

HABITUAL RESIDENCE IN BRUSSELS II BIS

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Abstract in original language

In my article I'm trying to deal with the question of habitual residence in the context of Regulation (EC) No. 2201/2003 (Brussels II bis). The term habitual residence itself is not defined in the Regulation. It also occurs in Member States laws, which can cause some interpretation problems. The article tries to point out some definitions of the habitual residence definition in the Member States systems of law and assess whether it is possible for the national definitions to cohere with the Regulation as the instrument of unification.

Key words in original language

habitual residence

”The term habitual residence was not created by the EU, but it is a connecting factor existing for several decades in the international area.“
“Habitual residence was also enforced so that the autonomous international interpretation could take place without any kind of prejudice, independent of the law of any Member State, and so that there is universally applicable connecting factor. And especially this aim would be hardly achieved through the criteria of domicile, which is a traditional part of English law, in a slightly different form in American law and in a completely different form in continental law. The concept of habitual residence reflects the factual relationship between a person and place, not relationship in the legal sense. The interpretation of this concept cannot be bound by any predefined rules which would not be able to adapt to all situations arising in real terms and thus would create a legal fiction.”¹

The concept of habitual residence is a key concept used in Regulation (EC) No 2201/2003, (the Brussels II bis Regulation) to determine the jurisdiction. This term is used in article 3 and 8(1). The habitual residence is here only mentioned but not defined. That leaves the place for the European Court of Justice to give the definition. The concept of habitual residence is not a new concept in the national legislation of some Member States. These two

¹ ZAVADILOVÁ, Marta, TUROŇOVÁ, Jana. Pravidla určování mezinárodní soudní příslušnosti dle nařízení Brusel II bis ve světle nejnovější judikatury Evropského soudního dvora. Právní rozhledy: časopis pro všechna právní odvětví, Praha, Beck. ISSN 1210-6410, 2010, vol. 2010, no. 7, p. 246-252.

facts lead the Member States to use their own interpretation rules; but it's also allowed to determine the habitual residence on a case-by-case basis.

The European Court of Justice has given the definition of habitual residence in the case C-523/07. In the judgement it is said: „the concept of ‘habitual residence’ under Article 8(1) of Regulation No 2201/2003 must be interpreted as meaning that it corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, in particular the duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State must be taken into consideration. It is for the national court to establish the habitual residence of the child, taking account of all the circumstances specific to each individual case.“

A child is habitually resident under Article 8(1) of Regulation No 2201/2003 in the place in which the child -- making an overall assessment of all the relevant factual circumstances, in particular the duration and stability of residence and familial and social integration – has his or her centre of interests. Only if no habitual residence in that sense can be established and if no jurisdiction based on Article 12 exists do the courts of the Member State in which the child is present have jurisdiction under Article 13(1) of the Regulation.

„The AG emphasises that the basic idea underlying the rules on jurisdiction in Brussels II bis is that the courts of the Member State should have jurisdiction which are best placed to take decisions concerning parental responsibility. And these are – because of proximity – the courts of the Member State in which the child is habitually resident (para. 18). Even though also mere presence may establish proximity to the courts of the respective State, the AG stresses that mere presence does not lead to a relationship of the same quality as habitual residence (para. 20). Thus, criteria must be developed in order to distinguish habitual residence from mere presence.

Taking into consideration the wording and objectives of Brussels II bis as well as the relevant multilateral conventions, AG states that “the concept of habitual residence in Article 8 (1) of the Regulation should therefore be understood as corresponding to the actual centre of interests of the child.” (para. 38) As relevant criteria for the distinction between habitual residence and the mere (temporary) presence, the AG designates in particular a certain duration and regularity of residence, which might be interrupted as long as it is only a temporary absence (para. 41 et seq.). Further, the familial and

social situation of the child constitute important indicators for habitual residence (para. 47 et seq.).”²

„The Brussels II bis Regulation have introduced quite a revolutionary solution with regard to the jurisdiction of Czech courts which differs from the determination of the jurisdiction of Czech courts in cases dealing with the custody and maintenance of minor children according to valid Czech law. Under a. 39(1) Private International Law Act the jurisdiction of the Czech courts is established even if the children who are Czech nationals, live abroad. This traditional solution establishing the jurisdiction of courts according to state nationality (citizenship) is considered to be somewhat out of date in today's Europe; modern legal systems recognise the jurisdiction of a court according to the habitual residence or presence of a child or any other relevant person. The latter approach, reflecting the reality in a more efficient way, should be taken into consideration when working on legislation which is in progress within the EU, for example in the area of family law and succession.”³

In the judgment no. 30 Cdo 2855/2005 it is proved that the Czech judiciary practice follows the provisions of Brussels II bis Regulation. The Supreme Court pronounced that since we joined the EU, the Regulations are directly applicable and that's why the jurisdiction should be established on the basis of the Brussels II bis Regulation. The Court also pronounced that under the Brussels II bis Regulation the jurisdiction of the Slovak republic where the child and his parents are habitually resident is established. Although the Czech Private International Law Act is not up to date with the European legislation, the Czech Courts decide in accordance with the Brussels II bis Regulation thanks to usage of the direct effect of Regulations doctrine.

² GAERTNER, Veronika. AG Opinion on Brussels II bis Regulation. Conflict of Laws.net [online]. Last modified 30 January 2009 [cited on March 17th, 2011]. Available at: <http://conflictoflaws.net/2009/ag-opinion-on-brussels-ii-bis-regulation/>

³ BOELE-WOELKI, Katharina; GONZÁLES BEIFLUSS, Christina. Brussels II bis: Its Impact and Application in the Member States. Antwerpen - Oxford: Intersentia, 2007. p. 81. ISBN 978-90-5095-644-4.

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