STILL IN DISCUSSION: HABITUAL RESIDENCE OF THE CHILD

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Abstract

The notion of "habitual residence" of the child is referred to in different juridical instruments, belonging to both national and international areas, which nevertheless do not define the notion. Given that the habitual residence must be determined in concreto in case of litigations, courts worldwide (national and international) have been forced to shape their own standards.

The purpose of the article is to analyse this notion in the particular situation of international child abduction, given the continuously increasing number of cases where children are moved from one state to another, in the context of both free movement of citizens, but also respect for family life.

Hence, the objectives of the present study are to identify legal instruments applying in case of an international child abduction and also the case law of both national and international courts, relevant in connection to the notion of "habitual residence".

Furthermore, in the context of lack of definition, absent juridical criteria and divided case-law, the study aims to identify the criteria that should be taken into consideration by national courts when establishing the state of habitual residence of the child.

Keywords: *best interests of the child, parental authority, domicile of the child, habitual residence of the child, respect for family life.*

1. Introduction

Starting from the increase of international abduction cases and the difficulties encompassed by courts in solving them, the present study aims to make an inquiry into the relevant juridical texts and also the case-law, in order to identify a definition of the notion of "habitual residence" of the child, or at least the criteria upon which to rely in order to determine it.

The subject has great importance, as the principle in case of international child abductions stipulates the prompt return of children who have been wrongfully taken from their state of habitual residence or wrongfully retained outside the state of their habitual residence.

In this context, establishment of the habitual residence of the child is a key element in solving these cases.

To reach this aim, the study will concentrate on legal provisions relevant for cases of international child abduction and also the case – law, both national and international, as lack of legal definition led to a consistent body jurisprudence of overwhelming importance in shaping the standards to be considered when establishing the habitual residence of the child.

Doctrinal opinions will also be identified and presented, with the necessary note that preponderance goes to studies from abroad, as in Romanian juridical literature the subject has not yet been discussed.

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2. Content

2.1. Juridical instruments

From the investigation in the legal area, it results that the notion of "habitual residence" of the child is referred to (but not defined such as) in a multitude of juridical instruments, which are different in nature.

These legal instruments can be organized in three main categories, belonging to the area of international private law, EU law, respectively national law.

The present study does not aim to present an exhaustive list of all juridical instruments, but only the most significant for the topic in discussion[1].

2.1.1. Private international law instruments

The most important juridical instrument of private international law is the **Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction**[2], to which Romania is a member state[3].

Although the Convention does not provide a clear definition of the notion of "habitual residence" of the child, the concept is at the very heart of the return mechanism provided for in the Convention and several articles repeatedly make explicit reference to the notion[4].

Juridical literature[5] underlined that "Despite the importance that determining a child's habitual residence plays in Child Abduction Convention proceedings, it is a tradition of the Hague Conferences not to define this term."

Given the variety of national laws and traditions of states, it would indeed have been a very difficult task to formulate a precise definition. Also, it seemed more appropriate to leave a margin of appreciation to contracting states. In addition, the diversity of circumstances that may occur in every specific case resulted in failure of any attempt to establish a precise definition.

The Explanatory Report on the 1980 Hague Child Abduction Convention[6] seeks to underline and explain the principles which form the basis of the 1980 Hague Convention and also provides a detailed commentary on its provisions.

Nor in this Explanatory Report is to be found any definition of the notion in discussion, the author explaining in para. 66 of the same report that a definition was not necessary, as the notion of habitual residence was already a "well-established concept": "(...) the notion of habitual residence, a well-established concept in the Hague Conference, which regards it as a

[1] For a list of juridical instrument applicable in international child abduction cases, see ECtHR, Decision adopted on 26 November 2013, Application no. 27853/09, case *X v. Latvia*.

[2] Intergovernmental agreement concluded at The Hague on October 25, 1980, during the 14th Session of the Hague Conference on Private International Law, which entered into force on December 1, 1983.

[3] Law no. 100/1992 for Romania's accession to 1980 Hague Convention on the Civil Aspects of International Child Abduction, published in the Official Gazette of Romania no. 243/30.09.1992.

[4] E.g., Article 3, Article 4, Article 5, Article 13 of the 1980 Hague Convention.

[5] Tai Vivatvaraphol, *Back to Basics: Determining a Child's Habitual Residence in International Child Abduction Cases Under the Hague Convention*, in Fordham Law Review, vol. 77, no. 6/2009, pp. 3325 – 3369, p. 3338, available at the following link: https://ir.lawnet.fordham.edu/flr, last accession on 21.01.2021, 15,08.

[6] Drafted by Eliza Pérez-Vera, Madrid, April 1981, published in 1982 and available online at the following link: https://www.hcch.net/en/publications-and studies/publications2/explanatory-reports, last accession on 28.02.2018; 17,57.

question of pure fact, differing in that respect from domicile"[7].

Although the report provided no definition, it underlined an important principle, namely that habitual residence was always a question of fact, to be established individually from case to case.

Also, the Report identified another crucial principle to be taken into consideration, namely the bests interests of the child (paras. 21-25).

Still, no clues were construed regarding the standards to be considered when applying these principles for establishing the habitual residence of the child.

Another important private international law instrument, the **Convention on the Rights of the Child**[8]**,** does not make any explicit reference to the notion of "habitual residence", acknowledging nevertheless in a implicit manner the main elements in discussion in case of international child abduction and habitual residence of the child.

The UN Convention stipulates that any child "should grow up in a family environment, in an atmosphere of happiness, love and understanding"[9] and stress the idea that both parents have common responsibilities for the upbringing and development of the child, who shall not be separated from his or her parents against their will[10].

Neither does the **European Convention for the Protection of Human Rights and Fundamental Freedoms** [11] contain any definition or even reference to the notion of "habitual residence".

The inquiry in the texts of this Convention is justified, as the ECHR case law points out the close connection between the Hague Convention 1980, the Convention on the Rights of the Child and the ECHR Convention (particularly art. 8 of ECHR Convention – respect for family life).

As to the „relationship between the Convention and the Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980, the Court reiterates that *in the area of international child abduction the obligations imposed by Article 8 on the Contracting States must be interpreted in the light of the requirements of the Hague Convention (…) and those of the Convention on the Rights of the Child of 20 November 1989* (…), and of the relevant rules and principles of international law applicable in relations between the Contracting Parties (…)"[12] (our underline).

Conclusion is to be drawn that private international law offers neither a definition of the notion, nor criteria upon which it is to be established.

[7] The difference between notions of habitual residence and domicile was also acknowledged by ECtHR, Decision adopted on 07 July 2020, Application no. 10395/19, case *Michnea v. Romania:* "The Court of Appeal's decision does not explain why that court gave precedence to what appears to be the parents' Romanian domicile over the clear factual elements before it indicating that the family had been living in Italy".

[8]Adopted by United Nations General Assembly, signed in New York on November 20, 1989, which entered into force on September 2nd, 1990. Law no. 18/1990 for the ratification of the Convention on the Rights of the Child was published in the Official Gazette of Romania no. 109/28.09.1990 and republished in the Official Gazette of Romania no. 314/13.06.2001, subsequent to differences in translation from English to Romanian in the content of the Convention.

[9] Preamble of the Convention.

[10] Articles 9 and 18.

[11] European Convention for the Protection of Human Rights and Fundamental Freedoms, adopted by the Council of Europe in Rome, on November 4, 1950, which entered into force on September 3, 1953. Romania ratified the Convention by Law no. 30/18.05.1994, published in the Official Gazette of Romania no. 135/31.05.1994.

[12] ECtHR, Decision adopted on 26 November 2013, Application no. 27853/09, case *X v. LATVIA*, precited.

2.1.2. EU instruments

Council Regulation (EC) no. 2201/2003 of 27 November 2003[13], known as "the Brussels II bis Regulation" is of the highest significance in the area of EU law instruments.

Similar to the conventions in the area of international law, the Regulation does not include any definition for the notion of "habitual residence".

Although not providing a definition, it makes references to it in Article 10 and Article 11, thus explicitly acknowledging the term.

Charter of Fundamental Rights of the European Union[14], by contrast, contains only indirect references to elements specific for the notion of "habitual residence", namely respect for family life[15] and the right of the child to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests [16].

Therefore, the conclusion is the same as in case on texts of private international law: no definition or legal criteria.

2.1.3. National instruments

In Romanian law, references to the notion of "habitual residence" appear in provisions of Law no. 369/2004 on the enforcement of the Hague Convention[17], respectively Article 11 (3) and Article 14.

Such as in case of the juridical instruments of private international law and EU law, this national legal instrument does not provide a definition of the notion in discussion or even criteria to be considered when applying the notion.

2.2. Case-law

As research into the relevant legislation has not led to any conclusive result as to the notion or even guiding criteria, an investigation of the jurisprudence may prove useful.

To this respect, the study will take into discussion the case-law pronounced in contracting states under Hague Convention 1980, jurisprudence of European Court of Justice and the European Court for Human Rights, and also national decisions (including Romanian decisions).

2.2.1. Case-law in contracting states of 1980 Hague Convention

Although the drafters of the 1980 Hague Convention considered that a flexible approach would ensure a reasonable margin of appreciation for the courts, the lack of definition lead in practice to ambiguity and uncertainty.

In these circumstances, a consistent case-law had to be developed regarding not a precise definition, but criteria upon which

[13] Council Regulation (EC) no. 2201/2003 concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, repealing Regulation (EC) no. 1347/2000, published in the Official Journal L 338/1, 23 December 2003.

[14] Proclaimed on 7 December 2000 by the European Parliament, the Council of Ministers and the European Commission and entered into force with the Treaty of Lisbon in December 2009.

[15] Article 7.

[16] Article 24.

[17] Law no. 369/2004 on the application of 1980 Hague Convention on the Civil Aspects of International Child Abduction, published in the Official Gazette of Romania no. 888/29.09.2004 and republished in the Official Gazette of Romania no. 468/25.06.2014.

a court should determine a child's habitual residence[18].

Moreover, as there was no international court invested with interpretive powers, this difficult task had to be accomplished by national courts of signatory countries during the years that followed the conclusion of the 1980 Hague Convention.

Unfortunately, this resulted in a divided case-law and a variety of factors taken into consideration.

In United States, jurisprudence[19] based either on subjective criteria in relation to the parents' last common intention in establishing the child's residence[20], or on objective indicators of the child's acclimatization[21]. Common or "middle" approach was difficult[22].

Analysing the case-law of other states, it is clear that, generally, the objective approach was considered better suited to meet the need for uniformity in application among contracting states.

To this end, a part of juridical literature[23] pointed out that few jurisdictions place much emphasis on parental intent. "Generally, other common law countries focus on objective evidence. (...) Many civil law jurisdictions also use an objective, child-centered method of analysis. Argentinian courts have defined habitual residence as the place that provides the child with stability and permanence. In Sweden, courts have held that the analysis requires an examination of all objective evidence that would show a permanent attachment to a nation. Finally, Italian courts have found that habitual residence is the place where the child spends most of his or her time."

Another part of doctrine[24] opposed to the subjective approach in very categorical terms: „Any analysis that focuses on the shared subjective intentions of parents is not only illogical, but rigid, inconsistent, and wrought with uncertainty. Where a court is presented with a Child Abduction Convention proceeding, it must act with

[18] "It is greatly to be hoped that the courts will resist the temptation to develop detailed and restrictive rules as to habitual residence, which might make it as technical a term of art as common domicile. The facts and circumstances of each case should continue to be assessed without resort to presumptions or pre-suppositions." (Jeff Atkinson, *The meaning of "habitual residence" under the Hague Convention on the civil aspects of international child abduction and the Hague Convention on the protection of children*, in Oklahoma Law Review, University of Oklahoma College of Law Digital Commons, vol. 63, no. 4/2011, pp. 647 – 661, p. 649, available at the following link: https://digitalcommons.law.ou.edu/olr?utm_source=digitalcommons.law.ou.edu%2Folr%2Fvol63%2Fiss4%2F3&utm_medium=PDF&utm_campaign=PDFCoverPages, last accession on 21.01.2021, 13,25).

[19] For a very detailed presentation of US case-law, see Tai Vivatvaraphol, Back to Basics: Determining a Child's Habitual Residence in International Child Abduction Cases Under the Hague Convention, op. cit., pp. 3325 – 3369.

[20] In any circumstances, there must be a firm intention of parents to establish in the territory of the new state of residence in order to consider the latter as the state of habitual residence.

[21] E. g.: school enrollment, participation in social activities, length of stay in the country, child's age.

[22] Jeffrey Edleson, Taryn Lindhorst, Battered Mothers Seeking Safety Across International Borders: Examining Hague Convention Cases involving Allegations of Domestic Violence, in The Judges' Newsletter on International Child Protection - Vol. XVIII / Spring-Summer 2012, available at the following link: https://assets.hcch.net/docs/7624595a-b207-464b-b95d-8222e9ce8d56.pdf, last accession on 22.01.202118,44, pp. 22-24, p. 23 ("U.S. courts are divided on whether to evaluate the shared intent between parents to reside in a certain place as indicative of habitual residence").

[23] Morgan McDonald, Home Sweet Home? Determining Habitual Residence Within the Meaning of the Hague Convention, in Boston College Law Review, Law Journals at Digital Commons @ Boston College Law School, vol. 59, no. 9/2018, pp. 427 – 443, p. 442, available at the following link: http://lawdigitalcommons.bc.edu/bclr?utm_source=lawdigitalcommons.bc.edu%2Fbclr%2Fvol59%2Fiss9%2F24&utm_medium=PDF&utm_campaign=PDFCoverPages, last accession on 21.01.2021, 14,53.

[24] Tai Vivatvaraphol, Back to Basics: Determining a Child's Habitual Residence in International Child Abduction Cases Under the Hague Convention, op. cit., pp. 3325 – 3369, p. 3365.

restraint, focusing only on the objective evidence, and avoid reverting to more comfortable concepts, such as best interests."

The best interests of the child are though the main directing vector in any decision concerning children and could therefore not easily be ignored.

In spite of the various concrete manifestations of the principle of best interests of the child, we are of the opinion that it should always be considered and, due to its broadness, may encompass both objective and subjective factors.

Supreme Court of Canada has emphasised to this respect that the "hybrid" approach is to be preferred to the approach focused solely either on the acclimatisation of the child or the parental intention[25].

Even US jurisprudence has recently changed divided criteria for a uniform legal standard, as the US Supreme Court held for the first time in a decision pronounced on 2018 that a child's habitual residence depends on the totality of the circumstances specific to the case.[26]

As part of the 1980 Hague Convention, Romania has at present a unified case-law, based on a unified jurisdiction[27], which supports the opinion expressed above focusing on the "hybrid approach".

Romanian jurisprudence[28] establishes the habitual residence of the child based on both subjective and objective factors, which are considered and weighed *in concreto* depending on the specificity of the case.

2.2.2. Court of Justice of the European Union

Court of Justice of the European Union (CJEU) first analysed the notion of "habitual residence" in the context of assessment of the habitual residence of children for the purposes of Article 8 (1) of the Regulation in case *A*[29].

CJEU appreciated that the concept of "habitual residence" 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"[30].

These considerations were reiterated and developed in the well-known *Mercredi* case[31], of which the most relevant considerations are to be found in the following.

[25] Supreme Court of Canada, decision pronounced on 20 April 2018, case Balev, paragraphs 50 to 57.

[26] US Supreme Court, decision pronounced on 25 February 2020, case Monasky v. Taglieri.

[27] Romania has unified territorial competence on international abduction cases by Law no. 369/2004 (Bucharest Tribunal – first instance court and Bucharest Court of Appeal – recourse court).

[28] Bucharest Tribunal, Fourth Civil Section, decision no. 1272/11.09.2020, case no. 19673/3/2020, definitive, not published ("The Tribunal notes that the common intention of both parties was to establish with the child in France (…) the parties lived in France at the time of the birth of the child and throughout the period following this time and until August 2019 (…) the minor was enrolled in kindergarten (…) benefited from the medical service repeatedly (…) the plaintiff is employed in France").

[29] ECJ, Decision adopted on 02.04.2009, C-523/07, case *A* ("the case-law of the Court relating to the concept of habitual residence in other areas of European Union law (…) cannot be directly transposed in the context of the assessment of the habitual residence of children for the purposes of Article 8(1) of the Regulation.").

[30] Para. 44.

[31] ECJ, Decision adopted on 22.12.2010, C-497/10 PPU, case *Barbara Mercredi v. Richard Chaffe*, paragraphs 47 to 57.

"To ensure that the **best interests of the child** are given the utmost consideration, the Court has previously ruled that the concept of 'habitual residence' under Article 8 (1) of the Regulation corresponds to the place which reflects some **degree of integration by the child in a social and family environment**. That place must be established by the national court, taking account of **all the circumstances of fact specific to each individual case** (see *A*, paragraph 44).

Among the tests which should be applied by the national court to establish the place where a child is habitually resident, particular mention should be made of the **conditions and reasons for the child's stay on the territory of a Member State**, and the **child's nationality** (see *A*, paragraph 44).

As the Court explained, moreover, in paragraph 38 of *A*, in order to determine where a child is habitually resident, in addition to the **physical presence of the child** in a Member State, other factors must also make it clear that that **presence is not in any way temporary or intermittent**.

In that context, the Court has stated that the **intention of the person with parental responsibility** to settle permanently with the child in another Member State, manifested by certain tangible steps such as the purchase or rental of accommodation in the host Member State, may constitute an indicator of the transfer of the habitual residence (see *A*, paragraph 40).

In that regard, it must be stated that, in order to distinguish habitual residence from mere temporary presence, the former must as a general rule have a **certain duration which reflects an adequate degree of permanence**. However, the Regulation does not lay down any minimum duration. Before habitual residence can be transferred to the host State, it is of paramount importance that the person concerned has it in mind to establish there the permanent or habitual centre of his interests, with the intention that it should be of a lasting character.

(…)

The social and family environment of the child, which is fundamental in determining the place where the child is habitually resident, comprises various factors which vary according to the **age of the child**.

(…)

An infant necessarily shares the social and family environment of the circle of people on whom he or she is dependent. Consequently (…) it is necessary to assess **the mother's integration in her social and family environment**.

(…)

If the application of the abovementioned tests were (…) to lead to the conclusion that the child's habitual residence cannot be established, which court has jurisdiction would have to be determined on the basis of the criterion of the **child's presence**, under Article 13 of the Regulation". (our underline)

It appears from considerations presented that the European Court of Justice favours the "hybrid approach". Also, the principle of best interests of the child was referred to as of the "utmost consideration" at the very beginning of the reasoning, thus encompassing both subjective and objective factors discussed further on by the Court.

2.2.3. European Court of Human Rights

In the recent case *Michnea v. Romania*[32], the ECHR firmly supported the principle of **bests interests of the child** as paramount in all decisions concerning

[32] ECtHR, Decision adopted on 07 July 2020, Application no. 10395/19, case *Michnea v. Romania*, already cited.

children, aligning with the drafters of the 1980 Hague Convention and the EU case-law.

The Court stated that there was no indication in the national court's decision in case under discussion that "court identified the best interests of the child and appropriately took them into account in making its assessment of the family situation, as required by Article 8 of the Convention".

Also, the Court underlined that "article 8 of the Convention imposes on the domestic authorities a particular procedural obligation in this respect: when assessing an application for a child's return, the courts must make a ruling giving specific reasons in the light of the circumstances of the case".

Again, the pattern adopted by 1980 Hague Convention and ECJ was followed, as habitual residence was explained as a factual element, to be established after consideration of the circumstances of the case.

Subsequently, the Court argued the breach of Article 8 of the Convention as follows: "it appears that the Court of Appeal relied on the CJEU findings in the *Barbara Mercredi* judgment without making any assessment of the contextual difference between that case and the case brought before it by the applicant. (…) The Court considers that the particular circumstances of that case, which were significantly different than those of the case currently under examination, did call for a more in depth examination".

Also, the Court had obviously in mind the **parents'** shared intention to establish their and the child's residence in Italy (subjective factors) when pointing out that "the family had been living in Italy at the time of the child's birth and until her removal and had made all the arrangements upon her birth to register her in Italy and to allow her to benefit from the Italian welfare system".

Furthermore, reiterated that "draws inspiration from the principles of the Brussels II bis Regulation as interpreted by the CJEU in its case-law and cannot but note that prior to her removal from Italy, the child had been, at least to a certain degree, integrated in a social and family environment" in Italy (objective factors).

For reasons above presented, the Court concluded that the interpretation and application of the provisions of the Hague Convention and of the Brussels II bis Regulation by the Romanian national court failed to secure the guarantees of Article 8 of the Convention and that the interference with the applicant's right to respect for his family life had not been "necessary in a democratic society" within the meaning of Article 8 § 2 of the Convention.

2.3. Going deeper: determination of the habitual residence of the child

2.3.1. Criteria

As it resulted from ECJ and ECHR case-law presented before, it is for the national court to establish the habitual residence of the child, taking account of two sets of factors, both subjective and objective.

Neither one set of factors or yet one factor alone is decisive, and therefore national courts should pay attention to multiple (and often conflicting) indicators, both subjective and objective, when making a decision on habitual residence.

Nevertheless, it should be kept in mind that all these different factors are acting under the common and large umbrella of the concept of the best interests of the child, and therefore this concept should be the standard

vector when determining the habitual residence of the child[33].

Also, the list of factors to be presented and discussed as follows is not exhausting and courts should take account of all the circumstances of fact specific to each individual case[34].

Not least, it is important to bear in mind the proximity criterion, which means that the courts of the child's habitual residence are, owing to their proximity to the child's environment, the best placed to assess its situation.

Subjective criteria

This category refers to the parents' shared intention in establishing the child's residence in one state (or transfer it to another).

Generally, the importance of the subjective criteria was argued in the sense that children lack the material and psychological background to decide where they will reside, and therefore a child's habitual residence is consistent with the intentions of those entitled to exercise parental authority (which includes fixing the residence of the child).

In making the appreciation upon the intent, the courts should look not only (and primarily) at declarations, but also at actions and facts.

Juridical literature[35] and case-law included in this area factors such as:

- ***parental employment*** – decision to maintain a job in a state after divorce was appreciated as indicating the intent of holding to the pre-existing habitual residence[36]; on the contrary, decision to leave an employment in a state and gain of a job in another was considered a factor showing the intent to permanently move to another state
- ***purchase of home*** – more likely to express a long-term stay, in opposition to rental of a lodging
- ***moving of belongings*** – partial moving of belongings may nevertheless express incertitude towards the intent of a permanent movement to another state
- ***citizenship*** - if parents and child come to a country on a tourist visa and do not ask for a more permanent residency status, the habitual residence in the prior country may not have been abandoned
- ***location of bank accounts*** – importance of this factor is diminished, as at present on-line transactions may easily be activated and option to have accounts in different states may also be taken in relation to financial opportunities
- ***purpose of movement to the new state*** –journeys for vacations do not express the intent to change the habitual residence and are considered temporary[37]
- ***obtaining professional licenses*** specific to the new state is a factor that indicates intention to gain a new habitual residence.

[33] Bucharest Court of Appeal, Third Section Civil and for minors and family matters, decision no. 720/24.11.2020, case no. 19673/3/2020, definitive, not published: "The Court points out that the best interests of the child are presumed to be in favour of his return to the country of residence.".

[34] ECJ, Decision adopted on 02.04.2009, C-523/07, case *A*, already cited, para. 37.

[35] Jeff Atkinson, *The meaning of "habitual residence" under the Hague Convention on the civil aspects of international child abduction and the Hague Convention on the protection of children, op. cit.*, pp. 654 – 655.

[36] Bucharest Tribunal, Fourth Civil Section, decision no. 1522/27.10.2017, case no. 24670/3/2017, defintive, not published.

[37] Bucharest Court of Appeal, Third Section Civil and for minors and family matters, decision no. 720/24.11.2020, already cited: "The Court finds the temporary nature of the stay in Romania to which the applicant consented, being only a holiday.".

Objective criteria

This set of criteria ponder generally on inquiry whether children have "gained roots" in the new environment (the degree of the child's integration in a social and family environment).

It looks for indicia of the child's connectivity to a place through criteria such as school, extracurricular activities, social activities, significant relationships with people in that place, registrations concerning the child, physical presence of the child.

•***school enrolment*** is considered a key factor in determining if the child has acclimated to a new residence[38]

•***medical enrolment*** usually accompanies school inscription[39]

•***registration of birth*** in official registers[40]

•***participation in social activities*** – social life at school or outside is also considered as an indicator that the child has adapted to the new surroundings

•***length of stay in the country*** **-** the length of time is not fixed and the courts appreciate depending to the specific circumstances in each case[41]

•***the age of the child*** - different nuances are to be considered related to the child's age.

On the one hand, the age of the child is closely connected to the degree of maturity.

On the other hand, the factors to be taken into account in the case of a child of school age are not the same as those relevant for an infant. The environment of an infant (or even young) child is essentially a family environment, determined by the reference person(s)[42]

•***integration of the child's person(s) of reference*** **–** depends on the degree of the child's dependence (which varies according to his or her age), and also languages spoken by parents, geographic and family origins[43]

•***child's physical presence*** - if the child's habitual residence cannot be established by applying the tests above-mentioned, under Article 13 of the Regulation, the physical presence of the child should be taken into consideration (although it is not sufficient by itself to establish the habitual residence of the child[44]).

[38] Bucharest Tribunal, Fourth Civil Section, decision no. 1996/10.12.2020, case no. 16406/3/2020, not published.

[39] Bucharest Court of Appeal, Third Section Civil and for minors and family matters, decision no. 753/07.12.2020, case no. 21763/3/2019, definitive, not published. Also, Bucharest Tribunal, Fourth Civil Section, decision no. 432/23.02.2018, case no. 46495/3/2017, definitive, not published.

[40] Bucharest Tribunal, Fourth Civil Section, decision no. 472/14.03.2019, case no. 3813/3/2019, definitive, not published. Also, Bucharest Tribunal, Fourth Civil Section, decision no. 1215/16.10.2014, case no. 22913/3/2014, definitive, not published.

[41] Bucharest Court of Appeal, Third Section Civil and for minors and family matters, decision no. 753/07.12.2020, already cited: "the fact that the minor was born in Romania and lived in this country with the mother from 24.01.2018 until 06.04.2018 is not such as to lead to the conclusion of the establishment of the residence of the minor in this country.".

[42] Bucharest Court of Appeal, Third Section Civil and for minors and family matters, decision no. 753/07.12.2020, already cited: "In relation to the age of the child at the time when the father brought him to Romania, respectively 11 months, it is clear that the integration of the child targets the family and social environment determined by the reference persons in whose care the minor is (in the case, the mother) and assumes as such the evaluation of the integration of the reference persons".

[43] The logic of this approach is most evident when the habitual residence of a newly-born child is involved, who by definition had no time to become himself/herself integrated in any place at all and would be deprived of an habitual residence.

[44] ECJ, Decision adopted on 02.04.2009, C-523/07, case *A*, already cited, para. 33. Also, Bucharest Tribunal, Fourth Civil Section, decision no. 857/25.06.2015, case no. 40891/3/2014, definitive, not published. Related to this

2.3.2. (More) habitual residences

It is generally agreed that one person can have only one habitual residence at a time.

To this respect, Article 2570 of Romanian Civil Code stipulates for general relations under private international law that: "the habitual residence of a natural person is in the state where the person has his principal place of residence, even if he has not fulfilled the legal registration formalities. (…) For the determination of the main dwelling, account shall be taken of those personal and professional circumstances which indicate lasting connections with the state concerned or the intention to establish such connections"[45].

Albeit the case-law in this respect is also divided, practical experience has proved that there are situations when an alternate habitual residence was considered (persons who split time more or less evenly between two locations).

Juridical literature[46] underlined that the approach of the courts differs in how they handle cases in which there are elements which may lead to the conclusion that the child has more than one residence.

Reference was made to decisions pronounced by Australian courts (which agreed that the notion of dual habitual residence was inconsistent with the wording and the spirit of 1980 Hague Convention), whereas courts from United Kingdom found it was possible for habitual residence to change periodically if "that should be the intended regular order of life for parents and children".

We share the opinion already expressed by the doctrine that the Hague Convention "does not contemplate more than one habitual residence and was not intended to deal with such a circumstance"[47].

Similarly, case-law considered that "the Hague Convention enshrines the principle of exclusive recourse to the attachment to the child's habitual residence, which prevents a child from having several simultaneous habitual residences."[48]

Nevertheless, as cases where courts accepted a dual residence have already appeared, we consider that an amendment of the Hague Convention and the Regulation might be taken into consideration, so that a legal solution should be agreed upon.

In absence of a legal solution, situations of alternate habitual residences of the child are very difficult to be solved in the framework of international child abduction in case of transfer of the child between two (or more) states of habitual residence.

Indeed, one might easily consider that no international child abduction occurred at all, since no wrongful movement or retain of the child could be argued, as both states are considered habitual residences.

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factor, there were also argued opposed opinions that a child's physical presence in a particular state is not even a prerequisite for determining that it is habitually resident in that state (Advocate General Saugmandsgaard Øe, Opinion delivered on 20 September 2018, C-393/18 PPU, case *UD v XB*).

[45] From the wording of the text, it follows that the legislator took into account both subjective and objective factors.

[46] James Marks, *The application of the Hague Convention where there is more than one habitual residence*, p. 6, available at the following link: http://www.jamesmarks.ca/files/Hague-Paper.pdf, last accession on 22.01.2021, 15,26.

[47] James Marks, *The application of the Hague Convention where there is more than one habitual residence*, *op. cit.*, p. 14.

[48] Federal Supreme Court of Switzerland, decision no. 5A_846/06.11.2018, case no. C/21206/2018; DAS/190/2018, available at the following link: id1448-full-text-fr.pdf, last accession on 29.01.2021, 16,13.

3. Conclusions

Following the adoption of the 1980 Hague Convention and even after the Brussels II bis Regulation, as no legal definition was provided for the notion of "habitual residence", courts all over the world have struggled to structure the criteria upon which to establish the habitual residence of a child in international abduction cases.

The omission to provide a definition was indeed intentional, aimed to ensure a margin of appreciation for the courts and avoid rigid and formal determinations, which might have excluded circumstances specific to each case.

On the contrast to these "good intentions", the lack of clarity resulted in divergent views of jurisprudence, emphasizing solely either the child's (objective) or the parents' (subjective) perspective.

We argue that a "hybrid perspective" is more fitted to serve the bests interests of the child, as the question of the child's habitual residence is far more complex than a simple application of tests elaborated on the basis of case-law criteria (which are exemplificative and non-exhaustive).

Both the child's acclimatization and the parents' intention are important factors, albeit the weight given in particular to objective or subjective factors can vary from case to case.

The use of multiple factors from both perspectives, without pre-assigned weight, would also be consistent with the 1980 Hague Convention's and the Regulation's approach not to have a precise definition of "habitual residence".

Analyse of all factors related to the issue of habitual residence should be explored and settled by national courts taking into account the principle of bests interests of the child and also all circumstances of the case.

Amendment of the 1980 Hague Convention and the Regulation would be a solution for cases where dual (or more) habitual residences of the child are accepted.

Finally, as case-law is (still) divided, greater importance should be attached to a consistent and uniform application of the criteria of habitual residence both within the European Union and all the states signatories to the 1980 Hague Convention.

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