JURISDICTION OF CROSS-BORDER CASES AND RECOGNITION AND ENFORCEMENT OF JUDGEMENTS IN FAMILY LAW MATTERS

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FOREWORD

Publication provides for information on the Council Regulation (EC) No 2201/2003 of 27 November 2003 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (called also Brussels IIbis Regulation among the professionals).

Regulation 2201/2003 has a dual nature – it provides for rules on jurisdiction, recognition and enforcement of judgments in matrimonial matters and also for rules on jurisdiction, recognition and enforcement of judgments in matters of parental responsibility. By merging both areas into a single document European Union (EU) legislator has taken into account that it is more appropriate to have a single instrument for matters of divorce and parental responsibility since both of them are often reviewed in the same proceedings.

Publication is devoted to Brussels IIbis regulation and contains articles on various aspects of its application, including problematic issues and survey on the diverse application practice in different EU Member States. Articles are written by various experienced civil law and international private law lecturers from Latvia as well as from other EU Member States. The objective of the publication is to promote awareness and knowledge on Regulation 2201/2003, notably rules on jurisdiction, recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility.

Firstly, Ms.Federica Persano, lecturer at the Universities of Genova and Bergamo, examines different aspects of jurisdiction of divorce and legal separation in the context of Regulation 2201/2003, as well as rules of recognition and enforcement of judgments in matrimonial matters. The abovementioned is outlined in her article "From the Brussels IIbis Regulation to the Proposal for a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters". Federika Persano also gives introduction on the future agenda of EU, namely, informs on proposal for a Council Regulation amending the Regulation 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters (Rome III) and consequential rules on applicable law in divorce matters.

To continue the discussion on rules of jurisdiction covered by Regulation 2201/2003, article "Jurisdiction in cross-border parental responsibility cases" by Mr.Paul Randolph, the professor of the University of Aberdeen of United Kingdom; devotes critical analysis regarding matters related to jurisdiction in parental responsibility cases covered by Regulation 2201/2003 and case law of the Court of Justice of the European Union.

Dr.Andrea Schulz, Head of the German Central Authority for International Custody Conflicts and the International Protection of Adults, faces problems and seeks solutions on parental responsibility issues in her daily work. Therefore, she focuses on practical aspects of parental responsibility matters in her article "Brussels IIbis Regulation: Recognition and enforcement of judgments in matters of parental responsibility; Practical and legal aspects of abolition of exequatur for decisions of return of a child and on access rights".

Latvian court practice on application of Regulation 2201/2003 on cross-border parental responsibility and divorce matters is analysed in article "Application of grounds of jurisdiction of Brussels IIbis Regulation in matrimonial matters and matters of parental responsibility in Latvian courts" by Ms.Irena Kucina, lecturer of the University of Latvia, and Ms.Anita Zikmane, Director of the Civil law department of the Ministry of Justice of the Republic of Latvia.

The analysis of Regulation 2201/2003 is concluded by Mr. Agris Skudra, Representative from the Latvian Central Authority for International Child Abduction, and Ms. Irena Kucina in their joint article "Application of standards of Brussels IIbis regulation and 1980 Hague Convention in cases of child abduction in courts of Latvia". The article deals with particularly sensitive issue in Latvia as well as in any other EU Member State – civil aspects of cross-border child abduction. Namely, when after divorce or end of co-habitation one of the parents moves to live to another country together with the child, often contrary to law and views of the second parent.

Publication targets wide range of interested persons – advocates, lawyers, judges, students, academics, individuals involved in cross-border litigation as well as representatives from institutions having competence in cross-border family law matters. Publication intends to introduce the abovementioned target group with general aspects and outstanding issues related to Regulation 2201/2003.

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FROM THE BRUSSELS II BIS REGULATION TO THE PROPOSAL FOR A COUNCIL REGULATION AMENDING REGULATION (EC) NO 2201/2003 AS REGARDS JURISDICTION AND INTRODUCING RULES CONCERNING APPLICABLE LAW IN MATRIMONIAL MATTERS

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1. According to the EC Treaties, the Community does not have any competence in the field of substantive family law (and the situation is not likely to change with the entry into force of the Treaty of Lisbon).

Despite this, the boundaries between national competences and communitarian competences *de facto* are not so strict, as the Community seems to consider the issue of family law has to be faced as part of the phenomenon of European integration and free movement of people, in order to ensure the maintenance of family status within each member Country.

On one hand, the competences of the EC institutions, originally of a strictly economical nature, expanded as far as to indirectly regulate substantive family law, regarding the realization of the fundamental economic freedom and the protection of fundamental rights. On the other hand, following the entry into force of the Amsterdam Treaty in 1999, the Community can intervene directly in the field of judicial cooperation in civil matters, to create a space of freedom, security and justice.

Pursuant to Title IV of the EC Treaty, precisely art. 61–67, the Community has, inter alia, the power to adopt measures to promote the compatibility «of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction» (art. 65 b).

On the basis of these provisions, Reg. No 2201/2003 («Brussels II bis») has been adopted on 27 November 2003.

The Regulation has a dual character, being aimed to bring together in a single document the provisions on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility.

It does not govern the conflict-of-law rules, leaving to the national courts of the member States the task of determining the law applicable in accordance with their domestic law.

Therefore the Commission has adopted a proposal for a *«Council Regulation amending the Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters»* («Rome III»).

The proposal introduces a limited possibility for the spouses to choose the applicable law and the competent court in proceedings concerning divorce and legal separation (the rules will not apply to marriage annulment, where parties autonomy has been considered inappropriate).

The examination of the proposal will be outlined below, in parallel with the analysis of the provisions of Regulation concerning matrimonial matters, to which the present work is dedicated.

2. Regarding the material scope of application, in first place, the Regulation applies to civil proceedings in matrimonial matters, whatever the nature of the court or tribunal (purely religious procedures are excluded): the scope of the Regulation also includes non-judicial proceedings occuring in matrimonial matters (for instance administrative procedures officially recognised in a Member State).

In second place, pursuant to the eighth recital in the Preamble, the Regulation applies only to decisions concerning the dissolution of matrimonial ties: the word «judgment» refers only to decisions that lead to divorce, legal separation or marriage annulment and does not concern issues such as the grounds for divorce, property consequences of the dissolution of the marriage or any other ancillary measure, issues relating to inheritance rights of spouses separated or divorced, maintenance obligations.

Parental responsibility of spouses is the only consequence of divorce which is ruled in the Regulation

As for the temporal scope, the Regulation was adopted on 27 November 2003 and entered in force on 1 March 2005 (art. 72).

On the conditions established in art. 64 it also applies to proceedings and judgements given before that date.

Concerning art. 64.4, it states that judgments given before 1 March 2005 in proceedings instituted before the date of entry into force of the 1347/2000, shall be recognised and enforced in accordance with the Brussels II bis Regulation if jurisdiction is founded on rules which accord with the Regulation iteself, the 1347/2000 Regulation or a convention in force between the Member State of origin and the Member State of enforcement

Advocate General *Kokott* in *Hadadi* Case has observed that, pursuant to art 64.4, it does not matter whether the rules on which the court seised based its jurisdiction can not be ascertained. It needs only to be shown that the courts which have taken the decision would also have had jurisdiction on the basis of the rules provided in the Regulation: *«For Article 64(4) is intended to ensure that the Regulation's provisions concerning recognition are applied extensively to the judgments of all courts which would also have had jurisdiction under the harmonised legislation or the rules laid down in a convention».*

As regards to the geographical scope of application, the Regulation applies to all Member States witn the exception of Denmark.

Concerning the subjective scope, art. 6 states that a spouse who: (a) is habitually resident in the territory of a Member State; or (b) is a national of a Member State (or, in the case of the United Kingdom and Ireland, has his or her domicile in the territory of one of the latter Member States) may be sued in another Member State only in accordance with artt. 3, 4 and 5.

Clarified this, the Regulation does not provide a notion of habitual residence; according to the European Parliament legislative resolution of 21 October 2008, the term should mean «a person's place of ordinary abode» and should not refer to a concept of national law, but rather to a separate concept established in EC law.

Furthermore, art. 3, point (b), does not establish an autonomous notion of citizenship: thus, pursuant to EC jurisprudence it is not disputed that each Member State remains free to determine the criteria for the attribution of its nationality.

Regulation is also silent on the consequences of dual nationality.

With specific reference to this point, Advocate-General *Juliane Kokott* in the abovementioned *Hadadi* case, came to the conclusion that for the purposes of applying art. 3.1 b), the question of which nationality a person of dual nationality holds, or which of a number of nationalities must be taken into account, can not be determined exclusively in accordance with national law.

What is required in this context is, rather, an autonomous interpretation of the concept of nationality, which alone is capable of ensuring uniform application of the provisions on jurisdiction in all Member States.

For the purposes of determining jurisdiction under art. 3.1 *b*) in the case of spouses who hold more than one nationality, not only the more effective nationality is to be taken into account: the courts of all Member States whose nationality is held by both spouses have jurisdiction under that provision.

3. Art. 3 sets out a complete system of grounds of jurisdiction, based on the rule that there must be a real link between the parties concerned and the Member State exercising jurisdiction.

Unlike in Regulation No 44/2001 (Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters) there is not a general forum and there is not a hierarchy between the different grounds of jurisdiction, none of them taking precedence over the rest.

Art. 3, point (a), uses habitual residence in order to determine international jurisdiction, whereas in point (b), the ground for international jurisdiction is nationality (or domicile as the term is used in the United Kingdom and Ireland).

Art. 4 states that if a counterclaim should be made, it should be in the same court in which the initial proceedings are pending, to enable the joint handling of all cases relating to matrimonial crisis within the scope of Regulation.

Art. 5 states that a court of a member State that has given a judgment on legal separation shall also have jurisdiction for converting that judgment into a divorce, if the laws of the member State so provide.

According to art. 6, the grounds of jurisdiction of artt. from 3 to 5 have an exclusive nature: a spouse who is habitually resident in a Member State or who is a national of a Member State (or who has his or her domicile in the United Kingdom or Ireland) may be sued in another Member State only on the basis of these provisions.

Note that art. 6 must be read in conjunction with art. 7.1, pursuant to which, where no court of a member State has jurisdiction according to artt. from 3 to 6, jurisdiction will be determined, in each member State, by the laws of that State (in Italy by art. 32 of Law No 218/1995).

In fact, art. 6 alone would prevent us from invoking the member States' national laws every time that the grounds for jurisdiction of artt. from 3 to 5 do not apply, forcing the courts of the Member States to decline jurisdiction in favour of courts of third States.

Art. 7.1 rectifies this situation by allowing to establish the jurisdiction of Member States' courts on the basis of national standards: pursuant to this article, a spouse who is *i*) a national of a Member State (or, in the case of the United Kingdom and Ireland, has his or her domicile in the territory of one of the latter Member States) and *ii*) is not habitually resident in the territory of a Member State, may be sued in the Member State of nationality.

Furthermore, art. 7.2 states that member Countries can apply their internal laws in all cases where the Regulation does not claim exclusive jurisdiction, that is when the defendant is not a national of any Member State and is resident in a third Country.

Anyway, in the *Lopez* Case, the Court clarified that artt. 6 and 7 are to be interpreted as meaning that where, in divorce proceedings, a respondent is not habitually resident in a Member State and he is not a national of a Member State, the courts of a Member State can not base their jurisdiction to hear the petition on their national law, if the courts of another Member State have jurisdiction under art. 3, the objective of which is to lay down uniform conflict of law rules for divorce, in order to ensure a free movement of persons.

Consequently, the Regulation applies also to nationals of nonMember States whose links with the territory of a Member State are sufficiently close and in this way the grounds of international jurisdiction of the Regulation apply with effect *erga omnes.*

This situation is also consacrated in the proposed Regulation *Rome III*, where: i) art. 6 is deleted, as it may cause confusion; *ii*) a new version of art. 7 is adopted, introducing a uniform and exhaustive rule on residual jurisdiction.

We must now add that a court of a member State in urgent cases may take interim protective measures relating to persons and property, even if it is not seised of divorce proceedings under the Regulation (art. 20.1).

Finally, if certain conditions are met, a court which is seised of divorce proceedings under the Regulation can also have jurisdiction in matters of parental responsibility connected with the divorce, pursuant to the prorogation rule of art. 12.1.

4. It is important to clarify now that the grounds of jurisdiction are designed to meet objective requirements, to be in line with the interests of the parties, to involve flexible rules in order to deal with mobility and to meet individuals' needs without sacrificing legal certainty.

As suggested in the Green Paper of the Commission on applicable law and jurisdiction in divorce matters, jurisdiction rules do not entirely meet these objectives:in the absence of uniform conflict-of-law rules, the existence of several alternative grounds of jurisdiction may lead to the application of laws with which the spouses are not necessarily the most closely connected.

In addition, the current rules may induce a spouse to "rush to court", i.e. to seise a court before the other spouse has done it in order to ensure that the proceeding is governed by a particular law which is able to safeguard his or her interests.

To avoid these risks, art. 3 *bis* of the Proposal improves access to court for spouses of different nationalities by enabling them to designate by common agreement a court or the courts of a Member State of which one of them is a national, this possibility applying to spouses living in a Member State as well as spouses living in third States.

It introduces a limited possibility for the spouses to designate by common agreement the competent court ("prorogation of jurisdiction") in a proceeding relating to divorce and legal separation.

Spouses who designate a competent court may also avail themselves of the possibility to choose the applicable law pursuant to art. 20 *bis*.

This provision is based firstly on the choice of law of the spouses, confined to laws with which the marriage has a close connection, to avoid the application of "exotic" laws with which the spouses have little or no connection.

In the absence of choice, art. 20 ter determines the applicable law on the basis of a scale of connecting factors which will ensure that the matrimonial proceeding is governed by a legal order with which the marriage has a close connection, the first of these criteria being the habitual residence of the spouses and, failing that, their last habitual residence if one of them still resides there.

Pursuant to art. 20 *quater*, the proposed Regulation is meant to be of universal application, meaning that the conflict-of-law rule can designate the law of a Member State of the European Union or the law of a third State.

5. As regards examining jurisdiction, the starting point is that the recognition and enforcement of judgments given in a Member State should be based on the principle of mutual trust.

To this purpose, under art. 17 each court of a member State examines only its own jurisdiction. Therefore in this context three different situations may arise: *i*) if a court is seised of a case over which it has no jurisdiction under the Regulation and over which the court of the other member States have no jurisdiction too, art. 7 concerning residual jurisdiction applies; ii) if a court is seised of a case over which it has no jurisdiction and over which a court of another member State has jurisdiction under the Regulation, it must declare of its own motion that it has no jurisdiction; iii) whether the court has jurisdiction under the Regulation, courts of other Member States are no longer competent and they must dismiss any subsequent application.

The principle expressed in points *ii*) and *iii*) is also expressed in the rule on lis pendens between courts of member States in artt. 16 and 19 of the Regulation, aimed to ensure legal certainty and to avoid parallel actions and the possibility of irreconcilable judgments and essentially modeled on the corresponding rules contained in Regulation No 44/2001.

The main innovation of the Regulation is in a very broad concept of lis pendens, thus abandoning the requirement of objective identity of the causes: for instance, the filing of an application for separation precludes the establishment in another Member State of a case of divorce or annulment of marriage between the same spouses, although these cases have a separate object.

Art. 19.3 also contains a special rule whereby the party who brought the relevant action before the court second seised may, if he or she so wishes, bring that action before the court which claims jurisdiction because it was seised earlier.

6. Concerning recognition and enforcement of judgments, art. 21 provides for automatic recognition of all judgments without any intermediary procedure being required (par. 1), not requiring any special procedure also for updating the civil-status records of a Member State on the basis of a final judgment given in another Member State (par. 2).

Pursuant to art. 21.3, any interested party can apply for a decision if the judgment has to be recognised or not: in this case the procedure set out in Section 2 for enforcement will be followed.

This procedure is similar to that regulated by Regulation no. 44/2001, the declaration of enforceability being made by the judge in an ex parte proceeding, against which opposition can be made.

However, unlike art. 41 of Regulation no. 44/2001, art. 31.2 statues that the court seised may reject the application *ex officio* in the presence of one of the reasons for refusal of recognition specified in the Regulation no. 2201/2003.

The grounds of non recognition are restricted to the following: i) manifest contrary to public policy or; ii) the respondent is not served with the document which instituted the proceedings in sufficient time to arrange defence; or iii) recognition is irreconcilable with another judgment (art. 22).

The court seised with the application for recognition or non-recognition can not review either the jurisdiction of the State of origin, or the findings of fact.

We have to notice that in the *Rinau* case the question arose on how art.31.1 should be applied when an interested party has applied for nonrecognition of a judicial decision before an application for recognition of that decision has been submitted.

The EC Court stated that in the event of an application for nonrecognition the applicant is the person against whom the application for a declaration of enforceability has been brought: therefore the party against whom the application for nonre cognition is brought cannot be deprived of the possibility of making submissions on the application.

Any other outcome would result in limiting the effectiveness.

Finally, where the recognition of a judgment is raised as an incidental question in a court of a member State, that court may determine that issue (art. 21.4).

JURISDICTION IN CROSS-BORDER PARENTAL RESPONSIBILITY CASES

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A – Purpose of the Jurisdiction provisions on Parental Responsibility

The intention of the Community legislature in relation to the provisions on jurisdiction on parental responsibility in the Brussels IIbis Regulation (Reg 2201/2003) is set out in the recitals as follows:

'(12) The grounds of jurisdiction in matters of parental responsibility established in the present Regulation are shaped in the light of the best interests of the child, in particular on the criterion of proximity. This means that jurisdiction should lie in the first place with the Member State of the child's habitual residence, except for certain cases of a change in the child's residence or pursuant to an agreement between the holders of parental responsibility.

(13) In the interest of the child, this Regulation allows, by way of exception and under certain conditions, that the court having jurisdiction may transfer a case to a court of another Member State if this court is better placed to hear the case. However, in this case the second court should not be allowed to transfer the case to a third court.'

These recitals do not represent an exhaustive summary of the jurisdiction rules as they take no account of the rules in Articles 13 and 14 of the Regulation. However, it is significant that the recital states that the aim of the legislature was to craft jurisdiction rules that were 'shaped in the light of the best interests of the child'. This does not mean that the jurisdiction rules will always lead to the court exercising jurisdiction that is best placed to do so in the interests of the child. The courts have to apply the general rule of jurisdiction, habitual residence of the child, and the fallback rule of presence of the child whether or not they think that those rules are in the best interests of the child involved in the case before them. On the other hand they only have to accept jurisdiction based on party autonomy if they believe it is in the best interests of the child and 'by way of exception' the court that has jurisdiction under the rules of the Regulation may transfer the case to another Member State if the court believes that to be in the best interests of the child.

Recital 12 states that the grounds of jurisdiction are shaped in the light of the 'criterion of proximity' and that this is an outworking of the 'best interests of the child'. It is not clear what is meant by the 'proximity' principle. Advocate General Kokott, in her opinion of 29 January 2009 in Case C-523/07 A, gives an autonomous definition of the words of the Regulation and says that the main jurisdiction rule in Article 8 (habitual residence of the child) and the fallback jurisdiction in Article 13 (presence of the child) both reflect the proximity principle. However, it is clear that the 'proximity' principle should be subject to another principle that is not even mentioned in the recitals, ie the principle of 'party autonomy'. As we will see below the general jurisdiction in Article 8 and the presence jurisdiction in Article 13 are subject to the application of the prorogation jurisdiction in Article 12 (though in footnote 22 of her opinion AG Kokott notes that: 'The priority of Article 12 over Article 13 raises problems'.). However, Article 12 is not a pure party autonomy provision because the choice of jurisdiction by the holders of parental responsibility must be deemed by the chosen court to be in the best (or superior) interests of the child. In addition a chosen court may ultimately respect the principle of 'proximity' because it can transfer a case under Article 15 to another Member State 'with which the child has a particular connection'. Though it is hard to see how a chosen court could conclude that it is in the 'best (or superior) interests of the child' for it to hear the case under Article 12 and then conclude that it is in the 'best interests of the child' to transfer the case to another jurisdiction under Article 15.

B – General jurisdiction in parental responsibility cases

'Article 8

General jurisdiction

1. The courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the court is seised.

2. Paragraph 1 shall be subject to the provisions of Articles 9, 10 and 12.'

The first significant analysis of 'habitual residence' in the context of parental responsibility was given by the European Court of Justice (ECJ) in Case C-523/07 A. Advocate General Kokott noted that 'habitual residence' is not defined in the relevant multilateral conventions. This is true as the Hague Child Abduction Convention 1980 and the Hague Children Convention 1996 deliberately did not define habitual residence. She also noted the inapplicability of the interpretation given to habitual residence by Professor Borras, in her report on the Brussels II Convention that never entered force but was the predecessor for the Brussels II Regulation, as that interpretation was given in the context of adults involved in divorce proceedings.

She explained that:

'At least in the case of younger children, however, it is not the child's own will that is decisive but that of the parents, who as part of the right of custody also have the right to determine the child's place of residence. But precisely in the context of disputes over custody, the ideas of the persons entitled to custody as to where the child is to reside may well diverge. The intention of the father and/or mother to reside with the child in a particular place can therefore be only an indication of the child's habitual residence, not a sole deciding condition.' (36)

Advocate General Kokott makes a very important point here. Problems arise with determining the habitual residence of a child when those holding parental responsibility do not have the same intentions as to where the child should reside. When a child has been removed from his or her habitual residence or retained outside his or her habitual residence contrary to the intentions of any of the holders of parental responsibility such a holder can invoke the child abduction provisions and seek the return of the child (see Articles 10 and 11). Thus the parental responsibility jurisdiction provisions will normally only be contentious when the parental responsibility holders have agreed to, or at least acquiesced in, the child crossing a border but thereafter the views of the parental responsibility holders as to where the child should reside diverge. If all parental responsibility holders are agreed on where their child should reside then habitual residence should transfer to that country soon after the child moves there. If a child has moved in accordance with the shared intentions of the parental responsibility holders but one of the holders wants to leave that country with the child within the first few months after the move to that country a question will arise as to where the child is habitually resident. If the child has been in the new country (x) for an appreciable period of time, eg six months, and all parental responsibility holders shared an intention that the child should reside there then, even if a parental responsibility holder changes his or her mind and wants the child to reside somewhere else (y), the child will be habitually resident in country x.

The Advocate General did not think that the ECJ's case law on habitual residence in other contexts was relevant in the context of parental responsibility. She also resisted the temptation to be too prescriptive about what 'habitual residence' means in this context, emphasising that the national court, not the ECJ, 'must make an overall assessment of all the circumstances' (para. 48). However, she emphatically came down in favour of a child centred approach to assessing habitual residence in a parental responsibility case by saying that the habitual residence corresponds to the 'actual centre of interests of the child'.

The European Court of Justice (Third Chamber), in its judgment of 2 April 2009, followed the AG's lead in not reading across its own case law on habitual residence in other contexts and in recognizing that habitual residence has to be determined by the national court in the light of all the relevant circumstances specific to that case. However, wisely, it did not adopt the 'centre of interests of the child test'.

The Court said:

'38 In addition to the physical presence of the child in a Member State other factors must be chosen which are capable of showing that that presence is not in any way temporary or intermittent and that the residence of the child reflects some degree of integration in a social and family environment.

39 In particular, the duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State must be taken into consideration.

40 As the Advocate General pointed out in point 44 of her Opinion, the parents' intention to settle permanently with the child in another Member State, manifested by certain tangible steps such as the purchase or lease of a residence in the host Member State, may constitute an indicator of the transfer of the habitual residence. Another indicator may be constituted by lodging an application for social housing with the relevant services of that State.

41 By contrast, the fact that the children are staying in a Member State where, for a short period, they carry on a peripatetic life, is liable to constitute an indicator that they do not habitually reside in that State.

42 In the light of the criteria laid down in paragraphs 38 to 41 of this judgment and according to an overall assessment, it is for the national court to establish the place of the children's habitual residence.

43 However, it is conceivable that at the end of that assessment it is impossible to establish the Member State in which the child has his habitual residence. In such an exceptional case, and if Article 12 of the Regulation, which concerns the jurisdiction of the national courts with respect to questions relating to parental responsibility where those questions are related to an application for divorce, legal separation or marriage annulment, is not applicable, the national courts of the Member State in which the child is present acquire jurisdiction to hear and determine the substance of the case pursuant to Article 13(1) of the Regulation.'

The ECJ correctly gave a non-exhaustive list of factors that the national courts should take into account in determining if the child's residence in a country 'reflects some degree of integration in a social and family environment'. The one factor that the Court mentions which is highly contentious is that of 'nationality'. It seems inappropriate to regard the nationality of a child as being relevant for determining the child's habitual residence. Habitual residence and nationality are alternative connecting factors. The latter does not indicate that a person is resident in the country of nationality nor does it indicate that the person is resident there 'habitually'. A significant number of people are nationals of a State but only return to that State for visits and do not normally reside there.

The Court also says that parental intention to settle permanently with the child in a new State 'may' be an indicator of the transfer of habitual residence. This is too weak on the part of the Court. It is hard to see circumstances where a shared intention of those holding parental responsibility to settle permanently 'with the child' in a new State is not at least an 'indicator' of the transfer of the habitual residence. Clearly such intention should not be enough on its own as there must be a period of factual residence in the country concerned to create the 'integration in a social and family environment'. However, common intention to settle surely indicates that the family wants to integrate in its new environment and this is highly relevant for determining the habitual residence of a child. The Court stresses objective indicators of intention, eg the purchase or lease of immoveable property or an application for social housing. This is wise as ascertaining subjective intention is notoriously difficult and parties may say what their intention is or was on the basis of how it might advantage them in the process of determining jurisdiction.

The Court confirms the drafters' intention that it is possible to have no habitual residence and in those 'exceptional cases' the physical presence jurisdiction in Article 13 applies unless the parties have prorogated a jurisdiction under the terms of Article 12.

C- Continuing Jurisdiction of former Habitual Residence

'Article 9

Continuing jurisdiction of the child's former habitual residence

1. Where a child moves lawfully from one Member State to another and acquires a new habitual residence there, the courts of the Member State of the child's former habitual residence shall, by way of exception to Article 8, retain jurisdiction during a three-month period following the move for the purpose of modifying a judgment on access rights issued in that Member State before the child moved, where the holder of access rights pursuant to the judgment on access rights continues to have his or her habitual residence in the Member State of the child's former habitual residence.

2. Paragraph 1 shall not apply if the holder of access rights referred to in paragraph 1 has accepted the jurisdiction of the courts of the Member State of the child's new habitual residence by articipating in proceedings before those courts without contesting their jurisdiction.'

Advocate General Kokott said in her opinion in A that:

'43. In the case of a lawful move, habitual residence can shift to the new State even after a very short period. That is indicated by Article 9(1) of Regulation No 2201/2003. Under that provision, by way of exception to Article 8, the courts of the Member State of the child's former habitual residence retain jurisdiction during a three-month period following the move for the purpose of modifying a judgment on access rights issued in that Member State before the child moved, where the parent with access rights continues to live in the former Member State.

That provision is thus based on the idea that even before three months have passed there may be habitual residence in the new place of residence, so that a rule on jurisdiction is required, as an exception to Article 8, for the benefit of the courts of the former place of habitual residence.'

Given that it will be very rare indeed for habitual residence to change much before the 3 month period after the lawful move has taken place and Article 9 is only relevant from the date when such a change in habitual residence has happened up until the three month period after the move expires it seems that there is very little scope in time when Article 9 might apply. Furthermore, since the provision covers only access cases its practical relevance is very marginal.

D- Prorogation

'Article 12

Prorogation of jurisdiction

1. The courts of a Member State exercising jurisdiction by virtue of Article 3 on an application for divorce, legal separation or marriage annulment shall have jurisdiction in any matter relating to parental responsibility connected with that application where:

(a) at least one of the spouses has parental responsibility in relation to the child;

and

(b) the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner by the spouses and by the holders of parental responsibility, at the time the

court is seised, and is in the superior interests of the child.

2. The jurisdiction conferred in paragraph 1 shall cease as soon as:

(a) the judgment allowing or refusing the application for divorce, legal separation or marriage annulment has become final;

(b) in those cases where proceedings in relation to parental responsibility are still pending on the date referred to in (a), a judgment in these proceedings has become final;

(c) the proceedings referred to in (a) and (b) have come to an end for another reason.

3. The courts of a Member State shall also have jurisdiction in relation to parental responsibility in proceedings other than those referred to in paragraph 1 where:

(a) the child has a substantial connection with that Member State, in particular by virtue of the fact that one of the holders of parental responsibility is habitually resident in that Member State or that the child is a national of that Member State;

and

(b) the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner by all the parties to the proceedings at the time the court is seised and is in the best interests of the child.

4. Where the child has his or her habitual residence in the territory of a third State which is not a contracting party to the Hague Convention of 19 October 1996 on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children, jurisdiction under this Article shall be deemed to be in the child's interest, in particular if it is found impossible to hold proceedings in the third State in question.'

Article 12(1) is a classic party autonomy provision in that it requires the consent of all the 'holders of parental responsibility' to the choice of the court that is hearing the matrimonial action to hear the parental responsibility issues. It seems wise that, where all parental responsibility holders have expressly or otherwise unequivocally agreed to parental responsibility matters being decided in their court, the court should exercise jurisdiction. The court should be able to presume that in those circumstances it is in the 'superior interests of the child' to do so.

Article 12(3) creates a different kind of party autonomy provision. First it is not linked to matrimonial proceedings and secondly it is only 'the parties to the proceedings' that have to consent to the jurisdiction. This means that a holder of parental responsibility might not be a party to the proceedings and therefore may not have consented to this being the forum to resolve parental responsibility issues. In these circumstances the court should not presume that it is in the 'best interests of the child', for it to hear the case but rather should assess whether there are any parental responsibility holders who are not parties to the case and whether it might not be in the best interests of the child to resolve the case in a forum where such a parental responsibility holder would be involved.

E- Presence of the child

'Article 13

Jurisdiction based on the child's presence

1. Where a child's habitual residence cannot be established and jurisdiction cannot be determined on the basis of Article 12, the courts of the Member State where the child is present shall have jurisdiction.

2. Paragraph 1 shall also apply to refugee children or children internationally displaced because of disturbances occurring in their country.'

As can be seen from the A case it is possible that a child will have moved across a border with his or her parental responsibility holders and thus have lost his or her habitual residence there but not have been long enough in the new country, at the time when the court is seised, in the absence of a very clear shared intention of the parental responsibility holders to remain there, to have acquired a habitual residence there. In those circumstances the courts of the country where the child is present have jurisdiction.

F- Residual jurisdiction referring to national law

'Article 14

Residual jurisdiction

Where no court of a Member State has jurisdiction pursuant to Articles 8 to 13, jurisdiction shall be determined, in each Member State, by the laws of that State.'

The residual jurisdiction is a matter for national law but it can only arise where the child is neither habitually resident nor present in an EC Member State and neither the party autonomy jurisdiction in Article 12 nor the former habitual residence jurisdiction in Article 9 apply.

G- Transfer of jurisdiction

'Article 15

Transfer to a court better placed to hear the case

1. By way of exception, the courts of a Member State having jurisdiction as to the substance of the matter may, if they consider that a court of another Member State, with which the child has a particular connection, would be better placed to hear the case, or a specific part thereof, and where

this is in the best interests of the child:

(a) stay the case or the part thereof in question and invite the parties to introduce a request before the court of that other Member State in accordance with paragraph 4; or

(b) request a court of another Member State to assume jurisdiction in accordance with paragraph 5.

2. Paragraph 1 shall apply:

(a) upon application from a party; or

(b) of the court's own motion; or

(c) upon application from a court of another Member State with which the child has a particular connection, in accordance with paragraph 3.

A transfer made of the court's own motion or by application of a court of another Member State must be accepted by at least one of the parties.

3. The child shall be considered to have a particular connection to a Member State as mentioned in paragraph 1, if that Member State:

(a) has become the habitual residence of the child after the court referred to in paragraph 1 was seised; or

(b) is the former habitual residence of the child; or

(c) is the place of the child's nationality; or

(d) is the habitual residence of a holder of parental responsibility; or

(e) is the place where property of the child is located and the case concerns measures for the protection of the child relating to the administration, conservation or disposal of this property.

4. The court of the Member State having jurisdiction as to the substance of the matter shall set a time limit by which the courts of that other Member State shall be seised in accordance with paragraph 1.

If the courts are not seised by that time, the court which has been seised shall continue to exercise jurisdiction in accordance with Articles 8 to 14.

5. The courts of that other Member State may, where due to the specific circumstances of the case, this is in the best interests of the child, accept jurisdiction within six weeks of their seisure in accordance with paragraph 1(a) or 1(b). In this case, the court first seised shall decline jurisdiction. Otherwise, the court first seised shall continue to exercise jurisdiction in accordance with Articles 8 to 14.

6. The courts shall cooperate for the purposes of this Article, either directly or through the central authorities designated pursuant to Article 53.'

Article 15 creates room for judicial discretion to decline to exercise jurisdiction in favour of a court that has a particular connection with the child and where the court believes this transfer to be in the 'best interests of the child'. The Court's discretion is not absolute. It can only do so if the transfer is accepted by at least one of the parties and it will have to resume exercising jurisdiction if the transfer is not accepted by the court that it sought to transfer the case to. Use of this transfer provision is meant to be exceptional (see Article 15(1) and recital 13) and a court to which a case is transferred cannot transfer the case to a third court (recital 13).

BRUSSELS IIBIS REGULATION: RECOGNITION AND ENFORCEMENT OF JUDGMENTS IN MATTERS OF PARENTAL RESPONSIBILITY; PRACTICAL AND LEGAL ASPECTS OF ABOLITION OF EXEQUATUR FOR DECISIONS OF RETURN OF A CHILD AND ON ACCESS RIGHTS

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A. The general regime for recognition and enforcement of judgments in matters of parental responsibility under the Brussels II bis Regulation

a) Scope of the Regulation

The scope of Brussels IIbis encompasses all decisions concerning parental responsibility – including custody orders, contact orders, placements of children in institutions, foster care etc., the appointment of legal guardians and any other protective measure (see Article 1 of the Regulation).

b) Recognition

Pursuant to Article 21(1), these decisions are recognised in other EU Member States (except Denmark) by operation of law. The Regulation does however contain grounds for refusal of recognition of a judgment relating to parental responsibility (Article 23). In practice, this means that every authority would independently check whether one of the grounds for refusal applies if in proceedings pending before it the recognition of a foreign order relating to parental responsibility is decisive. The results may thus differ form one proceeding to another. Therefore any interested party may apply for a decision that the decision be or not be recognised (Article 21(3)). Such decision is binding between the parties concerned in the State where it is given, and the issue cannot be reopened unless a new decision is presented for recognition.

c) Declaration of enforceability

Where enforcement is required, as a first step a declaration of enforceability (exequatur) will be necessary (Article 28). The Regulation provides for two levels of legal challenge against the grant or refusal of the declaration of enforceability (Articles 33, 34). In Latvia, the apgabaltiesā (under Article 33) and the Augstākajā tiesā (under Article 34) have jurisdiction to decide about these legal challenges.

d) Applications for recognition and/or declaration of enforceability

In Latvia, applications under Article 21(3) for recognition or under Article 29 for a declaration of enforceability have to be filed with the rajona (pilsetās) tielsa. Article 37 of the Regulation lists the documents which have to be submitted, including a certificate under Article 39 of the Regulation from the State of origin of the judgment.

e) Enforcement

Enforcement as such remains a matter of national law (Article 47(1)). For coercive enforcement measures to be applied, the declaration of enforceability is not enough: In most legal systems, coercive measures may only be applied if they have been specifically ordered by a judge, taking into account the particular circumstances of the case. Normally this means that the judgment creditor has to allege non-compliance of the judgment debtor with the decision in a plausible way, and any additional requirements of national law (e.g. proportionality test or other) for the application of a particular coercive measure have to be fulfilled. Comparative law research has shown that coercive measures available under domestic laws are limited in numbers and seem to include only monetary fines, arrest and the application of physical force to make the debtor do something (or to remove the child from a person he or she is clinging to).[1] Not all types of measures are available in all States, though, and not for all kinds of orders to be enforced.

These coercive measures need to be ordered under the domestic law of the State where enforcement is sought, and the legal challenges are also governed by the law of that State. They can be manifold and lengthy.

f) Grounds for refusal of recognition and/or declaration of enforceability

Article 23 contains a catalogue of grounds of non-recognition:

o public policy of the requested State, taking into account the best interests of the child;

o the child was not given an opportunity to be heard;[2]

o in case of default judgments: no service or no timely service of document instituting the proceedings was effected, unless there is unequivocal acceptance of the judgment by the party not properly served;

o some holder of parental responsibility was allegedly infringed upon by not having been given an opportunity to be heard before the order was made;o the foreign order is irreconcilable with a later domestic order relating to parental responsibility;

[1] See A. Schulz, Enforcement of orders made under the 1980 Convention – A comparative legal study, Hague Conference on Private International Law, Preliminary Document No 6 of October 2006, available at www.hcch.net under "Conventions" – "Convention No 28" – "Practical Operation Documents".

[2] But see also Recital 19 of the Regulation which clarifies that the Regulation does not intend to modify national procedures on how such hearing has to take place.

o the foreign order is irreconcilable with a later domestic order relating to parental responsibility;

o the foreign order is irreconcilable with a later order given in another EU Member State;

o the foreign order is irreconcilable with a later order given in the non-Member State of habitual residence of the child;

o the consultation procedure for cross-border placement under Article 56 of the Regulation was not observed.

These grounds have to be applied:

o by a court requested to rule on the recognition of a judgment from another EU Member State (Article 21(3));

o by a court requested to declare a judgment from another EU Member State enforceable (Article 31(2)); and

o by any court or authority that has to decide about the recognition of a judgment from another EU Member State as a preliminary question in proceedings pending before it.

Recognition and a declaration of enforceability may not be rejected because the court of origin allegedly lacked jurisdiction under the Regulation (Article 24). In proceedings for a declaration of enforceability, the judgment debtor is not entitled to make any submissions (Article 31(1)). He or she can raise grounds for refusal only when appealing the declaration of enforceability. Whether the court has to examine the existence of any such grounds ex officio depends on national law. Where there are no indications for the existence of grounds for refusal, however, the court requested to declare a foreign judgment enforceable will normally not be obliged to investigate ex officio whether any grounds for refusal exist.

B. Practical and legal aspects of abolition of exequatur for decisions on the return of a child and on access rights

For two types of decisions, the Regulation contains a faster option. It is the choice of the judgment creditor only to opt for either the "ordinary" or the "fast track" version.[3] The judgment debtor (normally the parent with whom the child is currently staying) cannot file for a judgment on non-recognition under Article 21(3) unless the judgment creditor (the left-behind parent) has applied for the exequatur procedure instead of direct enforcement.

[3] Article 40(2) of the Regulation; see also the Judgment of the European Court of Justice, note 5 below.

a) Decisions on access rights

Contact orders made in one EU Member State which are enforceable there are recognised and enforceable in another Member State without the need for a declaration of enforceability and without any possibility of opposing recognition if a certificate pursuant to Articles 40, 41 has been issued in the Member State of origin. Article 41(2) describes the conditions for issuing a certificate, in broad terms, as follows:

(a) where in case of default judgments: no service or no timely service of document instituting the proceedings was effected, unless there is unequivocal acceptance of the judgment by the party not properly served;

(b) all parties concerned were given an opportunity to be heard; and

(c) the child was given an opportunity to be heard, unless a hearing was considered inappropriate having regard to his or her age or degree of maturity.

Where a certificate under Article 41 has been issued, the orders concerned enjoy the same status as domestic decisions (Article 47(2)). Recognition may not be refused; an exequatur is not required. Neither the certificate nor the contact order on the merits may be challenged in the State where enforcement is sought. The certificate cannot be challenged in State of origin either (Article 43(2)). But if the contact order as such is challenged there and the next instance makes a new contact order or excludes contact, the certificate issued by the first instance court has to be withdrawn and, if appropriate, replaced by a new one because according to Article 44, the certificate shall take effect only within the limits of the enforceability of the judgment.

b) Return decisions

aa) The procedure under Article 11(6)-(8) and the certificate pursuant to Articles 40, 42 of the Regulation

Article 42 provides for a certificate to accompany certain return orders. The provision needs to be read in conjunction with Article 11(6)-(8) of the Regulation. These paragraphs govern the interaction between the Hague Child Abduction Convention and the Brussels IIbis Regulation.

Where a child who is habitually resident in one EU Member State is abducted to, or being retained in, another EU Member State, the Hague Child Abduction Convention remains the instrument to be applied for obtaining the return of the child to the State of habitual residence. Article 11 of the Regulation specifies certain procedural details in the application of the Hague Convention between EU Member States. Paragraph 6 states that where return of the child is refused in one Member State on the basis of Article 13 of the Hague Convention, the court must transmit a copy of the non-return order and of the relevant documents, in particular a transcript of the court hearings, to the court in the State of habitual residence of the child having jurisdiction in custody matters.

This court must receive all documents within one month from the date the non-return order was made. If the court is not already seized with custody proceedings, it shall notify the parties of the information received and invite them to make submissions to the court within three months from the date of notification so that the court can examine the issue of custody of the child.

An important change brought about by the Regulation in the application of the 1980 Hague Convention is contained in Article 11(8) and relates to enforcement. If the court having jurisdiction over custody matters issues a decision concerning custody, and this decision requires the return of the child to another Member State, this return order (which, unlike a Hague return order, is an order on the merits of custody) is directly enforceable in all EU Member States if it is accompanied by a certificate in accordance with Articles 40, 42 of the Regulation. This includes enforceability in the Member State where return of the child was refused earlier under Article 13 of the Hague Convention.[4]

bb) Relation with Hague return proceedings

Any order refusing return of the child under Article 13 of the Hague Convention triggers the procedure for cross-border information and communication between courts which will possibly lead to a custody and return order on the merits. The Hague non-return order need not be final. If a first-instance Hague non-return order is appealed, it is thus possible that parallel proceedings will be pending on different but related issues: in the State where the child now is present on return under the Hague Convention, and in the State of (former) habitual residence of the child on custody (including return). A return order made by the courts of the State of habitual residence which was made after a non-return order under the Hague Convention in the other State will "trump" the latter also in that other State and is directly enforceable there if accompanied by a certificate (Article 11(8) of the Regulation).

According to Article 42(2), the conditions for issuing a certificate are:

- The child was given an opportunity to be heard, unless a hearing was considered inappropriate having regard to his or her age or degree of maturity;
- the parties concerned were given an opportunity to be heard; and
- the court has taken into account in issuing its judgment the reasons for and evidence underlying the order issued pursuant to Article 13 of the 1980 Hague Convention.

This last element provides the link between the two proceedings. Not every custody order made in an EU State having jurisdiction under the Regulation any time after a non-return order under Article 13 of the Hague Convention in another EU Member State enjoys direct enforceability in all EU States.

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[4] Concerning legal challenges, the same as for contact orders applies (see above under 2. a)).

This privilege is granted only to orders issued by a court to which the non-return order was transmitted before or during the custody proceedings pending before it. If the custody proceedings are unrelated to the Hague non-return order, the court making a custody order is not allowed to issue a certificate.

C. Leading case: ECJ C-195/08 PPU – Rinau; judgment of 11 July 2008

The interpretation of Article 11(6)-(8) of the Regulation and its relationship with the 1980 Hague Convention was clarified in a decision[5] of the Court of Justice of the European Communities (ECJ) on 11 July 2008. The case concerned a child abduction/retention between Germany and Lithuania, and the questions were submitted to the ECJ by the Supreme Court of Lithuania. For the first time, the ECJ applied the new urgency procedure for preliminary rulings, introduced mainly for matters concerning child abduction and the European Arrest Warrant. Little more than 50 days after the reference for a preliminary ruling reached the Court, the decision was given. The Court ruled:

1. Once a nonreturn decision has been taken and brought to the attention of the court of origin, it is irrelevant, for the purposes of issuing the certificate provided for in Article 42 of Council Regulation (EC) No 2201/2003 [...], that that decision has been suspended, overturned, set aside or, in any event, has not become res judicata or has been replaced by a decision ordering return, in so far as the return of the child has not actually taken place. Since no doubt has been expressed as regards the authenticity of that certificate and since it was drawn up in accordance with the standard form set out in Annex IV to the Regulation, opposition to the recognition of the decision ordering return is not permitted and it is for the requested court only to declare the enforceability of the certified decision and to allow the immediate return of the child.

2. Except where the procedure concerns a decision certified pursuant to Articles 11(8) and 40 to 42 of Regulation No 2201/2003, any interested party can apply for nonrecognition of a judicial decision, even if no application for recogni tion of the decision has been submitted beforehand.

3. Article 31(1) of Regulation No 2201/2003, in so far as it provides that neither the person against whom enforcement is sought, nor the child is, at this stage of the proceedings, entitled to make any submissions on the application, is not applicable to proceedings initiated for nonrecognition of a judicial decision if no application for recognition has been lodged beforehand in respect of that decision. In such a situation, the defendant, who is seeking recognition, is entitled to make such submissions.

[5] Available at www.curia.eu. See in further detail A. Schulz, Guidance from Luxembourg: First ECJ Judgment Clarifying the Relationship between the 1980 Hague Convention and Brussels II Revised, International Family Law 2008, pp. 221-225.

This quick decision has provided clarity on the interpretation of the rather complex rules in Article 11(6)-(8) of the Regulation.

D. Conclusion

Like the 1996 Hague Child Protection Convention on a global level, the Brussels IIbis Regulation provides an efficient system for recognition and enforcement of parental responsibility orders in relations between EU Member States. Recognition by operation of law plus the optional offer of a determination on recognition or non-recognition is already an asset for citizens and corresponds to their increasing mobility. Concerning enforcement, the exequatur procedure has proven to work well in commercial matters under Brussels I and is therefore also to be welcomed. Some caution might be required, however, with regard to the possible effect of an abolition of exequatur for contact orders and certain return orders. Expectations might be too high here. It should not be forgotten that coercive enforcement measures still need to be ordered by a court of the requested State (where enforcement is to take place), and that the Regulation leaves the enforcement procedure to national law. While Hague return orders are domestic orders and the return order issued under Article 11(8) of Brussels IIbis is a foreign one, the problems may therefore be the same when it comes to actual enforcement. So it has to be borne in mind by domestic legislators that when coercive enforcement is required, a balance needs to be struck between the interests of the "judgment debtor" (the parent or other person with whom the child is presently staying) and the "judgment creditor" (the parent having obtained a contact or return order), bearing in mind that the best interests of the child remain the primary concern. It is also recalled that contact should be a recurring event while return is a one-time action during a family crisis. This may have an impact on the way enforcement is carried out. The final decision is in the hand of the judges.

APPLICATION OF GROUNDS OF JURISDICTION OF THE BRUSSELS IIBIS REGULATION IN MATRIMONIAL MATTERS AND MATTERS OF PARENTAL RESPONSIBILITY IN LATVIAN COURTS

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Application of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000[1] (henceforth – Brussels IIbis Regulation) in the Member States of European Union, including Latvia, was initiated on the 1st of March 2005. Therefore, nowadays – in the year 2009 – we can safely speak about application of the Brussels IIbis Regulation in Latvian courts, and correspondingly analyze the Latvian court practice in application of this regulation.

This paper is not aiming at criticizing or praising any Latvian court for application of the Brussels IIbis Regulation. The aim of this paper is to indicate the most significant aspects of applying the Brussels IIbis Regulation and to analyze issues faced by Latvian courts in relation to its application.

It shall be noted that the Brussels IIbis Regulation encompasses a broad scope[2]. However, the authors of this paper only consider the most significant aspects of applying the Brussels IIbis Regulation, namely, jurisdiction issues in matrimonial matters and matters of parental responsibility in Latvian court practice[3].

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[1] The Brussels IIbis Regulation was published on December 23rd, 2003, OJ L 338, pages 1-29.

[2] The Brussels IIbis Regulation is applied in order to determine which court of Member States has the jurisdiction to consider matrimonial matters or matters of parental responsibility, as well as how to recognize or enforce judgments from another Member State. Amongst other issues, the Brussels IIbis Regulation is applicable in the European Union in matters of wrongful removal or retention of a child or cross-border abduction.

[3] In total, there were 11 parental responsibility cases for the period 2008–2009 and 3 divorce cases for the period 2006–2008 studied in respect to application of the Brussels IIbis Regulation.

A. Application of Grounds of Jurisdiction of the Brussels IIbis Regulation in Matrimonial Matters in Latvian Courts

Cross-border jurisdiction provisions in matrimonial matters[4] are provided in Section 1 of Chapter II of the Brussels IIbis Regulation. It shall be pointed out that Section 1 of Chapter II of the Regulation relates only to cross-border jurisdiction provisions in matrimonial matters and is not related to other issues which could be relevant settling a dispute on divorce, for example, division of property issues.[5]. Taking into account the fact that most often Latvian courts receive applications on divorce based on conditions of Article 3 of the Brussels IIbis Regulation, application of this Article is analyzed henceforth as well.

Article 3 of the Brussels IIbis Regulation provides alternative grounds on cross-border jurisdiction[6], which persons may choose in order to make applications on divorce. More recently applications on divorce in Latvian courts are made at the place of residence of the applicant, for example, if the applicant is habitually resident in Latvia and resides there for at least a year immediately before the application was made[7] or if the applicant is habitually resident in Latvia and resides there for at least six months immediately before the application was made and is a national of the Republic of Latvia[8]. Often applicants make joint application on divorce, if one of them is habitually resident in Latvia[9]. In the aspect of application of cross-border grounds of jurisdiction in matrimonial matters, special attention shall be paid to the question of how Latvian courts determine the habitual residence of the spouses/spouse and what issues are related to its application. It is important to note that there is no clear answer regarding how to determine whether person's habitual residence is in Latvia or not. One option would be to follow Article 7 of the Introduction to Civil Law providing how to determine the place of residence of a person (domicile)[10]. However, the Introduction to Civil Law does not define the term: habitual residence; therefore, it is not clear how to determine the habitual residence of a person, and what is the difference between this term and the term domicile.

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[4] Within the framework of application of the Brussels IIbis Regulation, matrimonial matters are namely matters relating to divorce, legal separation or marriage annulment (Recital 8 and Section 1 of Chapter II of Brussels IIbis Regulation).

[5] Recital 8 of Brussels IIbis Regulation.

[6] This means that a person can ask for divorce in a court of another Member State in accordance with any of the alternative cross-border grounds of jurisdiction provided in Article 3 of Brussels IIbis Regulation.

[7] Article 3(1)(a), Indent 5 of Brussels IIbis Regulation

[8] Article 3(1)(a), Indent 6 of Brussels IIbis Regulation

[9] Article 3(1)(a), Indent 4 of Brussels IIbis Regulation

[10] The Civil Law: the Law of the Republic of Latvia. Ziņotājs, 1993, No.22/23. Article 7 of the Introduction to Civil Law provides that the place of residence (domicile) is a place of voluntarily settlement with an expressed or implied intention to live or work there.

Another option for a court would be to establish the habitual residence of the person considering all the relevant circumstances of each case, assuming that the Latvian national regulation does not provide a clear definition of the term habitual residence. One might assume that it is possible to establish the habitual residence of the person based on the Law on Declaration of Place of Residence.[11] However, it shall be pointed out that the Law on Declaration of Place of Residence does not account for situations involving foreign elements or cross-border situations. In turn, the authors believe that courts should be allowed to establish the habitual residence of the person based both on the Introduction to Civil Law or by considering all the relevant circumstances of each case, as at the present moment the legislator has not clarified this question. That would allow for development of the court practice in defining the proper approach to this issue. In any circumstance, the Law on Declaration of Place of Residence cannot be used for resolving this issue. It shall be mentioned though, that the Latvian court practise demonstrates a different approach. Latvian courts do not establish whether a person's habitual residence is in Latvia or not, neither by the Introduction to Civil Law, nor by considering all the relevant circumstances of each case. Latvian courts agree to the applicant's indication that a habitual residence of a spouse/spouses is in Latvia.[12] Authors believe that a Latvian court having doubts about its jurisdiction to consider a respective divorce case upon receipt of an application shall leave an application not proceeded with, determining a time limit for rectification of discrepancies, for example, because there were no evidences submitted proving that the person's habitual residence is Latvia, in order for the court to be able to consider the divorce case based on one of the cross-border grounds of jurisdiction of Brussels IIbis Regulation. In its turn, if the court has no doubts regarding the person's habitual residence indicated in an application, or there were respective evidences submitted upon rectification of discrepancies, the court shall adopt a decision on acceptance of application and commencement of proceedings, and wait for the defendant's opinion regarding the person's habitual residence, since often a divorce application can also be made at the place of the defendant's habitual residence[13] and the defendant might have his/her own opinion regarding which is the state of his/her habitual residence. If defendant does not contest question on habitual residence of a person, a court should not examine question on habitual residence in order not to violate principle of adversarial proceedings. However, if defendant contests question on habitual residence of a person, a court should examine question on habitual residence. If defendant does not contest question on habitual residence of a person, a court should not examine question

[11] The Law on Declaration of Place of Residence: the Law of the Republic of Latvia. *Latvijas Vēstnesis*, July 10th, 2002. Article 1 of the Law on Declaration of Place of Residence provides that the aim of the law is to achieve accessibility of every person for legal relationships with the state and municipalities.

[12] For example, see judgment of the Zemgale Region Court of the Riga City of the 13th of July, 2007, with regard to case No.C31117907; judgment of the Aizkraukle Regional Court of the 7th of February, 2006, with regard to case No.C07002906

[13] Article 3(1)(a), Indent 3 of Brussels IIbis Regulation

on habitual residence in order not to violate principle of adversarial proceedings. However, if defendant contests question on habitual residence of a person, a court should examine question on habitual residence. At the same time, a question arises, what shall the court do in the circumstance a decision on acceptance of application and commencement of proceedings is adopted, but the court establishes that the person's habitual residence is abroad, and it does not have the jurisdiction to examine the case in accordance with Brussels IIbis Regulation. Provisions of the Civil Procedure Law for leaving a petition undecided[14] do not provide for court actions in such situation. Probably, such issue could be solved by applying provisions of the Civil Procedure Law on terminating court proceedings, according to which a court shall terminate court proceedings if the matter is not within the jurisdiction of the court.[15] However, the authors tend to believe that this is not the solution, as the question of case subjection[16] is not related to the question of jurisdiction. In the opinion of the authors, only Article 17 of the Brussels IIbis Regulation can be used in order to solve this issue. Latvian courts may apply Article 17 of the Brussels IIbis Regulation under condition of indicating why Latvian court has no jurisdiction, but a court of other Member State has jurisdiction to solve a case.

It is essential to note that grounds on jurisdiction of Brussels IIbis Regulation in matrimonial matters have international or cross-border nature. However territorial jurisdiction should be determined in accordance with national procedural regulation of a respective state and in case of Latvia it is the Civil Procedure Law. Grounds of jurisdiction in matrimonial matters provided by Brussels IIbis Regulation determine in which state a court shall consider the respective case, namely, whether it shall be Latvian, German or Italian court. This implies that in the circumstance a Latvian court states that a case falls within the jurisdiction of Latvia, this court shall examine whether it really is entitled to consider the respective case in accordance with grounds of jurisdiction provided in the Civil Procedure Law. For example, a question arises: which Latvian court shall consider a divorce case if the application is submitted in Latvia, since both spouses are Latvian citizens[17], however, none of them resides in Latvia. The answer depends on the fact whether the defendant has immovable property in Latvia or not, or whether the last place of his residence in Latvia is known to the court.[18] If there is no such information, then any Latvian court can examine the application, as the Civil Procedure Law does not provide territorial jurisdiction for cases when divorce applications are submitted in Latvia, since both spouses are Latvian citizens. It shall be noted that Latvian courts their jurisdiction base only on the provisions of Article 3 of Brussels IIbis Regulation, but do not apply the Civil Procedure Law in order to determine territorial jurisdiction. Authors believe that courts shall reason both cross-border and territorial jurisdiction in their judgments, since in order to define both cross-border jurisdiction and territorial jurisdiction, provisions of both European Union and the Civil Procedure Law must be applied.

[14] Chapter 25 of the Civil Procedure Law

[15] Paragraph 1 of Article 223 of the Civil Procedure Law

[16] A claim might be subjected not only to a court, but also to other state or municipality institutions, arbitration

[17] Article 3(1)(b) of Brussels IIbis Regulation

[18] Article 27 of the Civil Procedure Law

B. Application of Grounds of Jurisdiction of the Brussels IIbis Regulation in Matters of Parental Responsibility in Latvian Courts

Section 2 of Chapter II of Brussels IIbis Regulation deals with cross-border jurisdiction in matters of parental responsibility[19] and provides different grounds on jurisdiction in these matters. It shall be noted, that since 1st March 2005, Latvian courts still do not apply all the eight Articles related to questions of cross-border jurisdiction in matters of parental responsibility to the full extent. Therefore, henceforth authors consider only those cross-border grounds of jurisdiction for matters of parental responsibility that are applied in Latvian courts most frequently, and pay special attention to the analysis and application aspects of these grounds of jurisdiction.

a) General Jurisdiction (Article 8)

In Latvian courts[20], cross-border grounds of jurisdiction is most frequently based on Article 8 of the Brussels IIbis Regulation, which provides the general jurisdiction in matters of parental responsibility, in accordance to which the competent court is always the court of the Member State of habitual residence of the child at the time the court is seised.

The first aspect of application of Article 8 of Brussels IIbis Regulation is that like in matrimonial matters grounds on jurisdiction of Brussels IIbis Regulation in matters of parental responsibility have international or cross-border nature and territorial jurisdiction should be determined in accordance with national procedural regulation of a respective Member State. In contrast to the Latvian court practice of application of Brussels IIbis Regulation in divorce matters, Latvian courts base their jurisdiction in matters of parental responsibility both on Article 8 of Brussels IIbis Regulation and on the territorial grounds of jurisdiction of the Civil Procedure Law[21]. It shall be pointed out that in the circumstance of application of other cross-border grounds of jurisdiction in matters of parental responsibility of Brussels IIbis Regulation, the Civil Procedure Law will not always provide territorial jurisdiction; for example, if transfer to a Latvian court to hear the case is requested in accordance with Article 15 of Brussels IIbis Regulation.

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[19] The Brussels IIbis Regulation defines the term *parental responsibility* for the purposes of application of the Brussels IIbis Regulation; namely, by *parental responsibility* are meant all rights and duties relating to the person or the property of a child which are given to a natural or legal person by judgment, by operation of law or by an agreement having legal effect. The term shall include *rights of custody* and rights of access (Paragraph 7 of Article 2 of Brussels IIbis Regulation). The English text of the Brussels IIbis Regulation uses the term rights of custody, while the Latvian text uses the term *uzraudzības tiesības*. The most appropriate term in the Latvian language for the English *rights of custody is aizgādība vai aizbildnība.*

[20] As of 1st July 2009, there have been 8 cases, in 2008 there were 3 cases

[21] Usually it is Paragraph 1 of Article 244.[3] of the Civil Procedure Law determining that claims related to custody and access rights shall be submitted by the place of residence of the child.

For example, that would be possible in the circumstance, where the state of habitual residence of the child is Germany, and a respective German court stays the case and invites the parties to introduce a request before the Latvian court, since the child has particular connection with Latvia, and that would be in the best interests of the child. In such circumstance, any Latvian court would have the competence to examine this case, as the Civil Procedure Law does not provide which of the Latvian courts should have the jurisdiction in the circumstance of application of Article 15 of Brussels IIbis Regulation.

The second aspect of application of Article 8 of Brussels IIbis Regulation is that a court must establish whether the child is *habitually resident* in the respective Member State. The term: *habitual residence of a child* is not defined within Brussels IIbis Regulation. Latvian national legal acts provide no definition of the term *habitual residence of a child* too. Nevertheless, the Latvian court practice demonstrates different trends in establishing the habitual residence of the child. According to the Latvian court practice[22], when establishing the habitual residence of the child it is taken into account whether the child has a substantial connection with Latvia or not. Furthermore, this connection is established by applying the criteria provided in Brussels IIbis Regulation, Article 12(3)[23] or Article 15(3)[24]. Nevertheless, it shall be pointed out that the substantial connection criteria described in these Articles are related to application of these Articles only, namely, on prorogation of jurisdiction or on transfer to a court better placed to hear the case and are not related to the criteria for establishing the habitual residence of the child within the framework of application of Article 8 of the Brussels IIbis Regulation.

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[22] For example, see the judgment of the Collegium of the Civil Law of the Riga Regional Court of the 8th of June 2009, No.3-10/0903; judgment of the Collegium of the Civil Law of the Riga Regional Court of the 13th of February 2009, No. 3-10/728/08-7

[23] Article 12(3)(a) of Brussels IIbis Regulation determines that the courts of a Member State have jurisdiction in relation to parental responsibility in proceedings, if the child has a substantial connection with that Member State, in particular by virtue of the fact that one of the holders of parental responsibility is habitually resident in that Member State or that the child is a national of that Member State.

[24] Paragraph 3 of Article 15 of Brussels IIbis Regulation determines that it shall be considered that the child has a particular connection with the Member State, if that Member State (a) has become the habitual residence of the child after the court was seised; or (b) is the former habitual residence of the child; or (c) is the place of the child's nationality; or (d) is the habitual residence of a holder of parental responsibility; or (e) is the place where property of the child is located and the case concerns measures for the protection of the child relating to the administration, conservation or disposal of this property.

[25] The judgment of the European Court of Justice on case C523/07. The text is available in the OJ of the 20th of July, 2009, C 141, p.14.

It shall be noted, that since April 2nd, 2009, all issues in establishing the habitual residence of the child were solved, as starting from that date all courts must rely upon the criteria introduced by the European Court of Justice[25] in relation to establishing the habitual residence of the child[26].

Admittedly, the fact of the habitual residence of the child in a respective Member State must be established at the time the court is seised. Furthermore, a court should not wait for the opinion of the other party regarding the habitual residence of the child in the respective Member State; the court shall examine *ex officio* whether the habitual residence of the child is in the respective Member State at the time the court is seised, guided by criteria introduced by the European Court of Justice. This implies that Latvian courts shall establish the habitual residence of the child upon receipt of the application, adopting one of the decisions as provided by the Civil Procedure Law, Article 131. Inevitably, there will be situations where a court would adopt a decision on acceptance of application and commencement of proceedings, having established that the state of habitual residence of the child is Latvia, but in the course of examination of the case it might receive evidences from the defendant and certify that the child is habitually resident in another Member State. In such cases, Article 17 of Brussels IIbis Regulation shall be applied.

b) Prorogation of Jurisdiction (Article 12)

Paragraphs 1 and 2 of Article 12 of the Brussels IIbis Regulation provides for provisions on jurisdiction when matrimonial matters could be examined jointly with matters of parental responsibility. These provisions is of particular importance, since in Latvia divorce claims or annulment of marriage claims and claims arising from family legal relationships shall be examined simultaneously, including claims related to custody rights or the rights of access[27]. Therefore, in the course of application of Brussels IIbis Regulation, Latvian courts often face applications consolidating both divorce applications and applications for determination of custody or access rights.

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[26] The judgment of the European Court of Justice on case C523/07, Paragraph 72(2) – The concept of 'habitual residence' under Article 8(1) of Regulation No 2201/2003 must be interpreted as meaning that it corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, in particular the duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State must be taken into consideration. It is for the national court to establish the habitual residence of the child, taking account of all the circumstances specific to each individual case.

[27] Article 238 of the Civil Procedure Law

For example, that would be possible if a divorce applicant submits an application in Latvia based on the habitual residence of the defendant, and asks to consider the question of custody determination together with the divorce claim, while habitually residing together with the child in another Member State.

It shall be noted that consolidation of claims in the framework of application of Brussels IIbis Regulation is possible only in the circumstance of compliance with certain conditions. First, the Brussels IIbis Regulation allows consolidating matrimonial claims and parental responsibility claims only in circumstances, when grounds of jurisdiction in matrimonial matters are based on Article 3 of Brussels IIbis Regulation. Second, consolidation of claims is possible only if at least one of the spouses has parental responsibility in relation to the child. Third, consolidation is possible, if the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner by the spouses and by the holders of parental responsibility, at the time the court is seised. Fourth, the jurisdiction of a court accepted by the parties is in the superior interests of the child. This means that if any of these conditions is not fulfilled, the Regulation does not allow for joint examination of both the application of matrimonial matters and the application of parental responsibility matters.

When applying conditions of the Brussels IIbis Regulation regarding consolidation of claims, upon receipt of an application in a Latvian court, the court shall ex officio examine whether all necessary conditions provided in Brussels IIbis Regulation were fulfilled at the time the court is seised in order to consolidate claims; if necessary, asking for rectification of discrepancies and providing of evidences. It should not be allowed to make a decision on acceptance of application and commencement of proceedings and to wait for defendant's opinion, for example, on the question whether he agrees on consolidation of claims, since according to conditions of the Brussels IIbis Regulation, the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner at the time the court is seised. If after rectification of discrepancies the court still states that at least one of the conditions provided in Brussels IIbis Regulation is not fulfilled in order to consolidate claims, the court shall apply Article 17 of the Brussels IIbis Regulation and Article 131 of the Civil Procedure Law on refusal to accept the application. It shall be pointed out that in Latvian court practise these questions are resolved in a different way. One of the cases[28] would be when an application is submitted both for divorce and determination of custody rights, non-observing the conditions of the Brussels IIbis Regulation and applying Article 15 of the Brussels IIbis Regulation (instead of Article 17) on transfer to a court better placed to hear the case[29].

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[28] Judgment of Latgale Region Court of the Riga City of November 3rd, 2008, on case No.C29160407

[29] Article 15 of Brussels IIbis Regulation

It must be mentioned that this solution is not acceptable, as transfer of a case in accordance with provisions of Brussels IIbis Regulation is possible only for the cases of parental responsibility and only if the court willing to transfer the case has jurisdiction as to the substance of the matter, for example, if it has jurisdiction to examine the case based on jurisdiction of Article 8 of the Brussels IIbis Regulation and when other conditions provided by Article 15 of the Brussels IIbis Regulation are fulfilled.[30]

[30] Practice Guide for the Application of the Council Regulation (EC) No.2201/2003, p.18. Text available at the homepage of the European Judicial Network in civil and commercial matters at address: http://ec.europa.eu/civiljustice/parental_resp/parental_resp_ec_vdm_lv.pdf

APPLICATION OF STANDARDS OF BRUSSELS IIBIS REGULATION AND 1980 HAGUE CONVENTION IN CASES OF CHILD ABDUCTION IN COURTS OF LATVIA

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Along with the increase of mobility amongst citizens, society experiences the increase in the number of marriages and families where persons are citizens of different states or have previously lived in different states. It is a natural outcome, though, that the marriage divorce and broken-up family number is increasing, too. Often, a divorce or a break-up of a family with children may result in a situation where, after the divorce or ending of cohabitation, one of the parents jointly exercising custody decides to move to a different state against the will of the other parent, or where one of the child's parents leaves for a foreign country with the consent of another parent, but does not bring the child back to his/her habitual residence state at the agreed time. Also in Latvia, particularly after joining the European Union, the number of such cases increases where one of the parents unilaterally decides that the child should reside abroad, in spite of legal solution possibilities, even though the parents have joint custody of the child and this issue should have been resolved jointly. Sometimes, a parent living abroad brings a child to Latvia without the consent of the other parent.

In society and in the mass-media, such cases are called as child abduction, while the jurisprudence classifies it as wrongful cross-border child removal or retention (henceforth – child abduction).

The aim of this article is to provide an insight into the legal regulation and its main principles, which are developed in order to protect children from abduction on international level, as well as to analyze the Latvian court practice in relation to application of these principles.

A. Insight into the Legal Regulation

The Hague Convention on the Civil Aspects of International Child Abduction[1] (henceforth – the Hague Convention) is considered to be the effective mechanism in child abduction cases; it is legally binding for 81 state worldwide[2].

[1] The Hague Convention on the Civil Aspects of International Child Abduction of the 25th of October, 1980: International Agreement of the LR. *Latvijas Vēstnesis*, October 23, 2001, No. 151

[2] The Hague Convention is binding for 59 HCCH member states and 22 states that are not members of HCCH. Information about the Hague Convention with contracting state lists is available on the HCCH homepage: http://www.hcch.net/index_en.php?act=conventions.status&cid=24 (visited on July 5, 2009).

The main objectives of the Hague Convention are to protect children from the harmful effects caused by their abduction to establish procedures to ensure their prompt return to the state of their habitual residence[3], as well as to protect the rights and interests of the persons who are legal child custody holders[4]. The fact that child abduction is a topical issue, which requires an internationally unified approach for its solution, is also mentioned in the United Nations' Convention on the Rights of the Child[5].

Starting from March 1, 2005, regulation regarding the child abduction issues is simultaneously based on the provisions of the Council Regulation (EC) No.2201/2003 on Jurisdiction and Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, Repealing Regulation (EC) No.1347/2000[6] (henceforth – Brussels IIbis Regulation)[7], which replaces certain provisions of the Hague Convention, as well as amends them. Thus, in relations among the European Union member states regarding child abduction cases, both – the Hague Convention and the Brussels IIbis Regulation – are applied simultaneously. Moreover, in addition to the Hague Convention and the Brussels IIbis Regulation in Latvia also the national legal regulation is applied.[8]

B. The Main Principles of Application of the Hague Convention and the Brussels IIbis Regulation

a) Preconditions for Deciding on Child Return to the State of Habitual Residence of the Child

In order to decide on the return of the child to the state of habitual residence, at first two preconditions shall be ascertained in accordance with the Hague Convention – the habitual residence of the child before abduction and the unlawfulness of the abduction.

[3] The Hague Convention preamble

[4] The Hague Convention Article 3

[5] United Nations' Convention on the Rights of the Child of the November 20, 1989 was approved by the Supreme Council on the September 4, 1991. Article 11 of the Convention defines that member states shall take measures in the fight against wrongful child removal and non-return from abroad. For these purposes, member states facilitate conclusion of bilateral and multilateral agreements or accession to existing agreements.

[6] The European Union Council Regulation (EC) No.2201/2003 on Jurisdiction and Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, Repealing of Regulation (EC) No.1347/2000. Available in the Official Journal of the European Commission of the 23rd of December 23, 2003, L 338, p 1-29.

[7] The Brussels IIbis Regulation Article 11, Article 42

[8] On October 11,2006, amendments to the Civil Procedure Law took effect, providing more clear conditions on how to apply the regulations of the Hague Convention and the Brussels IIbis Regulation. Amendments to the Civil Procedure Law provide for two new articles, namely, Article 77.[1] stipulating conditions in the cases of unlawful child removal across the border to a different state or retention abroad, and Article 77.[2] regulating conditions in the cases of unlawful child removal across the border to Latvia or retention in Latvia.

The unlawfulness of the child abduction shall be examined only after the habitual residence of the child is established, defining whether or not the custody or guardianship rights had been violated according to the legislative acts of the state of habitual residence of the child. Having established the fact that according to these preconditions the child abduction has taken place, it is necessary to find out whether it is possible to apply any of the child's non-return principles provided by the Hague Convention.

The Habitual Residence of the Child

Neither the Hague Convention, nor the Brussels IIbis Regulation provides a definition of the term habitual residence of the child. The Latvian national regulation also says nothing in this regard. However, in the latest judicature of the European Court of Justice concerning the application of the Brussels IIbis Regulation in the case C-523/07 Korkein hallinto-oikeus (decree of April 2, 2009), the European Court of Justice has brought forward the criteria for establishing of the habitual residence of the child [9]. Furthermore, the European Court of Justice has made it easier for the European Union member state courts to establish the habitual residence of the child in the context of application of the Brussels IIbis Regulation, including child abduction cases. However, a question arises about that how binding is such an interpretation for the European Union member state courts when only the Hague Convention is applied to establish whether the child's habitual residence before the abduction was in a third country. The authors tend to believe that the courts of Latvia shall also rely upon the criteria for determining the habitual residence of the child defined by the European Court of Justice in circumstances also when only the Hague Convention is applied to determine whether the child's residence before the abduction was in a third country, because the existing legal regulation of Latvia provides no definitions or criteria regarding how the courts of Latvia should determine the habitual residence of the child.

The practice of the courts of Latvia when adjudicating child abduction cases shows that there were actually no any case where the courts determined the child's habitual residence; instead, this question was either completely ignored or information provided by the applicants regarding the habitual residence of children was accepted[10].

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[9] The judgement of the European Court of Justice in case C 523/07. The text is available in the Official Journal of the European *Commission of July 20,2009, C 141, p.14. Clause 72(2). of the judgement it is stipulated that the term habitual* residence in the interpretation of Brussels IIbis Article 8, Clause 1 implies that this residence shall be the place which corresponds to certain integration of a child in social and family environment. In this regards, it is especially important to take into account duration, regularity, conditions, presence in the territory of the member state, as well as reasons for family relocation to that state, the citizenship of the child, its educational institution and conditions, language skills, as well as social and family relations of the child in the mentioned state. The place of habitual residence of a child shall be established by a state court, taking into account all actual conditions of every particular case.

[10] For example, see decision of the Riga District Court of November 4, 2008, in the case No.C33241308; decision of the Vidzeme Suburb's Court of the Riga City of April 11, 2007, in the case No.C30-1553/5-2007.g.

However, it shall be noted that precise determination of the habitual residence of the child is of crucial importance regarding the application of the Hague Convention and the Brussels IIbis Regulation. The unlawfulness of child abduction is established in accordance with state legal acts of the habitual residence of the child. Also such cases are not excluded when a child after abduction is granted habitual residence in the state of abduction; therefore, a court in this case would not have any basis for deciding on the child's return. Furthermore, the authors tend to believe that, regardless of whether the state of habitual residence of the child is indicated in an application or not, as well as regardless of objection or non-objection of the respondent regarding the question of the habitual residence of the child, the court shall exercise the objective investigation principle and define the habitual residence of the child itself, asking for evidence if necessary.

Unlawfulness of Child Abduction

In the establishment of unlawfulness of child abduction, as well as in the determination of the habitual residence of the child, the application of the Hague Convention is very closely connected with the application of a state's national effective standards; namely, unlawfulness of child abduction in the Hague Convention interpretation arises if child's removal or retention violates custody rights, which can be granted by law, by court decision or administrative order, or by an agreement defined in accordance with legal acts of the state of habitual residence of the child11. The national regulation of Latvia provides all three grounds for establishment of custody and guardianship which are directly mentioned in the Hague Convention.

In the practice of the courts of Latvia, very close attention is paid to the establishment of unlawfulness of the abduction of the child, examining foreign custody and guardianship legislation and evaluating party agreements regarding these issues and whether these agreements are legally binding in accordance with legal acts of the state of habitual residence of the child, as well as by examining whether a custody or guardianship decision was made in the state of habitual residence of the child and whether it has already come into legal force[12].

To compare with the Hague Convention, the Brussels IIbis Regulation specifies in which cases custody rights should be considered as jointly exercised[13]. Furthermore, in accordance with conditions of the Brussels IIbis Regulation, child's removal from one member state to another without consent of another custody holder is clearly considered as unlawful abduction.

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[11] The Hague Convention, Article 3

[12] For example, see decision of Zemgale Region Court of the Riga City of November 19, 2008, in the case No.C31287808; decision of the Riga Region Court of November 4,, 2008, in the case No.C33241308

[13] The Brussels IIbis Regulation, Article 2, Clause 11

b) Child Non-return Grounds

Having established that child abduction has taken place, it is necessary to examine whether it is possible to apply any of the child non-return grounds provided by the Hague Convention.

Application of child non-return grounds provided by the Hague Convention is essential, because establishing of this ground allows the child to stay in the abduction state and does not allow for the return of the child to the state of habitual residence. The list of child non-return grounds provided by the Hague Convention is exhaustive, and its extension is inadmissible. Furthermore, child non-return grounds must be proved by a person or an institution objecting to the return of the child[14].

The Hague Convention allows for non-return of the child in the following cases:

1) *when the child is settled in the new environment after the abduction*[15]. It shall be pointed out that grounds for non-return is applicable only in circumstances when case examination has been commenced after the expiration of the period of one year from the date of child abduction. However, it must be mentioned that in the practice of courts of Latvia there still are cases when this non-return grounds is applied even for proceedings that have been commenced before the period of one year has elapsed, for example, even in circumstances when a child has spent only few months in Latvia after the abduction16;

2) *when there is a grave risk that return of the child would expose him or her to physical or psychological harm or otherwise place the child in an intolerable situation*[17]. It should be noted, this is one of the most discussed and sensitive child non-return grounds. It is important to note that two different case types must be distinguished when examining this non-return ground; namely, the court shall examine whether the return of the child may or may not expose the child to harm; however, the court does not have to assess his or her well-being, defining with whom of the parents the child is better to live, since decision on this question goes into the custody case category and it is not included in the Hague Convention application sphere.[18] The practice of courts of Latvia indicates that in all cases this non-return ground is used as the main argument of the party objecting to child return (the abductor). In the practice of courts of Latvia, application of this non-return ground is relatively different.

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[14] The Hague Convention, Article 13, Clauses a and b

[15] The Hague Convention, Article 12

[16] For example, see decision of the Talsi District Court of December 3, 2007, in the case No.C-36-0607; decision of the Board of the Civil Case Court of the Riga Regional Court of May 24, 2007, in the case No.CA-2608/2

[17] The Hague Convention, Article 13, Clause b

[18] The Hague Convention, Article 16

For example, in one case the court of Latvia has considered that the child abductor is not able to provide evidence of sexual abuse committed against the child by the person applying for the return of the child, despite the fact that the abductor asserted seeing it[19]. In another case, the court also considered unproved the fact of physical violence committed by one of the parents against the other, which, in its turn, could serve as a basis for emotional harm to the child[20]. In the practice of courts of Latvia there are also cases where courts have stated this non-return ground as proved, considering that separation of child and mother would result in an intolerable situation for the child in circumstances, when mothers refuse to come back to the state of habitual residence of the child because of insufficient financial funds, absence of accommodation, etc.[21] As a result of such arguments, there was one case when the court of Latvia applied the options provided by the Brussels IIbis Regulation, Article 11, Clause 4, and asked for clarification regarding possible protection measures that would be available to the child after his return to the state of habitual residence. Nevertheless, upon receipt of the answer, the Latvian court made a non-return decision[22].

3) *when the child opposes its return*[23]. The right of the child to oppose the return is a relatively flexible ground for non-return of the child, because the opinion of the child can be recognized as sufficient for non-return only in the circumstances when the child has attained an appropriate age and degree of maturity. Furthermore, establishment of the age and the appropriate degree of maturity is based solely on the court judgment. It shall be noted that there was a case in the practice of courts of Latvia, when non-return of a child was justified by the child objecting to return[24].

4) *when the person or institution having undertaken the care of the child was not actually exercising the custody rights at the time of removal or retention, or had given consent or had not objected regarding the removal or retention of the child*[25].

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[19] For example, see decision of the Riga District Court of the June 18, 2008, in the case No.C33140508; decision of the Board of the Civil Case Court of the Riga Regional Court of September 4, 2008, in the case No.CA-3583/4

[20] For example, see decision of the Zemgale Region Court of the Riga City of July 7, 2008, in the case No.C31193208; decision of the Board of the Civil Case Court of the Riga Regional Court of September 10, 2008, in the case No.CA-3847/20; decision of the Riga District Court of the 13th of March 2008, in the case No.C33095508

[21] For example, see decision of the Vidzeme Regional Court of the Riga City of the 11th of April, 2007, on the case No.C30-1553/5-2007.g.

[22] For example, see decision of the Council of the Civil Case Court of the Riga Regional Court of the May 24, 2007, in the case No.CA-2608/2

[23] The Hague Convention Article 13

[24] For example, see decree of the Liepaja Court of the December 13, 2006, in the case No.C20-279706/12

[25] The Hague Convention, Article 13, Clause a

It shall be pointed out that application of this ground for non-return in the courts of Latvia was not exercised;

5) if this is not permitted by the fundamental principles related to the protection of human rights and fundamental freedoms of the state to which the child is abducted[26]. It shall be pointed out that application of this ground for non-return was exercised in the courts of Latvia only in few cases[27]. Furthermore, it was applied together with the non-return ground provided by the Hague Convention, Article 13, Clause b. However, it should be pointed out that there exist different opinions amongst jurisprudents in relation to introduction and application of this non-return ground of the Hague Convention[28].

It is important to note that conditions of the Brussels IIbis Regulation exclude application of the Hague Convention conditions in three aspects. First of all, according to the conditions of the Brussels IIbis Regulation29, a court can not deny return of a child based on the Hague Convention, Article 13, Clause b[30], if it discovers that there were corresponding measures taken in order to ensure the protection of the child after its return. Second, the court cannot deny returning of the child if the person applying for the return was not given a possibility to be heard.[31] Third, in contrast to the conditions of the Hague Convention, the Brussels IIbis Regulation provides for a procedural regulations update for the cases when the child return is denied based on Article 13 of the Hague Convention.[32]

C. Statistics on Application of the Hague Convention and the Brussels IIbis Regulation in the Courts of Latvia

Although the Hague Convention is in force in Latvia since February 1, 2002, its application started only in 2004. According to the data of the Central Authority of Latvia[33], during the period from the year 2004 till July 5, 2009, there were 52 cases of unlawful child removal from Latvia across the border to a foreign state or retention abroad; in turn, during the period from the year 2005 until the July 5, 2009, there were 15 cases of unlawful child removal from abroad across the border to Latvia or retention in Latvia.

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[26] The Hague Convention, Article 20

[27] For example, see decision of the Riga District Court of the 18th of April, 2006, on the case No.C33055206; decree of the Liepaja Court of the 13th of December 2006, on the case No.C20-279706/12

[28] Beaumont P.R. and McEleavy P.E. "The Hague Convention on International Child Abduction OUP, Oxford, 1999 at p. 172-173

[29] The Brussels IIbis Regulation Article 11, Clause 4

[30] The Hague Convention, Article 13, Clause b stipulates that the child should not be returned if there exists a grave risk that that return of the child would expose him or her to physical or psychological harm or otherwise place the child in an intolerable situation

[31] The Brussels IIbis Regulation, Article 11, Clause 5

[32] The Brussels IIbis Regulation, Article 11, Clauses 6-8

[33] Formerly – The Ministry of Children, Family, and Integration Affairs, since July 1, 2009 – The Ministry of Justice

Cases of Child Return from Abroad to Latvia

For cases of unlawful removal of a child from Latvia to a foreign state or retention abroad, in 17 cases it was Ireland, in 16 – the United Kingdom, 6 - Germany, 3 – Spain, 2 – Sweden, and in one case each of the following – Turkey, Finland, China, France, USA, Ukraine, Poland, and Italy. In all these cases, child's parents were citizens or aliens of Latvia. In 18 cases, foreign courts had decided to return children to Latvia; in 6 cases, foreign courts had decided not to return children to Latvia; in 14 cases, persons that submitted applications had withdrawn them; for 14 cases, the procedure within the framework of the Hague Convention is still continuing abroad.

Only in 6 cases, persons considering that the removal of the child to a different member state of the Hague Convention violated their custody rights have used the option provided by the Civil Procedure Law, Part 77.[1] to submit a claim to the court applying for a decision on submission of application to a foreign state regarding the return of the child to Latvia. In other cases, applicants have submitted their applications to foreign states with support of the Central Authority of Latvia. There were no cases of persons directly turning to foreign central authorities or foreign courts. It shall also be noted that regulations of Part 77.[1] of the Civil Procedure Law can also be applied in the circumstance when a child is abducted to a state not being a Hague Convention member state. In the practice of the courts of Latvia there has been only 1 such case when a child was removed to Russia. In all 6 cases, courts of first instance have adopted the decisions to submit applications to foreign states in regard to child return to Latvia; in 2 cases it was resolved at the second instance to reverse the judgments of the courts of first instance[34]; in 1 case, it was resolved at the second instance to leave the judgment of the court of first instance unchanged; in 2 cases, there were no ancillary claims submitted regarding the judgments of the courts of the first instance; in one case, legal proceedings are still pending at the second instance.

Cases of Child Return from Latvia to a Foreign State

For cases of unlawful removal of a child from abroad to Latvia or retention in Latvia, in 4 cases – from the United Kingdom, 2 – from Italy, 2 – from Sweden, and in one case – from each of the following countries – Ireland, Norway, Israel, Estonia, Germany, Austria, and Australia. In 13 of these cases, the parents of the children were citizens of two different states and the abductions were committed by mothers; in turn, in 2 cases the parents of the children were citizens or aliens of Latvia, and the abductions were committed by fathers.

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[34] In one case, the child was voluntarily returned to the applicant during the proceedings; in another case, the court of second instance established that the applicant actually has not exercised his custody rights

Of these 15 cases, in 6 cases the courts of Latvia have decided that the children should have been returned to the state of habitual residence; in 4 cases the courts of Latvia have decided that the children should not have been returned; in 4 cases applicants have withdrawn applications after case referral to Latvian courts, and cases were dismissed; in its turn, in one case the child abductor has delivered the child back to the foreign state voluntarily, without the case coming to trial. Thus, there were 14 cases considered by the courts of Latvia. Taking into account the fact that in 4 cases applicants have withdrawn applications, and the cases were dismissed, currently we can speak about 10 cases examined by the courts of Latvia in relation to child return to Latvia from abroad. It should be mentioned that out of these 10 cases, in the four first cases the courts decided in the favour of non-return of the child, and the decisions were adopted in the period before 2008; in turn, the remaining 6 cases, where the courts decided in favour of returning of the child, were resolved in 2008 and in the beginning of 2009. This, in its turn, permits the conclusion that knowledge and experience regarding application of the Hague Convention and the Brussels IIbis is growing in Latvia. Out of these 10 cases, 7 matters were adjudicated at two instances, while the remaining 3 were adjudicated by one instance. In all cases where matters were adjudicated at two instances, the decisions of the first instance were upheld.