situation of the European law of civil procedure: it would be premature to stop the ongoing development of the concept by the CJEU through case law by imposing a "half-reflected" legislative definition of a very sensitive concept.

2. Different Applications in European International Procedural and Private Law

2.1. European Family Law

The most prominent application of habitual residence is found in the Brussels II ter Regulation[16]. Here, the concept applies to the two material areas of the Regulation by allocating jurisdiction in cases of divorce[17] and of parental responsibility. In divorce proceedings, Article 3(1)[18] provides that the courts of the Member State shall have jurisdiction where the spouses are habitually resident, or were last habitually resident, insofar as one of them still resides there, or the respondent is habitually resident. Three additional heads of jurisdiction equally refer to the habitual residence of one of the spouses[19], whereas Article 3(2) refers to nationality.

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[15] Recently: B. Rentsch, *Der Gewöhnliche Aufenthalt im System des Europäischen Kollisionsrechts*, Tübingen 2017.

[16] 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 (OJ L 178, p. 1).

[17] The Regulation equally applies to separation and nullity.

[18] The text of this provision has been unchanged since the adoption of 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 both spouses (OJ L 160, p. 19), cf. Conclusions AG Campos Sánchez-Bordona, 8 July 2021, C-289/20, IB, EU:C:2021:561, paras 34 ff.

[19] These provisions read as follows: "In the event of a joint application, either of the spouses is habitually resident, (4) the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made, or (5) the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is national of the Member State in question".

The jurisdictional provisions of the regulations on matrimonial property[20] and on maintenance[21] either refer to the heads of jurisdiction of the Brussels II ter Regulation (as ancillary heads of jurisdiction) or provide for heads of jurisdiction based on habitual residence, too. Accordingly, Article 8 of the Rome III Regulation[22] determines the law applicable to the divorce by reference to the habitual residence of the spouses in cases where the spouses do not agree on the applicable law[23]. In both constellations (regarding jurisdiction and applicable law), the reference to habitual residence requires a stable relationship to or a stable stay at a specific place[24]. However, the Regulations do not provide any definition of the concept[25].

In cases of parental responsibility, habitual residence operates to some extent differently. Article 7(1) of Brussels II ter Regulation[26] states:

"The courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the court is seized".

In addition, recitals 19 and 20 contain guidelines for the determination of the child's habitual residence. While recital 20 refers to the criterion of proximity and to the protection of human rights, recital 19 combines the habitual residence with the "best interest of the child"[27] – a criterion clearly unrelated to the habitual residence of adults. The interpretation of the habitual residence of a child shows that the (basic) concept – if there

[20] Article 5 of 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 (OJ L 183, p. 1, as amended). Article 6 lit (a), (b) and (c) of this Regulation equally connect jurisdiction in other constellations to the habitual residence.

[21] Article 3(c) and (d) of Council Regulation (EC) 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (OJ L 7, p. 1, as amended). Article 3(a) and (b) of this Regulation base jurisdiction on the habitual residence of either the defendant or the plaintiff.

[22] 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 (OJ L 343, p. 10).

[23] Cf. Articles 5–7 Rome III Regulation.

[24] Conclusions AG Campos Sánchez-Bordona, 8 July 2021, C-289/20, para 36.

[25] CJEU, 28 June 2018, C-512/17, HR, EU:C:2018:513, para 40 (addressing Article 8 of the Brussels II bis Regulation).

[26] This provision corresponds to Article 8 of the Brussels II bis Regulation.

[27] Recitals 19 and 20 read as follows: "(19) The grounds of jurisdiction in matters of parental responsibility are shaped in the light of the best interests of the child and should be applied in accordance with them. Any reference to the best interests of the child should be interpreted in light of Article 24 of the Charter of Fundamental Rights of the European Union ('the Charter') and the United Nations Convention on the Rights of the Child of 20 November 1989 (...). (20) To safeguard the best interests of the child, jurisdiction should in the first place be determined according to the criterion of proximity. Consequently, jurisdiction should lie with the Member State of the habitual residence of the child, except for certain situations set out in this Regulation, for instance, where there is a change in the child's residence or pursuant to an agreement between the holders of parental responsibility".

is any[28] – is adapted to the respective specific legal context and interpreted according to the circumstances of the case at hand[29]. The CJEU has constantly interpreted the concept of the habitual residence of a child in the light of all the pertinent individual circumstances of a case and independently from any EU instruments in different areas where the term "habitual residence" is equally used[30].

2.2. Habitual Residence in the Succession Regulation

The same basic approach is found in succession law where the last habitual residence of the deceased at the time of his or her death designates the competent court or judicial authority (Articles 4 ff. of Regulation (EU) 650/2012[31]) and the applicable law regarding the succession (Article 21). Submitting jurisdiction and applicable law to the same criteria would facilitate the parallelism (Gleichlauf) of the competent court and the applicable law[32]. According to recitals 23[33] and 24[34], the judicial authority, when determining the habitual residence of the deceased at the time of death, shall take into account all circumstances of the life of the deceased during the years preceding his death. It shall take into consideration all relevant facts, and in particular assess the duration and regularity of the presence of the deceased in the State concerned, including the conditions and reasons for

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[28] Cf. infra text at footnotes 115 ff.

[29] G. Van Calster, *European Private International Law*, Oxford 2021, para 3.52.

[30] Constant case law of the CJEU, since CJEU, 2 April 2009, C-523/07, A, EU:C:2009:225, para 37; 22 December 2010, C-497/10 PPU, Barbara Mercredi v. Richard Chaffe , EU:C:2010:829, paras 47 ff.

[31] 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 (OJ L 201, p. 107, as amended).

[32] As highlighted by recital 7 of Regulation 650/2012.

[33] Recital 23 reads as follows: "(...) In order to determine the habitual residence, the authority dealing with the succession should make 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, in particular the duration and regularity of the deceased's presence in the State concerned and the conditions and reasons for that presence. The habitual residence thus determined should reveal a close and stable connection with the State concerned taking into account the specific aims of this Regulation".

[34] Recital 24 says: "In certain cases, determining the deceased's habitual residence may prove complex. Such a case may arise, in particular, where the deceased for professional or economic reasons had gone to live abroad to work there, sometimes for a long time, but had maintained a close and stable connection with his State of origin. In such a case, the deceased could, depending on the circumstances of the case, be considered still to have his habitual residence in his State of origin in which the centre of interests of his family and his social life was located. Other complex cases may arise where the deceased lived in several States alternately or travelled from one State to another without settling permanently in any of them. If the deceased was a national of one of those States or had all his main assets in one of those States, his nationality or the location of those assets could be a special factor in the overall assessment of all the factual circumstances".

such presence. As a result, the habitual residence should reveal a close and stable link with the Member State exercising jurisdiction.

In the Succession Regulation, the EU lawmaker adopts habitual residence as a general connecting and overarching concept for both jurisdiction and conflicts of laws. Again, it adopts a sectorial approach in order to adapt the connecting link to the specific circumstances of the legal field[35]. The CJEU has taken up this approach in recent cases where the court – well advised by the Advocate Generals[36] – specified the need for an individual assessment of habitual residence in the given context of successions where the deceased (as the main "interested party") cannot be asked in the proceedings[37]. As a result, one must state that there is still considerable uncertainty regarding habitual residence – despite the attempts of the Court to clarify the concept[38]. The legal literature tends to elaborate different case groups but it is still an open question whether the CJEU will take up this approach[39].

2.3. The Maintenance Regulation

Following parallel Hague instruments[40], the Maintenance Regulation provides for a multitude of heads of jurisdiction in order to facilitate claims for maintenance by creditors. The basic connecting factor is the habitual residence of the defendant (Article 3(a)); alternatively, the habitual residence of the plaintiff applies (Article 3(b))[41]. The alternative heads of jurisdiction permit a creditor to choose the most appropriate place to enforce his or her claim[42]. Interestingly, the application of the concept has not generated major problems[43] – the decisive criteria are the living circumstances of the maintenance creditor at the place where he or she initiates proceedings. In the case of adults, the concept of the Regulation corresponds to the concept of Article 3 of the Brussels II ter Regulation[44].

[35] Recitals 23 and 24 clearly adapt the general concept to the specificities of succession law. The recitals expressly refer to the present instrument.

[36] Examples: Conclusions AG Szpunar, 22 February 2018, C-20/17, Oberle, EU:C:2018:89; AG Campos Sánchez-Bordona, 26 March 2020, C-80/19, E.E., EU:C:2020:230, paras 45 ff.

[37] CJEU, 16 July 2020, C-80/19, E.E., EU:C:2020:569, para 38.

[38] However, recital 23 and 24 provide the most helpful guidance for the national justice systems applying the concept of "last habitual residence", B. Hess, *Europäisches Zivilprozessrecht...*, para 7.199 ff.

[39] O. Remien, *Die Europäische Erbrechtsverordnung und die vielen Fragen der europäischen Rechtsprechung – fünf Jahre nach Inkrafttreten*, „IPRax" 2021, p. 329 ff.

[40] In particular, the 2007 Hague Protocol on the Law Applicable to Maintenance Obligations. Its Article 3 refers to the habitual residence of the creditor.

[41] B. Rentsch, *Der gewöhnliche Aufenthalt...*, p. 296 ff.

[42] CJEU, 5 September 2019, C-468/18, R v. P, EU:C:2019:666, paras 59 and 60; B. Hess, *Europäisches Zivilprozessrecht...*, para 7.142.

[43] Cf, however, CJEU, 5 September 2019, C-468/18.

[44] This systematic connection becomes evident in the case of a jurisdiction agreement by the spouses. According to Article 4(1)(c) of Regulation 4/2009, the spouses may conclude a jurisdiction agreement designating the courts of their last common habitual residence, B. Hess, *Europäisches*

Similarly, in the case of minors, the concept of Article 7 of the Brussels II ter Regulation must be followed, as jurisdiction in maintenance matters depends on the best interest of the child in order to determine the child's financial needs for living. Consequently, Article 3(c) and (d) of Regulation 4/2009 provide for ancillary jurisdiction in divorce proceedings or in proceedings on parental responsibility[45].

2.4. The Insolvency Regulation

The concept of habitual residence is also present in the Insolvency Regulation. Here, it serves as an indirect criterion to determine the debtor's centre of main interest: Article 3(1) Regulation 848/2015[46].

According to Article 3(1) subpara (4), the centre of the main interests of a natural person is presumed to be located at the principal place of business or at his or her habitual residence. However, the criteria determining the habitual residence are different from the instruments in family law: here, the financial and economic indicators of the debtor and their ascertainability to third parties (the creditors of the debtor) are decisive[47]. Obviously, economic factors determine the centre of main interests of the insolvent individual debtor. Practically, the respective court or judicial authority – when assessing its jurisdiction – needs to examine all objective factors[48]. As a result, this assessment is very similar to the examination in family and succession matters. However, it relates to the financial and economic interests and activities of the debtor.

2.5. The Payment Order and the Small Claims Regulation

An additional and different application of the habitual residence is found in the Payment Order[49] and Small Claims Regulations[50]. As a matter of principle, both instruments follow

Zivilprozessrecht..., para 7.144; B. Rentsch, *Der gewöhnliche Aufenthalt...*, p. 297; M. Brosch, *Die Rechtswahl und Gerichtsstandsvereinbarung im internationalen Familien- und Erbrecht der EU*, Tübingen 2019, p. 21 ff.

45 CJEU, 16 July 2015, C-184/14, A v. B, EU:C:2015:479, paras 40 ff: The court addressing parental responsibility is usually in the best position to evaluate the child's financial needs.

46 Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (OJ L 141, p. 19, as amended). B. Hess, *Europäisches Zivilprozessrecht...*, para 9.31.

47 CJEU, 16 July 2020, C-253/19, Novo Banco, EU:C:2020:585, paras 23–24. B. Hess, *Europäisches Zivilprozessrecht...*, paras 9.28 ff.

48 Article 3(1) subpara (4) of Regulation 2015/848 provides for a rebuttable presumption. In case most assets of the debtor are located in a different Member State, the courts of this Member State may exercise jurisdiction, CJEU, 16 July 2020, C-253/19, paras 29–30.

49 Regulation (EC) 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure (OJ L 399, p. 1, as amended).

50 Regulation (EC) 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure (OJ L 199, p. 1, as amended).

the jurisdictional regime of the Brussels I bis Regulation which is based on the concept of domicile[51]. However, both instruments limit their territorial scope of application to cross-border settings (Article 3). These constellations are defined as situations where the parties are domiciled or habitually resident in different EU Member States. Yet, the instruments do not clarify whether there is any difference between the terms used in the pertinent provisions. It appears that habitual residence is being used as a fall-back provision. So far, case law has not addressed the issue[52].

2.6. Conflict of Law Rules in the Rome I and II Regulations

Finally, an additional concept of habitual residence is found in the conflict of law rules of the Rome I[53] and II Regulations[54]. Especially in the Rome I Regulation, habitual residence operates as a subsidiary connecting factor to establish the applicable law when the parties have not agreed on the applicable law (cf. Article 3)[55]. Consequently, habitual residence operates as a part of the default regime of Article 4 that refers to the characteristic obligation of the contract at hand[56]. In the cases of a sales contract or a contract for services – just to mention the most important constellations – the place where the debtor operates his or her business is decisive[57]. This place of operation is determined by the habitual residence of the seller or the service provider, which Article 19 assimilates to his or her principal place of business[58].

In the Rome II Regulation, the role of habitual residence is more limited as the criterion is only used in some of the specific heads designating the applicable law, i.e. in the context of product liability with regard to the habitual residence of the person sustaining the damage (Article 5). In addition, Article 4(2) considers the common habitual residence

51 B. Hess, *Europäisches Zivilprozessrecht...*, Chapter 10 II and III.

52 B. Rentsch, *Der gewöhnliche Aufenthalt...*, p. 322–323.

53 Regulation (EC) 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ L 177, p. 6, as amended).

54 Regulation (EC) 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) (OJ L 299, p. 40); B. Rentsch, *Der gewöhnliche Aufenthalt...*, p. 278.

55 The concept had been initially adopted in the 1980 Rome Convention on Applicable Law to Contractual Matters.

56 It must be noted that this regime does not apply generally but only to some case groups of Article 4(2), especially lit a), lit b), lit e) and lit f). F. Ferrari, *From Rome to Rome via Brussels: Remarks on the Law Applicable to Contractual Obligations Absent a Choice by the Parties (Art. 4 of the Rome I Regulation)*, Rabels Zeitschrift für ausländisches und internationales Privatrecht (The Rabel Journal of Comparative and International Private Law), 2009 , 750, 753; B. Rentsch, *Der gewöhnliche Aufenthalt...*, p. 281.

57 In this context, the habitual residence appears to be similar to the habitual residence in the context of the Insolvency Regulation.

58 The determination may be based on similar factors as the determination of the COMI under Article 3 Insolvency Regulation, supra at footnote 49.

of both parties as a closer connection and an exception to the basic rule of Article 4(1) of the Rome II Regulation[59].

Finally, both instruments provide for an autonomous definition of the "habitual residence" of legal persons and individuals. The latter "fixes" Article 19 of the Rome I Regulation as follows:

"(1) For the purposes of this Regulation, the habitual residence of companies and other bodies, corporate or unincorporated, shall be the place of central administration. The habitual residence of a natural person acting in the course of his business activity shall be his principal place of business.

(2) Where the contract is concluded in the course of the operations of a branch, agency or any other establishment, or if, under the contract, performance is the responsibility of such a branch, agency or establishment, the place where the branch, agency or any other establishment is located shall be treated as the place of habitual residence"[60].

Compared to the open concept of habitual residence in family and succession law, Article 19 of the Rome I and Article 23 of the Rome II Regulations make a considerable difference[61]. They provide for a self-standing definition mainly operating as presumptions. As such, they do not require a full assessment of all the circumstances of an individual case. Consequently, the definition in the instruments remains clearly confined to the specific context[62]. In addition, habitual residence is mostly used as one of several elements to determine the applicable law. Thus, it appears that the EU lawmaker adopted a sectorial approach instead of developing an overarching concept[63]. Besides that, it must be mentioned that these definitions are not comprehensive as they do not define the habitual residence of consumers, a criterion equally used in the regulations.

3. Historical and Systematic Background: Habitual Residence in Conventions of the Hague Conference of Private International Law

The concept of habitual residence was not an invention of the European lawmaker. It appeared in several Conventions of the Hague Conference of Private International Law generally since the 1950s[64]. In this period, the intention of using the criterion of habitual

[59] A. Dickinson, *The Rome II Regulation: The Law Applicable to Non-contractual Obligations*, Oxford 2008, paras 4.80 ff.

[60] The same definition is found in Article 23 of the Rome II Regulation.

[61] Cf. a different opinion of A. Dickinson, *The Rome II Regulation...*, para 3.49, who refers to the Brussels II bis Regulation for the determination of the criterion and expects the respective case law of the Court to become decisive for the interpretation of Article 23 of Regulation Rome II.

[62] As they refer to the principal place of business, they only apply to businesspersons, not to consumers although the Rome I Regulation also refers to the habitual residence of the consumer, ie in Article 6(1).

[63] G. Van Calster, *European Private International Law...*, para 3.52 highlighting the importance of the context of adjudication to be taken into account.

[64] B. Rentsch, *Der gewöhnliche Aufenthalt...*, p. 93, 102 ff. It must be mentioned that the 1905 Hague Convention on Civil Procedure already used the criterion of habitual residence in the context of legal aid.

residence was twofold: on the one hand, it aimed at overcoming nationality as a connecting factor (mainly in family matters). This intention of the Hague Conference had a worthy aim. Since WW II (and in the time before), nationality had become an instable connecting factor as authoritarian and totalitarian regimes had denied citizenship and, in addition, nationality to persecuted groups within their own populations[65]. As a result, stateless and displaced persons were deprived of any basic protection of their private (human) rights[66]. Consequently, the Hague Conference strived to replace nationality with habitual residence as a connecting factor. On the other hand, there was an ongoing debate among the Contracting States of the Hague Conference about whether nationality or domicile was the best-suited connecting factor to be adopted. The replacement of both concepts by habitual residence was a political compromise eventually accepted by both sides[67], and helped bolster the willingness of states to ratify the Conventions of the Conference[68].

Against this background, the 1956 Maintenance Convention firstly used habitual residence as the main (and exclusive) connecting factor[69]. Here, the reference to habitual residence being the centre of the personal and social relationships of a person makes more sense as the determination and calculation of maintenance largely depends on the needs of the creditor as determined by his or her local situation[70]. However, the materials of the Convention do not provide any definition of habitual residence, which was considered to be a factual reference to all pertinent circumstances of the case at hand. This approach is also found in other Conventions of the Hague Conference, starting with the 1961 Hague Convention on the Protection of Minors, equally in the 1980 Child Abduction Convention and finally in the 1996 Convention on the Protection of Adults[71]. According to a long-standing and continuous practice, the Hague Conference avoided any discussion on and, therefore, any definition of the concept of the habitual residence[72]. However, the concept is related to the ideas of the closest connection and of proximity, which are generally accepted connecting factors in private international and procedural law. In everyday language, it indicates a lawful or stable stay of a person as well as their social integration in a specific place[73].

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65 F.A. Mann, *„Der gewöhnliche Aufenthalt" im Internationalen Privatrecht: Ein Beitrag zum Problem der Rechtsvereinheitlichung*, „Juristen Zeitung" 1956, p. 466.

66 Many victims had been expelled and killed in the 1930s and 1940s. The survivors often lived for a long time as so-called stateless persons in different camps before they could immigrate. Similar situations persist today.

67 L.I. De Winter [in:] *Recueil des Cours. Collected Courses, Tome/Volume 128*, Leiden 1969, p. 349, 357 ff.

68 B. Rentsch, *Der gewöhnliche Aufenthalt...*, p. 103; J. von Hein, *The role of the HCCH in shaping private international law* [in:] *The Elgar Companion to the Hague Conference of Private International Law*, eds. T. John, R. Gulati, B. Köhler, Cheltenham 2020, p. 112, 118–119.

69 The 1956 Convention only addressed conflicts of laws, not jurisdiction.

70 This underlying idea was recognized by the CJEU in case C-184/14 with regard to Article 3 of the EU Maintenance Regulation.

71 Summarising B. Rentsch, *Der gewöhnliche Aufenthalt...*, p. 122 ff.

72 D. Baetge, *Der gewöhnliche Aufenthalt im internationalen Privatrecht*, Tübingen 1994, p. 33 ff.

73 Conclusions AG Campos Sánchez-Bordona, 8 July 2021, C-289/20, para 36 with further references.

4. Autonomous, but Sectorial Interpretation: the Case Law of the CJEU

Many EU-instruments, not only in private international law, refer to the habitual residence of individuals and moral persons[74]. In European Union law, the adoption of habitual residence as a connecting factor is similar to its usage in the Hague Conventions through a justification: As EU law prohibits any discrimination on the ground of nationality, using nationality as a connecting factor is difficult to justify. Against this background, it was no surprise that EU law adopted the criterion of habitual residence in private international and procedural law instruments[75]. Like the Hague Conventions, European family and succession laws do not provide for any comprehensive definition of the concept[76].

Being Union law, the interpretation of habitual residence falls within the genuine competence of the CJEU. According to its consistent case law, the Court interprets EU law autonomously, taking into account the scheme and the objective of the respective instrument but also the function of the provision in the specific context[77]. However, the primary objective of the autonomous interpretation is to avoid any reference to national law[78]. In this regard, the basic approach of EU law does not differ from the concept of the Hague Conventions, which equally strive for a uniform interpretation[79]. The following section scrutinizes the CJEU's case law to inquire if there is any comprehensive approach to habitual residence.

4.1. European Family Law

During the last decade, the Court has been more frequently asked about the concept and meaning of habitual residence in EU family law instruments. Most judgments related to the habitual residence of children under Article 8 of the Brussels II bis Regulation[80]. In the first case, C-523/07, A, the Court stated clearly that habitual residence is a notion of EU law, to be interpreted autonomously according to the wording, framework and

[74] For an overview cf. B. Rentsch, *Der gewöhnliche Aufenthalt...*, p. 228 ff; A. Dutta, *Domicile, habitual residence and establishment* [in:] *Encyclopedia of private international law. Vol. 1*, eds. J. Basedow, G. Rühl, F. Ferrari, F. Miguel Asensio, A. Pedro, Cheltenham 2017, p. 555 ff.

[75] A. Dutta, *Domicile...*, p. 555, 556 ff.

[76] During the negotiations of the 1998 EC-Convention which was the model for the present regulation, delegations tried to define habitual residence, but without success, Report of A. Borrás to the Convention (OJ 1998 C 221, p. 27), para 33.

[77] CJEU, 2 April 2009, C-523/07, para 40; CJEU, 8 June 2017, C-111/17 PPU, OL v. PQ, EU:C:2017:436.

[78] B. Hess, *Europäisches Zivilprozessrecht...*, paras 4.44 ff.

[79] Explanatory Report Lagarde to the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, signed at the Hague on 19 October 1996, Doc. Conf. de La Haye 1996 (552), p. 40. However, the Hague instruments are not taking profit from a supranational court providing for a binding and uniform interpretation.

[80] Now Article 7 of the Brussels II ter Regulation.

objective of the regulation[81]. Secondly, the Court held that the case law pertaining to legal instruments of EU law in different areas of law (especially staff regulations and social law) could not be transposed to Article 8 Brussels II bis Regulation[82]. The Court eventually developed a (cautious) description of habitual residence to be "interpreted as meaning that it corresponds to the place which reflects some degree of integration by the child in a social and family environment"[83]. The Court added several criteria indicating the sufficient social integration of the child to be applied in the case under consideration[84]. Lastly, it held that it was "for the national court to establish the habitual residence of the child, taking account of all the circumstances specific to each individual case"[85]. When commenting on the judgment, some authors have reflected on whether the concept was legal or primarily factual[86].

In the course of the last decade, the Court has developed its approach further: in cases C-497/10 PPU, Barbara Mercredi v. Richard Chaffe[87], and C-512/17, HR[88], the Court especially stressed the importance of the physical presence of the child in the Member State exercising jurisdiction under Article 8 Regulation Brussels II bis as a starting point[89]. It emphasised that the adjective "habitual" indicates that the residence must have a certain stability or regularity[90]. Therefore, it required that the courts of the Member States must assess all pertinent factors to clarify that the presence of the child is not in any way temporary or intermittent[91].

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81 CJEU, 2 April 2009, C-523/07, paras 37–41. The case concerned a family with several minor children that lived partially in Finland and in Sweden at different places.

82 CJEU, 2 April 2009, C-523/07, para 36.

83 CJEU, 2 April 2009, C-523/07, para 38.

84 The Court stated: "To that end, in particular 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 in that State must be taken into consideration", CJEU, 2 April 2009, C-523/07, para 39.

85 CJEU, 2 April 2009, C-523/07, para 41.

86 In this regard, the qualification of habitual residence has always been disputed in legal doctrine. B. Rentsch, *Der gewöhnliche Aufenthalt...*, p. 296 with further references.

87 CJEU, 22 December 2010, C-497/10 PPU.

88 CJEU, 28 June 2018, C-512/17, paras 46 and 52 ff.

89 This issue was highlighted in case C-393/18 PPU where the father had coerced the then-pregnant mother to move from England to Bangladesh where the child was born. The mother returned to England and applied at the High Court of London to become ward of her child. However, the CJEU held that the wrongful behaviour of the father could not establish any habitual residence of the child in England as the child had never been physically there, CJEU, 17 October 2018, C-393/18 PPU, UD v. XB, EU:C:2018:835, para 59. Similar constellation: CJEU, 24 March 2021, C-603/20 PPU, SS v. MCP, EU:C:2021:231, paras 46 and 56.

90 CJEU, 22 December 2010, C-497/10 PPU, para 44.

91 Cf. CJEU, 2 April 2009, C-523/07, para 38; CJEU, 22 December 2010, C-497/10 PPU, para 49; CJEU, 9 October 2014, C-376/14 PPU, C v. M, EU:C:2014:2268, para 51; CJEU, 15 February 2017, C-499/15, W and V v. X, EU:C:2017:118, para 60; CJEU, 8 June 2017, C-111/17 PPU, para 43; CJEU, 28 June 2018, C-512/17, para 41.

As a connecting factor, habitual residence refers to proximity. This means that the court closest to the child's personal and familial environment is in the best position to assess the situation and the needs of the child. In several cases, the Court held that young children (newborn or a few months old) usually share the habitual residence of the parent who takes care of the child[92]. In this regard, the CJEU referred to recital 12 of the Regulation, which links habitual residence directly to proximity and the child's best interests[93]. This reference to the best interest of the child demonstrates the necessity of distinguishing the concept of habitual residence of a minor from that of an adult[94].

So far, the Court has not yet directly addressed the concept of habitual residence under Article 3(1) of the Brussels II bis Regulation. Here, the situation is more complicated as the recitals of the Regulation do not provide any guidance[95]. However, two pending preliminary references are currently addressing this issue.

Case C-289/20, referred by the Cour d'Appel de Paris, relates to a French-Irish couple. The husband worked and stayed in Paris during the week while the wife and the family lived in Ireland. On weekends, the husband visited his family in Ireland. When the husband applied for a divorce in France, the wife seized the Irish courts. The jurisdiction of the French courts depends on the existence of a habitual residence of the husband in France. The question referred by the Cour d'Appel de Paris is whether Article 3(a) of the Brussels II bis Regulation permits the existence of two (or even more) permanent residences, one located in France and the other one in Ireland. Although, regarding nationality, the Court decided that several nationalities might entail additional heads of jurisdiction, the situation regarding habitual residence appears different[96]. Nationality is not used as the sole connecting factor, whereas habitual residence operates solely. Splitting up habitual residence would lead to a multiplication of heads of jurisdiction and, accordingly, of applicable laws. In succession matters, the Court has already decided that the assumption of several habitual residences would entail fragmentation and legal uncertainty[97] – a situ-

[92] CJEU, 17 October 2018, C-393/18 PPU, para 59. Similar constellation: CJEU, 24 March 2021, C-603/20 PPU, paras 46 and 56.

[93] CJEU, 2 April 2009, C-523/07, paras 31, 34 and 35; CJEU, 22 December 2010, C-497/10 PPU, paras 44 to 46; CJEU, 9 October 2014, C-376/14 PPU, para 50; CJEU, 8 June 2017, C-111/17 PPU, para 40.

[94] To assess the social and family integration of the child, the national court also needs to consider the habitual residence of the parent taking care of the child, CJEU, 2 April 2009, C-523/07, para 40, Conclusions AG Kokott, 29 January 2009, C-523/07, EU:C:2009:39, para 44.

[95] The Conclusions of AG Campos Sánchez-Bordona, 8 July 2021, C-289/20, paras 68 and 69, contain a (non-exhaustive) list of criteria to be assessed. These include inter alia: the jurisdiction of origin, the place where family and friends are living, the place where the individual rented or owns a flat, the nationality, the place of a regular work, a place where the individual has cultural ties.

[96] The Court declined to adopt the concept of effective nationality, CJEU, 16 July 2009, C-168/08, Laszlo Hadadi (Hadady) v. Csilla Marta Mesko, épouse Hadadi (Hadady), EU:C:2009:474, paras 51 ff. However, the situation in Article 3(b) is different as the nationality of both spouses is required, Conclusions AG Campos Sánchez-Bordona, 8 July 2021, C-289/20, paras 91 ff.

[97] CJEU, 16 July 2020, C-80/19, para 41 following the Conclusions AG Campos Sánchez-Bordona, 26 March 2020, C-80/19, para 42.

ation that the Brussels II bis Regulation clearly tends to avoid. Therefore, the Conclusions strongly advocate limiting the concept of habitual residence to one habitual residence only[98].

A second case, C-501/20[99], relates to a Spanish-Portuguese couple who were married in the Spanish embassy in Guinea Bissau while the spouses worked as detached staff members of the European Commission with diplomatic status. They had two children with Spanish and Portuguese nationality. The marriage broke down when they were detached to Togo. The wife started divorce proceedings in Spain, relying on Article 40 of the Spanish Civil Code according to which the habitual residence of diplomats abroad remains in Spain[100]. She applied for parental custody as well as for maintenance for the children[101]. The wife also asserted that the Togolese legal system would not provide adequate judicial protection[102]. In addition, diplomatic immunities might exclude the Togolese courts from exercising jurisdiction[103]. Finally, she relied on the *forum necessitatis* as contained in Article 7 of the Maintenance Regulation and on Article 47 of the Charter of Fundamental Rights in order to expand jurisdiction of necessity to divorce proceedings.

Case C-501/20 will permit the Court to elaborate on the influence of the temporary detachment of diplomats on the concept of habitual residence. However, it is hardly in doubt that the habitual residence of the spouses (and the kids) is in Togo as they have been staying there since 2015. The fact that relocation to another state or back to Europe could take place one day does not exclude the establishment of a close and durable connection as well as the social integration of the family in Togo during their stay.

On the other hand, the Court might consider that jurisdiction should be applied based on a *forum necessitates* in a case where effective judicial protection in the third state of habitual residence is not available. In case C-501/20, Article 6 of the Regulation

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98 Conclusions AG Campos Sánchez-Bordona, 8 July 2021, C-289/20, paras 71 ff. According to the Conclusions, habitual residence does not require any minimum time limit as the personal circumstances of spouses during a marital crisis may change quickly. However, there is a need to establish a stable connection between the person and the Member State, Conclusions AG Campos Sánchez-Bordona, 8 July 2021, C-289/20, para 60.

99 The preliminary reference and the summary of the case are available at: https://curia.europa.eu/juris/showPdf.jsf?text=&docid=234125&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1638975 (access 3.11.2021).

100 Here the problem arises that the status of European Union staff members is not a diplomatic status under the 1961 Vienna Convention of Diplomatic Relationships (UNTS 500, 95).

101 Consequently, additional questions concern the jurisdiction of the Spanish court to address parental responsibility and maintenance.

102 In this regard, the applicant refers to several reports of the UN Human Rights Committee criticising the lack of independence and of professionalism of the judiciary in Togo as well discriminatory practices against women.

103 It is disputed whether Articles 31 and 33 of the 1961 Vienna Convention on Diplomatic Relations apply to diplomats of the European Union and, therefore, diplomatic immunity excludes the jurisdiction of the Togolese courts. According to recital 14 of the Brussels II bis Regulation, if jurisdiction under the Regulation cannot be exercised by reason of the existence of diplomatic immunity, jurisdiction should be exercised in accordance with national law of a Member State in which the person concerned does not enjoy such immunity.

excludes the application of Spanish national law according to Article 7 of the Regulation Brussels II bis as the defendant is a Portuguese national. However, recital 14 might permit the application of Article 40 of the Spanish Civil Code in order to avoid a denial of justice[104]. In maintenance matters, Article 7 of the Maintenance Regulation permits the exercise of jurisdiction provided that there is a sufficient link to the Member State which, according to recital 16 of the Regulation may also be based on nationality. It remains to be seen whether the Court enlarges the jurisdictional scope of the Brussels II bis Regulation through analogy with Article 7 of the Maintenance Regulation – the Court is usually very reluctant in this regard[105]. Finally, the case will permit the Court to further clarify the concept(s) of habitual residence of spouses and children in the Brussels II bis Regulation.

4.2. The Succession Regulation

The second main area of the CJEU's case law regarding the notion of habitual residence relates to Articles 4 and 21 of the Succession Regulation. These provisions link the jurisdiction of the competent court and the applicable law to the succession to the last habitual residence of the deceased. Generally, parallelism of jurisdiction and applicable law appears to be an overarching objective of the Regulation[106]. Recitals 23 and 24 of the Regulation provide guidance as they contain a list of possible criteria that EU Member State courts may apply when assessing the last habitual residence of the *de cujus*.

To date, the CJEU has dealt with habitual residence in case C-80/19, E.E., in which the deceased, a Lithuanian national, spent the last years of her life in Germany where she lived with her husband. However, she had still kept ties with Lithuania where she owned an apartment and most items of her estate were located. Following the Conclusions of the Advocate General, the Court stated that habitual residence shall reveal a close and stable connection between the succession and the Member State concerned[107]. This assessment was difficult as the referring court had not provided much information on the factual circumstances. However, the Court made it clear that the national judges need to follow the guidelines of recitals 23 and 24 when assessing the factual circumstances of habitual residence. Finally, the Court explicitly stated that the concept excludes the existence of several last habitual residences. Permitting several (competing) habitual residences would entail considerable fragmentation (especially regarding the applicable laws) and would run counter to any predictability in cross-border settings, which is one main objective of the Regulation[108].

[104] Still, it remains to be seen whether the Court will deviate from Article 6 of the Regulation.
[105] B. Hess, *Europäisches Zivilprozessrecht...*, paras 4.99 ff and paras 4.104–4.105.
[106] Cf. recital 7 of the Succession Regulation.
[107] CJEU, 16 July 2020, C-80/19, para 38; Conclusions AG Campos Sánchez-Bordona, 26 March 2020, C-80/19, paras 42 ff.
[108] CJEU, 16 July 2020, C-80/19, para 41; Conclusions AG Campos Sánchez-Bordona, 26 March 2020, C-80/19, para 42.

E.E. is an important decision for the development of the legal concept of habitual residence by the CJEU. In line with its case law about Article 8 of Brussels II bis Regulation, the Court elaborated further on the basic legal criteria and their factual implementation. It advised the national judge to proceed as follows: As a starting point, there is a basic understanding of the concept as one striving to establish a stable and predictable connection of the individual to a specific jurisdiction. In a second step, this connection needs to be assessed in the light of the pertinent circumstances of the particular case[109]. Regarding the assessment, recitals 23 and 24 do not provide an exhaustive list of pertinent circumstances[110]. Furthermore, subjective factors, such as a person's intention to change their place of living, can be considered if they materialised in objectively provable activities[111].

5. Conclusion: the Desirability and Feasibility of a Uniform Concept

At present, it appears premature to infer a comprehensive concept of habitual residence from the case law of the CJEU. The Court has decided only a few cases, most of them related to the habitual residence of children[112]. However, the growing corpus of case law permits the sketching of a basic concept, at least in family and succession matters[113]. This corresponds to the function of the CJEU as being the only supranational court to address the issue comprehensively[114].

5.1. Assessment: Is the CJEU striving for a positive definition of habitual residence in EU private international law?

So far, the following basic features can been detected from its case law. Firstly, habitual residence is usually a connecting factor for both jurisdiction and conflict of laws[115]. In these constellations, having regard to only one aspect would disrupt the coherence of the concept[116]. Secondly, the underlying general ideas of the concept are proximity[117] and

[109] In this regard, the diverging powers of the EU Member State courts to assess their jurisdiction may severely impede the effective and uniform application of EU law. A harmonization of the diverging procedural rules of the EU Member States is needed. Article 81 TFEU confers competence to the European Union to adopt pertinent legislation.

[110] The list in recitals 23 and 24 is only indicative.

[111] CJEU, 16 July 2020, C-80/19, para 45; Conclusions AG Campos Sánchez-Bordona, 26 March 2020, C-80/19, para 52.

[112] See supra text at footnotes 81 ff.

[113] Cf. especially the pending cases C-289/20 and C-501/20.

[114] The conclusions of the Advocate Generals play a major role in the development of the concept.

[115] Cf. J. von Hein, *Münchener Kommentar zum BGB*, München 2018, Art. 5 EGBGB, para 140.

[116] This systematic context prohibits a subjective conception of habitual residence, see infra text at footnote 128.

[117] Between the competent court and the case as a comprehensive assessment of all pertinent facts is needed.

(a certain) stability which permit social integration[118]. These objectives demonstrate that the concept is not purely factual but also normative[119]. Third, the basic concept needs to be adapted to the needs of the legal field and the circumstances of the case at hand[120]. An assessment of all relevant factors is needed – as highlighted by recitals 23 and 24 of the Succession Regulation[121]. The court has set out a list of similar factors for the habitual residence of children[122]; it is expected to do the same for the habitual residence of spouses in the context of divorce[123]. The factors developed by the Court are analogous, despite differing contexts. This is no surprise, as they all localize individuals and operate as a connecting factor. However, neither the Court nor the Advocate Generals have applied the criteria listed in recitals 23 and 24 as guidelines for other EU-instruments. The case law here appears too cautious – the situations in family and succession matters are similar (as the heads of annex jurisdiction in maintenance and matrimonial property demonstrate). Subjective factors (such as the intention of the individual concerned)[124] may be considered when they have been objectively manifested. However, the basic concept of habitual residence is predominantly based on objective factors to be assessed by the court. As a result, a certain variation of the concept in different contexts is needed[125]. Still, this does not exclude the concept from being interpreted and applied in a similar way in "parallel" instruments as the Brussels II Regulation and the Maintenance Regulation demonstrate[126].

On the other hand, habitual residence in the Rome I and II Regulations is a self-standing, different concept as the legal definitions of Articles 19 of the Rome I and 23 of the Rome II Regulations demonstrate. Although the concept equally serves to localize the parties, it usually does not require a comprehensive assessment of all individual factors – what counts is the clear visibility of the existence of specific factors. Similar considerations apply to the determination of habitual residence in the context of the Insolvency Regulation although the localization of the debtor may require a more comprehensive assessment[127].

[118] CJEU, 16 July 2020, C-80/19, para 38; Conclusions AG Campos Sánchez-Bordona, 26 March 2020, C-80/19, paras 52 ff.

[119] B. Rentsch, *Der gewöhnliche Aufenthalt...*, p. 58 ff (summarising the discussion in the legal literature).

[120] As highlighted by recital 12 to the Brussels II ter Regulation: serving the best interest of the child in cases of parental responsibility.

[121] Similar guidelines should be included into the recitals of the Brussels II Regulation.

[122] Supra footnote 84.

[123] As already proposed by AG Campos Sánches-Bordona in case C-289/20, supra footnote 98.

[124] To stay permanently at a given place.

[125] Subjective factors are more important in the context of Article 3(1) of Brussels II bis Regulation than in the context of the Succession Regulation.

[126] CJEU, 16 July 2015, C-184/14, paras 36 ff., the interdependence is also highlighted by the heads of annex jurisdiction.

[127] CJEU, 16 July 2020, C-253/19; B. Hess, *Europäisches Zivilprozessrecht...*, paras 9.31–9.32.

5.2. Towards a subjective concept of habitual residence?

In the legal literature, Marc Philipp Weller and Bettina Rentsch propose conceiving of the concept of habitual residence as an intentional understanding based on a natural intention to dwell[128]. Relying on the case law of the Court of Justice[129], they consider that the main function of habitual residence is to describe the social integration of a person at a given place. Social integration shall require the disclosure of some degree of intention to stay. Finally, they place habitual residence closer to party autonomy as the natural will of a person to stay and integrate in a given place shall be decisive[130].

Although subjective elements may be considered as individual factors to be assessed and weighed when they have been clearly materialized, the extension of habitual residence to an equivalent of party autonomy does not correspond to its function as an objective determination of the closest relationship of a person with a given place[131]. Intentions may overcome the requirement of a longer stay at the place of habitual residence – especially in a situation of separation (and upcoming divorce)[132]. However, party autonomy in European procedural law is based on formal requirements, which should not be circumvented by "factual decisions" in the context of habitual residence[133]. Thus, a subjective conception of habitual residence is difficult to reconcile with the present system of European private and procedural law[134].

5.3. The (un)desirability of a codification

Finally, the ultimate question remains: would it make sense to define and describe habitual residence as an overarching concept of European private international and procedural law? The answer to this question must be negative. Although the case law of the Court of Justice has developed the function of the concept as a connecting factor, it has clearly respected the different contexts of its operation within various instruments[135]. Elaborating a large list of potential factual elements to be (partially) considered by the national courts in the different contexts would not make much sense. It would not increase

[128] M.P. Weller, B. Rentsch, *Habitual Residence...*, p. 171, 184–187; more cautious B. Rentsch, *Der gewöhnliche Aufenthalt...*, pp. 150 ff.

[129] Especially CJEU, 22 December 2010, C-497/10 PPU, para 51, where the Court emphasised the intention of the mother of the child to return to her jurisdiction of origin.

[130] M.P. Weller, B. Rentsch, *Habitual Residence...*, p. 171, 186; more cautious B. Rentsch, *Der gewöhnliche Aufenthalt...*, p. 375–376.

[131] The need of physical presence at a given place cannot be replaced by the subjective will to stay there, CJEU, 8 June 2017, C-111/17 PPU, para 48.

[132] Conclusions AG Campos Sánchez-Bordona, 8 July 2021, C-289/20, para 60.

[133] Cf. Article 25 of the Brussels Regulation.

[134] Same opinion J. von Hein, *Münchener Kommentar zum BGB...*, Art. 5 EGBGB, para 153.

[135] And as Articles 3 and 8 of the Regulation Brussels II bis demonstrate, even the different contexts within one single instrument.

predictability and legal certainty[136]. However, the EU lawmaker should provide more guidance by listing potential criteria in the recitals of the respective instruments.

Abstrakt

Ku jednolitemu pojmowaniu miejsca zwykłego pobytu w europejskim prawie procesowym i prawie prywatnym międzynarodowym?

Burkhard Hess – *Profesor doktor, doktor honoris causa, Instytut Prawa Procesowego Maxa Plancka, Luksemburg*
ORCID: 0000-0002-1409-5456

W prawie prywatnym międzynarodowym i prawie procesowym Unii Europejskiej miejsce zwykłego pobytu jest często używanym pojęciem służącym do określania jurysdykcji i prawa właściwego. Jego szerokie zastosowanie nie oznacza jednak, że opiera się ono na jednolitym pojmowaniu tego terminu. W artykule przeanalizowano różne obszary, w których stosowana jest ta zasada. Podkreślono, że w prawie europejskim nie istnieje jednolita koncepcja zwykłego pobytu, mimo że bazuje ona przede wszystkim na czynnikach obiektywnych. Ponadto, z punktu widzenia regulacji prawnych, nie wydaje się pożądane traktowanie tego pojęcia w jednolity sposób. W tym zakresie orzecznictwo Europejskiego Trybunału Sprawiedliwości, rozróżniające różne zastosowania tego pojęcia, wydaje się być wyważone.

Słowa kluczowe: *miejsce zwykłego pobytu, łącznik, europejskie prawo prywatne międzynarodowe, europejskie prawo procesowe*

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