Federal Law on Private International Law

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COMMENTARY ON

Art. 20 PILA

A commentary by Loïc Stucki

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Section 4 Domicile, Seat and Citizenship

I. Domicile, habitual residence and establishment of a natural person

Art. 20

1 Within the meaning of this Act, a natural person:

a. has their domicile in the state where they reside with the intent of establishing permanent residence;

b. has their habitual residence in the state where they live for a certain period of time, even if this period is of limited duration from the outset;

c. has their establishment in the state where the centre of their professional or commercial activities is located.

2 No person may have more than one domicile at the same time. If a person does not have a domicile anywhere, the habitual residence is the relevant place. The provisions of the Civil Code relating to domicile and residence do not apply.

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I. INTRODUCTION

A. General

1 Art. 20 IPRG equally regulates domicile, habitual residence and establishment. These concepts are of great relevance for various provisions of the IPRG. Basically, the IPRG considers the principle of domicile as central both for the conflict of laws and for the jurisdiction rule. In particular, domicile and habitual residence serve as connecting factors for various rules of jurisdiction and conflict-of-law rules.

2 Various ideas are attached to the connecting factors of Art. 20 IPRG. For example, the connection of domicile is intended to ensure the proximity between a legal system or the place of jurisdiction and the legal question to be judged. The purpose of the domicile connection is often a certain protection of the person concerned. Protective considerations may also be relevant for the connection to the habitual residence or to the place of establishment. For example, in certain legal matters, reliance on the known law of the habitual residence of the person concerned is protected (e.g. Art. 123 IPRG; so-called environmental law).

B. Scope of Application and Classification in the Doctrine of Conflict of Laws

3 For the entire IPRG, the concepts of Art. 20 IPRG apply equally to conflict of laws, jurisdiction rules, and recognition and enforcement. The norm is a substantive norm of IPR: there is no reference to a legal system for the determination of domicile, but this question is basically regulated immediately by Art. 20 IPRG. This may result in the otherwise applicable law (lex causae) determining a place other than domicile. According to the wording, Art. 20 IPRG applies only to natural persons. In contrast, Art. 21 IPRG applies to legal persons and trusts. In the scope of application of (autonomously interpreted) international treaties, Art. 20 IPRG does not apply - unless the convention explicitly refers to domestic law (such as Art. 59 para. 1 Lugano Convention).

4 For the determination of the applicable law, either the point in time fixed by the conflict-of-law rule or (without standardized fixation) the point in time of the judgment is decisive. However, the connecting factors of domicile, habitu-

al residence and establishment are mobile or changeable, since they can be transferred to different states in the course of time. Thus, the problem of a change of statutes may arise. With regard to the applicable law, such a change of statute is, in principle, relevant, i.e. a change of domicile occurring during the proceedings or during the relevant period leads, in principle, to the (co-)consideration of the law at the new domicile. According to prevailing doctrine and case law, it is basically sufficient for the determination of the (direct) international jurisdiction to be based on the occurrence of the lis pendens - a later transfer of the domicile or the habitual residence does not harm due to the perpetuatio fori. If jurisdiction did not already exist at the time of the lis pendens, it must exist at the latest at the time of the judgment (cf. Art. 59 para. 2 lit. b CCP). For indirect jurisdiction in the area of recognition and enforcement, the time at which the action is brought is generally decisive.

1. Relevance in International Civil Procedure Law

5 The concepts of domicile, habitual residence and establishment under the ICCPR refer only to a specific state as a superior territorial unit, but not to a specific constituent state or even a specific place. However, local jurisdiction is assessed according to the IPRG if a court in Switzerland has international jurisdiction (cf. Art. 1 para. 1 lit. a IPRG). If, on the other hand, the IPRG declares Swiss courts to lack jurisdiction, it does not at the same time also regulate the (local) jurisdiction of the foreign court; rather, the relevant foreign laws must be consulted to determine jurisdiction. If the IPRG wants or has to regulate the local jurisdiction within the country of domicile (especially if the domicile is in Switzerland), Art. 20 IPRG is also relevant for this (e.g. for Art. 2 IPRG). Also for indirect jurisdiction, Art. 20 IPRG may be invoked under certain circumstances, whereby jurisdiction in the state of judgment according to Art. 26 lit. a IPRG is sufficient - a closer localization with regard to the jurisdiction of the court is not necessary.

2. Relevance in conflict of laws

6 The principle that the terms of Art. 20 IPRG refer only to the superior territorial unit of the state is in principle also valid in conflict of laws. If the domicile, habitual residence or establishment as connecting factor is in Switzerland, Swiss law is applicable, which is why a closer localization seems mostly superfluous. Even if such a connecting factor is realized abroad, this state will normally simply be relevant. Thus, as a rule, reference is made to the law of the

state in which a specific connecting factor of Art. 20 IPRG is realized, but not to a specific place or member state in the territory of the state.

7 Exceptions to this principle are references to multi-jurisdictional states. These are states that are organized federally and do not have a uniform legal system. An example of this is the United States of America with the non-unified legal systems of the individual states. In the case of multi-jurisdictional states, merely referring to the state as a whole is not expedient. Rather, this must be specified in more detail. According to one doctrine, this concretization must take place by way of an "extension" of the connection. According to this opinion, which at least applies to territorial connecting factors, the domicile in the case of multi-jurisdictional states should not only be located in a nation, but should also be located closer - for example in a specific federal state. The same can also apply to Switzerland if, exceptionally, it is the canton or a specific place that is to be decisive.

8 Example: From a jurisdictional point of view, a person may be domiciled in the USA because he or she has resided there continuously for years. However, if this person lives nomadically within the U.S., he or she may not be domiciled in any state. Nevertheless, the jurisdiction of domicile will have to be located in the USA, since only the superior state (the USA) is relevant for this. For the question of the applicable law at the domicile, on the other hand, the relevant federal state must be found: e.g. by extending the connection of Art. 20 IPRG and thus by focusing on a possible habitual residence (cf. Art. 20 para. 2 IPRG). Accordingly, a domicile may exist under the law of jurisdiction that does not exist under the law of conflict.

II. DOMICILE (PARA. 1 LIT. A)

9 Article 20(2) IPRG - like the CC (Article 23(2) CC) - is based on the principle of unity of domicile: According to this, a person cannot be domiciled in several places at the same time. The closest relationship must be sought for a single place among several possible ones (see also N 21 f.). Moreover, it is conceivable that the domicile under IPRG differs from that under other laws (in particular from the domicile under tax or social security law).

A. Elements of domicile

Domicile within the meaning of the IPR is not a purely factual concept, but is also characterized by legal elements and evaluations. Thus, domicile is a legal concept; only the circumstantial elements used are questions of fact, while the objectified intention to settle (and thus, ultimately, domicile) to be inferred from them is a question of law. Accordingly, two cumulative elements are required to establish residence: 10

- An objective element: the physical residence in a certain place or in a certain state;
- A subjective element: the intention to remain permanently at this place, which must, however, be recognizable from the outside (objectified standard).

This results - according to unanimous doctrine and case law - in the center of life or the center of life's interests. Consequently, this center of interests must be sought in order to determine the place of residence. In addition, the nature of the legal question must be taken into account for which the domicile connection is to be made (so-called functional concept of domicile). In the final analysis, the purpose of a domicile connection under the IPRG is nothing other than to establish the closest connection with a legal system. Accordingly, from the point of view of international private law, it is far-fetched to affirm the domicile connection at a place with which the facts underlying a legal question have no connection whatsoever. 11

1. The Objective Element: Physical Residence

The objective criterion of domicile requires physical presence at a place or in a state. As long as it depends solely on a specific state and not on a more detailed determination (as is the case in particular with multi-jurisdictional states; see N 7), residence in the state in question is sufficient. It is not mandatory that the person always stays in the same place in said state or that the stay is without interruptions. 12

In principle, the duration of the physical stay is not relevant for determining domicile. Thus, even a short stay can establish domicile. The decisive factor is rather that the subjective element has been realized in combination with the 13

physical residence. Consequently, domicile can be established as of the first day of presence, and a specific duration of stay is not required.

2. The subjective element: intention to stay permanently

14 The intention to remain permanently in a certain state or in a certain place as a subjective element must be made recognizable to the outside world. A clear manifestation of the inner will is required. Since the subjective element is considered objectified, we also speak of the objectified concept of domicile.

15 The inner will to remain cannot be decisive on its own; it must be made recognizable externally (in accordance with the principle of trust). Consequently, residence cannot be established by a mere declaration of intent. Rather, objectively recognizable elements are required to ensure that this declaration of intent can actually be followed. It is even conceivable that a domicile is established against the will of the person if, on the basis of created facts, the appearance of an intention to remain permanently clearly arises. This is because the will to establish residence is not necessarily congruent with the intention of permanent residence required by law. The motive for a person's residence in a state is fundamentally irrelevant to the concept of domicile.

16 It is also questionable to what period of time the intention to remain must refer. When the law speaks of "permanent" residence, it means nothing other than "not merely temporary". Even a short stay can in principle fulfill the subjective element, if the externally recognizable elements indicate the establishment of a center of life, i.e. the intensity of the relationship to a certain place is sufficiently strong. Thus, if there is a prospect of a long or continuous stay, residence will generally be affirmed, irrespective of the duration that has already taken place. But also a temporary intention can be sufficient, provided that the center of life is effectively relocated for this period of time. In the final analysis, the intensity of the relationship to a certain place, as it is recognizable from the outside, is decisive. As a rule, the subjective element can be located where the family interests and ties are most strongly localized. However, there may be exceptions to this rule if other indications prevail (N 17 ff.).

3. Indications for the assessment of domicile

17 The doctrine as well as the case law contains a large number of indications which can be decisive in the localization of the domicile. The approaches from the case law should only serve as a guideline. A case-by-case assessment

must always be made, taking into account all relevant, externally recognizable circumstances. The indications on which recourse may be had are in principle identical to those under Art. 23 CC. Nevertheless, the differences between the domicile definitions of the CC and the IPRG must be taken into account.

Indications that are sometimes put forward include: Means of communication such as the telephone connection or the postal address, whereby an address used for official or judicial proceedings can be a very significant indication. An address in Switzerland should have a high indicative value if debt collection or Swiss proceedings have already been successfully conducted against the person concerned at this address (at least if no complaint was filed due to lack of jurisdiction; cf. Art. 46 para. 1 SchKG). Provided that the factual situation has not changed since then, an appeal to another domicile would under certain circumstances even amount to a venire contra factum proprium. The keeping of medical appointments also indicates a residence (at least if there is no residence for care, cf. n 26 f.). Likewise, health insurance can be an indication, but this alone does not permit any conclusion. Family contacts can be an important element, especially if a person has established a family in a state. However, especially for unmarried (and childless) individuals, family ties may also take a back seat if they compete with other (especially commercial) contacts. Other factors that may be taken into account include household insurance, the use of an address in contracts, leisure activities, being seen on a regular basis, exercising political rights, or the existence of housing facilities such as a bathroom or kitchen. On the other hand, mere preparatory acts for the transfer of domicile cannot suffice if there are no indications of a shift in personal and financial interests. In order for the domicile to be transferred at all, the previous domicile must be given up - this accordingly requires a certain change in circumstances. 18

Public-law aspects (identity cards, residence certificates, residence permits, etc.) may be used as indicia, but do not yet establish a presumption of domicile. Since the IPRG does not recognize any (positive) presumptions of domicile, public-law documents have at most a heightened indicative effect in this respect. It is also possible that the domicile is localized differently from public law. It should be noted that even a residence ban by the aliens police or a missing residence permit cannot exclude residence within the meaning of Art. 20 IPRG. Moreover, it is irrelevant whether domicile also exists under the national-autonomous law of the (alleged) state of domicile. Nationality cannot 19

be an indication. In the case of expressions of will by the affected party, an indicative effect should only be assumed with great caution if these were not visibly followed. However, expressions of will can at least serve as a negative indication: Thus, the Federal Supreme Court has used the expression of the will to take up residence in Switzerland in the future as an indication against a current Swiss residence.

B. Difficulties in determination

20 Often, domicile is not difficult to determine. The determination can become problematic if there are several domiciles, none of which clearly predominates. If the determination of the domicile is impossible, then in principle, according to Art. 20, para. 2, sentence 2 IPRG, the habitual residence according to Art. 20, para. 1, lit. b IPRG can be used as a basis. However, this conclusion should not be drawn already in case of mere difficulties of the provision.

1. Physical residence in several states

21 Difficulties in determining domicile arise when a natural person realizes the objective element of domicile in several states. The determination must then be made primarily on the basis of the subjective element. It is not appropriate to base the determination solely on physical residence, for example, on the basis of the number of days spent in a particular state. In the case of several possible residences, even more consideration must be given to the individual circumstances of the case so that the closest relationship or the strongest integration in a state can be determined. In the case of multiple residences, for example, electricity costs, renovations, bank accounts, purchases at the claimed residence, number and intensity of friendships, registration of a vehicle, or the location of personal effects can be used as circumstantial evidence and, if necessary, compared between different states.

22 A notable example of complicated circumstances is provided by exceptionally wealthy individuals who have multiple domiciles. Such individuals, thanks to their great wealth, have greater freedom and opportunity to shift their physical location to one of several possible states within a short period of time. In addition, it may be difficult to establish the center of interests in one state due to worldwide economic activities and the sometimes widely dispersed family and personal relationships. In such cases, the subjective element may take on greater weight: Repeated, consistent and outwardly directed statements as to

which of the possible states has the closest relationship or where the residence should be located are a strong indication of strong integration in such cases. However, the subjective will must always be objectively recognizable from the outside. Accordingly, the Federal Supreme Court weighs up a wide range of objectively recognizable indications, especially in the case of wealthy persons (cf. above n 17 ff.). Thus, if the expressions of intent are obviously followed, the assumption of residence in the designated state is obvious, even if the person lives temporarily in other states.

Temporarily posted workers - at least if their family does not join them - will not regularly establish their residence in the new state. The same will often be true for diplomats. The situation is similar for other persons with only temporary residence without having severed their ties to the other state (e.g. students who regularly return to their parents or stay abroad, seasonal workers). Another problem is with so-called globetrotters: They regularly move to different countries at their own will, without wanting to settle permanently in one place. In their case, it will have to be assessed whether they have definitively given up their residence or whether they would be likely to return in an emergency (e.g. in case of health or financial problems). If they have definitively abandoned their domicile and have not established a new one, the subsidiary connection to habitual residence applies (cf. Art. 20, para. 2 IPRG). 23

2. "Simulated" domicile

Even before the IPRG was enacted, the so-called principle of the authenticity of the domicile was postulated in part, which was intended to prevent a simulated, pretended or fictitious domicile. The question arises whether such a principle could also be upheld in the current version of Art. 20 IPRG. A domicile can be established with "malicious" intent (e.g. to evade possible enforcement, to create a favorable jurisdiction or to apply a favorable law). From the point of view of the IPRG, there is nothing wrong with such motives: Provided that a person fulfills the elements of Art. 20 para. 1 lit. a IPRG, there is domicile. Any protection aspects are already countered at the jurisdictional level by means of compulsory jurisdiction. On the level of conflict of laws, under certain circumstances, a correction can be made via the exception clause (Art. 15 IPRG) or via ordre public (Art. 17 IPRG), or intervention standards (Art. 18 f. IPRG) can be applied. On the other hand, a purely pretended "domicile", which was only established as a sham, is by definition not a domicile at all. In 24

such a situation, at least one residence requirement (at least the subjective one) is necessarily not fulfilled, since otherwise the residence would not be simulated. In this respect, this is not a problem of the concept of domicile, but of the correct assessment of the facts. Consequently, a principle of authenticity cannot apply under Art. 20 IPRG in the sense explained above. On the one hand, abuse of rights can be encouraged by the general requirements for establishing domicile; on the other hand, this is done in certain norms by additional requirements (e.g. Art. 59 IPRG).

3. Anticipated domicile

25 According to a voice in the literature, a so-called anticipated domicile can be established, i.e. a domicile that will only come into existence in the future. However, the decisions of the Federal Supreme Court, which are cited in the sense of justifying this opinion, only speak of the fact that the duration to be expected in the future can also be significant, whereby there was always already a physical residence at the domicile in question. The Federal Supreme Court thus rather points out that already (but also at the earliest) from the first day onwards a domicile may exist at the new place. An anticipated domicile in the aforementioned sense cannot yet be derived from this. There can be no question of a de facto domicile that does not yet exist under Art. 20 IPRG, since the objective element in the sense of a physical residence must always be present.

4. Residence for special purposes

26 Although the provisions of the CC on domicile are denied (direct) application under Art. 20(2) IPRG, the same questions arise in international relations in the case of residence for special purposes. Such a special purpose exists primarily in the case of residence for care or in an institution. The Federal Supreme Court has applied the (negative) presumption that residence for special purposes does not establish domicile also under the IPRG. As under Art. 23 para. 1 sentence 2 CC, this presumption is rebuttable also for Art. 20 IPRG: On the one hand (as a precondition of the subjective component), capacity of judgment must be demonstrated before the (objectified) intention to transfer domicile and actual residence are shown.

27 By definition, in order for a residence to be established at all at the place of care, the previous residence must be given up. If the need for care is only

slight and the place was freely chosen, this indicates a change of domicile at the place of care. However, if the stay is limited to the special purpose only, no domicile arises in principle. If the stay was to a certain extent forced for health or psychological reasons and thus not freely chosen (especially if the place of care is ordered by third parties), no domicile is generally established at the place of care. However, the "compulsion of circumstances" establishes a domicile if the institution could be freely chosen. Despite a will to return to another country after recovery, residence at the place of care can still be affirmed. The residence must therefore serve an end in itself - "life" - and not merely a special purpose.

5. persons incapable of acting or having judgemental capacity

The IPRG requires capacity to judge as a precondition for establishing domicile. This can be inferred, among other things, from the fact that in Art. 66 ff. the ICCPR refers only to habitual residence for children (as a showcase example of incapacity to judge). This conclusion also corresponds to the legislative will. This is regrettable insofar as it raises the question of which statute should be used to assess capacity to judge. In matters of domicile, at least in principle, a low barrier is to be placed on the capacity to judge. It should also be possible for persons who are incapable of acting to establish a domicile, provided they have the capacity to judge in this respect. If there is no domicile due to incapacity to judge, the substitute connection of habitual residence can be used if necessary (see N 29 ff. and 38). 28

C. Relationship to the domicile provisions of the Civil Code

The wording of Article 20(1)(a) IPRG is very similar to that of Article 23(1) CC. However, Art. 20, para. 2, sentence 3 IPRG excludes the application of the provisions of the CC on domicile in international relations. However, the Federal Supreme Court has confirmed that the interpretation of Art. 20 para. 1 lit. a IPRG must closely follow that of Art. 23 para. 1 CC. Thus, in principle, literature and case law on domicile according to the CC can also be consulted. When interpreting Art. 20 IPRG, however, its conflict-of-law character must always be kept in mind. Clearly excluded in the international relationship on the basis of Art. 20 para. 2 IPRG are the continued domicile according to Art. 24 para. 1 ZGB as well as the derived domicile in the sense of Art. 25 ZGB. Overall, the IPRG does not know any (positive) presumptions that establish a 29

domicile. This can be concluded from the fact that fictitious or derived domiciles do not have the proximity to a legal relationship or the facts of the case required by conflict and jurisdiction law. Unlike in the CC, a domicile does not necessarily have to exist under Art. 20 IPRG - it is therefore possible that a person has no domicile. The domicile according to IPRG can be given up more easily than that of the ZGB, but not more easily established. If an international situation exists, the concept of domicile under the IPRG must take precedence over that under the CC.

III. HABITUAL RESIDENCE (PARA. 1 LIT. B)

30 The habitual residence can be relevant in two respects: On the one hand, as a connecting factor in various norms of the IPRG, on the other hand, as a substitute connecting factor if there is no domicile. Direct links to habitual residence are found for the most part in the norms of child law (cf. Art. 66 et seq. IPRG). The fact that habitual residence functions as a substitute connection (cf. N 38 ff.) also implies that it should not be adopted lightly. The concept originates from the various Hague Conventions and is also found in other conventions, namely in Art. 5 Lugano Convention.

31 It follows from the historical development of Art. 20(1)(b) IPRG that the interpretation may borrow from the term used in the various Hague Conventions. This borrowing is largely to be supported, but because of systematic differences it cannot go so far as to allow the concept of habitual residence under the IPGR to coincide fully with that of the Hague Conventions. The concept of the Hague Conventions is always to be interpreted autonomously by treaty and must follow the relevant principles of interpretation. Within the scope of application of the Hague Conventions, the principles developed for Art. 20 IPRG may in principle not be resorted to because of the primacy of state treaties and treaty-autonomous interpretation. In the scope of application of the IPRG, however, an interpretation in the light of the Hague Conventions is certainly possible, namely on the basis of the historical interpretation. Such an interpretation is also welcome in order to promote the international consistency of decisions. However, differences may arise on the basis of a functional interpretation, in particular because of the possibility of a subsidiary connection to habitual residence (cf. N 38 ff.), which is fundamentally foreign to the Hague Conventions. Also, the IPRG - in contrast to the Hague Conventions (cf. e.g. Art. 6 HEsÜ) - does not recognize a subsidiary connection to the

simple residence or the mere place of residence. These differences must be taken into account if an interpretation is to be made parallel to the Hague Conventions. It follows that in legal areas in which the IPRG provides for habitual residence as the primary connecting factor (namely in matters relating to children pursuant to Art. 66 et seq. IPRG), an analogy to the Hague Conventions may be assumed more generously. If, on the other hand, habitual residence is only the subsidiary connecting factor (cf. Art. 20(2) IPRG), analogies should be handled more cautiously; cases in which habitual residence under the Hague Conventions does not coincide with habitual residence under Art. 20(1)(b) IPGR are nevertheless likely to be absolute exceptions.

32 The habitual residence may be at a different place than the domicile. This is the case if there is no externally recognizable intention of permanent residence, but nevertheless a longer stay in one place takes place in fact. This may be the case, for example, in the case of studies abroad, seasonal workers or posted employees. The habitual residence can be changed much more easily than the domicile and is therefore a less stable connection. Exceptionally, it is also possible that a person has his habitual residence in several places, the provision of Art. 20 para. 2 IPRG refers only to the prohibition of multiple residence. With the h.L. this is to be agreed in principle, provided that the necessary conditions for a habitual residence are realized in several states. Already due to the designation as "habitual" residence, it seems practically hardly possible that a person actually habitually resides in several states at the same time. Because of the subsidiary applicability of residence in the absence of domicile, multiple habitual abodes also create further problems and uncertainties. Consequently, multiple habitual residences should only be inferred in exceptional cases where the requirements are met to the same extent in several states. Such a case may exist, for example, in the case of "jet-setters". If, on the other hand, a preponderance of the indications can be located in one place, then the habitual residence exists exclusively in this place.

A. Requirements

1. "Living"

33 In assessing habitual residence, the legislator's intention is to focus more on "external appearances" than in the case of residence. The focus is on the actual event of a person's physical presence in a place of some duration (question

of fact). Contrary to the Federal Supreme Court, however, the "center of gravity of the living conditions" at the place is not required, since otherwise habitual residence would be too close to domicile. Nevertheless, legal assessments follow from this - the assessment of whether this residence establishes a sufficient external appearance - which in the end make the concept a question of law.

34 Habitual residence may also contain a certain subjective component. This is because the wording of the standard requires that the person "lives" at the habitual residence. Actions that indicate "living" in a place generally occur only with the will of the person concerned (with the exception, for example, of persons incapable of judgement). However, habitual residence can also be established without or even against the express will of the person concerned. An - albeit longer - vacation stay or a forced change of residence (e.g. in the case of abduction) are basically not capable of establishing habitual residence. After all, an outwardly recognizable minimum degree of personal, professional or at least emotional attachment is required for there to be any "living" at all in a place. Such subjective criteria should not be subject to a high limit: As soon as a bond cannot be clearly denied, the requirements should have been met. Thus, habitual residence can be affirmed even in the case of long-term placement in a prison, whereas a sufficient relationship is usually not established in the case of abduction.

2. "For a longer period of time"

35 The wording of Art. 20(1)(b) IPRG requires residence "for a longer period". This element distinguishes habitual residence from mere residence. It is sometimes argued that a certain minimum duration is required. Such abstract minimum durations must be rejected: neither a planned nor an already existing minimum duration is required. Rather, the circumstances of the individual case must be taken into account to determine whether a sufficiently long stay already exists or can at least be expected. Admittedly, it will hardly be possible to build up the required relationship - i.e. a "life" (cf. above N 33 f.) - in less than a few months. Particularly with regard to children, however, it cannot be assumed in the abstract that they must already have lived at the location for a longer period of time. It is always central whether the impression is given to the outside that a person normally or at least usually stays at this place. Short-

er interruptions do not dissolve the habitual residence, as long as the attachment to this place remains.

B. Difficulties in determining habitual residence

The so-called globetrotters (cf. N 23) also present problems in determining habitual residence. Often, no domicile can be established for globetrotters, since they regularly have no intention of settling permanently in one place. Thus, their habitual residence is used as a subsidiary basis (Art. 20 para. 2 IPRG). However, habitual residence can be equally difficult to find for globetrotters, since this also requires that the person "lives in one place for a longer period of time". If they repeatedly return to the same state or stay there for a significantly longer period of time, habitual residence will have to be assumed. Otherwise, the legal appearance is to be taken into account, whereby it is quite possible that the habitual residence shifts frequently and rapidly. 36

For children (possibly illegally) taken abroad, the habitual residence should be assumed to be where the closest or most stable family relationships are to be located. In this context, an analogy to the concepts of the Hague Conventions would be appropriate (unless the relevant conventions are applicable anyway). As a rule, the closest relationship will be located with the custodial spouse. For newborn children, the habitual residence is presumably to be located at the place where the ties of the custodial parent are strongest. In the context of the functional connection, a shift of the habitual residence is only to be assumed with reservation in questions concerning children if they have been brought illegally into a state. 37

C. The relationship between habitual residence and domicile

According to Art. 20(2) IPRG, in cases where a person has no domicile anywhere, the habitual residence is to be taken into account. However, according to the explicit wording of Art. 20 para. 2 IPRG, this subsidiary application only comes into question if no domicile can be located either in Switzerland or abroad. In view of the subsidiarity, it can also be explained that a habitual residence must be located for each person - otherwise various connections would run into the void in the absence of both a domicile and a habitual residence. 38

39 Habitual residence applies in particular when the previous residence is abandoned and no new residence is established. The subsidiary connection to the habitual residence is not to be applied if the criteria for determining the place of residence are not clear. In other words, habitual residence will not already be inquired about if there are several possible places of residence, but only if no place can be considered a place of residence. As a rule, the subsidiary connection will not be applied to persons who, despite living in different states, maintain a clear and recognizably closer relationship to one state: they still have a domicile. This is the case if persons live only temporarily in different states or outside a state territory. This is the case, for example, for guest workers with a short duration of stay in different states (tourism, missionaries, etc.), deep-sea workers or travelers.

40 The substitute connection to habitual residence basically refers to both conflict of laws and jurisdiction rules. In some cases, only domicile can be used as a substitute, which means that habitual residence cannot be invoked. This will be the case in the law of succession (Art. 86 et seq. IPRG), where the "last domicile" is taken into account. If a person has given up his domicile before his death and has died at his habitual residence, the last domicile must nevertheless be taken into account. An exception can only exist if the decedent did not have a domicile at any time. Certain norms also provide for the possibility of linking to the habitual residence in Switzerland if there is no residence in Switzerland (e.g. Art. 46 IPRG). In such cases, habitual residence is not subsidiary only when there is no domicile anywhere, but already when there is no Swiss domicile.

IV. ESTABLISHMENT (PARA. 1 LIT. C)

41 The establishment is located at the center of business activities of a natural person. The focus must be on the center of activities that are aimed at generating a profit. Establishment for a certain period of time is also required for the branch office, which is why merely temporary market or trade fair stands are not sufficient. It is not necessary that the gainful activity is carried out on a full-time basis. What is essential is the legal appearance that is created for third parties in accordance with the principle of trust.

42 A workshop, a salesroom, a studio or an office are considered to be an establishment of a natural person. Examples may also be the practice of a self-employed lawyer or the office of an architect. The relevant time of localization is

the time when the contractual (or tortious) relationship in question existed - a relocation of the establishment after the termination of this relationship should remain irrelevant. For legal entities or trusts, not Art. 20 but Art. 21 IPRG is applicable. Thus, the concept of establishment according to Art. 20 para. 1 lit. c IPRG still mainly covers sole traders.

BIBLIOGRAPHY

Message on the Federal Act on Private International Law (IPR Act) of 10 November 1982, BBl 1983 I, p. 263 ff, available at: https://www.fedlex.admin.ch/eli/fga/1983/1_263_255_239/de.

Baetge Dietmar, Der gewöhnliche Aufenthalt im Internationalen Privatrecht, Tübingen 1994.

Bohnet François / Othenin-Girard Simon, Le for du domicile et de la residence habituelle: Comparaison des régimes de la LDIP et de la LFORS, SJ 2001/II, p. 139 ff.

Bucher Andreas, in: Bucher Andreas (ed.), Loi fédérale sur le droit international privé (LDIP) / Convention de Lugano (CL), Commentaire Romand, Basel 2011.

Bucher Andreas / Bonomi Andrea, Droit international privé, 3rd ed.

Bucher Andreas, Natürliche Personen und Persönlichkeitsschutz, 4th ed.

Bucher Eugen, Die natürlichen Personen, Kommentar zu den Art. 11-26 ZGB, Berner Kommentar Band/Nr. I/2/1, 3rd ed., Bern 1976.

Buhr Axel / Gabriel Simon / Schramm Dorothée, in: Furrer Andreas, Girsberger Daniel, Müller-Chen Markus (eds.), Handkommentar zum Schweizer Privatrecht, Internationales Privatrecht (Art. 1-200 IPRG), 3rd edition, Zurich 2016.

Dutoit Bernard, Droit international privé suisse, Commentaire de la loi fédérale du 18 décembre 1987, 5th ed, Basel 2016.

Furrer Andreas / Girsberger Daniel / Siehr Kurt, Private International Law: General Doctrines, Swiss Private Law Volume XI/1, Basel 2008.

Grolimund Pascal / Schnyder Anton K., International Private and Civil Procedure Law, Zurich/St. Gallen 2011.

Guillaume Florence, Droit international privé, 4th ed, Basel 2018.

Hausheer Heinz / Aebi-Müller Regina E., Das Personenrecht des Schweizerischen Zivilgesetzbuches, 5th ed.

Hotz Sandra / Schlatter Christina, in: Büchler Andrea / Jakob Dominique (eds.), Kurzkommentar ZGB, 2nd ed., Basel 2018.

Hrubesch-Millauer Stephanie / Bürki Melanie, Forum shopping - eine erbrechtliche Betrachtung (IPRG & EuErbVO), in: Markus Alexander R. / Hrubesch-Millauer Stephanie / Rodriguez Rodrigo (eds.), Zivilprozess und Vollstreckung national und international - Schnittstellen und Vergleiche, Festschrift für Jolanta Kren Kostkiewicz, Bern 2018, p. 105 et seq.

Hürlimann-Kaup Bettina / Schmid Jörg, Einleitungsartikel des ZGB und Personenrecht, 3rd edition, Zurich/Basel/Geneva 2016.

Keller Max / Siehr Kurt, Allgemeine Lehren des internationalen Privatrechts, Zurich 1986.

Knoepfler François / Schweizer Philippe / Othenin-Girard Simon, Droit international privé suisse, 3rd ed.

Laube Jacques, Domicile and Nationality as Conjunctive Concepts in Private International Law. Changes in their Mutual Relationship, Diss. Zurich 1961.

Levante Marco, Wohnsitz und gewöhnlicher Aufenthalt im internationalen Privat- und Zivilprozessrecht der Schweiz, Diss. St. Gallen 1998.

Markus Alexander R., International Civil Procedure Law, 2nd ed. Bern 2020.

Kren Kostkiewicz Jolanta, IPRG/LugÜ Commentary, Orell Füssli Commentary, 2nd ed, Zurich 2019.

Kren Kostkiewicz Jolanta, Swiss Private International Law, 2nd ed, Berne 2018.

Kren Kostkiewicz Jolanta, in: Müller-Chen Markus / Widmer Lüchinger Corinne (eds.), Zürcher Kommentar zum IPRG, 3rd ed, Zurich 2018.

Markus Alexander R., Internationales Zivilprozessrecht, 2nd ed.

Siehr Kurt / Markus Alexander R., in: Müller-Chen Markus / Widmer Lüchinger Corinne (eds.), Zurich Commentary on the IPRG, 3rd ed., Zurich 2018.

Masmejan Denis, La localisation des personnes physiques en droit international privé, Diss. Lausanne 1994.

Müller-Chen Markus, in: Müller-Chen Markus / Widmer Lüchinger Corinne (eds.), Zurich Commentary on the IPRG, 3rd ed., Zurich 2018.

Oberhammer Paul, in: Dasser Felix / Oberhammer Paul (eds.), Lugano Convention (LugÜ), SHK Stämpflis Handkommentar, 2nd ed.

Schneider Bernard, Le Domicile International, Diss. Neuchâtel 1973.

Schnyder Anton K. / Liatowitsch Manuel, International Private and Civil Procedure Law, 4th ed., Zurich/Basel/Geneva 2017, N 138 f.

Schwander Ivo, Einführung in das internationale Privatrecht, Erster Band: Allgemeiner Teil, 3rd ed.

Schwander Ivo, in: Walter Gerhard / Jametti Greiner Monique (eds.), Texte zum internationalen Privat- und Verfahrensrecht, Loseblattsammlung, 7. Ergänzungslieferung, Bern 2000.

Siehr Kurt, Das Internationale Privatrecht der Schweiz, Zurich 2002.

Spühler Karl / Meyer Claudia, Einführung ins internationale Zivilprozessrecht, Zurich 2001.

Staehelin Daniel, in: Geiser Thomas / Fountoulakis Christiana (eds.), Civil Code I, Basler Kommentar, 6th ed, Basel 2018.

Truniger Philipp, Internationales Privatrecht, Basel 2011.

von Steiger Werner, Der Wohnsitz als Anknüpfungsbegriff im internationalen Privatrecht, Diss. Berne 1934

Walter Gerhard / Domej Tanja, International Civil Procedure Law of Switzerland, 5th ed. Bern 2012.

Westenberg Catherine, in: Grolimund Pascal / Loacker Leander D. / Schnyder Anton K. (eds.), Internationales Privatrecht, Basler Kommentar, 4th ed.