Civil Procedure Review
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Habitual Residence as a Ground of Jurisdiction in Matrimonial Disputes Connected with the EU: Challenges and Potential

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Abstract:

Habitual residence has long been a well-established ground of jurisdiction in family law matters decided both in purely internal cases and in proceedings connected with other EU Member States different from the forum. Nonetheless, its increasing role in defining jurisdiction especially in divorce, legal separation and annulment cases under Regulation (EU) No 2201/2003 on matrimonial matters (so called 'Brussels IIa'), coupled with the lack of an autonomous definition at the EU level, have given rise to diverging interpretations by Member States' courts. As a result, the non-uniform

1. *Part of the Member States' case-law on Reguation (EC) No 2201/2003 referred to in the present article was collected in the context of the Project "EU Judiciary Training on Brussels IIa Regulation: From South to East" coordinated by Professor Costanza Honorati (University of Milano-Bicocca) and co-funded by the European Union (DG Justice and Consumers, JUST/2014/JTRA/AG/EJTR/6854), to which the author took part as external expert (not funded); the related research materials are published on the official website of the Project: http://www.brussels2family.eu/.

application of habitual residence can represent a threat to predictability and unjustified discrimination in cases involving couples having an objective connection with the EU. The following observations aim at providing a little guidance in the determination of the actual meaning of habitual residence, deriving from common principles developed by the EU Court of Justice and evident in the recent case-law of the Member States on Brussels IIa Regulation.

Keywords: Habitual residence; EU grounds of jurisdiction in matrimonial matters; Regulation (EU) No 2201/2003.

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1. THE SEARCH FOR AN AUTONOMOUS INTERPRETATION OF HABITUAL RESIDENCE IN MATRIMONIAL PROCEEDINGS IN THE EU

Habitual residence is a key concept in an increasing number of EU acts introduced in the area of civil justice, especially involving family law issues. Precisely, the first time it has been used as a connecting factor to determine jurisdiction in matrimonial matters (divorce, legal separation and annulment cases) within the Regulation (EC) No 1347/2000, later repealed by the Regulation (EC) No 2201/2003 (so called 'Brussels IIa'),[2] involving proceedings aimed at the definition of the matrimonial status of a

2. 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 (so called Brussels II, OJ L 160, 30 June 2000, 19-36); 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 (OJ L 338 of 23 December 2003, 1-29); both acts are referred to as 'Brussels II system' hereinafter. For other relevant Regulations referring to habitual residence as connecting factor and ground of jurisdiction see: Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the

Civil Procedure Review, v. 11, n. 1: jan.-abr. 2020.
ISSN 2191-1339 – www.civilprocedurereview.com

growing number of heterosexual couples moving before, during and/or after their marriage breakdown inside or outside the European Union and thus often having multiple and fragmented contacts with more than one forum.[3] The reference to habitual residence made within Brussels IIa was decided exactly with the scope of identifying

law applicable to divorce and legal separation (OJ L343, 29 December 2010, so called 'Rome III'; cf. arts 5 and 8); 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 (OJ L7/2009; cf. arts 3, 4, 5, 6, 8, 11, 27, 32, 45(d)); 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 L201/2012; cf. arts 4, 6, 10, 13, 16, 21, 27, 28); and finally Regulations (EU) No 1103/2016 and No 1104/2016 respectively on 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 and on property consequences of registered partnerships (OJ L 183, 8 July 2016 1-29, 30-56; cf. respectively arts 5, 6, 16 and arts 6 and 16 and, for applicable law arts 22-25 26, 28 of both regulations).

3. See generally on the 'Brussels II system' on matrimonial matters: J. Basedow, G. Rühl, F. Ferrari, P. de Miguel Asensio, I. Queirolo, *EU Law and Family Relationships: Principles, Rules and Cases*, Rome, 2015, 212-216; K. Siehr, *Verordnung (EG) Nr. 1347/2000 (EuEheVO),* in *Münchener Kommentar zum Bürgerlichen Gesetzbuch* (MüKoBGB), Internationales Privatrecht I, Band 10, 6. Aufl., 2015, Rdn. 1106-1177; C. Althammer (ed.), *Brüssel IIa, Rom III. Kommentar zu den Verordnungen (EG) 2201/2003 und (EU) 1259/2010*, München, 2014; S. Corneloup (dir.), *Droit européen du divorce. European Divorce Law*, Paris, 2013; U. Magnus, P. Mankovsky (eds.), *Brussels IIbis Regulation*, Munich, 2012; B. Nascimbene, *Divorzio, diritto internazionale privato e dell'Unione europea*, Milano, 2010; T. Rauscher (Hrsg.), *Europäisches Zivilprozess- und Kollisionsrecht, Band 4: Brüssel IIa-VO, EG-UntVO, EG-ErbVO-E,* Paris, 2010; L. Schiano di Pepe, I. Queirolo (a cura di), *Lezioni di diritto dell'Unione europea e relazioni familiari*, 2nd edn., Torino, 2010; M.N. Shùilleabhàin, *Cross-border divorce law: Brussels II bis*, Oxford, 2010; S.M. Carbone, *Lo spazio giudiziario europeo in materia civile e commerciale. Da Bruxelles I al regolamento CE n. 805/2004*, 6th edn., Torino, 2009; C. Holzmann, *Brüssel IIa VO: Elterliche Verantwortung und internationale Kindesentführungen*, Sellier, Paris, 2008; K. Boele-Woelki, C. Gonzalez Beilfuss (eds.), *Brussels II bis: Its Impact and Application in the Member States,* Antwerp-Oxford-New York, 2007; I. Queirolo, *Separazione, annullamento, divorzio e responsabilità genitoriale: il regolamento CE 2201/2003*, in G. Ferrando (diretto da), *Il nuovo diritto di famiglia*, *Vol. I, Matrimonio, separazione e divorzio*, Bologna, 2007, 1107 ff.; H. Fulchiron, C. Nourissat (dir.), *Le nouveau droit communautaire du divorce et de la responsabilité parentale*, Paris, 2005; R. Baratta, *Scioglimento e invalidità del matrimonio in diritto internazionale privato*, Milano, 2004, 143-185; G. Biagioni, *Il nuovo regolamento comunitario sulla giurisdizione e sull'efficacia delle decisioni in materia matrimoniale e di responsabilità dei genitori*, in *Rivista di diritto internazionale*, 2004, 991-1035; E. Gallant, *Responsabilité parentale et protection des enfants en droit international privé*, Paris, 2004; P. McEleavy, *Brussels IIbis: Matrimonial Matters, Parental Responsibility, Child Abduction and Mutual Recognition*, in *Int. Comp. Law Quarterly*, 2004, 503-512; R. Baratta, *Il regolamento comunitario sulla giurisdizione e sul riconoscimento di decisioni in materia matrimoniale e di potestà dei genitori sui figli,* in *Giustizia civile,* 2002, 455-469; B. Ancel, H. Muir-Watt, *La désunion européenne: le Règlement dit 'Bruxelles II'*, in *Revue critique de droit international privé*, 2001, 403-457; A. Bonomi, *Il regolamento comunitario sulla competenza e il riconoscimento in materia matrimoniale e di potestà dei genitori*, in *Rivista di diritto internazionale*, 2001, 298 ff.

an objective connection[4] between one or both spouses and the forum State[5] with a certain degree predictability.

Although such a notion was not new to national civil procedure and private international law rules of many States in matrimonial disputes, the EU legislator made no express reference to those national legal concepts. In fact, even though the Brussels IIa Regulation does not contain any definition of habitual residence of an adult, reference to the internal notions of Member States shall be avoided, due to the well-established principle requiring a uniform interpretation of EU law. In general, the term of a provision included in a EU act must normally be given an *autonomous* meaning, following the so called 'golden rule' of interpretation applied constantly by the Court of Justice in Luxembourg since the *Cilfit* judgment, specifying that "legal concepts do not necessarily have the same meaning in Community law and in the law of the various Member States".[6] Besides "every provision of Community law must be placed in its *context* and interpreted in the light of the provisions of Community law *as a whole*, regard being had to the *objectives* thereof and to its state of *evolution* at the date on which the provision in question is to be applied".[7]

To this extent, useful criteria must first be looked for both in EU law (taking into account the specific context of the provision and all the relevant acts), and in general common principles valid throughout all the EU.[8] The latter are enshrined in the fundamental provisions of the Treaties (including the EU Charter of Fundamental Rights) and have been often identified by the European Court of Human Rights. This said, the

4. See recital no 12 of BII Regulation. It should be highlighted that under the Regulation no space is given to spouses' autonomy to agree on fora (with the very limited exception of the ground of jurisdiction of the habitual residence of either spouse in case of joint application, provided for in Article 3(1)(a) forth indent, even if they can choose among several uniform grounds of jurisdiction pre-set in the Regulation.
5. Brussels IIa Regulation does not determine the venue *ratione loci* and *materiae* of the single judge who should hear the case within the forum State having jurisdiction over the matter: this is left to the national rules of each Member State (see, for an example, Oberlandesgericht München, 20 December 2013, discussed in more detail in Section 5. of this Chapter, where internal civil procedure rules have been correctly applied in order to resolve a case of *lis pendens* between two German judges seised for divorce and legal separation involving the same couple).
6. ECJ, judgment 6 October 1982, case C-283/91, *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*, para 19 (emphasis added; ECR 1982, 3415). On the principles of interpretation in EU private international law and specifically in family matters see L. Tomasi, C. Ricci, S. Bariatti, *Characterisation in family matters for purposes of European private international law*, in J. Meeusen, M. Pertegás, J, Straetmans, F. Swennen (eds.), *International family law for the European Union*, Antwerp-Oxford-New York, 2007, 341-388.
7. ECJ, *Cilfit* cit., para 20 (emphasis added).
8. Cf. among the first Scholars tackling the issue of the identification of common principles in EU family matters, R. Baratta, *Verso la comunitarizzazione dei principi del diritto di famiglia*, in *Rivista di diritto internazionale privato e processuale*, 2005, 593 and 597; D. Martiny, *Objectives and values of (private) international law in family law*, in in J. Meeusen, M. Pertegás, J, Straetmans, F. Swennen (eds.), *International family law for the European Union*, cit., 69-99.

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ISSN 2191-1339 – www.civilprocedurereview.com

Court of Justice has admitted that, where it cannot ascertain -neither in EU law nor in the general principles of EU law- the "criteria enabling it to define the meaning and scope of such a provision by way of independent interpretation", the application of EU law "may sometimes necessitate a *reference to the laws of the Member States*", in order to realize both the need for uniformity and the respect for the principle of equality.[9]

In other words, whenever autonomous interpretation is not feasible, *uniformity* should still be looked for in legal systems of all the Member States of the European Union, considered as 'a whole'. Such a search should then be focused on finding *common criteria* in the law (and practice) of all the Member States*, irrespective of particular notions* accepted only in one or few jurisdictions. Further, the suggested reference to domestic law may generally develop on the basis of three different patterns: (i) the direct application of substantive law notion of the *lex fori*; or (ii) the identification of law indicated by the conflict-of-law provisions of the *forum* State; or finally (iii) the reference to a specific State law.[10]

The first pattern (i), which requires the application of national substantive law notions, given the diversity of each legal system, would most probably lead to non-uniform solutions and thus should be avoided. On the opposite, a uniform interpretation would result through the *renvoi* by the EU legislator to the law indicated both by private international law rules of the forum State if the conflict-of-law rules are the same of the other Member States (pattern ii) and by the single State law identified by the EU act directly (pattern iii).

With regard to Brussels IIa Regulation, as already noticed an explicit definition of habitual residence of adults is lacking[11]. At the same time, the EU legislator has not

9. Court of First Instance, two judgments dating 18 December 1992, *José Miguel Díaz García v European Parliament*, case T-43/90, para 36 (ECR 1992, II-2619) and case T-85/91, *Khouri v Commission*, paras 32-33 (ECR 1992, II-2637), later confirmed by the same Court in the judgment 21 April 2004, case T-172/01, *M. v Court of Justice*, paras 69-73 (ECR 2004, II-1075); L. Tomasi, C. Ricci, S. Bariatti, *Characterisation in family matters for purposes of European private international law*, spec. 369-371, 378-385, underlying that the uniformity is required "in order to assure that no discrimination is made between similar situations and that the same rights and duties are recognized for the parties to a legal relationship irrespective of the Member State concerned".

10. L. Tomasi, C. Ricci, S. Bariatti, *Characterisation in family matters*, cit., 382.

11. See generally on the issue: P. Beaumont, J. Holliday, *Recent Developments on the Meaning of 'Habitual Residence',* in *Aberdeen Centre for PIL Working Paper* No. 2015/3, 2016; K. Hilbig-Lugani, *'Habitual Residence' in European Family Law: the Diversity, Coherence and Transparency of a Challenging Notion"*, in K. Boele-Woelki, N. Dethloff, W. Gephart (eds.), *Family Law and Culture in Europe: Developments, Challenges and Opportunities*, Antwerp-Oxford-New York, 2014, 249-262; K. Pranevičienė, *Unification of Judicial Practice Concerning Parental Responsibility in the European Union - Challenges Applying Regulation Brussels II Bis*, in *Baltic Journal of Law & Politics*, 2014, Vol. 7, Issue 1, 113-127; C. Ricci, *Habitual Residence as a Ground of Jurisdiction in Matrimonial Disputes: from Brussels II-bis to Rome III*, in A. Malatesta, S. Bariatti, F. Pocar (eds.), *The External Dimension of EC Private International Law in Family and Succession Matters*, Padova, 2008, 207-219; R. Lamont, *Habitual Residence and Bruxelles II* bis: *Developing Concepts for European Private International Family Law*, in *Journal of Private International*

even indicated the pattern to follow to make reference to Member States' legislation, differently from what happens both under Article 3(2) of the same Regulation for the term of "domicile" (which must be characterised, following mode (iii), referring to the legal systems of the United Kingdom and Ireland),[12] and under the system of Brussels I Regulations dealing with civil and commercial matters, for the same notion identified through the reference to the conflict of law rules of the *forum* State, as per mode (ii).[13]

In the absence of a specific definition in the Regulation, the present contribution aims at verifying whether a uniform notion of habitual residence of adults to be used under Brussels IIa can be construed on the basis of "basic principles among Member States, irrespective of limited and secondary divergences",[14] taking into account both its *context* and the purpose of the relevant EU law, considered as a whole, with special regard to its state of evolution, following the clear path traced by the already mentioned golden rule of interpretation given by the CJEU.

2. ANALYSIS OF THE LEGAL CONTEXT

It is undisputed that the lack of a 'Europe-autonomous' definition of habitual residence, from one side, granted a certain degree of flexibility to the entire Brussels II system, leaving to the Member States' courts a margin of appreciation to weight all the circumstances and connections of the party/parties with different fora in order to determine the jurisdiction with EU countries in compliance with the scope and objectives of the Regulation(s) in favour of "the higher mobility of cross-border couple and their specific needs".[15]

Nonetheless, from another side, in more complex cases involving couples whose life has been connected (voluntary or involuntary) with many different States in variable

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Law, 2007, 261 ff.; M. Pertegás, *Beyond Nationality and Habitual Residence: Other Connecting Factors in European Private International Law in Family Matters*, in J. Meeusen, M. Pertegás, J, Straetmans, F. Swennen (eds.), *International family law for the European Union*, Antwerp-Oxford-New York, 2007, 319-340; A. Richez Pons, *Habitual Residence considered as a European Harmonization Factor in Family Law (regarding the "Brussels II-bis" Regulation)*, in K. Boele-Woelki (ed.), *Common core and better law in European family law*, Antwerp-Oxford-New York, 2005.

12. P. Stone, *EU Private International Law. Harmonisation of laws*, 2006, Cheltenham-Northampton, 419-440; Id., *Stone on Private International Law in the European Union*, 4th edn., Cheltenham-Northampton, 2018, 605-610.

13. A. Dutta, *Chapter D.8: Domicile, habitual residence and establishment*, in J. Basedow, G. Rühl, F. Ferrari and P. de Miguel Asensio (eds.), *Encyclopedia of Private International Law*, Cheltenham-Northampton, 2017, 555-561; P. McEleavy, *The Communitarization of Divorce Rules: What Impact for English and Scottish Law?*, in *International and Comparative Law Quarterly*, 2004, 623; F. Salerno, *I criteri di giurisdizione comunitari in materia matrimoniale*, in S. Bariatti, C. Ricci (eds.), *Lo scioglimento del matrimonio nei regolamenti europei: da Bruxelles II a Roma III*, Padova, 2007, 3-28.

14. Cf. L. Tomasi, C. Ricci, S. Bariatti, *Characterisation in family matters*, cit., 358-388, 380.

15. MPI Luxembourg, *Chapter 3. Jurisdiction*, in I. Viarengo, F.C. Villata (eds.), *Planning the future of cross border families: a path through coordination*, published online at: http://www.eufams.unimi.it/wp-content/uploads/2017/12/EUFams-Final-Study-v1.0.pdf, spec. at 136.

Civil Procedure Review, v. 11, n. 1: jan.-abr. 2020.
ISSN 2191-1339 – www.civilprocedurereview.com

manners, such a lack has proved to be challenging.[16] This conclusion is confirmed by the analysis of the case-law of Member States' judges trying to apply the unified grounds of jurisdiction provided by Brussels IIa to the matrimonial breakdown of spouses having fragmented relations with multiple fora, with a specific intention (if not fraud) or by accident.[17] Even in these cases, a guidance in interpreting the concept of habitual residence for matrimonial disputes must be first looked for within the legal context in which it is inserted, both the specific one (Brussels IIa) and in the relevant EU law, considered as a whole.

2.1. The role of habitual residence of adults within the context of Brussels IIa Regulation

The CJEU has given no guidance for determining spouses' habitual residence so far within the meaning of Brussels IIa Regulation, while it has rendered specific judgments interpreting children's habitual residence,[18] observing though that the

16. See *Borrás Report*, paras 27-64. Cf., for a partially different opinion, R. Lamont, *Habitual Residence and Brussels II*, cit., 268-273. Cf. F. Salerno, *I criteri di giurisdizione comunitari in materia matrimoniale*, cit., 63, referring to the *Leffler* case on Regulation No 1348/2000 (Case C-443/03, *Leffler* v. *Berlin Chemie AG*, ECR 2005, I-9611, para. 43) to justify the necessary independent and autonomous character of the Regulations having their basis on Article 65 EC. This could imply the irrelevance of the mentioned explanatory report to the 1998 Convention based on Article K3 TEU from which the same Regulations originated.

17. Cf. I. Viarengo, *International Divorce Proceedings in Italy: Issues Arising in the Case Law*, in *Rivista di diritto internazionale privato e processuale*, 2016, 701-724; J. Hodson, *What is jurisdiction for divorce in the EU? The contradictory law and practice around Europe,* in *International Family Law*, 2014, 170-174; R. Hausmann, *Commentaires des dispositions du Règlement 2201/2003 Bruxelles II* bis *relatives au divorce. Articles 3, 4 and* 5, in S. Corneloup (dir.), *Droit européen du divorce*, cit., 235-260; M. Fallon, *Commentaires des dispositions du Règlement 2201/2003 Bruxelles II* bis *relatives au divorce. Articles 6 and 7*, in S. Corneloup (dir.), *Droit européen du divorce*, cit., 261-282; C. Campiglio, *Il foro della residenza abituale del coniuge nel Regolamento (CE) N° 2201/2003: note a margine delle prime pronunce italiane*, in *Cuadernos de Derecho Transnacional (octubre 2010)*, vol. 2, n. 2, 242-249; A. BorrÁs, *Competencias exclusivas y competencias residuales de Bruselas II a Roma III*, in *Essays in honour of Konstantinos D. Kerameus*, vol. 1, 2009, 165-181; A. BorrÁs, *"Exclusive" and "Residual" Grounds of Jurisdiction on Divorce in the Brussels IIbis Regulation*, in *IPRax*, 2008, 233-235; S. Corneloup, *Les règles de competence*, in H. Fulchiron, C. Nourissat (dir.), *Le nouveau droit communautaire du divorce*, cit., 69-86 ; P. McEleavy, *The Communitarization of Divorce Rules*, cit., 622; V. Gaertner, *European Choice of Law Rules in Divorce (Rome III): An Examination of the Possible Connecting Factors in Divorce Matters against the Background of Private International Law Developments*, JPIL, 2006, 128; R. Lamont, *Habitual Residence and Brussels II* bis, cit., 261; P. Stone, *EU Private International Law. Harmonization of Laws*, cit., 400; F. Salerno, *I criteri di giurisdizione comunitari in materia matrimoniale*, cit., 72.

18. Two EUCJ judgments are particularly relevant to this extent: 2 April 2009, case C-523/07, *A*, paras. 37-40 (ECR 2009, I-2805); 22 December 2010, case C-497/10 PPU, *Mercredi*, paras 53-55 (ECR 2011, I-70). See for an in-depth analysis of the determination of habitual residence of the child in the light of his or her best interest: A. Limante, I. Kunda, *Jurisdiction in Parental Responsibility Matters*, in C. Honorati (ed.), *Jurisdiction in Matrimonial Matters, Parental Responsibility on International Abduction. A Handbook on the Application of Brussels IIa Regulation in National Courts*, Torino-Frankfurt am Main,

latter notion is very peculiar because of the typical scope of protection of their 'best interests' of the minors indicated in the Regulation for parental responsibility and child abduction cases.[19] Thus, the interpretation of a child's habitual residence cannot be directly transposed for the assessment of jurisdiction in divorce, legal separation and annulment of marriage,[20] leaving the interpreter without a guiding principle to determine adults' one. Moreover, the latter is particularly relevant in Brussels IIa because such an instrument is referring always to habitual residence while listing six[21] (out of

2018, 64-91; while for the definition of the best interest of the child in the light of return proceedings see C. Honorati, A. Limante, *Jurisdiction in Child Abduction Proceedings*, *ibidem*, 133-136.

19. With regard to parental responsibility, habitual residence has seldom constituted a problem in the application of the relevant Hague Conventions, that represent the model to which the Community acts (both EC Regulations No 1347/2000 and No 2201/2003), and even before the 1998 Convention, referred to. Even The Hague Conference on Private International Law has deliberately refrained from giving a definition thereof, so that the same concept could be flexible and adaptable to the practical circumstances of each case. It is left to the interpreter to determine the forum State through the quantitative and qualitative evaluation of all the connecting factors that can be relevant in order to grant the "best interest of the child". See generally: B. Ancel, H. Muir Watt, *L'intérêt supérieur de l'enfant dans le concert des juridictions: Le Règlement de Bruxelles II bis*, in *Revue critique du droit international privé*, 2005, 569-605; P. Beaumont, P. McEleavy, *The Hague Convention on International Child Abduction*, Oxford, 1999. Cf. for example the debate held during the drafting of the 1996 Convention on the international protection of children in *Proceedings of the Eighteenth Session (1996)*, *II, Protection of children*, 226, 319-323, 552. The issue is expressly considered in the *Report of the Special Commission drawn up by Peter Nygh and Fausto Pocar* to the preliminary draft Convention on jurisdiction and foreign judgments in civil and commercial matters, *Preliminary Document No 11 of August 2000 (Nineteenth Session of June 2001),* published in F. Pocar, C. Honorati (eds.), *The Hague Preliminary Draft Convention on Jurisdiction and Judgments*, 2005, 228 and 302. Cf. K. Siehr, *General Problems of Private International Law in Modern Codifications* – De lege lata *and* de lege europea ferenda, in *Yearbook of Private International Law*, 2005, 33.
20. See again ECJ judgment, *Mercredi* (para. 53), mentioned *supra*, note 17, mostly with the effect of child's age on the weight to be attributed to the habitual residence of the adult primary carer: when the child is just an infant of few days or months, the criterion of physical presence and intention to integrate in social and family environment must be referred to the care-giver and the factual circumstances showing the steps followed by the same parent to settles down, such as finding a house, looking for a job, etc. See A. Limante, I. Kunda, *Jurisdiction in Parental Responsibility*, cit., 68-70, 75. In favor of the extension of the case-law on habitual residence of children to adults', see T. Kruger, *Chapter 2. Finding a habitual residence*, in in I. Viarengo, F.C. Villata (eds.), *Planning the future of cross border families*, cit., 78 ff.
21. Under Article 3(1)(a) the Regulation includes the following six alternative grounds of jurisdiction (in six distinguished indents) based on habitual residence either of both spouses or of only one partner, and linked to other factors:

    - either common actual habitual residence of the couple: in this case, it is sufficient that the spouses live within the same State even if in different places, since it is highly probable they do not cohabit anymore;

    - or last common habitual residence of the couple, insofar as one of them still resides there, in order to facilitate the one who remained, he/she being familiar with the language of the State and able to have the benefit of all the contacts necessary to undertake an action;

    - or habitual residence of the respondent, in application of the well-known common principle actor sequitur forum rei;

Civil Procedure Review, v. 11, n. 1: jan.-abr. 2020.
ISSN 2191-1339 – www.civilprocedurereview.com

seven, including common nationality) equally alternative[22] grounds of jurisdiction for divorce, legal separation and annulment proceedings (Articles 3(1)(a), 4 and 5). The same grounds of jurisdiction are referred to as "exclusive" (as it reads in the title of Article 6), since they are the only ones that can be used for the matters covered by the Brussels IIa Regulation. This implies that, whenever there is a court in one Member State having jurisdiction under Articles 3-5, there is no room for application of other rules, in particular of the national rules, including the internal rules on *lis pendens*.[23]

- or habitual residence of either of the spouses, in the event of a joint application, if *lex fori* admits it, being this the only (limited) case which gives the spouses certain choice of forum;

- or habitual residence of the applicant, where the applicant resided there for at least a year immediately before the application was made;

- or habitual residence of the applicant, where the applicant resided there for at least six months immediately before the application was made and either is a national of the Member State in question or, in the case of the United Kingdom and Ireland, has his/her 'domicile' there.

The last two criteria are based exceptionally on the *forum actoris* in conjunction with other conditions and have been long debated among the Member States, in contrast with the first four that did not raise much doubt. They are less favorable to the spouse who had moved away because he/she had to wait up to six or twelve months to start an action. On the other hand, such jurisdictional rules work to the benefit of the spouse who is still living in the last common habitual residence: he/she can immediately start a divorce action (under the second indent of Article 3(1)(a)). It should be noted that, as the CJEU has recently specified, the forum actoris included in the fifth and sixth indents of Article 3(1)(a) 'is provided to protect the interest of the spouses' only, by adding a forum in favour of one of them when bringing to court an action dealing with their marriage. As a consequence, the court stated that "A third party may not rely on such grounds of jurisdiction." This is the interpretation followed by the CJEU, 13 October 2016, C-294/15, *Mikołajczyk*, para. 49-52, in affirming that the daughter born from a previous marriage, and resident in Poland, cannot bring in that State an action for annulment of the second marriage celebrated by the father in France, since Poland never constituted the residence of the spouses during the second marriage. Nonetheless, the CJEU said that such an interpretation "does not deprive that third party of access to the courts, since such party may rely on other grounds of jurisdiction provided for in Article 3" that are not specifically set forth in the interest of the spouses. S. Corneloup, *L'action en annulation du mariage intentée par un tiers après le décès d'un époux – Cour de Justice de l'Union européen, 13 octobre 2016, aff. C- 294/15*, in *Revue critique de droit international privé*, 2017, 291-294; C. Ricci, *Jurisdiction in Matrimonial Matters (Articles 3-7)*, in C. Honorati (ed.), *Jurisdiction in Matrimonial Matters*, cit., spec. 45-47.

22. All the grounds of jurisdiction set out in Article 3 (and also, for specific cases in Articles 4 and 5) are alternative. There is no hierarchy among them, as specified by the CJEU in the *Hadadi* case (16 July 2009, C-168/08). In this case, the court clarified that the so-called 'principle of *favor divortii*' enshrined in the Brussels IIa Regulation (which should favour the possibility to obtain a divorce and have it recognized/enforced in the EU) allows the jurisdiction of the courts of a Member State to be determined in the presence of just one of the objective links indicated under Article 3 and thus also when the applicant 'does not put forward other links' (even more genuine) with that State (para. 45 and 57). As a result, even if the plaintiff is linked to the court seised only, for example, on the basis of the sole common nationality of the couple, that is enough to determine the jurisdiction of such a judge (no other links are required with the forum).

23. This simple statement nonetheless gave rise to tricky questions in practice, where a court of a non-EU State is seised but there is another court of a Member State having jurisdiction under Articles 3-5 of the Regulation. The question left partially open by the EU legislator is how to determine the moment of the commencement of the proceedings when two connected claims are pending

Member States' rules may only be used in those (few) cases where the Regulation is not applicable ('residual jurisdiction' under Article 7).

Such an interpretation of the ambiguous wording of Articles 6 and 7 was confirmed by the CJEU in the *Sundelind Lopez* case,[24] where the court specified that in the Brussels IIa Regulation there is no personal general forum (as in Regulation No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, the so-called Brussels I). Instead, the application of Brussels IIa Regulation, on one hand, does not depend on any characteristics of the respondent, and, on the other, is confirmed whenever there is a court of a Member State having jurisdiction under Articles 3-5, including situations where an action is brought against a respondent who is not a national of or resident in the EU.[25]

Moreover, according to Article 17, the court of a Member State, lacking jurisdiction under the Brussels IIa Regulation and seised of a case over which the courts of another

simultaneously before a Member State and before a third State. Two similar decisions are indicative to this extent. The first case concerned the divorce of a French couple having their habitual residence in Switzerland. The divorce was claimed by the husband in France in April 2010, but challenged by the wife in June 2010 on the ground that Swiss courts had already been seised to take provisional measures concerning the marriage (*mesures de protection de l'union conjugale*). In July 2010, the French court of first instance – after considering that the Brussels IIa Regulation was not applicable because the couple had their habitual residence in a third State – declined jurisdiction in favour of the Swiss courts. The Court of Appeal reversed the decision, clarifying the absence of a *ratione loci* rule in the Regulation and stated that French courts had jurisdiction pursuant to Article 3(1)(b) – due to common French nationality. In addition, by referring to Article 16 of the Regulation, the Court of Appeal strictly applied the *lis pendens* chronological rule and came to the conclusion that, with regard to the merits, French courts were seised before the Swiss courts. Therefore, French courts had exclusive jurisdiction over the divorce proceedings (Cour d'Appel de Lyon*,* 11 April 2011, No 10/05347). Similarly, in the second case, the Tribunale di Milano in 2014 declared Italian jurisdiction in the proceeding for legal separation between an Italian husband and a Moroccan-Italian wife on the basis of the common Italian nationality of the spouses (pursuant to Article 3(1)(b)), applying also Articles 16 and 19 Brussels IIa Regulation in order to verify that the Italian judge was seised before the Swiss court, which was the forum of the State of their 'prevalent' habitual residence (Tribunale di Milano, 16 April 2014).

24. See *CJEU, 29 November 2007, Case C-68/07, Sundelind Lopez*, where on the basis of this reasoning, the CJEU affirmed French jurisdiction over the divorce claim brought by the Swedish wife against the Cuban husband, the two spouses having settled their common habitual residence in France while married, even if soon after the couple's break the husband went back to Cuba. At the same time, no space was left to Swedish internal rules on jurisdiction wrongfully applied by the Swedish judge first seised.

25. The misleading phrasing of Articles 6 and 7 caused much confusion for the first years of application of the Brussels IIa Regulation. For example, a Spanish court was petitioned by a Moldovan wife, habitually resident in Spain for several years, for divorce from her Moldovan husband, who was resident in Moldova. Instead of declaring its jurisdiction on the basis of Article 3(1)(a) fifth indent of the Regulation (habitual residence of the applicant protracted for more than one year in the forum State), the court declared its lack of jurisdiction over their divorce in accordance with Article 22(3) of the Spanish Judiciary Act (LOPJ) – affirming that, on the one hand, the defendant was not domiciled in Spain and, on the other, the claimant was not Spanish (*Audiencia Provincial de Barcelona,* 15 December 2005, No 821).

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Member State have jurisdiction pursuant to the same act, has to declare of its own motion that it has no jurisdiction.[26]

From this brief analysis of the specific legal *context* in which it is inserted, it is evident that habitual residence and its identification is fundamental for different reasons: firstly, to define the subjective scope of application of the Brussels IIa Regulation and thus assess jurisdiction within the EU under Articles 3-5, excluding applicability of Member States' internal criteria.

Secondly, such a uniform jurisdictional ground is functional to encourage trust between all Member States' courts "for the creation of a genuine judicial area" (recital no 2 of the same Regulation), since it forms "the basis of the simplified recognition and enforcement regime" of divorce, separation and annulment decisions within the EU. With this regard, in fact, even if Brussels IIa prohibits the review the jurisdiction of the rendering court (Article 24), each national judge must "*assume that there was an appropriate connection* between the Member State court and the dispute".[27]

Finally, all the above mentioned results would be relevant to spouses who are not 'significantly' linked to the EU to know in advance with a certain degree of *predictability* which court could settle the disputes over their matrimonial crisis and all the other connected claims.

These are the same reasons requesting a clearer guidance to determine habitual residence in complex cases where it is not so easy to detect the "appropriate" and significant connection with a Member State jurisdiction for matrimonial disputes. Since Brussels IIa is not helping to this extent, it has been affirmed that the interpreter

26. Consequently, many States corrected their previous practice. Nonetheless, unfortunately, even afterwards some (few) national courts have still wrongfully grounded their jurisdiction on national rules in cases to which the Brussels IIa Regulation has to be applied. It should be noted, however, that at least in some instances the application of national rules has produced the same final practical result that the Regulation would have brought, as national rules and the Regulation often use similar grounds of jurisdiction. See Tribunale di Ravenna, 31 March 2016, deciding over two Moroccan nationals that got married in Morocco in 1992 and had three children. The family was habitually resident in Italy. In 2015 the wife, due to the violent behaviour of the husband, applied for divorce before the Tribunal of Ravenna. The court grounded its jurisdiction not on Article 3 Brussels IIa Regulation, but – wrongfully – on Article 3 of the Italian Private International Law Statute (Law No 218/1995) according to which the jurisdiction shall lie with the Italian judges if the defendant is *simply* resident in Italy. Similar harmless misapplications were made by: Audiencia Provincial de Murcia, *10 October 2013 No 598*, confirming Spanish jurisdiction *also* in accordance with Article 22(3) of the Spanish Judiciary Act (LOPJ) over divorce proceedings initiated in Spain by the Spanish husband against the Spanish wife still residing in France, where their common habitual residence used to be before the return to Spain of the former; Tribunale di Milano, 22 December 2011, improperly affirming Italian jurisdiction over a divorce action on the basis of the sole Italian nationality of the claimant (under Article 32 of the Italian PIL No 218/1995) against the Dominican spouse, without realizing that, since the couple had been habitually resident in Italy, the Brussels IIa Regulation had to be applied.

27. R. Lamont, *Habitual Residence and Brussels II* bis*: Developing Concepts for European Private International Family Law*, *JPIL*, 2007, 261 (emphasis added).

could draw inspiration from the same notion as applied in different contexts by the EU legislator, because "individuals do not compartmentalise their lives into sections such as tax, social security and family" and thus "it would make sense to simplify and converge approaches across legal fields rather than to needlessly complicate them".[28]

2.2. The concept of habitual residence developed by the EU Court of Justice in other contexts

In the interpretation of notions used in EC acts in other fields, such as namely fiscal matters, social security and Staff Regulation, the Court has considered that habitual residence refers to the State "where the habitual centre of their interests was to be found"[29] or, more precisely, "in which the official concerned has established, with the *intention* that it should be of a lasting character, the permanent or habitual centre of his interests. However, for the purposes of determining habitual residence, all the factual circumstances which constitute such residence must be taken into account."[30]

More recently in *Swaddling* the Court specified the relevance to be attributed to the intentional factor, stating that, to determine where the habitual centre of their interests is to be found under Article 10(*a*) of Regulation No 1408/71, "account should be taken in particular of the employed person's *family situation*; the *reasons* which have led him to move; the *length* and *continuity* of his residence; the fact (where this is the case) that he is in stable employment; and his *intention as it appears from all the circumstances*."[31] In that case, eight weeks were considered enough for a worker to regain the habitual residence status in his State of origin where he come back and reside again together with all his family (that had never moved) after a long period spent in another Member State only for working reasons.

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28. T. Kruger, *Chapter 2. Finding a habitual residence*, cit., 78.

29. Cf. Case C-169/03, *Wallentin* v. *Riksskatteverket*, ECR 2004, I-6443, para. 15, recently confirmed in the judgment of 25 January 2007, Case C-329/05, *Finanzamt Dinslaken* v. *Meindl*, para. 23, nyr (cf. http://curia.europa.eu).

30. Case C-452/93, *Fernández* v. *Commission*, ECR 1994, I-4295, para. 22, mentioned by A. Borrás in the *Explanatory Report*, cit., para. 38 (emphasis added): "However, although not applicable under the 1968 Brussels Convention, particular account was taken of the definition given on numerous occasions by the Court of Justice, i.e. '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". Cf. the consistent previous decisions of the Court: Case 13/73, *Angenieux et al.* v. *Hakenberg*, ECR 1973, 935; Case 76/76, *di Paolo* v. *Office nationale de l'emploi*, ECR 1977, 315; 14 July 1988, Case 284/87, *Schäeflein* v. *Commission*, ECR 1988, 4475; Case C-297/89, *Rigsadvokaten* v. *Ryborg*, ECR 1989, I-1943, para. 19; but also Case T-63/91, *Benzler* v. *Commission*, ECR 1992, II-2095, paras. 17 and 25.

31. Cf. Case C-90/97, *Swaddling* v. *Adjudication Officer*, ECR 1999, I-1075, para. 29, referring, *mutatis mutandis* in relation to Article 71, para. 1, lit. *b*, *ii* of Regulation No 1408/71, to the previously cited case 76/76, *di Paolo*, paras. 17 to 20, and to the decision of 8 July 1992, Case C-102/91, *Knoch* v. *Bundesanstalt für Arbeit*, ECR 1992, I-4341, paras. 21 and 23.

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From these decisions it follows that, on the one hand, the intention of residing in a certain place could be relevant only when the factual situation would confirm it but, on the other hand, it could also allow *immediate* acquisition of habitual residence, without a specific length of time being required.[32]

Therefore, the analysis to determine an adult's habitual residence in the EU Court's view should *preeminently* refer to the *objective* circumstances; the *subjective* element (*i.e.* the intention of the spouses) can be of a certain importance as well, even though it would not be enough *per se*. In practical terms, the requirement of *stability* and *regularity* can be discretionarily evaluated on a case-by-case analysis by each different Member State's courts.

Against this background, it is still not clear whether the rule of interpretation given in these decisions in other context can be used extensively for the interpretation of Brussels IIa on matrimonial proceedings. In this sensitive area of law, other EU principles elaborated by the Court could not entirely be applicable. Nonetheless, the same meaning is usually attributed to a notion used in different instruments "with the precise aim of *coordinating* their respective scope of application".[33]

From the previous considerations it follows that an intervention of the Court would be desirable or even necessary (waiting for a future specific action of the EU institutions) to clarify the extent to which the analysed case-law on habitual residence can be exported to family law instruments and/or to give an autonomous notion of habitual residence or to indicate all the common factors that should be considered relevant,[34] as emerged from the comparative overview of the national practice (but far from the single divergences).[35]

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32. P. McEleavy, *The Communitarization*, cit., 623.
33. L. Tomasi, C. Ricci, S. Bariatti, *ibidem*, 380 (emphasis added) and further *infra*, in the last paragraph.
34. This seems to be the approach assumed by E. Gebhardt in the *Working Document on the Law Applicable in Matrimonial Matters* (PE 391.952v01-00), presented to the Parliament by the Committee on Civil Liberties, Justice and Home Affairs, where it can be read: "One wonders whether it would not be useful to add a definition of the concept of the 'common habitual residence'…, no definition being included at present. If there is to be a definition, we need to think about what should be included in the definition… this could go beyond the objective facts to include the spouses' intentions, to make the residence a permanent, or at least a long-term one".
35. In the opinion of F. Salerno, *I criteri di giurisdizione comunitari in materia matrimoniale*, cit., 14-17, a broad interpretation of the ground of jurisdiction represented by habitual residence could be justified following Opinion No 1/2003, where the Luxembourg Court affirmed its preference for an extensive interpretation of 'domicile' within the Brussels I system, to avoid "the concurrent jurisdiction of several courts to resolve the same dispute, but also… a complete lack of judicial protection, since no court may have jurisdiction to decide such dispute" (Opinion of the Court of 7 February 2006 on the competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, ECR 2006, I-1145, para. 141, also published in F. Pocar (ed.), *The External Competence of the European Union and Private International Law*, Padova, 2007, 141 ff., spec. at 171). As a consequence, the same Author affirms that the identification of a "prevalent" residence in one of the different Member States of

At the present stage, however, in the silence both of the Court and of the EU legislator, the Regulation could be interpreted by some national judges in an excessively broad way, so that an immediate acquisition of habitual residence, determined only by the *mere* intention of a party to reside in a certain Member State to which he/she is not anyway else connected, would be enough to assess jurisdiction by the judge of said country (under at least four of the bases of jurisdiction set forth in Article 3, read in conjunction with Article 6).[36] The result will turn out to be unfair to other couples and circumvent predictability and certainty of law allowing *forum shopping* to a higher degree, since the grounds of jurisdiction would depend only from a subjective factor (the fraudulent will to obtain a false residence) not accompanied by any other effective link with the forum State.[37] To avoid such a misleading practice, the continuous reference to the objectives and scope of the Regulation is of paramount importance.

3. TELEOLOGICAL INTERPRETATION

3.1. The original scope: objective connection of the adults with the forum State, flexibility and predictability vs. national divergences

In the original idea which justified the necessity of identifying the alternative uniform grounds based on habitual residence was that they have to "meet *objective* requirements, are in line with the interests of the parties, involve *flexible* rules to deal with mobility and are intended to meet individuals' needs without sacrificing *legal certainty*"; they are in fact "based on the principle of a *genuine connection* between the person and a Member State".[38]

Thus they were meant initially in a way as to consent, at the same time, both *predictability* and a certain degree of *flexibility* to the interpreter in order to evaluate habitual residence on the basis of a *case-by-case analysis*.[39] In fact, such a connecting

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the "fragmented" residence during a given period, would allow the assessment of jurisdiction under Brussels IIa through a quantitative and qualitative evaluation of all the connections (both objective and intentional) with that State, without avoiding predictability of results and certainty. On the effects of a more far-reaching approach as to jurisdiction rules deriving from Opinion No 1/2003, see: A. Malatesta, *The* Lugano *Opinion and its Consequences in Family and Succession Matters*, in A. Malatesta, S. Bariatti, F. Pocar (eds.), *The External Dimension of EC Private International Law in Family and Succession Matters*, cit., 19-31, spec. 26-27.

36. P. McEleavy, *The Communitarization*, cit., 623.
37. Cf. O. Lopez Pegna, *Collegamenti fittizi o fraudolenti di competenza giurisdizionale nello spazio giudiziario europeo*, in *Rivista di diritto internazionale*, 2015, spec. 437-439, and further *infra*, at para. 3.2.
38. See *The Explanatory Report on the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on Jurisdiction, Recognition and Enforcement of Judgments in Matrimonial Matters*, prepared by A. Borrás, OJ 1998 C221/27, at para 24 [hereinafter: 'Borrás Report'].
39. *Ibidem,* para 27.

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factor has traditionally been considered, in the majority of courts, mainly as "a question of fact, to be decided by reference to all the circumstances of any particular case".[40]

Nevertheless, both some scholars[41] and some national courts have added "legal 'gloss' on the factual concept of habitual residence", evidencing that sometimes "the qualitative requirement denoted by the word 'habitual'…" may be not sufficient,[42] depending also on the nature and the scope of the rules of jurisdiction in which it is used. It has a "caractère fonctionnel qui la prive d'un véritable contenu uniforme".[43] That is why the same notion used to exercise jurisdiction in child protection cases cannot most of the time be appropriate to identify the forum of the alimentary obligations or that of the divorce proceedings, even if sometimes they can coincide.[44]

In other areas of law different from matrimonial matters, before the entry into force of Brussels II Regulation, the ground of jurisdiction based on habitual residence contained in substantive law provisions of the Member States was widely interpreted by national judges as implying the physical presence of an adult in a country for a

40. L. Collins, J. Harris (eds.), *Dicey, Morris & Collins on the Conflict of Laws*, 15th edn. mainwork & 5th supplement, 2018, 867, para. 18-005; D. McClean, *De Conflictu Legum. Perspectives on Private International Law at the Turn of the Century. General Course on Private International Law*, *Collected Courses*, vol. 282, 2000-I, 81 ff.; A. Richez-Pons, *La notion de "résidence"*, in H. Fulchiron, C. Nourissat (dir.), *Le nouveau droit communautaire du divorce*, cit., 149-156.

41. See generally: E. M. Clive, *The Concept of Habitual Residence*, JurRev, 1997, 137-147; A. Bucher, *La famille en droit international privé*, RCADI, vol. 283, 2000-II, 38.

42. These are the expression critically used by D. McClean, *De Conflictu Legum*, cit., 82 (quoting as an example the House of Lords decision on social security, *Nessa* v. *Chief Adjudication Officer*, 1999, 4 All ER 677), even if the Author himself believes in the opportunity to introduce a quantitative requirement in terms of length of time to this factual concept (cf. 86).

43. A. Bucher, *La famille en droit international privé*, cit., 39.

44. See generally, C. Honorati, *Problemi applicativi del Regolamento Bruxelles II: la nozione di residenza abituale del minore*, in *Studium Iuris*, 2012, n. 1, 24-34 and 162-171; I. Queirolo, *La disciplina della responsabilità genitoriale: il regolamento 2201/2003*, in L. Schiano di Pepe, I. Queirolo, *Lezioni di diritto dell'Unione europea e relazioni familiari*, cit., 301 ff.; M.C. Baruffi, *La responsabilità genitoriale: competenza e riconoscimento delle decisioni nel regolamento Bruxelles II*, in S.M. Carbone, I. Queirolo (a cura di), *Diritto di famiglia e Unione Europea*, Torino, 2008, 257-281; R. Espinosa Calabuig, *Custodia y visita de menores en el espacio judicial europeo*, Madrid-Barcelona, 2007; I. Viarengo, *Le obbligazioni alimentari nel diritto internazionale privato comunitario*, in S. Bariatti (a cura di), *La famiglia nel diritto internazionale privato comunitario*, 2007, 227-265, spec. 244; J.J. Vara Parra, *El interés del menor en los foros de competencia judicial para las acciones de responsabilidad parental en el Reglamento (CE) núm. 2201/2003*, in *Revista española de derecho internacional*, 2006, vol. 58, 2. Aufl., 797-820; S. Corneloup, *Les règles de compétence relatives à la responsabilité parentale»*, in H. Fulchiron, C. Nourissat (dir.), *Le nouveau droit communautaire du divorce*, cit., 69-86; C. Gonzales-Beilfuss, *EC Legislation in Matters of Parental Responsibility and Third States*, in A. Nuyts, N. Watté (eds.), *International Civil Litigation in Europe and Relations with Third States*, Bruylant, Bruxelles, 2005; R. Espinosa Calabuig, *La responsabilidad parental y el nuevo reglamento de "Bruselas II-bis": entre el interés del menor y la cooperación judicial interestatal*, in *Rivista di diritto internazionale privato e processuale*, 2003, 735-782.

somewhat prolonged period of time. Its character of stability[45] was often affirmed as not being challenged by occasional absence.[46] In some jurisdictions there was also the reference to a kind of factual presumption,[47] namely a specific minimal duration required to assume the existence of habitual residence, such as the six months term considered as sufficient permanence in Germany and Austria.[48] On the opposite, the mere inscription on public registers was deem to be not relevant to prove it.[49]

Yet, exceptions or divergences from this common *factual* interpretation in national practice could be found with regard to the relevance to be given to other *subjective* and/or *legal* factors. The House of Lords, for example, held that the *intention* of continuing to reside either indefinitely or for a substantial period of time (at least some years)[50] can be enough *per se* to acquire the habitual resident status even if there is only a short term physical presence (just some weeks)[51] at a given time. Moreover in *Mark* decision it has been affirmed that, on the one hand, habitual residence may arise even when a person is resident *unlawfully* and that, on the other, it could have *different meanings* in different statutory contexts.[52]

45. Corte di Cassazione, 25 July 1997 No 6975, in *Rivista di diritto internazionale privato e processuale*, 1998, 437, especially at 439 (where the Court stress the peculiar "carattere di serietà e definitività" of habitual residence).

46. E. M. Clive, *The Concept of Habitual Residence*, cit., 137; P. Rogerson, *Habitual Residence: The New Domicile?*, *International and Comparative Law Quarterly*, 2000, 86-107.

47. Cf. the Domicile and Matrimonial Proceedings Act 1973, section 5(2) (England & Wales), section 7(2) (Scotland), that accepted as a basis of jurisdiction the habitual residence of one of the spouses in England and Wales throughout a period of one year before the beginning of the action; P. McEleavy, *The Communitarization*, cit., 622 and D. McClean, *De Conflictu Legum*, cit., 86, who was involved in the works of the Law Commissions of England and Scotland for the reform of the law of domicile and was in favour of the introduction of a similar presumption in some contexts where it is used (87-88). On the issue see recently P. McEleavy, *Regression and Reform in the Law of Domicile*, ICLQ, 2007, 453-462.

48. See respectively: Bundesgerichtshof, 29 October 1980, IPRax, 1981, 139 and Oberster Gerichtshof, 30 November 1982, *ivi*, 1984, 159.

49. See in Italy, Corte di Cassazione No 791/1985, No 8019/1992, No 4492/1999, No 6012/2001; see for a comment: P. Venturi, *Osservazioni sulla residenza dell'attore quale criterio giurisdizionale*, in *Rivista di diritto internazionale privato e processuale*, 2005, 999.

50. *Dickson* v. *Dickson*, 1990, SCLR, 692 (Inner House). For a complete reference of the case-law indicating three years as a minimum period of time to be considered "substantial", cf. P. Stone, *EU Private International Law. Harmonisation of laws*, cit., 401, note 79.

51. Even one month only (but no shorter period) was held to be a sufficient permanence to acquire the habitual resident status by the House of Lords: *Re J*, 1990, 2 AC 562; *Friedrich* v. *Friedrich*, 983 F2d 1369 (C6 1993) confirmed by the previously mentioned decision *Nessa* v. *Chief Adjudication Officer* and other cases referred by P. Stone, *ibidem*, 402, note 80.

52. *Mark* v. *Mark*, 2005, 3 WLR 111; see the comment of Forsyth, *The Domicile of the Illegal Resident*, JPIL, 335-343. See also the previous decision of the English Court of Appeal *Ikimi* v *Ikimi* (2001, 2 *Family Law Report* 1288) holding that for the purposes of jurisdiction a person may have two concurrent habitual residences, as confirmed later in *Mark* where it was also stated that an adult may have no habitual residence at all.

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The intentional factor appeared also in Italy but only with an incidental and not essential role.[53]

The temptation to interpret the concept of habitual residence contained in the Brussels IIa Regulation, adjusting it to national concepts, is evidently not in line with EU law. Nonetheless, such misleading adjustment could be detected in other internal decisions, especially in the first years of application of the Regulation. For example, in England and Wales courts in several cases referred to the test or 'ordinary residence' used for fully-internal tax and migration claims.[54] In Bulgaria judges tended to presume that residence exceeding six months was 'habitual', taking for granted the applicability of the national standard test to habitual residence under the Regulation (however, a shorter period cannot be automatically excluded from the possibility of being considered as habitual residence under the Regulation, mostly if accompanied by other relevant 'quality' connections). In Lithuania, the main obstacle for a uniform interpretation was the Lithuanian linguistic version of the Regulation, which translates habitual residence as 'permanent residence' (*nuolatinė gyvenamoji vieta*). Recently, the Supreme Court of Lithuania clarified that habitual residence under the Brussels IIa Regulation should not be linked to the national concept, as has previously been done by Lithuanian judges, but must be seen as an autonomous notion.[55]

These divergences from the golden rule of interpretation of EU law should be considered irrelevant in depicting a uniform notion of habitual residence.

3.2. The original scope unattended: 'forum shopping' and unpredictability

The above mentioned temptation of 'nationalizing' the concept of habitual residence should be avoided in order to enhance the uniform application of the Regulation throughout EU, the predictability of results and ultimately the mutual trust among all the Member States' courts. Nonetheless, the original objectives of the Brussels II system have proved to be often circumvented in practice by those parties who profited of the same structure of the Regulation to concentrate the action before the more favorable forum.

53. Corte di Cassazione, 3 February 2004 No 1994, in *Rivista di diritto internazionale privato e processuale*, 2004, 1390.

54. Cf. *Re H-K (Habitual Residence)* [2012] 1 *Family Law Reports* 436.

55. Cf. the report lately presented by the Supreme Court of Lithuania on jurisdiction in family law matters in the EU, *Tarptautinės ir Europos Sąjungos teisės taikymo sprendžiant jurisdikcijos nustatymo klausimą šeimos bylose apžvalga*, Teismų praktika (43), 2016. It clarifies to lower instance courts on the application of private international law in family law matters. See A. Limante, *Establishing habitual residence of adults under the Brussels IIa regulation: best practices from national case-law*, in *Journal of Private International Law*, 2018, 14:1, 160-181, spec. notes 19 and 31-32, quoting national case-law on the concept: Regional Court of Panevėžys, judgment No. 2S-145-227/2014 of 27 February 2013 and (Lithuania) Regional Court of Kaunas, judgment No. 2S-2412-260/2012 of 22 November 2012.

In fact, the (maybe excessive) multiplicity of alternative fora, coupled with *lis pendens* rules[56] and the *diversity of substantive law regimes* on divorce, legal separation and annulment in each Member State[57] gave rise to a 'rush to the forum' by those spouses searching for the most profitable substantive rules to be applied to their marriage breakdown. This 'forum shopping' phenomenon is directed at being the first to bring the action before the court whose law is more advantageous in order either to *put a faster end* to the marriage or, on the opposite, to *postpone* that moment.

For example, from the perspective of forum shoppers, the spouse who would like to delay the divorce should rush and be first to ask for legal separation in those courts that would apply a substantive law requiring couples to go through some years of separation before starting the divorce proceedings. On the other hand, the forum shopper interested in a faster divorce would do the opposite and try to avoid systems requiring going through separation before the divorce. No surprise that in Italy, before the recent legal reform (providing for faster divorce actions),[58] many Italian couples residing in Italy that had agreed to put an end to a marriage were looking for fast-track divorce possibilities. Therefore, instead of starting the proceeding in Italy (knowing that they would need to go through a separation period), they sought to establish a 'pretended' habitual residence in a Member State whose law provided for immediate divorce. The *Rapisarda v Colladon* case decided by the Family Division of the High Court of Justice, so called 'P.O. box saga', is exemplary in this regard. Between 2010 and 2012, a bold lawyer had managed to register the residence of one of the two spouses of a large number of Italian couples in the UK, where the judges – having declared their jurisdiction pursuant to Article 3(1)(a) Brussels IIa Regulation – applied unilaterally English substantive law allowing immediate divorce on the basis of the proof of 'adultery, unreasonable behavior, desertion', without previous separation. Following this scheme, 180 Italian couples claimed that one partner of each couple had habitual residence at 'Flat No. 201, 5 High Street, Maidenhead – Berkshire' before 137 different judges in Britain. As a matter of fact, 'No. 201' was not a flat, but one of the small post office boxes in a Berkshire Mailboxes Etc. branch. Since the divorce proceedings in the UK are paper-based, no check had been

56. See A. Malatesta, *Article 16* and *Article 19*, in S. Corneloup (dir.), *Droit européen du divorce. European Divorce Law*, cit., 283-292; 321-338; C. Rosende Villar, *Lis Pendens and Related Actions. Latest European and Spanish Legislative Reforms*, in *Anuario Espanol de Derecho Internacional Privado*, 2016, vol. 16, 347-374.

57. K. Boele-Woelki, T. Sverdrup, *European Challenges in Contemporary Family Law*, Antwerp-Oxford-New Yok, 2008;

58. See Law dated 6 May 2015 no 55 and entitled: "Disposizioni in materia di scioglimento o di cessazione degli effetti civili del matrimonio nonché di comunione tra i coniugi" (*Gazzetta Ufficiale*, 11 May 2015 no 107), in force since 26th May 2015 and Law-decree of 12 December 2014 no 132 on consesual separation (converted into Law no 162/2014) assisted by lawyers (art. 6) and public officials (art. 12); cf. G. Bonilini, *Manuale di diritto di famiglia*, Milano, 8th edn., 2018, 256-260 and 263-301, spec. 280-285 on the new procedures; U. Giacomelli, *Separazione, divorzio e scioglimento dell'unione civile*, in S. Armellini, B. Barel, U. Giacomelli (eds.), *La famiglia nel diritto internazionale. Giudice competente, diritti e tutele*, Milano, 2019, spec. 140-141 and note 96.

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made, and in just a few months they all obtained divorce from UK courts. Almost two years later, when the deceitful scheme was discovered, all of the 180 divorce judgments were declared 'void' by the High Court of Justice. The court concluded that they were all obtained by "using systematic fraud and forgery", a "conspiracy to pervert the course of justice on an almost industrial scale".[59]

The 'P.O. box saga' showed the alarming potential effect of the forum shopping generated by a multitude of possible fora of the Brussels IIa Regulation based on a missing common notion of habitual residence, coupled with a non-unified European system of conflict of law rules on divorce and legal separation. On this and other critical issues involving the Regulation, the Commission presented on 14 March 2005 a Green Paper on applicable law and jurisdiction in divorce matters which launched a wide-ranging public consultation on possible solutions,[60] followed by a proposal (on 17 July 2006) for a regulation both amending the Brussels IIa Regulation as regards jurisdiction and introducing new rules concerning applicable law in matrimonial matters.[61] Unfortunately, at its meeting held in Luxembourg on 5-6 June 2008, the Council concluded that there was a lack of unanimity on the proposal and that there were "insurmountable difficulties that made unanimity impossible".[62] Nonetheless, a group of Member States addressed a request to the Commission indicating that they intended to establish enhanced cooperation among themselves in the area of applicable law in matrimonial matters in order exactly to prevent a situation from arising where 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 or she considers more favorable to his or her own interests.[63] After the authorization by the

59. Sir James Munby, President of the Family Division, Family Court of England and Wales, Family Division, 30 September 2014, *Rapisarda v Colladon (Irregular divorces),* (2014) EWFC 35, Case No: AL11D00099 and 179 other petitions; O. Lopez Pegna, *Collegamenti fittizi o fraudolenti*, cit., 439; C. Ricci, *Jurisdiction in Matrimonial Matters*, cit., spec. 51-53; A. Limante, *Establishing habitual residence of adults*, cit., 166.

60. Green Paper on applicable law and jurisdiction in divorce matters, COM (2005) 82 fin. of 14 March 2005 on which see S. Tonolo, *Il Libro Verde della Commissione europea sulla giurisdizione e la legge applicabile in materia di divorzio*, in *Rivista di diritto internazionale*, 2005, 767 e

61. Proposal for a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters, COM (2006) 399 fin. of 17 July 2006: see F. Pocar, *Osservazioni a margine della proposta di regolamento sulla giurisdizione e la legge applicabile al divorzio*, in S. Bariatti (ed.), *La famiglia nel diritto internazionale privato*, Milano, 2006, 267 ff.; J. Carrascosa Gonzàles, F. Seatzu, *Normas de competencia judicial internacional en la propuesta de reglamento "Roma III"*, in *Rivista di diritto internazionale privato e processuale*, 2009, 567 ff.

62. Proposal for a Council Regulation (EU) implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, COM (2010) 105 fin. of 10 March 2010; O. Lopes Pegna, *La proposta di cooperazione rafforzata sulla legge applicabile a separazione e divorzio: profili problematici*, in *Cuadernos de Derecho Transnacional*, 2010, 126 ff.

63. *Ibidem*, preamble, note 4 and para. 2.3.

Council[64] the so-called Rome III Regulation (EU) No 1259/2010 of 20 December 2010 implemented the enhanced cooperation in the area of the law applicable to divorce and legal separation,[65] up now applicable to seventeen participating Member States: Austria, Belgium, Bulgaria, Estonia (as from 11 February 2018), France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Portugal, Romania, Slovenia and Spain. Other EU countries are free to join this Regulation at any time according to Article 328(1) TFEU.

The new set of uniform rules on applicable law will certainly lessen the phenomenon of forum shopping (at least in those Member States where they are binding), but they are not sufficient *per se* to overcome the problems that have been detected in years of practice in the application of the Brussels IIa Regulation.

4. THE GUIDANCE OFFERED BY COMMON TRENDS IN MEMBER STATES' BEST PRACTICE ON BRUSSELS IIA REGULATION

The analysis of national case-law reveals that the Member State courts generally confirm the just mentioned approach by the CJEU, upholding that it is mainly a substantially factual evaluation referring both to the place of personal and to the place

64. Council Decision 2010/405/EU of 12 July 2010, authorising enhanced cooperation in the area of the law applicable to divorce and legal separation (OJ 189 of 22 July 2010); F. Pocar, *Brevi note sulle cooperazioni rafforzate e il diritto internazionale privato*, in N. Parisi, M. Fumagalli Meraviglia, A. Santini, D. Rinoldi (eds.), *Scritti in onore di Ugo Draetta*, Napoli, 2010, 569 ff.; K. Boele-Woelky, *For Better or for Worse: The Europeanization International Divorce Law*, in *Yearbook of Private International Law*, 2010, spec. 6 ff.; S. Peers, *Divorce European Style: Authorization of Enhanced Cooperation*, in *European Constitutional Law Review*, 2010, 340 ff.

65. See the early comments by: M.C. Baruffi, *La legge applicabile ai divorzi europei*, in L. Panella, E. Spatafora (eds.), *Studi in onore di Claudio Zanghì. Diritto dell'Unione europea*, vol.3, t. II, 2011, 387–408; Ead., *Le nuove regole per i divorzi in Europa*, in *Guida al Diritto*, 2011, 2 ff.; E. Bergamini, *Evoluzioni nel diritto di famiglia dell'Unione europea: il regolamento n. 1259/2010 sulla legge applicabile al divorzio e alla separazione personale*, in *Studi sull'integrazione europea*, 2012, 181-201; R. Clerici, *Il nuovo regolamento dell'Unione europea sulla legge applicabile al divorzio e alla separazione personale*, in *Famiglia e diritto. Mensile di legislazione, dottrina e giurisprudenza*, 2011, 1053-1065; De Marzo, *Il regolamento (UE) 1259/2010 in materia di legge applicabile al divorzio e alle separazioni: primi passi verso un diritto europeo uniforme della famiglia*, in *Foro It*., 2011, I, 917 ff.; P. Franzina, *The Law Applicable to Divorce and Legal Separation under Regulation (UE) No. 1259/2010 of 20 December 2010*, in *Cuadernos de Derecho Transnacional*, 2011, 90 ff.; L. Idot, *Le divorce international, premiére utilisation du mécanisme des coopérations renforcées*, in *Europe*, Feb. 2011, 2; P. Hammje, *Le nouveau règlement (UE) n° 1259/2010 de Conseil du 20 dècembre 2010 mettant en oeuvre une coopéracion renforcèe dans le domaine de la loi applicable au divorce et à la separation des corps*, in *Revue critique de droit international privé*, 2011, 291-338; M. Velletti, E. Calò, *La disciplina europea del divorzio*, in *Corriere Giuridico*, 2011, 719 ff.; I. Viarengo, *Il Regolamento UE sulla legge applicabile alla separazione e al divorzio e il ruolo della volontà delle parti*, in *Rivista di diritto internazionale privato e processuale*, 2011, 601-624; A. Zanobetti, *Divorzio all'europea. Il regolamento UE n. 1259/2010 sulla legge applicabile allo scioglimento del matrimonio e alla separazione personale*, in *La nuova giurisprudenza civile commentata*, 2012, 250-261.

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of professional life. Namely, reference shall be made to the place of "main relevance of affective relations", "the habitual centre of interest and relations" on the basis of "the analysis of a factual evaluation of all the elements, irrespective of the registered residence in the public records, in order to find the place where personal life develops during the lifetime". This is the definition given by the Italian Supreme Court in a divorce claim brought before Italian judges by the Italian wife against her German husband, who had been habitually resident for 30 years in Belgium together with their child. Although she was still formally registered as habitually resident in Belgium in the Belgian public records, the court declared Italian jurisdiction in the case, giving a decisive weight to the fact that she had already moved to Italy more than one year prior to the commencement of the proceedings in order to follow and support their grown-up son who was attending an Italian university.[66]

Since habitual residence is to be established based on all the factual circumstances, the question might arise as to what particular circumstances should be taken into account. The CJEU guidance as well as the common trends registered in national jurisprudence allow one to claim that national courts should consider such facts as *duration* of the stay, *regularity* of the presence in each State, *conditions* and *reasons* of stay, the person's *nationality* and *linguistic* knowledge, place of *employment*, *social and family ties*, including *doctors* visited, *friends* and *integration* into the local community. That is also why habitual residence cannot be found only as referring to the centre of economic interests.[67]

66. Italian Corte di Cassazione, joint sessions, order 17 February 2010 n. 3680, also confirmed in subsequent decisions, as in judgments of 25 June 2010 n. 15328 and 13 February 2012 n. 1984.

67. These are the findings of Court of Appeal of England and Wales (Civil Division), on appeal from the principal Registry, Family Division, 2 July 2013, *Saward v Saward* [2013] EWCA Civ 1060, Case No: B6/2013/0328. In the case, the husband was a British national and the wife was a national of Romania and Canada. The husband had been living in Spain since 2002; in 2005 the couple met there and married in Gibraltar in 2009. The family lived in Spain, but when the marriage broke down two years later the wife petitioned for divorce before UK judges under Article 3(1) Brussels IIa Regulation on the basis of the habitual residence of the husband in the UK. The husband contested this, declaring he was also habitually resident and domiciled in Spain. The court of first instance dismissed the case, affirming its lack of jurisdiction due to the prevalence of the links with Spain. Upon appeal, the wife asserted that the first instance judge had focused too heavily on the husband's intention as to where he resided. She claimed that the judge should instead have given more weight to factors pointing to the centre of his interests, such as the sources of his *income* and the *majority of his assets* that were in the UK, the transfer of a portion of the *damages* received from some Spanish litigation and the proceeds of a *property* which he sold in Spain to the UK; the *payment of taxes* as if he were domiciled in the UK; the continued use of an *address* in the UK *for significant legal documents* and finally the declared *intention* to return to the UK. The Court of Appeal noted that habitual residence has an autonomous meaning for the purposes of the Brussels IIa Regulation and it is not the same as habitual residence under domestic law. A person's habitual residence is the place where he/she has established on a fixed basis the permanent or habitual centre of his/her interests, with all the relevant factors being taken into account for the purpose of determining such residence. However, all the factors relied upon by the wife had actually been considered by the trial judge. The Court of

The comparative analysis of national case law shows how fact-finding and fact-weighing analysis in determining habitual residence is sometimes challenged either (i) by certain complex family ties involving several jurisdictions or (ii) by proofs created or 'selected' on purpose by one spouse or by both spouses. For such situations no uniform solution has been found yet.

4.1. Fact-weighing in complex family ties involving several jurisdictions

A typical situation in this regard concerns spouses who spend their life in more than one jurisdiction for almost the same duration, generally when one of the two is posted frequently in different States. In one such case, an Italian court decided to make use of the idea of a 'prevailing' habitual residence.[68] In proceedings for legal separation between an Italian husband and a Moroccan-Italian wife, the court had to ascertain the habitual residence of the couple under Article 3(1)(a) Brussels IIa Regulation. The court found that before and after the wedding the couple used to spend five months a year in Santo Domingo in the husband's house, three summer months on board the husband's private vessel on the Mediterranean Sea between Italy, France and Spain, and the remaining months between Italy (Milan) and Switzerland (Lugano). The court chose to define as relevant the *prevailing* habitual residence ("residenza abituale prevalente") of the family, which is to be identified on the basis of the combined use of quantitative and qualitative connections with a certain State, a criterion of actual prevalence ("un criterio di attualità e prevalenza"), taking into account not only the couple's but also the kids' family life ("il nucleo familiare"). The connections with Switzerland were prevalent since in Lugano there could be found: the constant *attendance at elementary school* by the minors, the *presence of the babysitter* to look after the kids, the *applications for domicile permit and driving license*, and the subscription to a *household social security plan* in favour of the wife. All the factors implied an agreed choice of the couple on their principal centre of interests (while the presence of clothes and toys, bills and receipts found both in Milan and Lugano apartments were considered less relevant).

In some other cases the *stability* and *duration* of the permanence as well as the *intention* to reside in a Member State is compared with the nature of a temporary posting for professional reasons. This happens typically for employees of larger multinational companies or international organizations who often move with their families between different States in a relatively short span of time. The French courts had decided several such cases, with opposite outcomes as to jurisdiction, by detecting

Appeal on this basis confirmed the lack of UK jurisdiction – and hence the Spanish jurisdiction – since apparently his family life was developed in Spain.

68. Tribunale di Milano, order 16 April 2014. It is worthy of notice, nonetheless, that after this detailed analysis, the Italian jurisdiction was affirmed on the basis of the common nationality (pursuant to Article 3(1)(b) Brussels IIa Regulation).

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from all the relevant factual circumstances the intention of the couple (or of one spouse) either to remain in the host State or to return to the State of origin.[69]

4.2. The (unveiled) abuse of voluntary manipulation or omission of factual elements by the parties

It has emerged from several decisions rendered by national judges in divorce cases that, in order to attract jurisdiction from the most favourable court, a party may manipulate (or omit) some factual elements so as to affirm the existence of habitual residence in a certain more 'convenient' forum State.

This has been proved likely to happen to avoid time-consuming and/or very expensive divorce proceedings. As has already been described in the 'P.O. box saga' decided by the UK High Court in 2014,[70] a 'shortcut' had been tried through the registration of (fake) habitual residence in the UK by 180 Italian couples in a two-year time period. The supposed 'fast track' to divorce in the UK proved to be not a success story but, indeed, a tragedy, given the subsequent annulment of *all* the divorce judgments and, what is more, the High Court decision caused additional voiding effects on the new marriages celebrated in the meanwhile with new partners.

In other cases, the claimant seems to manipulate the fact-weighing operation to determine a certain habitual residence, aiming to obtain a higher financial award.

In two successive judgments, *Chai v Peng*,[71] the High Court of Justice, Family Division, affirmed the UK jurisdiction over a divorce claim which was brought by the Malaysian wife against her Malaysian husband (who was living in Malaysia). She succeeded in proving her habitual residence in the UK for the twelve months prior to the issue of her petition for divorce even though before moving to the UK she lived at the family home in Canada for 20 years and all the time kept moving between several jurisdictions. This decision was made on a lengthy and close

69. In a case involving two Australian nationals posted in France for almost two years by a fixed-term contract, the Court of Appeal of Aix-en-Provence considered irrelevant the presence of a house in France since it was paid for by the Australian government. The court held that the couple's centre of interest remained at their marital home in Melbourne, therefore referring jurisdiction to the Australian judges (Cour d'Appel d'Aix-en-Provence, 5 December 2007 No 07/11782). In a more recent case (Cour de Cassation, 24 February 2016-15 October 2016 No 15-10.288, confirming first and second instance decisions, respectively, of the Juge aux affaires familiales and the Cour d'Appel de Versailles), the purchase of immovable property in France by a couple, both Azerbaijani nationals, settled in France together with their children since their birth in that State, has been interpreted as being evidence of the spouses' common intention to establish their habitual residence in France, even though one spouse was formally posted in France for only three years.

70. See *Rapisarda v Colladon* case *supra*, at para 3.2.

71. *Chai v Peng* [2014] High Court of England and Wales, EWHC 3518 (Fam), Case No FD 13 D00747D, and *Chai v Peng* [2014] EWHC 3519 (Fam).

examination of the facts, a very detailed analysis of her travel movements from various sources (passport entries, e-tickets, medical appointments, petty cash purchases, etc.), the number of rooms in their UK home and so on. The judge evaluated "a titanic quantity of evidence",[72] including even the clothes and number of shoes present in the British and Malaysian properties as proof of the wife's intention to settle her habitual residence. "The *quality* of the time spent, including the *reasons* for it, is crucial", for the judge affirmed that: "The person's *motives* or intentions about where he or she lives are part of the factual matrix which the court must evaluate".[73] The judge refused the submission advanced on behalf of the husband that the wife's uncertain immigration *status* was a telling factor in the determination of habitual residence. Relying on the above mentioned famous precedent, in fact, the court stated that the *unlawful presence* in the UK does not exclude habitual residence, since "residence does not need to be lawful residence; and the question of whether residence was habitual was *ultimately a question of fact*".[74] Nonetheless the judge was aware that: "In making an assessment of the party's motives in living within a particular jurisdiction, account can be taken of his or her own evidence; but the question is an objective one, to be viewed and tested alongside all the other various factors and pointers. The party's own statements are clearly in the nature of 'special pleading' …and so, such evidence is to be looked at with considerable *skepticism* and *caution*", mostly in cases where the hidden real motivation for living in the UK and invoking jurisdiction there could be to obtain a higher financial award than in Malaysia.[75]

Forum shopping is always a shortcoming inherent to the flexible nature of habitual residence, but it is up to the judge to be cautious in evaluating all the relevant factors in determining the quality of the time spent and the reasons of the stay and to eventually apply "mechanisms designed to tackle the evasion of the law, such as *fraude à la loi* in the context of private international law", as suggested in the more recent Regulation No 650/2012 on successions (recital no 26). Against this background, habitual residence can indeed favor the mobility of couples within EU also because it also allows them the possibility to profit of the advantages offered by the divergences among the legal systems of the Member States without jeopardizing the exercise or their fundamental rights. To this extent, it can significantly contribute to social integration in a judicial area beyond the territorial borders of a single State,[76]

72. Cf. para. 5 of the first judgment, [2014] EWHC 3518 (Fam).
73. *Ibidem*, para. 2 (emphasis added).
74. See para. 26, quoting [House of Lords] *Mark v Mark* [2006] 1 AC 98, referred to *supra*, at para. 3.3, note 51.
75. *Ibidem* (emphasis added).
76. A. Davì, A. Zanobetti, *Il nuovo diritto internazionale private europeo delle successioni*, Torino, 2014, spec. 45-46.

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safeguarding at the same time the basic values both of the forum State[77] and of the EU, capable of protecting those migrants fleeing from unbearable situations of compression of their rights in the foreign States of origin.

5. THE INTERPRETATION LINKED TO THE STATE OF EVOLUTION OF EXISTING LEGISLATION

The preferential adoption of habitual residence as a fundamental factor by the EU legislator in all the recent private international law acts, both to assess jurisdiction and to determine the law applicable to matrimonial matters,[78] demonstrates clearly its 'functional' nature. In fact, due to its flexibility, it allows the valorisation of all the factual and intentional elements characterising a complex situation in order to adapt such a notion to the specific legal context and scope of the act in which it is inserted.[79] Therefore, legal technicalities (that are typical of the concept of 'domicile') and ideological choices (implied in the recourse to citizenship) can (and should) be avoided to ensure a genuine connecting factor within the framework of increasing mobility of citizens and migration fluxes.

Moreover, the further tendency of the EU legislator of referring to habitual residence both as a ground of jurisdiction and as a connecting factor in all the recent Regulations in family matters aims at the scope of simplifying the interpreter by providing for a general coincidence between forum and *ius*.[80] This practical result is particularly evident in the different Regulations dealing with all the connected complexities deriving from the end of a matrimonial tie (subsequent to a judicial decision or to the death of one of the spouses), such as alimentary obligation, matrimonial property regimes and successions, all referring to the same preferred connection.

The advantages of such a uniform reference are manifest also in terms of both coordinating these acts and facilitating the 'family planning' for couples having different nationalities (even of third States) but common habitual residence, since both the Regulation No 650/2012 on Successions and Regulations No 1103/2016 and 1104/2016

77. See F. Mosconi, *Introduzione*, in C. Campiglio (ed.), *Un nuovo diritto internazionale privato*, Milano, 2019, XV-XIX and R. Clerici, *Alcune considerazioni sull'eventuale ampliamento del ruolo della residenza abituale nel sistema italiano di diritto internazionale privato*, *ibidem*, 55-78, spec. 61-64, who pointed out, on occasion of the re-thinking a future reform of the Italian system of private international law, the advantages of the substitution of the criterion of citizenship with habitual residence in different provisions of Law 31 May 1995 no 218.
78. See *supra*, note 1.
79. See F. Mosconi, *Introduzione*, cit., spec. XVIII-XIX and R. Clerici, *Alcune considerazioni sull'eventuale ampliamento del ruolo della residenza abituale nel sistema italiano di diritto internazionale privato*, *ibidem*, 55-78, spec. 61-64, who pointed out, on occasion of the re-thinking a future reform of the Italian system of private international law, the advantages of the substitution of the criterion of citizenship with habitual residence in different provisions of Law 31 May 1995 no 218.
80. Cf. again F. Mosconi, *ibidem*, and R. Clerici, *Alcune considerazioni*, cit., spec. 60.

respectively on matrimonial property regimes and property consequences of registered partnerships refer to habitual residence to determine jurisdiction and applicable law.[81]

A desirable clarifying intervention on the notion of habitual residence within Brussels IIa by the EU legislator or by the EUCJ, would not correspond to a rigid normative definition but rather to a general indication of those connecting factors that should be relevant to determine the habitual residence of the spouse (later the deceased), in order to foster the flexible and functional nature of such a connection. Therefore, the proper model to follow also matrimonial matters should be similar to the one indicated in the Succession Regulation. As specified by recital no 23, the interpreter should make "an overall assessment of the *circumstances of the life*" during a period of life which would be pertinent for the specific Regulation, taking into account "all relevant factual elements, in particular the *duration* and *regularity* of the *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 the Regulation at stake. The EU legislator has also provided for "special factors", as the "place where the *centre of interests* of his family and his *social life* was located", to be considered in complex cases, depending on the circumstances of the case. To this extent even the State of origin and the nationality could become relevant factors to

81. A. Davì, A. Zanobetti, *Il nuovo diritto internazionale private europeo delle successioni*, cit., 42-46, spec. 43; F. Mosconi, C. Campiglio, *Diritto internazionale privato e processuale, vol. II. Statuto personale e diritti reali*, 4th edn., 2016, Milano, spec. 109, 134-135, 265; P. Lagarde, *Règlements 2016/1103 et 1104 du 24 jiun 2016 sur les régimes matrimoniaux et sur le régime patrimonial des paternariats enregistrès*, in *Rivista di diritto internazionale privato e processuale*, 676-687, spec. 687; A. Dutta, *Das neue internationale Ehegüterrecht der Europäischen Union*, in *FamRZ*, 2016, 1973; S. Godechot-Patris, *Commentaire du Règlement du 24 juin 2016 relatif aux Régimes Matrimoniaux: le Changement dans la Continuité*, in *Recueil Dalloz*, 2016, 2292; C. Kohler, W. Pintens, *Entwicklungen im europäischen Personen- und Familienrecht 2015–2016*, in *FamRZ*, 2016, 1509; C. Nourissat, M. Revillard, *Règlements Européens du 24 Juin 2016 sur les Régimes Matrimoniaux et les Effets Patrimoniaux des Partenariats Enregistrés*, in *Defrénois*, 2016, 878; H. Péroz, *Le Nouveau Règlement Européen sur les Régimes Matrimoniaux*, in JCPN, 2016, 1241; Ead., *Effets Patrimoniaux des Partenariats Enregistrés: Le Règlement du 24 Juin 2016*, JCPN, 2016, 949; L. Perreau-Saussine, *Le nouveau Règlement Européen: Régimes Matrimoniaux*, in *JCP*, 2016, 1926; P. Twardoch, *Le Règlement Européen en Matière de Régimes Matrimoniaux de la Perspective du Droit Polonais*, in *Revue critique de droit international privé,* 2016, 465; L. Usunier, *Libre, Mobile, Divers: le Couple au Miroir du Droit International Privé de l'Union Européenne*, in *RTD civ.*, 2016, 806; H. Péroz, *Le Notaire et le Droit International Privé*, in H. Péroz, É. Fongaro (eds.), *Droit International Privé Patrimonial de la Famille*, 2017, 2nd edn., Paris, 25; F. Maoli, *International Couples, Property Relations and Succession Matters in the New European Regulations*, in B. Heiderhoff, I. Queirolo (eds.), *Current Legal Challanges in European Private and Institutional Integration*, Roma, 2017, 144 ff.; I. Viarengo, *Effetti patrimoniali delle unioni civili transfrontaliere: la nuova disciplina europea*, in *Rivista di diritto internazionale privato e processuale*, 2018, 33-58, spec. 41-44; P. Franzina, *Jurisdiction in Matters Relating to Property Regimes under EU Private International Law*, in *Yearbook of Private International Law*, 2018, 159-194, spec. 165-176; P. Bruno, *I Regolamenti sui regimi patrimoniali dei coniugi e delle unioni registrate. Commento ai Regolamenti (UE) 24 giugno 2016, nn. 1103 e 1104 applicabile dal gennaio 2019*, Milano, 2019, spec. 75-92; S. Marino, *I rapporti patrimoniali della famiglia nella cooperazione giudiziaria civile dell'Unione europea*, Milano, 2019, spec. 126-145.

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be evaluated together with all the others (but *per se*).[82] Contrary to what is provided for the Succession Regulation, instead, no space should be left in such a proposed system to a 'manifestly closest connection' because it would nullify all the efforts of finding a stable and predictable connection.[83]

With the regard to the possible spread of the malpractice of 'evasion of the law', such as *fraude à la loi* in the context of BIIa Regulation should be hampered: as already mentioned, each national authority should be expressly authorized to make recourse to all the appropriate means, including the reference to the procedural public policy exception.

Finally, the hypothetical general indication of the relevant factors to determine habitual residence must consider that the uniform EU rules defining jurisdiction in matrimonial matters are anyway subject to the limits imposed by the Treaties and the general principles of EU law, including the Charter of Fundamental Rights and the European Convention of Human Rights. To this extent it is indicative that a human rights compliance test of internal legislation has been introduced by the European Court of Justice with regard to the concept of 'unlawful residence', which could be enough to settle habitual residence if justified under Article 8 of the ECHR,[84] in accordance with the *Akrich*[85] and *Chen*[86] decisions, but also with some national practice.[87] In this

82. Precisely recital no 24 reads as follow: "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".

83. See the critics already pointed with regard to the 'exception clause' provided in Article 21(1) and specified in recital 25 of the Succession Regulation by A. Davì, A. Zanobetti, *Il nuovo diritto internazionale private europeo delle successioni*, cit., 51-55.

84. H. Stalford, *EU Family Law: A Human Rights Perspective*, in J. Meeusen, M. Pertegás, G. Straetmans, F. Swennen (eds.), *International Family Law for the European Union*, cit., 101-128, paras. 19-23, 28-35.

85. ECJ, judgment 23 September 2003, case C-109/01, *Secretary of State for the Home Department v Hacene Akrich*, ECR 2003, I-9607. Cf. S. Peers, *Family Reunion and Community Law*, in N. Walker (ed.), *Europe's Area of Freedom, Security and Justice*, Oxford, 2004, 151 and 158; C. Ricci, *La 'famiglia' nella giurisprudenza comunitaria*, cit., 112. See also, for critic comments on the introduction of the concept of "lawful" residence: R. Plender, *Quo vadis? Nouvelle orientation des règles sur la libre circulation des personnes suivant l'affaire Akrich*, in *Cahiers de droit européen*, 2004, 261.

86. ECJ, judgment 19 October 2004, case C-200/02, *Kunqian Catherine Zhu, Man Lavette Chen* v *Secretary of State for the Home Department*, ECR 2004, I-9925; see the comment of J.Y. Carlier, in *Common Market Law Review*, 2005, 121-131; C. Ricci, *La 'famiglia' nella giurisprudenza comunitaria*, cit., 135.

87. Cf. the previous paragraph 4.2, *supra*, at the end with regard to *Mark*, note 73.

context, the different rights alleged to the citizenship of the Union of one member of the family, including the spouse (as recently set in *Coman*)[88] would constitute the relevant juridical link with the European Union.

88. EUCJ, judgment 5 June 2018, case C-673/16, *Relu Adrian Coman, Robert Clabourn Hamilton, Asociaţia Accept v Inspectoratul General pentru Imigrări, Ministerul Afacerilor Interne, Consiliul Naţional pentru Combaterea Discriminări* (intervener), ECLI:EU:C:2018:385. In its much-awaited judgment, the EUCJ ruled that the term 'spouse' for the purpose of the grant of family reunification rights under EU free movement law, includes the same-sex spouse of a Union citizen who has moved between different Member States. This implies that a Union citizen can require the State of destination to admit within its territory the same-sex spouse, irrespective of whether that State has extended marriage to same-sex couples within its legal system. The same compliance test with human rights and EU principles should be assessed in case of recourse to the method of full recognition of situations validly created abroad, especially whenever it was chosen by a Member State (*i.e.* Italy) to re-balance the asymmetry created by the conflict-of-law method, as pointed out by A. Davì, *Il riconocimento delle situazioni giuridiche costituite all'estero*, in C. Campiglio (ed.), *Un nuovo diritto internazionale privato*, cit., 28-53, spec. 32-35, note 3.

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ISSN 2191-1339 – www.civilprocedurereview.com