

# THEMIS COMPETITION 2016

VILNIUS, LITHUANIA

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Semi-final B - International Judicial Cooperation in Civil Matters – European Family Law

## **JURISDICTION = MORE THAN JUST HABITUAL RESIDENCE**

The team of: Tereza Koryntová  
Jana Vorličková  
Lukáš Pišvejc  
Kristina Románková



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# VILNIUS

## **Introduction**

The title of this paper indicates that conditions for establishing jurisdiction on parental responsibility are much wider than the mere application of Article 8 dealing with child's habitual residence. The courts commonly limit their attention to child's habitual residence even though Council Regulation (EC) No 2201/2003 (hereinafter 'Brussels IIa') stipulates more relevant provisions which enable the courts to find the most suitable solution for each individual case. The methodology of this paper consists in analyzing chosen articles that regulate jurisdiction in matters of parental responsibility and their application on a real-life case. One of the main goals of this paper is to create a guidebook for judges of the Member States on how to proceed in practice. With regards to the limitation of the paper the child abduction is not examined here.

## **1. Background**

Once upon a time there was a French woman called Julie and a Czech man named Milan (hereinafter also as the mother and the father). They met during a rainy day in Nantes and fell in love. After several months they got married, bought a house in Nantes and in 2003 mother gave birth to Sofia and 4 years later to Rosalie. Both children have obtained a dual nationality, Czech and French. Their fairytale lasted for 12 years. Unfortunately, they did not live happily ever after. The father moved back to the Czech Republic in 2012. Both daughters stayed in France where they visited school and had many friends and hobbies. Every year the daughters spent the summer holidays with their father in Italy. Then, in the summer of 2014, Sofia went on holiday alone because Rosalie participated in the French swimming championship. Sofia had a good time with her father and during the holiday Sofia revealed to her father some serious problems she had had with her mother. Milan and Sofia decided that Sofia would not return to France but stays with her father in the Czech Republic. On the 22 August 2014 Sofia called her mother to tell her she wanted to remain with her father. Milan filed for divorce before a court in the Czech Republic on 8 September 2015. Simultaneously, he initiated court proceedings on parental responsibility asking for both daughters to stay in the Czech Republic for the period of time after divorce and suggested his sole custody of both daughters. The mother raised action for divorce in France on 6 October 2015 and also demanded her sole custody of both daughters. Nevertheless, she did not make a request for the return of Sofia. At that point serious legal problems arose:

- 1) According to which regulation shall the court proceed?
- 2) The courts of which Member State have the jurisdiction over the case?
- 3) May parties choose which Member State has the jurisdiction?
- 4) What are the key factors for determining the jurisdiction in matters of parental responsibility?

## **2. Habitual residence**

Brussels IIa in its Article 8(1) stipulates that 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. The fundamental importance to the ability to correctly apply the above mentioned provision has the right understanding of the term ‘habitual residence’. Such definition seem quite clear, however, in order to apply the above mentioned provision correctly, it is essential to understand the exact meaning of the term ‘habitual residence’. And here the clear definition seems to be missing.

### *2.1 Nature and origin*

The term ‘habitual residence’ firstly arose from international private law documents (Hague Conventions). The pursued aim of its adoption was to create the autonomous international connecting factor (the term ‘domicile’ was not able to meet such expectations since it had different meanings in Common and Continental law systems). Subsequently it was incorporated into Brussels IIa. The main reason why neither Hague Conventions nor Brussels IIa contain the definition of ‘habitual residence’ has been the nature of present term which expresses factual bond between person and place, not bond in legal sense unable to adapt to changing circumstances of real life creating thus a legal fiction.<sup>1</sup>

Therefore, to achieve the correct understanding and application of Article 8(1) of Brussels IIa thorough familiarization with practice of the Court of Justice of the European Union (hereinafter “CJEU”) is required since it is the only authority which has the power to provide the legally binding

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<sup>1</sup> Marta Zavadilová, Jana Turoňová: Pravidla určování mezinárodní soudní příslušnosti dle nařízení Brusel II bis ve světle nejnovější judikatury Evropského soudního dvora, [Právní rozhledy 7/2010, s. 246].

interpretation of the legislative acts of the EU (Article 267 of the Treaty on the Functioning of the European Union).

MODEL CASE:

Rosalie is 8 years old and she lives with her mother in Nantes, France, whole life. Rosalie attends primary school there. Her hobbies are swimming and playing violin in an orchestra. She often visits her grandparents from father side in Prague, the grandparents from mother side died before she was born. Rosalie is a native speaker of French; her knowledge of Czech is limited. Sofia is 12 years old, she was born in Nantes, France. She moved to the Czech Republic in 2014 and lives with her father and his girlfriend. Sofia started to attend the primary school in Prague in September 2014, before that she was a pupil of the primary school in Nantes. She plays softball and chess. Sofia is a native speaker of French and Czech. The court thus has to examine carefully where the habitual residence of each daughter is.

The crucial importance in this matter is in the decision of the CJEU in case C-523/07<sup>2</sup> of April 2009. In this particular decision the CJEU reached following conclusions: “The ‘habitual residence’ of a child, within the meaning of Article 8(1) of the Regulation, must be established on the basis of all the circumstances specific to each individual case. In addition to the physical presence of a child in a Member State, other factors, capable of proving that that presence is not in any way temporary or intermittent and that the residence of the child reflects some degree of integration both in a social and family environment, shall be provided. To be more specific, the court shall take into account 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, knowledge of the official language and the family and social ties of the child. 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. By contrast,

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<sup>2</sup> Case C-523/07 reference for a preliminary ruling from Korkein hallinto-oikeus - Finland.

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.”

## 2.2 Definition

Rather than provide the exact definition of the term habitual residence the CJEU presents the overview of factors or circumstances which should be taken into consideration by a Member State court when trying to determine the location of ‘habitual residence’ of a child. Such approach seems to be focused on the literal meaning of the term, therefore only thorough study of concrete facts of each individual case will lead to its right application.

### MODEL CASE:

First of all the Czech courts have to make a request for the information whether any of the parties initiated court proceedings on parental responsibility concerning Sofia and Rosalie and the same cause of action in France, and if so, when.

1) The mother has initiated proceedings in France

a) The father had initiated the proceeding before that in the Czech Republic

Under these circumstances the Czech court has to by virtue of Article 19(2) stay its proceedings and wait for the French court to decide whether it has jurisdiction.

b) The father followed the example of his wife and initiated the proceeding in the Czech Republic

Under these circumstances the French court has to stay its proceedings and wait for the Czech court to decide whether it has jurisdiction.

2) The mother did not initiate proceedings in France

The Czech court has to decide whether it has jurisdiction.

The father filed for the divorce in the Czech Republic on 8 September 2015 and has initiated court proceedings on parental responsibility. The mother raised action for divorce in France on 6 October 2015 and has also demanded her sole custody of both daughters. Therefore, the situation corresponds with 1) b).



In case of Rosalie the court took into consideration her age, the fact that she lives in France and attends school there, the length of her stay in France, her close relationship with her mother and high level of her integration to the society in France. The court also took into account the fact that part of her family lives in the Czech Republic. After thorough consideration of all the above mentioned facts the Czech court has reached the conclusion that the habitual residence of Rosalie should be in France.

In case of Sofia the court has to firstly ask the competent French court whether a request for the return of Sofia has been lodged by her mother, and if so, what decision on return has been issued. As already stated in this paper, the mother did not make a request for the return of Sofia within the period of one year after she had acquired the knowledge of the Sofia's move to the Czech Republic. Thus, after receiving the official reply from the French court on this matter, the Czech court begins to solve its jurisdiction.

Subsequently the Czech court scrutinizes the level of Sofia's integration to Czech society which is rather more complicated. On one hand the duration of her stay in the Czech Republic might be considered too short for establishing the habitual residence. On the other hand, she has already created strong ties to the country and to the rest of the family living there. Moreover, the court takes into account her perfect knowledge of the Czech language and also the fact that she attends the school there. The court comes to the conclusion, unlike in the case of Rosalie, that with regards to the permanent character of Sofia's stay in the Czech Republic her habitual residence should be established there.

It needs to be stressed that the court shall put the emphasis on the best interests of the child.

The above mentioned guidelines provided by the CJEU to determine the habitual residence of a child allow clear distinction from other legal terms used to designate person's whereabouts for legal purposes.

### *2.3 Distinction from other terms*

The term habitual residence differs from term ‘domicile’ which is used in the Council Regulation (EC) No 44/2001 (Brussels Ibis). While ‘habitual residence’ represents the term of factual and objective nature (as explained above) ‘domicile’ is a legal notion which is determined by application of national law of respective Member State. Within the Czech context, ‘domicile’ is not only defined by existence of a real bond between a person and a place (objective criterion) but also by subjective criterion (the intention to continue living in that place).<sup>3</sup>

There is also a fundamental difference between habitual residence and legal concepts of ‘personal residence’ derived from administrative law. The term ‘permanent residence’ which is frequently used in the Czech law (predominantly in public law, however, it plays the important role in private law as well<sup>4</sup>) represents the sound example of such administrative approach to personal residence. Personal residence is a mere entry from the register of addresses which may or may not have any connection to person’s habitual residence or domicile.

### **3. Transfer to a better placed court**

As stated above, the habitual residence of a child has to be determined to the moment when the court is seized. Subsequently it retains its competence to hear the case until the end of proceedings even if the child acquires habitual residence in another Member State in the course of court proceedings (*perpetuatio fori*). However, Article 15 of the Brussels Ia allows the transfer to a court better placed to hear the case when certain conditions are met.

The child should have particular connection with another Member State and the transfer would be in the best interests of the child.

The child shall be considered to have a particular connection to a Member State if that Member State:

- has become the habitual residence of the child, or

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<sup>3</sup> Judgment no. 30 Cdo 2244/2011 of the Czech Supreme Court of 22 November 2011.

<sup>4</sup> Art. 46b (a) of the Czech Civil Procedure Act (No. 99/1963 Coll.) In: Beck-online [online legal system]. C. H. Beck Publishing.



- is the former habitual residence, or
- is the place of the child's nationality, or
- it is the habitual residence of the holder of parental responsibility, or
- the child owns property in that Member State.

The enumeration is exhaustive.

“It is in the best interests of the children for their respective futures to be determined in the jurisdiction in which each of the realistic options for their long term welfare is located and in the jurisdiction that is best able to assess each of those options within the national, cultural, linguistic, ethnic and religious context which comprises the heritage of the children.”<sup>5</sup>

MODEL CASE:

On one hand Sofia has expressed her view that she wishes to stay in the Czech Republic with her father but on the other hand she has been upset about not being with her sister. She used to spend a lot of time with her which is not possible anymore. Rosalie also wants to be with her older sister more often. Even though Sofia is satisfied with living with her father, the relation with her sister is very close. Due to this she is considering the possibility of returning to France.

Sofia has not expressed strongly and consistently her objection about returning to France. On the contrary, having strong ties with her younger sister their emotional relation would be endangered. This bond and feelings should be taken into the consideration of the Czech court when determining, whether a transfer of jurisdiction to the French courts is in the best interests of Sofia.

MODEL CASE:

As it came out, each of the daughters has received the habitual residence in a different Member State. Thus, the Czech courts have jurisdiction in relation to Sofia and the French courts in relation

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<sup>5</sup> Medway Council v B & Others [2015] EWHC 3064 (Fam)

to Rosalie. Nevertheless, the Czech court has examined the special circumstances of the case, e.g. the former Sofia's habitual residence in France and the presence of her sister and mother there, and has decided that it would be in the best interest of Sofia to transfer the case to the French court.

There are two possible ways how to transfer the case or its specific part - either by staying the proceedings and inviting the parties to introduce a request before another court or making a request to the court of another Member State to assume jurisdiction.

**MODEL CASE:**

The Czech court can stay the proceedings in matters of parental responsibility and ask the parents to introduce a request or can make the request on the court's own motion. The Czech court decided to make the request by its own motion to the French court to take over the case. The mother tacitly accepted the transfer and the French court has agreed that the transfer is in the Sofia's best interests. The French court shall accept jurisdiction within six weeks and after that the Czech court shall decline its jurisdiction.

Brussels IIa does not describe the exact process of communication between the courts, details of the procedure or a form of the courts' decisions. In practice, the courts might communicate through national administrative bodies,<sup>6</sup> by using the European e-justice portal<sup>7</sup> or informally via e-mails or letters. Concerning the form of decisions, the court can issue a resolution which states the transfer to a court of another Member State and also stays the proceedings in the framework of the former court. Additionally, the parties should be given a possibility to express their views as the resolution influences their procedural rights. The absence of technicalities might on one hand cause practical problems but on the other hand it enables the courts to act more informally and to accelerate the proceedings.

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<sup>6</sup> For instance the Office for International Legal Protection of Children in the Czech Republic.

<sup>7</sup> <https://e-justice.europa.eu/home.do?action=home&plang=en&init=true>

#### 4. Divorce vs. parental responsibility

The relation between the divorce proceedings and the proceedings on parental responsibility.

##### MODEL CASE:

Simultaneously both parents initiated the proceedings in matters of parental responsibility and the divorce. Milan filed the application earlier than Julie did. According to Article 3 Brussels IIa both courts, the French and the Czech one, have the jurisdiction in matters relating to divorce because both spouses are habitual residents in a respective state where they resided for at least a year immediately before the application was made. For the sake of the fact that the divorce proceedings was firstly initiated in the Czech Republic the French court shall under Article 19(1) on its motion stay its proceedings.

As a result the Czech court shall hear the divorce proceedings and the French court shall hear the proceedings on parental responsibility.

##### *4.1 Czech regulation*

Afterwards the Czech court has to solve which law is applicable to a particular case, whether the Czech or the French law. According to Article 49(1) of the Czech Private International Law Act (No. 91/2012 Coll.)<sup>8</sup> the divorce is ruled by the Czech legal system. To reach the decision on divorce several conditions have to be met. One of these conditions is that first of all the matters on parental responsibility must be solved. The court which specializes in matters of parental responsibility is obliged to decide issues relating to children, such as custody and maintenance, for the period after divorce. Merely after making the decision on the issues relating to children the divorce court is entitled to adjudicate on divorce. It needs to be understood that these two proceedings are separate in the Czech legal system. Therefore, there are two different courts, one civil court dealing with the divorce and one family court dealing with children.

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<sup>8</sup>Art. 49 (1) stipulates that personal situation of spouses shall be governed by the laws of the State of which they are both citizens. If they are citizens of different states is governed by the laws of this state of affairs of the State in which both spouses are habitually resident, or Czech law.

**MODEL CASE:**

At this point of the case of the father and the mother the Czech court needs to wait for the decision of the French court on parental responsibility for the period after the divorce.

*4.2 French regulation*

Unlike in the Czech legal system, in French divorce proceedings the Family Causes Judge who is competent to try such cases is obliged to render a decision not only of divorce itself (when the required conditions are met) but also of its legal consequences. One of these consequences of divorce is the obligation to regulate relations of separated parents with their children. Accordingly, the French court issues solely one judgment which contains following adjustments: divorce, child custody, child and spouses' maintenance, distribution of property and other things related to the end of marriage.

**MODEL CASE:**

The father's request for his sole custody of both daughters regards the period after divorce. Nonetheless, the French legal system does not deal with that situation because the French courts decide about this issue in the framework of the divorce proceedings. There are no exact provisions how to proceed in such cases. The French court should not take the ongoing divorce proceedings in the Czech Republic into account and should proceed as if Julie and Milan were not married but factually separated.<sup>9</sup> Such decision should provide sufficient grounds for granting the divorce by the Czech court.

**5. Prorogation**

In majority of cases the spouses are able to agree on the conditions of divorce as well as parental responsibility. The jurisdiction in matters of parental responsibility is not established merely by virtue of Article 8. The Brussels IIa regulation also contains exceptions from this general rule establishing the jurisdiction of a court other than that in which the child has its habitual residence.

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<sup>9</sup> The French court should follow Articles 373-2 to 375-9 of the Code Civil which set the rules of the exercise of parental authority by separated parents.

**MODEL CASE:**

Let's imagine a situation that the mother and the father would consent on the main issues in respect of divorce and children. They agreed on letting the Czech courts to adjudicate on divorce and also on parental responsibility. The father lodged the application on divorce at the Czech court and simultaneously he initiated court proceedings on parental responsibility concerning both daughters in the Czech Republic for the period of time after divorce. The mother joint the application after she had been called on to make a statement with divorce.

*5.1 The jurisdiction of the divorce court*

Article 12(1) contains a prorogation rule which stipulates that the court exercising the jurisdiction on an application for divorce, legal separation or marriage annulment according to Article 3 shall have under specific conditions jurisdiction in any matter relating to parental responsibility connected with that application. Article 12 gives a party an option to choose a court of a Member State in which the child is not habitually resident, but with which the child has a substantial connection.

As follows from the wording, the jurisdiction of the divorce court shall be determined pursuant to Article 3. Therefore, Article 7 allowing the application of national rules is not applicable in relation to parental responsibility.

**MODEL CASE:**

According to Article 3 Brussels IIa the Czech court has the jurisdiction in matters relating to divorce because the father as the applicant is habitually resident in the Czech Republic for at least six months immediately before the application was made.

The connection between the application for divorce and parental responsibility should not be construed in the sense that this article is solely applicable if these two matters are part of one proceedings according to the national law of a Member State. Such an interpretation would be

too narrow and it would not correspond with the purpose of the provision to deal with divorce and parental responsibility in one particular state. Moreover, Article 12(2)(b) underpins this construction since it occupies with the cessation of jurisdiction in the cases where proceedings relating to parental responsibility are still pending on the date when the judgment on divorce would become final. Thus, the aforementioned Article evidently contains the option of separate proceedings.

**MODEL CASE:**

As mentioned above these two proceedings are separate in the Czech legal system. Therefore, there are two different courts, one civil court dealing with the divorce and one family court dealing with children.

## *5.2 Conditions*

The application of Article 12(1) depends on fulfilment of three cumulative conditions. The first one requires at least one of the spouses has parental responsibility in relation to the child. This condition does not cause interpretative difficulties and therefore it is not elaborated in this text. The second condition demands that 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. The third condition requires the jurisdiction of the courts is in the superior interests of the child.

### *5.2.1 The acceptance of the jurisdiction*

The second condition induces interpretative difficulties. The jurisdiction has to be accepted expressly or in an unequivocal manner. There are no prescribed requirements regarding the form of the acceptance, therefore it can be made in a written form or be expressed tacitly if the condition of unequivocalness is met.

Furthermore, the acceptance shall be expressed at the time the court is seised but differences in the national laws of Member States emerge. Article 16 defines that a court shall be deemed to be

seised at the time when the document instituting the proceedings is lodged with the court or if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service. The problem arises when the national law does not enable the spouses to file a joint application and the spouse who did not file the application will have his or her first opportunity to react on the matter of jurisdiction later than at the moment when the proceedings has been instituted. Under these conditions the court should take this into account and should consider whether the spouse expressed his or her intention at his or her very first opportunity (first act in the proceedings).

### 5.2.2 Interest of the child

In English version The Article 12(1)b contains the term „superior interests of the child“, whereas the Article 12(3)(b) uses the term „best interests of the child“. There is no distinction between them in other languages as they employ identical wording in both paragraphs, nor is there any difference between them in English. The superior interests of the child is in compliance with the Article 12(1)b a situation when the child is habitually resident in a third State which is not a signatory state of Hague Convention on Child Protection, especially if there is no option to hold proceedings in this third State.

“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.<sup>10</sup>

#### MODEL CASE:

The best interests of Rosalie and Sofia must be taken into consideration. The Sofia’s interests are more apparent because she lives in the Czech Republic and she has already created strong bonds to the country while the Rosalie’s interests still need to be scrutinised. She lives in France with her

<sup>10</sup> Case C-215/15 request for a preliminary ruling from Varhoven kasatsionen sad - Bulgaria.



mother Julie, she attends the school there and also has her social contacts there. The agreement between the holders of parental responsibility plays a substantial role in this particular case. Moreover there are other circumstances that are relevant to it such as Rosalie's dual nationality, the presence of close relatives in the Czech Republic, her knowledge of the Czech language and cultural and social environment.

Both spouses have parental responsibility for the daughters so the first condition is met. The second requirement that the mother must expressly accept the jurisdiction of the Czech court is also fulfilled. Lastly this is in the best interests of the daughters.

### *5.3 End of the jurisdiction*

The jurisdiction of the divorce court ends as soon as the judgment allowing or refusing divorce becomes final [Article 12(2)(a)] or as soon as a final judgment is issued in proceedings on parental responsibility which were still pending when the divorce judgment became final [Article 12(2)(b)]. The jurisdiction also ceases if the aforementioned proceedings come to an end for another reason, for instance where the applications are withdrawn. After the cessation of the jurisdiction of the divorce court, the jurisdiction in matters of parental responsibility is to be established by virtue of the child's habitual residence.

### *5.4. The jurisdiction of other courts*

Apart from the above mentioned there is another possible way of establishing the jurisdiction of a Member State in matters of parental responsibility even if the child is not habitually resident in that Member State. Under certain conditions stated in Article 12(3) the courts of a Member State shall also have jurisdiction in relation to parental responsibility in proceedings other than those for divorce, legal separation or marriage annulment, for instance proceedings regarding child's property claims. Such proceedings include the appointment of a guardian or the approval of agreements on behalf of a child, e.g. in inheritance proceedings.<sup>11</sup> On the grounds of a broader interpretation Article 12(3) applies irrespective of the fact whether the proceedings in matters

<sup>11</sup> C-404/14 - request for a preliminary ruling from Nejvyšší soud - Czech Republic.

of parental responsibility is connected with other proceedings or not.<sup>12</sup> It corresponds to the aforementioned explanation of Article 12(1).

#### 5.4.1. Preliminary request

But how shall the courts proceed if there are not related proceedings at all? The Supreme Court of the Czech Republic requested<sup>13</sup> the CJEU for a preliminary ruling in connection with the interpretation of paragraph 3 and posed the question whether it must be interpreted as establishing jurisdiction over proceedings concerning parental responsibility even where no other related proceedings (that is ‘proceedings other than those referred to in paragraph 1’) are pending. The CJEU stated in its judgment that Article 12(3) must be interpreted as allowing the jurisdiction of a court of a Member State which is not that of the child’s habitual residence to be established even where no other proceedings are pending before the court chosen.<sup>14</sup> The CJEU referred to its judgment in E, C436/13 from which follows that the jurisdiction of the court chosen may be prorogued even to hear those parental responsibility proceedings alone. Moreover, the CJEU stressed that Article 12(3) does not contain any provision regarding the cessation of the jurisdiction which would provide for that jurisdiction under Article 12(3) ends in connection with the cessation of other proceedings. Mainly, the CJEU emphasised that the interpretation of this provision in a restrictive manner would substantially reduce the possibilities of having recourse to that prorogation, bearing in mind that the need to bring proceedings in matters of parental responsibility may arise independently of any other proceedings.<sup>15</sup>

#### 5.4.2. Conditions

There are two cumulative conditions to be met: the first condition is a substantial connection between the child and the Member State, the second condition is similar to the requirement determined in Article 12(1)(b) with the exception that the jurisdiction of the courts shall be accepted by all the parties to the proceedings not merely by the spouses and by the holders of parental responsibility. Therefore, the child’s guardian must also accept the jurisdiction provided that he is a party to the case as well.

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<sup>12</sup> Siehr, K. Münchner Kommentar zum Bürgerlichen Gesetzbuch. Band 10: Internationales Privatrecht, 4. Aufl. München: C. H. Beck, 2006, p. 1297, marg. no. 111.

<sup>13</sup> Resolution no. 30 Cdo 1994/2013 - 362 of the Czech Supreme Court of 12 November 2013.

<sup>14</sup> Case C-656/13 request for a preliminary ruling from Nejvyšší soud - Czech Republic (para. 52).

<sup>15</sup> Case C-656/13 request for a preliminary ruling from Nejvyšší soud - Czech Republic (para. 46).

## **6. Conclusion**

Brussels IIa does not contain definitions of all used terminology, for instance of the term of habitual residence or the child's best (superior) interests. The CJEU clarifies the meaning of various terms in its rulings, however interpretative problems are still present in some cases.

Even though in most of the cases in matters of parental responsibility the jurisdiction is determined by virtue of the child's habitual residence there are certain exceptions to be taken into account. The court established under the condition of habitual residence does not necessarily represent the court which should hear the case according to the child's best interests. Moreover, the parties to a case often do not have the knowledge of their possibility to decide in which country the court will hear the case. Brussels IIa gives the parties a limited form of autonomy in matters of parental responsibility. This approach supports parties to achieve a peaceful agreement and thus it accelerates and facilitates the process. Another option for the parties or the competent court is to transfer the case to a court better placed. In view of the fact that the acceptance of the transfer by the court of another Member State is required these courts should closely communicate. The exchange of views should be realized rapidly but there are barriers which impede the smooth course of the communication (e.g. language, culture, national laws etc.).

To overcome these difficulties the authorities of the European Union and also the national bodies of the Member States should promote cooperation between the judges by organising mutual meetings where they may discuss concrete problems and should raise public awareness of the eventualities in relation to the jurisdiction in matters of parental responsibility.

## Resources

### Articles and Literature

1. Marta Zavadilová, Jana Turoňová: Pravidla určování mezinárodní soudní příslušnosti dle nařízení Brusel II bis ve světle nejnovější judikatury Evropského soudního dvora, [Právní rozhledy 7/2010, s. 246].
2. Siehr, K. Münchner Kommentar zum Bürgerlichen Gesetzbuch. Band 10: Internationales Privatrecht, 4. Aufl. München: C. H. Beck, 2006.
3. Brussels IIbis Regulation – European Commentaries on Private International Law – Edited by Peter Mankowski, Ulrich Magnus, Sellier European Law Publishers GmbH, Munich, 2012.
4. Zavadilová M., Komentář k Nařízení o uznávání rozhodnutí ve věcech manželských ( Brusel IIbis ), ASPI ID KO32003R2201CZ.

### Regulations, Acts and Treaties

1. Council Regulation (EC) No 2201/2003 of 27th November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, Official Journal of the European Union of 23rd December 2003; cited: Brussels IIa Regulation.
2. Treaty on the Functioning of the European Union, consolidated version, Official Journal of the European Union of 26th October 2012.
3. Code civil des français (C. civ.), promulgué le 21 mars 1804.
4. Czech Private International Law Act No. 91/2012 Coll.
5. Czech Civil Procedure Act No. 99/1963 Coll.

### CJEU Judgments

1. Case C-523/07 reference for a preliminary ruling from Korkein hallinto-oikeus - Finland.
2. Case C-215/15 request for a preliminary ruling from Varhoven kasatsionen sad - Bulgaria.
3. Case C-656/13 request for a preliminary ruling from Nejvyšší soud - Czech Republic.
4. Case C-404/14 request for a preliminary ruling from Nejvyšší soud - Czech Republic.

**Other Judgements**

1. Czech Supreme Court; Judgment No. 30 Cdo 2244/2011 of 22 November 2011.
2. Czech Supreme Court; Resolution No. 30 Cdo 1994/2013 - 362 of 12 November 2013.
3. High Court of Justice; Medway Council v B & Others [2015] EWHC 3064 (Fam).