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Commentary on Art. 20 IPRG

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I. Introduction

A. General

1 Art. 20 IPRG governs domicile, habitual residence and establishment in equal measure. These concepts are of great relevance for various provisions of the ICCPR.[1] The IPRG considers the principle of domicile to be central to both conflict of laws and jurisdiction rules. [2]particular, domicile and habitual

[1] Cf. Message IPRG, p. 315; SCHWANDER, N. 1 on Art. 20 IPRG.
[2] Message IPRG, p. 315 f.; KELLER/SIEHR, p. 314. Cf. SCHNYDER/LIATOWITSCH, para. 138 f.

residence serve as connecting factors for various rules of jurisdiction and conflict-of-law rules.

2 The connecting factors of Art. 20 IPRG are based on various ideas.[3] For example, the connection to domicile is intended to ensure the proximity between a legal system or the place of jurisdiction and the legal question to be judged.[4] 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 habitual residence or 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). [5]

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.[6] The norm is a substantive norm of IPR: no reference is made to a legal system for the determination of domicile, but this question is in principle regulated immediately by Art. 20 IPRG. [7]This may result in the otherwise applicable law (*lex causae*) determining a place other than domicile. [8]According to its 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 (e.g. Art. 59 para. 1 Lugano Convention). [9]

4 For the determination of the applicable law, either the point in time fixed by the conflict-of-law rule or (without a standardized fixation) the point in time of

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3 On the whole: KNOEPFLER/SCHWEIZER/OTHENIN-GIRARD, para. 444 ff.

4 Message IPRG, p. 318 and 344; cf. DUTOIT, N. 4 on Art. 20 IPRG; SCHWANDER, para. 399 and 201.

5 Cf. Message IPRG, p. 319 f.

6 LEVANT, p. 47 f.; WALTER/DOMEJ, p. 118 f.

7 MARKUS, para. 291; SCHNYDER/LIATOWITSCH, para. 544. Exceptions may arise from Art. 39 para. 1 and Art. 91 para. 1 IPRG, see KREN KOSTKIEWICZ, para. 625.

8 On the internationally divergent concepts of residence: LEVANT, p. 19 ff. with further references.

9 Judgment 5A_68/2017 of 21 June 2017 E. 2.3; BSK IPRG-Westenberg, N. 13 on Art. 20 IPRG; CHK-Buhr/Gabriel/Schramm, N. 3 on Art. 20 IPRG; KREN KOSTKIEWICZ, para. 631 f.

the judgment is decisive.[10] However, the connecting factors of domicile, habitual residence and establishment are mobile or changeable, as they can be transferred to different states over time.[11] Thus, the problem of a change of statute may arise.[12] As far as the applicable law is concerned, 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. [13]According to prevailing doctrine [14]and case law[15], it is 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 is not detrimental due to the *perpetuatio fori.* [16]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). [17]For indirect jurisdiction in the area of recognition and enforcement, the date on which the action was brought is in principle decisive. [18]

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.[19] However, local jurisdiction

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10 KREN KOSTKIEWICZ, para. 644; cf. KNOEPFLER/SCHWEIZER/OTHENIN-GIRARD, para. 214.

11 BSK IPRG-Westenberg, n. 20 to Art. 20 IPRG; Schnyder/Liatowitsch, para. 548; SIEHR, p. 541 f.; TRUNIGER, para. 73.

12 See: FURRER/GIRSBERGER/SIEHR, para. 471 ff; KELLER/SIEHR, p. 406 ff; KNOEPFLER/SCHWEIZER/OTHENIN-GIRARD, para. 214 ff.

13 Cf. FURRER/GIRSBERGER/SIEHR, para. 497 ff. with further references; KREN KOSTKIEWICZ, para. 644.

14 BSK IPRG-Westenberg, n. 22 on Art. 20 IPRG; GROLIMUND/SCHNYDER, p. 91; KNOEPFLER/SCHWEIZER/OTHENIN-GIRARD, para. 652b; LEVANTE, p. 65 f.; ZK-Müller-Chen, n. 58 on Art. 2-10 IPRG. In favour of the time of the decision on jurisdiction: KREN KOSTKIEWICZ, para. 643.

15 BGE 129 III 404 E. 4.3; BGE 116 II 9 E. 5; judgment 5A_235/2012 of 31 August 2012 E. 5.1.

16 BONOMI/BUCHER, para. 85; MARKUS, para. 181. Differentiating: LEVANTE, p. 66 f.

17 BGE 116 II 9 E. 5; cf. with reference in particular to divorce actions CHK-Buhr/Gabriel/Schramm, N. 17 on Art. 20 IPRG. In favour of the initiation of proceedings alone, cf. BSK IPRG-Westenberg, n. 22 on Art. 20 IPRG.

18 CR LDIP-Bucher, n. 12 on Art. 26 IPRG. The exact point in time is to be determined according to the relevant foreign law: KREN KOSTKIEWICZ, marginal no. 645. Differentiating ZK-Müller-Chen, n. 20 f. on Art. 26 IPRG.

19 BOHNET/OTHENIN-GIRARD, p. 153; CR LDIP-Bucher, n. 15 on Art. 20 IPRG. This already follows from the wording of Art. 20 para. 1 IPRG, which speaks in each case of "in the state".

is assessed under the IPRG if a court in Switzerland has international jurisdiction (see Art. 1(1)(a) IPRG).[20] If, on the other hand, the IPRG declares Swiss courts to lack jurisdiction, it does not at the same time regulate the (local) jurisdiction of the foreign court;[21] rather, the relevant foreign laws must be consulted to determine jurisdiction. If the IPRG wants to or has to regulate the local jurisdiction within the state of domicile (especially if the domicile is in Switzerland), Art. 20 IPRG is also decisive for this (e.g. for Art. 2 IPRG).[22] Art. 20 IPRG is also used for indirect jurisdiction under certain circumstances, whereby jurisdiction in the state of judgment according to Art. 26 lit. a IPRG is sufficient - a more precise location with regard to the jurisdiction of the court is not necessary. [23]

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 also applies in principle in conflict of laws. If the domicile, habitual residence or establishment as a connecting factor is in Switzerland, then Swiss law is applicable, which is why a more detailed localisation usually seems superfluous. Even if such a connecting factor is realised abroad, this state will normally simply be relevant.[24] Thus, as a rule, reference is made to the law of the state in which a specific connecting factor of Art. 20 IPRG is realised, but not to a specific place or constituent state in the territory of the state.

7 References to multi-jurisdictional states are excluded from this principle. These are states that are organised in a federalist manner 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 concretisation

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20 WALTER/DOMEJ, p. 91 f.; ZK-Müller-Chen, N. 52 before Art. 2-10 IPRG.
21 MARKUS, para. 184 and 191; SCHNYDER/LIATOWITSCH, para. 276 f. and 549; WALTER/DOMEJ, p. 91 f.
22 CHK IPRG-Buhr/Gabriel/Schramm, n. 4 to Art. 20 IPRG; LEVANTE, p. 55.
23 BOHNET/OTHENIN-GIRARD, p. 154.
24 Cf. LEVANT, p. 56.

must take place by way of an "extension" of the connection. According to this opinion, which at least applies to territorial connecting factors, residence in the case of multi-jurisdictional states in particular should not merely be located in a nation, but should also be established more closely - for example in a specific federal state. The [25]same can also apply to Switzerland if[26], exceptionally, the canton or a specific place is to be decisive.

8 Example: From a jurisdictional perspective, a person may be domiciled in the United States because he or she has resided there continuously for years. However, if this person lives nomadically within the USA, he or she may not be domiciled in any state. Nevertheless, domiciliary jurisdiction will have to be located in the USA, since only the superior state (the USA) is relevant for this purpose. For the question of the applicable law at the domicile, however, the relevant federal state must be found: e.g. by extending the connection of Art. 20 IPRG and thus by referring to 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. The domicile (para. 1 lit. a)

Art. 20 para. 2 IPRG assumes - as does the CC (Art. 23 para. 2 CC) - the principle of the unit of domicile: [27]Accordingly, 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.). [28]Moreover, it is conceivable that the domicile under the ICCPR differs from that under other laws (in particular from the domicile under tax or social security law). [29]

25 FURRER/GIRSBERGER/SIEHR, para. 559; SCHNEIDER, para. 270 et seq. Differentiating: BUCHER/BONOMI, marginal note 461; in favour of interlocal conflict of laws or, if necessary, a different connection, DUTOIT, n. 7 on Art. 13 IPRG; KNOEPFLER/SCHWEIZER/OTHENIN-GIRARD, marginal notes 188 f.; SCHWANDER, marginal note 405.

26 Cf. BOHNET/OTHENIN-GIRARD, p. 154.

27 DUTOIT, n. 10 on Art. 20 IPRG.

28 KREN KOSTKIEWICZ, para. 634.

29 DUTOIT, n. 3 on Art. 20 IPRG.

A. Elements of residence

10 Domicile within the meaning of IPR is not a purely factual concept, but is also shaped by legal elements and assessments.[30] Residence is thus a legal concept; [31]only the indicia used are questions of fact, while the objectified intention to settle (and thus ultimately residence) to be inferred from them is a question of law.[32]Accordingly, two cumulative elements are required to establish residence: [33]

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

11 This results - according to unanimous doctrine[34] and case law[35] - in the centre of life or the centre of life's interests. Consequently, this centre must be sought in order to determine domicile. 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).[36]Ultimately, the purpose of a domicile connection under the IPRG is nothing other than to establish the closest connection with a legal system. [37]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.

30 Cf. LAUBE, p. 20 f.
31 See already VON STEIGER, p. 12 f. So also SCHWANDER, N. 2 to Art. 20 IPRG.
32 BGE 120 III 7 E. 2a; judgment 5A_419/2020 of 16 April 2021 E. 2.3; judgment 5A_270/2012 of 24 September 2012 E. 4.2.3.
33 Cf. KREN KOSTKIEWICZ, para. 626; MARKUS, para. 296; SPÜHLER/MEYER, p. 25.
34 GUILLAUME, p. 88; LEVANTE, p. 50; MARKUS, para. 295; MASMEJAN, p. 70 f.; OFK-Kren KOSTKIEWICZ, n. 7 on Art. 20 IPRG; cf. CR LDIP-Bucher, n. 1 on Art. 20 IPRG; SIEHR, p. 139; TRUNIGER, para. 75.
35 Instead of many: BGE 120 III 7; BGE 119 II 64 E. 2bb.
36 HRUBESCH-MILLAUER/BÜRKI, p. 120; KREN KOSTKIEWICZ, para. 628; cf. message IPRG, p. 317; BK-Bucher, N. 21 f. before Art. 23 ZGB.
37 BGE 119 II 64 E. 2aa; judgment 5A_663/2009 of 1 March 2010 E. 2.2.1.

1. The objective element: Physical stay

12 The objective criterion of domicile is physical presence in a place or in a state.[38] As long as the only criterion is a specific state and not a more precise 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 the state in question or that the stay takes place without interruptions. [39]

13 The duration of physical residence is in principle not relevant for determining domicile.[40] A residence can therefore be established even in the case of a short stay. The decisive factor is rather that the subjective element has been realised in combination with the physical residence.[41]Consequently, residence can be established from the first day of presence, and [42]a specific duration of stay is not a prerequisite.

2. The subjective element: intention to remain permanently

14 The intention to remain permanently in a particular state or in a particular place as a subjective element must be made recognisable to the outside world. [43]A clear manifestation of the inner will is required. [44]Since the subjective element is considered objectified, we also speak of the objectified concept of domicile. [45]

15 The internal will to remain cannot be decisive on its own;[46] it must be made recognisable externally (in accordance with the principle of trust).[47] Consequently, residence cannot be established by a mere declaration of

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38 LEVANT, p. 49; MARKUS, para. 296.

39 Cf. judgment 5A_609/2011 of 14 May 2012 E. 4.2.4 (temporary stays abroad do not cancel the domicile); judgment 5C.247/2004 of 10 February 2005 E. 4.3; DUTOIT, n. 3 on Art. 20 IPRG.

40 MARKUS, para. 296.

41 LEVANT, p. 53.

42 Judgment 5A_398/2007 of 28 April 2008 E. 3.2; Judgment 5C.163/2005 of 25 August 2005 E. 4.1; BSK IPRG-Westenberg, N. 18 to Art. 20 IPRG.

43 Message IPRG, p. 316 f.

44 BGE 119 II 64 E. 2b/bb; BGE 115 II 120 E. 4a.

45 OFK IPRG-Kren KOSTKIEWICZ, n. 6 to Art. 20 IPRG.

46 Judgment 5A_725/2010 of 12 May 2011 E. 2.3; OFK IPRG-Kren KOSTKIEWICZ, n. 6 on Art. 20 IPRG.

47 HAUSHEER/AEBI-MÜLLER, para. 397; BK-Bucher, n. 12 to art. 23 ZGB.

intent.[48] Rather, objectively recognisable elements are required to ensure that this declaration of intent can actually be followed. It is even conceivable that a domicile may be established against the will of the person if, on the basis of created facts, there is a clear appearance of an intention to remain permanently. [49]This is because the will to establish residence is not necessarily congruent with the intention of permanent residence required by the law. The [50]motive for a person's residence in a state is in principle irrelevant for the concept of domicile. [51]

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".[52] Even a short stay can in principle fulfil the subjective element if the externally recognisable elements indicate the establishment of a centre of life, i.e. the intensity of the relationship to a particular place is sufficiently strong.[53] 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.[54] However, even a temporary intention can be sufficient, provided that the centre of life is effectively relocated for this period of time.[55] In the final analysis, the intensity of the relationship to a certain place is decisive, as it can be seen from the outside.[56] As a rule, the subjective element can be located where the family interests and ties are most strongly localised.[57]However, there may well be exceptions to this rule, provided that other indications predominate (N 17 ff.).

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48 Judgment 5A_267/2012 of 21 November 2012 E. 6.4; LAUBE, p. 23; cf. BGE 120 III 7 E. 2b.

49 BUCHER, para. 338 f.; Cf. judgment 5A_725/2010 of 12 May 2011 E. 2.3 (testator expressed the will to take up residence in the USA during his lifetime, BGer nevertheless assumed residence in Switzerland); further judgment 9C_98/2017 of 9 June 2017 E. 2.4 (persons wanted to be "globetrotters", residence nevertheless assumed in the USA); SCHNEIDER, para. 283.

50 LAUBE, p. 26; SCHNEIDER, para. 283 (the will is a "will to act," not a "will to succeed").

51 HAUSHEER/AEBI-MÜLLER, para. 398; BSK ZGB I-Staehelin, n. 24 to art. 23 ZGB.

52 LAUBE, p. 27; cf. ZK-Kren KOSTKIEWICZ, n. 19 on Art. 20 IPRG.

53 BUCHER, para. 345; LEVANT, p. 53

54 Judgment 5A_30/2015 of 23 March 2015 E. 4.1.1; MARKUS, para. 296.

55 Judgment 5A_419/2020 of 16 April 2021 E. 3.2.2; Judgment 5A_725/2010 of 12 May 2011 E. 2.3; cf. ZK-Kren KOSTKIEWICZ, n. 22 on Art. 20 IPRG; a.M. probably FURRER/GIRSBERGER/SIEHR, para. 307, who require that the person at the domicile "resides for an unlimited period".

56 KUKO ZGB-Hotz/Schlatter, n. 6 on Art. 23 ZGB; ZK-Kren KOSTKIEWICZ, n. 19 on Art. 20 IPRG.

57 OFK IPRG-Kren KOSTKIEWICZ, n. 7 on Art. 20 IPRG; cf. message IPRG, p. 317.

3. Indications for the assessment of the domicile

17 The doctrine and case law contain a large number of indications that can be decisive in determining the place of residence. The approaches from case law should only serve as a guideline. A case-by-case assessment must always be made, taking into account all relevant, externally recognisable circumstances. [58]The indications on which recourse may be had are in principle identical to those under Art. 23 CC. [59]Nevertheless, the differences between the domicile definitions of the CC and the IPRG must be taken into account.

18 Circumstantial evidence that is sometimes adduced includes: Means of communication such as the telephone connection or the postal address, [60]whereby an address used for official or judicial proceedings can be a very significant piece of circumstantial evidence.[61] An address in Switzerland should have a high indicative value if debt collection proceedings or Swiss proceedings have already been successfully conducted against the person concerned at this address (at least if no complaint was lodged on the grounds of lack of jurisdiction; cf. Art. 46 para. 1 SchKG). Provided that the factual situation has not changed since then, invoking a different domicile would under certain circumstances even amount to a *venire contra factum proprium. The* keeping of medical appointments also indicates a change of residence (at least if there is no residence for care, cf. n 26 f.).[62] Likewise, health insurance can be an indication, but this alone does not allow any conclusion to be drawn.[63] Family contacts can be an important element,[64] especially if a person has established a family in a state. However, especially for unmarried (and childless) persons, family ties can also take a back seat if they compete with other (especially commercial) contacts.[65] Other factors that may be taken into

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58 Message IPRG, p. 317; cf. BK-Bucher, N. 14 on Art. 23 ZGB.

59 LEVANTE, p. 50 f.; cf. BGE 119 II 64 E. 2aa.

60 CHK-Buhr/Gabriel/Schramm, n. 9 on Art. 20 IPRG; cf. BSK ZGB I-Staehelin, n. 6 on Art. 23 ZGB. But cf. judgment 5A_663/2009 of 1 March 2010 E. 4.2.3.

61 Cf. judgment 5A_917/2018 of 20 June 2019 E. 4.2.5; judgment 4A_36/2016 of 14 April 2016 E. 4 u. 6.2; judgment 5A_30/2015 of 23 March 2015 E. 4.2.

62 Cf. judgment 5A_903/2013 of 29 January 2014 E. 3.

63 Judgment 5A_663/2009 of 1 March 2010 E. 3; Judgment 5A_903/2013 of 29 January 2014 E. 3.

64 Judgment 5A_419/2020 of 16 April 2021 E. 3.1; however, witness statements of the family are to be assessed with restraint: Judgment 4A_558/2017 of 6 April 2018 E. 4.1.

65 Cf. judgment 2C_270/2012 of 1 December 2012 E. 2.4 (even in the case of weekly visits to siblings or parents, contacts with the place of work may predominate); further judgment 5A_917/2018 of 20 June 2019 E. 4.1; cf. also Botschaft IPRG, p. 317.

account include household insurance,[66] the use of an address in contracts, [67]leisure activities, being seen on[68] a [69]regular basis, the exercise of political rights, [70]or the existence of housing facilities such as a bathroom or kitchen.[71] Mere preparatory acts for the transfer of domicile, on the other hand, cannot suffice if there are no indications of a shift in personal and financial interests.[72] 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. [73]

19 Public-law aspects (identity cards, residence certificates, residence permits, etc.) can be used as circumstantial evidence, but they do not give rise to a presumption of residence.[74] Since the IPRG does not provide for any (positive) presumption of domicile, public-law documents have at most a heightened indicative effect in this respect.[75] It is also possible that the domicile is localised differently from public law.[76] It should be noted that even a residence ban imposed by the aliens police or the absence of a residence permit cannot exclude domicile within the meaning of Art. 20 IPRG.[77] Moreover, it is irrelevant whether domicile also exists under the national-autonomous law of the (alleged) state of domicile.[78] Nationality cannot be an indication. [79]In the case of expressions of will by the affected party, an indicative effect should only be assumed with great reluctance, insofar as these have not been visibly complied with.[80] However, expressions of intent can at least be useful as negative evidence: the Federal Supreme Court has used expressions of intent to

66 Judgment 5A_1015/2015 of 18 March 2016 E. 4.2.
67 Judgment 5A_30/2015 of 23 March 2015 E. 4.2; but cf. BGE 125 III 100 E. 3.
68 BGE 120 III 7 E. 2b.
69 Judgment 5C.171/2000 of 16 October 2000 E. 2 u. 4d.
70 LEVANT, p. 51.
71 Judgment 4C.65/2005 of 28 April 2005 E. 4.
72 BGE 85 II 318 E. 3; Cf. judgment 5A_659/2011 of 5 April 2012 E. 2.3 (inter alia, conclusion of a mobile phone subscription or a household insurance policy).
73 Judgment 5A_235/2012 of 31 August 2012 E. 5.2 f.
74 Message IPRG, p. 317; cf. LEVANTE, p. 52. Misleading in this respect CHK-Buhr/Gabriel/Schramm, N. 10 to Art. 20 IPRG.
75 Cf. judgment 4A_558/2017 of 6 April 2018 E. 3.2.1.
76 KREN KOSTKIEWICZ, para 630.
77 MARKUS, para. 294; cf. judgment 5A_609/2011 of 14 May 2012 E. 4.2.4.
78 Judgment 9C_295/2019 of 18 June 2019 E. 2.2.2.
79 Judgment 5A_419/2020 of 16 April 2021 E. 3.2.2.
80 Cf. judgment 4A_443/2014 of 2 February 2015 E. 4.

take up residence in Switzerland in the future as evidence against a current Swiss residence. [81]

B. Difficulties in the determination

20 It is often not difficult to determine the domicile. The determination can become problematic if there are several domiciles, none of which clearly predominates. If it is impossible to determine the domicile, 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 taken as a basis. However, this conclusion should not already be drawn in the case of mere difficulties of determination.

1. Physical residence in several states

21 Difficulties arise in determining residence when a natural person realises the objective element of residence 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 [82]so that the closest relationship[83] or the strongest integration in[84] a state can be determined. In the case of several residences, electricity costs, renovations, bank accounts, purchases at the claimed place of residence, number and intensity of friendships, registration of a vehicle or the location of personal effects can be used as indications and, if necessary, compared between different states. [85]

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81 Judgment 5A_235/2012 of 31 August 2012 E. 4.1 (see also the previous instance: Obergericht des Kantons Zürich, Judgment LQ100065 of 16 February 2012 E. 2b).

82 Cf. HAUSHEER/AEBI-MÜLLER, paras. 401 and 405; LEVANTE, p. 53 f.

83 KREN KOSTKIEWICZ, para. 633 f.

84 LEVANTE, p. 53 f.; TRUNIGER, para. 75; cf. message IPRG, p. 317.

85 Cf. judgment 5A_663/2009 of 1 March 2010.

22 A good example of a complicated situation is provided by exceptionally wealthy individuals who have several domiciles.[86] Thanks to their great wealth, such persons have greater freedom and opportunities to change their physical location to one of several possible states within a short period of time. In addition, it can be difficult to establish the centre of interests in one state due to global 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 domicile should be located are in such cases a strong indication of strong integration. However, the subjective intention must always be objectively recognisable from the outside. Accordingly, the Federal Supreme Court weighs up a wide range of objectively discernible indications, particularly in the case of wealthy persons (cf. n 17 ff. above). [87]Thus, if the expressions of intent are evidently followed, the assumption of domicile in the designated state is obvious, even if the person lives in other states from time to time.

23 Temporarily posted workers - at least if their family does not join them - will regularly not establish their residence in the new state.[88] The same will often apply to diplomats. [89]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[90] or during a stay abroad, seasonal[91] workers). Another problem arises in the case of 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 be necessary to assess whether they have definitively given up their residence or whether they would be likely to return in an emergency (e.g. in the event of health or financial problems).[92]their domicile and have not established a new

86 By way of example: judgment 4A_558/2017 of 6 April 2018; judgment 5A_663/2009 of 1 March 2010. With regard to the problem of habitual residence, see: KELLER/SIEHR, p. 324 f.

87 Judgment 5A_663/2009 of 1 March 2010 E. 2.2.2.

88 Cf. IPRG Message, p. 319, according to which annual residents with family abroad do not establish residence; also HAUSHEER/AEBI-MÜLLER, para. 402 f.

89 For the applicability of the IPRG to diplomats: MASMEJAN, p. 70; see also BGE 110 II 156 E. 2b.

90 BGE 82 III 12.

91 MASMEJAN, p. 70.

92 Cf. BGE 138 II 300 E. 3.6.3.

one, the subsidiary connection to habitual residence applies (cf. Art. 20 para. 2 IPRG).

2. "Simulated" residence

24 Even before the IPRG was enacted, the so-called principle of the authenticity of domicile was postulated in some quarters, which was intended to prevent a simulated, pretended or fictitious domicile.[93] 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. in order to evade possible enforcement, to create a favourable jurisdiction or to apply a favourable law). From the point of view of the IPRG, there is nothing wrong with such motives: Provided that a person fulfils the elements of Art. 20 para. 1 lit. a IPRG, there is domicile. Any protection aspects are already addressed at the jurisdictional level by means of compulsory jurisdiction. On the level of conflict of laws, a correction can be made under certain circumstances by means of the exception clause (Art. 15 IPRG) or by means of *ordre public (*Art. 17 IPRG), or intervention rules (Art. 18 f. IPRG) can be applied. [94]On the other hand, a purely pretended "domicile", which was only established for the sake of appearances, does not constitute a domicile by definition. In such a situation, at least one residence requirement (at least the subjective one) is necessarily not met, [95]since otherwise 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). [96]

93 On this point: VON STEIGER, p. 42 ff; cf. also SCHNEIDER, para. 284.
94 Cf. also VON STEIGER, p. 49 ff. on the old *fraus legis doctrine.*
95 Gl.M. VON STEIGER, p. 44 f.
96 Cf. BGE 119 II 64 E. 2a; judgment 5A_663/2009 of 1 March 2010 E. 2.2.2.

3. Anticipated residence

25 According to one opinion in the literature, a so-called anticipated domicile can be established, i.e. a domicile that will only come into being in the future.[97]However, the Federal Supreme Court decisions cited in support of this opinion merely state that the duration to be expected in the future may also be significant, whereby physical residence at the domicile in question has always already existed. [98]The Federal Supreme Court thus rather points out that a domicile can already (but also at the earliest) exist from the first day 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. [99]

4. The stay for special purposes

26 Although the provisions of the CC on residence are denied (direct) application under Article 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 ICCPR.[100] 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 to judge must be proven before the (objectified) intention to transfer the domicile and the actual residence are shown. [101]

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97 KREN KOSTKIEWICZ, para. 627; OFK-Kren KOSTKIEWICZ, n. 9 on Art. 20 IPRG; similarly CR LDIP-Bucher, n. 23 on Art. 20 IPRG; HRUBESCH-MILLAUER/BÜRKI, p. 121.

98 Cf. judgment 5A_432/2009 19 April 2010 E. 5.2.1; judgment 5A.34/2005 25 August 2005 E. 4.1; BGE 116 II 202 concerns the special case of the family name, where there was also physical residence in Switzerland after marriage.

99 Gl.M. LEVANTE, p. 49; so then also ZK-Kren KOSTKIEWICZ, N. 19 to Art. 20 IPRG *in fine*; a.M. under the ZGB: BK-Bucher, N. 19 f. on Art. 23 ZGB.

100 BGE 108 Ia 252 E. 5; judgment 5A_278/2017 of 19 June 2017 E. 3.1.1.2. Agreeing BSK ZGB I-Staehelin, N. 19e on Art. 23 ZGB. Denying applicability: MASMEJAN, p. 73; ZK-Kren KOSTKIEWICZ, n. 70 on Art. 20 IPRG.

101 Cf. judgment 5A_278/2017 of 19 June 2017 E. 3.1.1.2; MARKUS, para. 301; see also KUKO ZGB-Hotz/Schlatter, n. 7 on art. 23 ZGB.

27 In order for a residence to be established at all at the place of care, the previous residence must, by definition, be relinquished.[102]If the need for care is only slight and the place was freely chosen, this indicates that residence at the place of care has been taken up. [103]However, if the stay is limited to the special purpose only, no domicile arises in principle. [104]If the stay was to a certain extent forced for health or psychological reasons and thus not freely chosen (in particular if the place of care is ordered by a third party), no domicile is generally established at the place of care. [105]However, the "compulsion of circumstances" establishes a domicile if the institution could be freely chosen. [106]Despite a will to return to another country after recovery, residence at the place of care can nevertheless be affirmed. [107]Residence must therefore serve an end in itself - "life" - and not merely a special purpose. [108]

5. Persons incapable of acting or having judgement

28 The ICCPR requires capacity to judge as a precondition for establishing domicile.[109] This can be inferred, inter alia, from the fact that in Art. 66 et seq. the ICCPR refers only to habitual residence for children (as a prime example of incapacity to judge).[110] This conclusion also corresponds to the legislative intention.[111] This is regrettable in that 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.[112] It should also be possible for persons who are incapable of acting to establish a domicile, provided that they have the capacity to judge in this respect.[113] If there is no

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102 BGE 108 Ia 252 E. 5.
103 Cf. BGE 140 V 563 E. 3.1 (all the more so if the place is close to the family).
104 Cf. BUCHER, para. 348. On the CC: BSK ZGB I-Staehelin, N. 19a ff. on Art. 23 ZGB.
105 Judgment 5A_278/2017 of 19 June 2017 E. 3.1; also BGE 120 III 7 E. 2b *in fine*.
106 HÜRLIMANN-KAUP/SCHMID, para. 687; cf. BGE 134 V 236 E. 5.2.
107 Judgment 5A_725/2010 of 12 May 2011 E. 2.3. and 4; cf. judgment 5A_267/2012 of 21 November 2012 E. 6.3.2.
108 KUKO ZGB-Hotz/Schlatter, N. 4 to Art. 23 ZGB.
109 BOHNET/OTHENIN-GIRARD, p. 146; CHK-Buhr/Gabriel/Schramm, N. 13 to Art. 20 IPRG.
110 MASMEJAN, p. 67 (with criticism on p. 71); similarly CHK-Buhr/Gabriel/Schramm, n. 13 on Art. 20 IPRG; ZK-Kren KOSTKIEWICZ, n. 30 on Art. 20 IPRG; cf. judgment 5A_278/2017 of 19 June 2017 E. 3.1.1.1. Partially a.M. CR LDIP-Bucher, n. 9 u. 27 on Art. 20 IPRG.
111 Message IPRG, p. 320.
112 BK-Bucher, n. 28 to Art. 23 ZGB; HÜRLIMANN-KAUP/SCHMID, para. 686.
113 Cf. KREN KOSTKIEWICZ, para. 636 ff.

domicile as a result of incapacity to judge, it may be possible to fall back on the alternative criterion of habitual residence (see N 29 ff. and 38). [114]

C. Relationship to the domicile provisions of the CC

29 The wording of Art. 20 para. 1 lit. a IPRG is very similar to that of Art. 23 para. 1 CC.[115] However, the third sentence of Art. 20(2) IPRG precludes 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.[116] Thus, in principle, the literature and case law on domicile under the CC can also be consulted. [117]When interpreting Art. 20 IPRG, however, its conflict-of-law character must always be kept in mind.[118] Clearly excluded in international relations on the basis of Art. 20 para. 2 IPRG are the continued domicile according to Art. 24 para. 1 CC as well as the derived domicile in the sense of Art. 25 CC.[119]Overall, the IPRG does not recognise any (positive) presumptions that establish domicile. [120]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. [121]Unlike under the CC, a domicile is not mandatory under Art. 20 IPRG - it is therefore possible for a person not to have a domicile.[122] Residence under the IPRG is easier to give up than under the CC, but not easier to establish. [123]If an international situation exists, the concept of domicile under the IPRG must take precedence over that under the CC. [124]

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114 BSK IPRG-Westenberg, n. 35 to Art. 20 IPRG.
115 Message IPRG, p. 316.
116 BGE 120 III 7 E. 2a; BGE 119 II 167 E. 2b; judgment 4A_443/2014 of 2 February 2015 E. 3.4; cf. also LEVANTE, p. 45; TRUNIGER, para. 75.
117 DUTOIT, n. 1 on Art. 20 IPRG; SCHNYDER/LIATOWITSCH, para. 545.
118 BSK IPRG-Westenberg, n. 12 to Art. 20 IPRG.
119 WALTER/DOMEJ, p. 119; MARKUS, para. 300; cf. BGE 133 III 252 E. 4; Message IPRG, p. 318.
120 Cf. MASMEJAN, p. 72 ff; also BGE 119 II 64 E. 2aa; SCHWANDER, para. 197.
121 See BOHNET/OTHENIN-GIRARD, p. 145.
122 CHK-Buhr/Gabriel/Schramm, n. 15 on Art. 20 IPRG; MASMEJAN, p. 72.
123 BGE 119 II 167 E. 2b.
124 LEVANT, p. 55 f.; SCHWANDER, para. 192.

III. Habitual residence (para. 1 lit. b)

30 Habitual residence can be relevant in two respects: On the one hand, as a connecting factor in various rules of the ICCPR, and on the other hand, as a substitute connecting factor if there is no domicile. Direct links to habitual residence are to a large extent found in the rules of the law relating to children (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. [125]The concept originates from the various Hague Conventions [126]and is also found in other conventions, namely in Art. 5 Lugano Convention.

31 The historical development of Article 20(1)(b) IPRG shows that the interpretation may be based on the concept used in the various Hague Conventions.[127] This approach 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.[128] The concept of the Hague Conventions is always to be interpreted autonomously by treaty and must follow the relevant principles of interpretation.[129] 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.[130] However, within the scope of application of the ICC, an interpretation in the light of the Hague Conventions is certainly possible, [131]in particular on the basis of historical interpretation. Such an interpretation is also to be welcomed in order to promote international consistency of decisions. Differences may arise, however, on the basis of a functional interpretation, in particular because of the possibility of a subsidiary connection to habitual residence (cf. n 38 ff.),

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125 DUTOIT, n. 11 on Art. 20 IPRG; KREN KOSTKIEWICZ, para. 652; LEVANTE, pp. 93 f. and 103.

126 Message IPRG, p. 319; cf. BAETGE, p. 58 f.; BSK IPRG-Westenberg, N. 6 f. on Art. 20 IPRG.

127 BUCHER/BONOMI, para. 170; MARKUS, para. 307; cf. also BAETGE, p. 61 f.

128 ZK-Kren KOSTKIEWICZ, n. 49 on Art. 20 IPRG; cf. also BGE 141 IV 205 E. 5.3.2; in favour of complete harmony, cf. CR LDIP-Bucher, n. 37 f. on Art. 20 IPRG; SHK-Oberhammer, n. 90 on Art. 5 Lugano Convention.

129 Judgment 5A_1021/2017 of 8 March 2018 E. 5.1.2; Judgment 5A_68/2017 of 21 June 2017 E. 2.3; Judgment 5A_164/2013 of 18 April 2013 E. 3; BSK IPRG-Westenberg, N. 39 on Art. 20 IPRG.

130 ZK-Kren KOSTKIEWICZ, n. 49 on Art. 29 IPRG; ZK-Siehr/Markus, n. 57 on Art. 5 HCN Convention. To be rejected in this respect: Judgment 5A_220/2009 of 30 June 2006 E. 4.1.2; Judgment 5A_427/2009 of 27 July 2009 E. 4.2.

131 MARKUS, para. 307; ZK-Kren KOSTKIEWICZ, n. 49 on Art. 29 IPRG; see also MASMEJAN, p. 119.

which is fundamentally alien to the Hague Conventions. [132]Moreover, the ICCPR - in contrast to the Hague Conventions (cf. e.g. Art. 6 HEsÜ) - does not recognise a subsidiary connection to the simple place of residence or the mere place of abode. These differences must be taken into account if an interpretation is to be made parallel to the Hague Conventions. It follows that in areas of law in which the ICCPR provides for habitual residence as the primary connecting factor (namely in matters relating to children under Article 66 et seq. of the ICCPR), an analogy with the Hague Conventions may be adopted 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 that under Art. 20(1)(b) IPGR should nevertheless constitute absolute exceptions.

32 The habitual residence may be in a different place from the domicile.[133] This is the case if there is no externally recognisable intention to remain permanently, but a longer period of residence in a place nevertheless takes place de facto. This may be the case, for example, in the case of studies abroad, seasonal workers or posted workers. The [134]habitual residence can be changed much more easily than the domicile and is therefore a less stable connection. [135]Exceptionally, it is also possible that a person has his or her habitual residence in several places, but the provision of Art. 20 para. 2 IPRG only refers to the prohibition of multiple residence. In principle, this is to be agreed with the majority opinion, provided that the necessary conditions for habitual residence are fulfilled in several states. [136]Already as a result of the designation as "habitual" residence, it hardly seems possible in practice that a person actually habitually resides in several states at the same time. [137]Because of the

132 Cf. only ZK-Siehr/Markus, n. 253 ff. on Art. 5 HEsÜ.

133 BSK IPRG-Westenberg, n. 38 on Art. 20 IPRG; cf. message IPRG, p. 319.

134 Judgment 5A_812/2015 of 6 September 2016 E. 5.1.2; Judgment 4C.4/2005 of 16 June 2005 E. 4.1 u. 4.3; CHK-Buhr/Gabriel/Schramm, N. 11 to Art. 20 IPRG; FURRER/GIRSBERGER/SIEHR, para. 310.

135 FURRER/GIRSBERGER/SIEHR, para. 310; SCHWANDER, para. 203.

136 FURRER/GIRSBERGER/SIEHR, para. 315; LEVANTE, p. 100; cf. BSK IPRG-Westenberg, n. 37 on Art. 20 IPRG; MASMEJAN, p. 99 f.; SCHWANDER, N. 3 on Art. 20 IPRG; TRUNIGER, para. 77; in agreement CR LDIP-Bucher, n. 37 on Art. 20 IPRG; DUTOIT, n. 9 on Art. 20 IPRG. Under the Hague Conventions, on the other hand, multiple habitual residence is rejected by the majority (see CHK-Buhr/Gabriel/Schramm, n. 30 on Art. 20 IPRG), which reveals a difference between the concepts under the IPRG and those under the Hague Conventions.

137 Similarly MARKUS, para. 306.

subsidiary applicability of residence in the absence of domicile, multiple habitual abodes also create further problems and uncertainties. [138]Consequently, multiple habitual residence 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". [139]If, on the other hand, a preponderance of the indications can be located in one place, then habitual residence exists exclusively in that place.

A. Requirements

1. "Life"

33 In assessing habitual residence, the legislature intended that "external appearance" should be more important than in the case of domicile.[140] The focus is on the actual process of a person's physical presence in a place of some duration (question of fact).[141] Contrary to the Federal Supreme Court[142], however, the "centre of gravity of the living conditions" at the place is not required, as otherwise habitual residence would be too close to domicile.[143]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. [144]

34 Habitual residence may also contain a certain subjective component.[145] This is because the wording of the standard requires that the person "lives" in the place of habitual residence. As a rule, acts indicating "living" in a place are

138 Cf. DUTOIT, n. 10 on Art. 20 IPRG. SIEHR, p. 493, aptly points out that the connection in the case of several places of residence is not a question of habitual residence, but precisely of connection.

139 KELLER/SIEHR, p. 324 f.

140 Message IPRG, p. 319; HÜRLIMANN-KAUP/SCHMID, para. 690.

141 Judgment 5C.272/2000 of 12 February 2001 E. 3b; cf. BUCHER/BONOMI, para. 597; GUILLAUME, p. 89. But cf. the reference to the international tendency under the Hague Conventions to dispense with physical presence in extreme situations in matters relating to children in MARKUS, para. 312.

142 BGE 117 II 334 E. 4a; cf. BGE 129 III 288 E. 4.1. This consideration of the Federal Supreme Court can be attributed to the fact that this element originates from the conception of the Hague Conventions.

143 DUTOIT, n. 5 on Art. 20 IPRG; LEVANTE, p. 92 f.; FURRER/GIRSBERGER/SIEHR, para. 311.

144 MASMEJAN, p. 90 et seq. with further references; SCHNEIDER, para. 214; cf. in this respect also judgment 8C_60/2016 of 9 August 2016 E. 3.2.1; Judgment 5A_427/2009 of 27 July 2009 E. 3.1.

145 MASMEJAN, p. 98 f.

performed 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.[146] A holiday stay, albeit a long one, or a forced change of residence (e.g. in the case of abduction[147]) cannot in principle constitute habitual residence.[148] After all, an outwardly recognisable minimum degree of personal, professional or at least emotional attachment is required for there to be any "living" at all in a place.[149]Such subjective criteria should not be subject to a high barrier: As soon as a bond cannot be clearly denied, the requirements should have been satisfied. Thus, even in the case of long-term placement in a prison, habitual residence can be affirmed, whereas in the case of abduction, as a rule, no sufficient relationship is established. [150]

2. "During longer time"

35 The wording of Article 20(1)(b) IPRG requires residence "for a long period". This element distinguishes habitual residence from mere residence. [151]It is sometimes argued that a certain minimum duration is required.[152] Such abstract minimum durations must be rejected:[153] neither a planned nor an already existing minimum duration is required.[154] 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.[155] Admittedly, it will hardly be possible to build up the necessary relationship - i.e. a "life" (cf. above n 33 f.

146 BSK IPRG-Westenberg, n. 35 on Art. 20 IPRG; LEVANTE, p. 99; SCHWANDER, n. 3 on Art. 20 IPRG; ZK-Kren KOSTKIEWICZ, n. 47 on Art. 20 IPRG.

147 Cf. for child abduction, however, the HCCH as well as Art. 7 of the HCCH.

148 FURRER/GIRSBERGER/SIEHR, para. 314; in the case of child abduction, however, the establishment of a habitual residence is not impossible, cf. BGE 109 II 375 E. 5b.

149 Similarly BUCHER/BONOMI, para. 597; LEVANTE, p. 92; cf. judgment 5A_68/2017 of 21 June 2017 E. 2.3.

150 Cf. MASMEJAN, pp. 99 and 121; also ZK-Kren KOSTKIEWICZ, n. 47 on Art. 20 IPRG; on child abduction under the HCsÜ: ZK-Siehr/Markus, n. 62 on Art. 5 HCsÜ.

151 LEVANTE, p. 98; MARKUS, para. 309. In particular, habitual residence is not to be equated with residence under Art. 24 para. 2 CC; cf. TRUNIGER, para. 78.

152 BUCHER/BONOMI, para. 597 (several months). Rule of thumb of three months: SCHWANDER, para. 206; SPÜHLER/MEYER, p. 25. Differentiating: LEVANTE, p. 97; cf. also GROLIMUND/SCHNYDER, p. 16.

153 Gl.M. MARKUS, para. 309.

154 Cf. FURRER/GIRSBERGER/SIEHR, para. 314; KNOEPFLER/SCHWEIZER/OTHENIN-GIRARD, para. 451.

155 BGE 117 II 334 E. 4a; SCHNYDER/LIATOWITSCH, para. 551.

) - in less than a few months.[156] However, particularly with regard to children, it cannot be assumed in the abstract that they must already have lived at the location for a longer period of time.[157]is always central is whether the impression is given to the outside world that a person normally or at least usually stays at this place. [158]Shorter interruptions do not dissolve the habitual residence, provided the attachment to this place remains. [159]

B. Difficulties in determining habitual residence

36 The so-called globetrotters (cf. n 23) also pose problems in determining habitual residence. It is often not possible to establish domicile for globetrotters, as they regularly have no intention of settling permanently in one place. Therefore, 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, as this also requires the person to "live in one place for a long period of time". If they repeatedly return to the same state or stay there for a significantly longer period, habitual residence will have to be assumed. Otherwise, it is a matter of prima facie case, and it is quite possible for habitual residence to shift frequently and rapidly.

37 In the case of children who have been taken abroad (possibly unlawfully), habitual residence should be assumed to be where the closest or most stable family relationships are to be located. [160]In this context, an analogy with the concepts of the Hague Conventions would be appropriate (unless the relevant conventions are applicable in any case). As a rule, the closest relationship will be located with the custodial spouse.[161] For newborn children, the habitual residence is presumably to be located at the place where the ties of the parent with custody are strongest. [162]Within the framework of the functional connection, a shift in the habitual residence is only to be assumed with

156 KREN KOSTKIEWICZ, para. 647.
157 SIEHR, p. 139.
158 Message IPRG, p. 319; LEVANT, p. 93.
159 BSK IPRG-Westenberg, n. 34 on Art. 20 IPRG; cf. message IPRG, p. 319.
160 Message IPRG, p. 320.
161 Judgment 5A_609/2011 of 14 May 2012 E. 4.2.2; cf. on the whole CR LDIP-Bucher, N. 33 on Art. 20 IPRG; KNOEPFLER/SCHWEIZER/OTHENIN-GIRARD, para. 451.
162 BGE 129 III 288 E. 4.1; BSK IPRG-Westenberg, n. 36 to Art. 20 IPRG. However, this is not an irrefutable fiction: Judgment 5P.128/2003 of 7 May 2003 E. 3.2.

reservations in questions concerning children if they have been brought illegally into a state. [163]

C. The relationship between habitual residence and domicile

38 According to Art. 20(2) IPRG, in cases where a person has no domicile anywhere, habitual residence is to be taken into account. However, according to the explicit wording of Art. 20(2) IPRG, this subsidiary application only comes into question if no domicile can be located either in Switzerland or abroad. Subsidiarity also explains why a habitual residence must be established for each person - otherwise, in the absence of both a domicile and a habitual residence, various connections would come to nothing. [164]

39 Habitual residence applies in particular when the previous residence is abandoned and no new residence is established.[165] The subsidiary connection to habitual residence is not intended to apply already when the criteria for determining residence are not clear. In other words, the question of habitual residence will not be asked already when there are several possible places of residence, but only when no place can be regarded as a place of residence. As a rule, the subsidiary connection will not apply to persons who, despite residing in different states, maintain a clear and recognisably closer relationship with 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 stay in different states (tourism, missionaries, etc.), workers on the high seas or travellers.

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

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163 Whereby the MSA applies to children, cf: CHK-Buhr/Gabriel/Schramm, N. 27 f. on Art. 20 IPRG; LEVANTE, p. 89 f.

164 A.M. KELLER/SIEHR, p. 325; MASMEJAN, pp. 72 and 100; SCHWANDER, para. 209. Admittedly, the idea that habitual residence is mandatory is not entirely correct from a dogmatic point of view and is rather guided by practical considerations. As a result, habitual residence in such constellations approximates to simple residence, which then probably also regularly does justice to the closest connection with regard to the legal relationship in question.

165 BGE 119 II 167 E. 2b; judgment 4C.298/2002 of 30 April 2003 E. 2; BSK IPRG-Westenberg, N. 19 to Art. 20 IPRG.

the case in the law of succession (Art. 86 et seq. IPRG), where the "last domicile" is taken as a basis. If a person has given up his or her domicile before death and died at his or her habitual residence, the last domicile must nevertheless be taken into account.[166] An exception can only be made if the deceased did not have a domicile at any time.[167] Certain norms also provide for the possibility of taking the habitual residence in Switzerland as a basis if there is no residence in Switzerland (e.g. Art. 46 IPRG). In such cases, habitual residence is not subsidiary only if there is no domicile anywhere, but already if there is no Swiss domicile. [168]

IV. Establishment (para. 1 lit. c)

41 The establishment is located at the centre of business activity of a natural person. The focus must be on the centre of activities aimed at generating a profit. [169]a specific duration is also required for the establishment, which is [170]why merely temporary market or trade fair stands are not sufficient. [171]It is not necessary that the gainful activity is carried out on a full-time basis. What is [172]essential is the legal appearance that is created for third parties in accordance with the principle of trust. [173]

42 A workshop, a salesroom, a studio or an office are considered to be an establishment of a natural person.[174] Examples may also include the practice of a self-employed lawyer or the office of an architect.[175] The relevant time of localisation is the time when the contractual (or tortious) relationship in question existed[176]- a transfer of the establishment after the termination of this relationship should remain irrelevant. For legal persons or trusts, not Art. 20

166 op. cit. GUILLAUME, p. 90.
167 This is also the case with DUTOIT, n. 4 on Art. 86 IPRG; ZK-Künzle, n. 3 on Art. 86 IPRG.
168 See BOHNET/OTHENIN-GIRARD, p. 152 f. with further references.
169 BGE 129 III 738 E. 3.4.1; SCHNYDER/LIATOWITSCH, para. 553; SPÜHLER/MEYER, p. 26; cf. BGE 134 III 224 E. 3.2.2.
170 Message IPRG, p. 320 f.; KREN KOSTKIEWICZ, para. 657.
171 GROLIMUND/SCHNYDER, p. 17.
172 SCHNYDER/LIATOWITSCH, para. 553; cf. MASMEJAN, p. 133.
173 ZK-Kren KOSTKIEWICZ, n. 60 on Art. 20 IPRG; cf. CHK-Buhr/Gabriel/Schramm, n. 33 on Art. 20 IPRG.
174 Message IPRG, p. 320; cf. MASMEJAN, p. 134; SCHWANDER, para. 213.
175 Cf. SCHWANDER, n. 4 on Art. 20 IPRG.
176 MASMEJAN, p. 134; cf. also TRUNIGER, para. 84.

but Art. 21 IPRG is applicable. The concept of establishment according to Art. 20 para. 1 lit. c IPRG thus still mainly covers sole traders. [177]

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