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How Does the Displacement of Natural Persons during War Influence the Applicable Law

Abstract: In this article the authors analyse the consequences of displacement of natural persons during war, in the field of private international law. That displacement may affect the determination of applicable law if the factors to be taken into account include domicile, habitual residence, permanent residence, residence or sojourn of natural person. Apart from discussing the general understanding of these factors, we present the situations where a person has lost links with the country of his or her nationality because of the war but has not acquired strong links with any other country. All of the issues are discussed in the light of legal assistance agreements, EU law, and national laws.

Keywords: forced displacement — war — Ukraine — applicable law

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1. Introduction

As of May 22, 2022, the number of refugees from Ukraine due to the full-scale invasion of Ukraine by Russia was 6,552,971.¹ A significant number of them stay in the EU countries (e.g. in Poland — 3,505,890; in Romania — 961,270; in Hungary — 644,474; in Slovakia — 442,316;² in Germany — 700,000).³ And despite the fact that as of May 22, 2022, more than 2,000,000 Ukrainians had returned to Ukraine, due to the instability of the situation, it is impossible to assert whether or not they will leave Ukraine again.⁴ In addition, it can be assumed that some Ukrainians will not return to Ukraine even when the war ends.⁵ This situation raises many questions, including legal ones. Among the latter is a question regarding the determination of the applicable law to private relations involving displaced natural persons.

If such a question comes up before a court or an official of any of the EU countries, it will be resolved on the basis of international treaty between the relevant EU country and Ukraine⁶ (e.g. legal assistance

¹ Operational Data Portal: *Ukraine Refugee Situation*, <https://data2.unhcr.org/en/situations/ukraine> (accessed: 22.05.2022).

² *Ibidem*.

³ The Number of refugees in Germany as of May 14, 2022. Over 700,000 refugees from Ukraine registered in Germany. Reuters: *Welt am Sonntag reports*, <https://www.reuters.com/world/europe/over-700000-refugees-ukraine-registered-germany-welt-2022-05-14> [accessed: 22.05.2022].

⁴ Operational Data Portal: *Ukraine Refugee Situation*, <https://data2.unhcr.org/en/situations/ukraine> (accessed: 22.05.2022).

⁵ S.F. Joireman: *Ukrainian Refugees Might Not Return Home, Even Long After The War Eventually Ends*, *The Conversation*, 5.04.2022, <https://theconversation.com/ukrainian-refugees-might-not-return-home-even-long-after-the-war-eventually-ends-180294> [accessed: 22.05.2022].

⁶ Ukraine has concluded agreements on legal assistance with the following EU Member States: Republic of Poland, Republic of Bulgaria, Romania, Republic of Estonia, Republic of Lithuania, Republic of Latvia, Czech Republic, Hungary, the Hellenic Republic, Republic of Cyprus. In addition, according to the information provided by the Ministry of Justice of Ukraine, some agreements on legal assistance, concluded by the former USSR, remain in force under the Law of Ukraine on the Succession of Ukraine from 12.09.1991. See Ministerstvo yustytstii Ukrainy: *Dohovirno-pravova baza v haluzi pravovykh vidnosyn u tsyvilnykh i kryminalnykh spravakh*, https://minjust.gov.ua/m/str_9385 [accessed: 27.05.2022]. They include: 1) Convention between the USSR and the Italian Republic on legal assistance (although the Ministry of Justice of Italy does not mention this Convention, among the treaties that are in force between Italy and Ukraine). See Ministero della Giustizia. *Atti internazionali: Materia selezionata: Cooperazione giudiziaria in materia civile e commerciale. Paese selezionato: Ucraina*, https://www.giustizia.it/giustizia/it/mg_1_3.page?tabait=y&tab=a&aia=&aip=AIP32634&ait=AIT32786#TopAi

agreement)⁷; in the absence of the international treaty (or if it does not contain conflict of laws rules allowing to determine the law applicable to certain relations or substantive law rules which exclude the necessity to determine the applicable law), the applicable law will be determined on the basis of the EU law rules. In the absence of the EU law rules, the applicable law will be determined on the basis of national rules of private international law of a certain EU country.⁸

The Ukrainian court or an official may determine the applicable law on the basis of the conflict rules of international treaties, and in their absence (and in the absence of unified substantive rules that exclude the necessity of the determination of applicable law) — on the basis of the Law of Ukraine on Private International Law from 23.06.2005⁹ (hereinafter — UPILA). The Polish court or an official would apply the private international law rules in a manner mentioned above, therefore the absence of EU law or international treaties (either bilateral or multilateral), the Polish Act on Private International Law from 4.02.2011¹⁰ would be applied (hereinafter — Polish PIL).

[accessed: 22.05.2022]. At the same time, some Italian authorities note that “Ukraine is no stranger to the Convention between the USSR and the Italian Republic on legal assistance.” See M. Di Marzio, S. Matteini Chiari: *Comunicazioni e notificazioni nel processo civile*. Giuffrè Editore Milano, 2008, p. 162. 2) The agreement between the USSR and the Republic of Finland on legal assistance (the Ukraine’s succession was formalized by exchange of notes); 3) The agreement between the USSR and the Federal People’s Republic of Yugoslavia on legal assistance. However, the Ministry of Foreign and European Affairs of the Republic of Croatia does not consider this treaty among the treaties in force. See Republic of Croatia Ministry of Foreign and European Affairs: *Overview of Bilateral Treaties of the Republic of Croatia by Country. List of international treaties and international acts concluded between the Republic of Croatia and Ukraine*, <https://mvep.gov.hr/foreign-policy/bilateral-relations/overview-of-bilateral-treaties-of-the-republic-of-croatia-by-country/22801?country=144> [accessed: 27.05.2022].

⁷ This conclusion follows, for example, from Article 28(1) of Rome II Regulation, Article 25(1) of Rome I Regulation, Article 75(1) of the Succession Regulation; 62(1) of Matrimonial Property Regulation.

⁸ As to the primacy of the EU law over national law of the Member States, see: EUR-Lex. An official website of the European Union: *Primacy of EU Law*, <https://eur-lex.europa.eu/EN/legal-content/glossary/primacy-of-eu-law.html> [accessed: 22.05.2022].

⁹ International treaties in Ukraine are subject to preferential application in comparison with the national legislation of Ukraine, since in accordance with Article 19(2) the Law of Ukraine On International Treaties from 29.06.2004: “If the international treaty of Ukraine, which entered into force in accordance with the established procedure, provides other rules than those provided for in the relevant act of Ukrainian legislation, then the rules of the international treaty shall be applied.”

¹⁰ Ustawa z dnia 4.02.2011 r. Prawo prywatne międzynarodowe, Dz.U. [Official Journal] of 2015 item 1792.

That is why in this article we will consider how the forced displacement of natural persons during the war influences the applicable law if it is determined on the basis of the conflict of laws rules of: 1) the agreements of legal assistance between Ukraine and certain EU countries¹¹; 2) national PIL rules of Ukraine; 3) the EU law; 4) national PIL of Poland.

2. The displacement of natural persons during the war and its influence on the applicable law as determined on the basis of the agreements of legal assistance

2.1. The connecting factors of agreements on legal assistance dependent on the place of person's stay

Some of the conflict of laws rules of the international treaties in question use the connecting factors which are not dependent on the location of persons (e.g. nationality,¹² party autonomy,¹³ *lex loci actus* (in its different variations)¹⁴). Consequently, in some cases the question of how the displacement of persons affects the determination of the applicable law

¹¹ There are other international treaties in which Ukraine and various EU countries are the Parties. Moreover, it may happen that it is not the conflict of laws rule of the legal assistance agreement, but of another international treaty will apply. For example, there is an Agreement between the Republic of Poland and Ukraine on legal assistance and legal relations in civil and criminal matters from 24.05.1993 (hereinafter: Agreement between Poland and Ukraine) which, among the other things, contains conflict of laws rules defining the law applicable to the form of the will. At the same time, Poland and Ukraine participate in the Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions (hereinafter: the Hague Convention). Since Article 97 of the Agreement between Poland and Ukraine states that: "this Agreement shall not prejudice the application of international treaties to which one or both Parties are bound" and the Hague Convention does not specify its relationships with the other international treaties, the law applicable to the form of wills shall be determined on the bases of the Hague Convention. However, it seems impossible to analyse all the treaties in which Ukraine and the EU Member States participate in this paper, so we shall focus only on the treaties on legal assistance.

¹² See for example, Articles 21(1), 23(3), 24(2), 25(1), 26(1), 28(1) of the Agreement between Poland and Ukraine.

¹³ Article 33(1) of the Agreement between Poland and Ukraine.

¹⁴ Articles 27(1), 33(1) of the Agreement between Poland and Ukraine.

will not arise at all. In the other cases, the place of residence,¹⁵ the place of permanent residence,¹⁶ the place of last permanent residence¹⁷ are the important factors in the determination of the applicable law. However, none of the legal assistance agreements explains the meaning of these terms. Accordingly, there is a need for their interpretation. Of course, in this article we will not be able to analyse all the agreements on legal assistance to which Ukraine is a party, so we will focus only on some of them.

For example, the Agreement between Poland and Ukraine does not contain rules regarding its interpretation. This Agreement was concluded in Polish and Ukrainian, and both texts have equal legal force (Article 99 of the Agreement). The Ukrainian text in the number of rules determines the applicable law as the law of the Party to the Agreement where a person or persons have their *mistse prozhyvannia* (Articles 25, 26, 29, 30), which can be translated as a ‘place of residence’. The Polish version uses the term “miejsce zamieszkania” in the same articles, which also can be translated as a ‘place of residence’. Since the Parties to this Agreement have not expressed any intention to give a special meaning to the term *mistse prozhyvannia* (“miejsce zamieszkania”) it should be interpreted in accordance with Article 31(1–3) of Vienna Convention on the Law of Treaties from 23.05.1969 (hereinafter: the Vienna Convention).¹⁸

¹⁵ For example, under Article 26(2) of the Agreement between Poland and Ukraine “If at the time of commencement of proceedings, one of the spouses is a citizen of one Contracting Party, and the other is a citizen of the other Contracting Party, the dissolution of the marriage occurs under the laws of the Contracting Party, in the territory of which they have their residence. If one of the spouses has a place of residence in the territory of one Contracting Party and the other in the territory of the other Contracting Party, the law of the Contracting Party whose authority opened the proceedings shall apply.” See also Articles 27, 28 (2,3), 29 of Agreement between Ukraine and Republic of Lithuania on legal assistance on civil, family and criminal matters from 7.07.1993 (hereinafter: the Agreement between Ukraine and Lithuania).

¹⁶ Articles 35(1), 38 (1) of the Agreement between Ukraine and Lithuania.

¹⁷ Article 34(1) of the Agreement between Ukraine and Republic of Estonia on legal assistance and legal relationships on civil and criminal matters from 15.02.1995 (hereinafter: the Agreement between Ukraine and Estonia); Article 18(1) of the Agreement between Ukraine and Republic of Cyprus on legal assistance in civil matters from 6.09.2004.

¹⁸ Under Article 31(1–3) of the Vienna Convention: “1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which

Article 31(1) of the Vienna Convention requires to interpret the terms of international treaties “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” That is why it is considered that “if no special meaning was given to the treaty provision by the parties, than it is necessary to look for ordinary meaning of the term.”¹⁹

It is not customary to interpret the terms of international treaties by reference to national law. But in this case, we will address it precisely in order to establish whether there is any ordinary meaning of the term “place of residence” and, if so, to what extent its understanding is compatible in Poland and Ukraine. First, it should be said that the concept of “miejsce zamieszkania” is determined as “a place in which the person lives and intends to live permanently.”²⁰ Therefore to decide if a person has a “miejsce zamieszkania” what needs to be analysed are both: “the external factor that is the physical presence of the person in that given place”²¹ and “the internal factor, that is, the desire of the person to live in that place.”²² The closest concept to the concept of “miejsce zamieszkania” from the EU law is the concept of the place of habitual residence,²³ however, the habitual residence focuses on the presence of a person, not so strongly taking into account the will (*animus*) to stay in a given country.

There is no official or doctrinal interpretation of the term *mistse prozhyvannia* used in the Ukrainian version of the Agreement between Poland and Ukraine. This term is used in UPILA, but as it will be shown

was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. 3. There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties.”

¹⁹ Z. Nový: *Evolutionary Interpretation of International Treaties*. “Czech Yearbook of International Law” 2017, vol. VIII, p. 217.

²⁰ European Commission: *Employment, Social Affairs and Inclusion: Poland — Place of Residence*, <https://ec.europa.eu/social/main.jsp?catId=1124&langId=en&intPageId=4731> [accessed: 27.05.2022]. See also S. Kalus, in: *Kodeks cywilny. Komentarz. Tom I. Część ogólna (art. 1—125)*. Eds. M. Habdas, M. Fras. Warszawa 2018, p. 137, who emphasises that also in cross-border cases the notion of “miejsce zamieszkania” (‘domicile’) should encompass both *corpus* and *animus manendi*, assuming that the court applies Polish PIL. If therefore the notion of “domicile” has a different meaning in another country (applying its own PIL), the applicable law may differ. See also M. Pazdan: *Prawo prywatne międzynarodowe*. Warszawa 2014, p. 54.

²¹ European Commission: *Employment...*

²² *Ibidem*.

²³ *Ibidem*.

in the text that follows, there is no single approach to its interpretation, so we cannot claim that there is any “ordinary meaning” of it in Ukrainian law. Therefore, in our opinion, to interpret the term *mistse prozhyvannia* in Ukrainian version of this Agreement one may use the Polish approach of understanding the term “miejsce zamieszkania,” and therefore, when determining whether the forced displacement of Ukrainians affected their *mistse prozhyvannia* analyse both their intention and external factors, especially the fact of centring of vital activities.²⁴

At the same time, it should be noted that Ukrainian versions of legal assistance agreements with some other countries use slightly different terminology, namely, in their conflict of laws rules they employ the term *postiine mistse prozhyvannia*,²⁵ which can be translated as ‘place of permanent residence’.

As for the term *postiine mistse prozhyvannia* in the Ukrainian versions of the relevant treaties, it most likely means ‘domicile’. This assumption is confirmed by the texts of Ukrainian versions of other treaties, which indicate that the term *postiine mistse prozhyvannia* is used as a translation of the term ‘domicile’. For example, French and English versions of Article 1(c) of Convention of October 1964 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions use the term “domicile”; the Ukrainian version translates this term as *postiine mistse prozhyvannia*.²⁶

²⁴ See judgment of Court of Appeal in Białystok of 13.08.2014, III AUa 1529/11, judgment of Administrative Court of Szczecin of 5.03.2015, II SA/SZ 1135/14. See also M. Czepelak: *Międzynarodowe prawo zobowiązań Unii Europejskiej*. Warszawa 2012, pp. 62—63. That means that the factual centre of living is taken into account — see D. Baetge, in: *Rome Regulations. Commentary on the European Rules of the Conflict of Laws*. Eds. G.P. Callies, Alphen aan den Rijn 2011, p. 313. The factors at stake are the duration of stay, regularity, conditions, and reason for the stay in a certain country, family and social relationships, school attendance, accommodation, access to social services etc. — *ibidem*. See also J. van Hein, *ibidem*, p. 415. See also ECJ cases no. C-262/99, C-523/07. See also P. Franzina, in: *European Commentaries on Private International law. Commentary. Volume III. Rome II Regulation*. Eds. U. Magnus, P. Mankowski. Köln 2019, pp. 629—630

²⁵ For example, according to Article 26 (1) of the Agreement between Ukraine and Lithuania the personal and property relations of the spouses are governed by the law of the Contracting Party in whose territory they have their permanent residence; under Article 36(1) of the Agreement between Ukraine and Republic of Latvia on legal assistance and legal relations in civil, family, labour and criminal matters from 23.05.1995 succession of movable property is governed by the law of the Contracting Party in whose territory the testator had his or her last permanent residence.

²⁶ According to Article 1(c) of Convention of October 1964 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions: “A testamentary disposition shall be valid as regards form if its form complies with the internal law of a place in which the

“Domicile,” as a connecting factor, originated in common law, but its understanding differs from one common law country to another.²⁷ However, when this concept is used in civil law systems or in international conventions, it is understood differently than in common law.²⁸ In civil law and international conventions it is “often more akin to habitual residence.”²⁹

In this connection it should be said that some agreements on legal assistance use the term *postiine mistse prozhyvannia* in Ukrainian version, and the term ‘habitual residence’ in the text in the language of the other Party to the agreement. This is the case of, for example, of the Agreement between Ukraine and Estonia which in its Article 34 defines the law applicable to inheritance of movable property as “selle lepingupoole seadusandlusega, kelle territooriumil pärandajal oli viimane alaline elukoht”³⁰ (‘law of the state where the deceased had his “alaline elukoht”’). The connecting factor “alaline elukoht” used in this article is translated in English in different ways: as ‘last domicile’³¹ or ‘last habitual residence’.³² Notwithstanding this, in our opinion, when this Agreement uses the connecting factor “alaline elukoht” it means ‘habitual residence’. This idea is confirmed by the text of the Estonian version of the EU Succession Regulation, which uses the same term (“alaline elukoht”) for the translation of the term “habitual residence” of the deceased.

testator had his domicile either at the time when he made the disposition, or at the time of his death.”

²⁷ A. Dutta, in: *Encyclopedia of Private International Law*, Vol. 1, *Domicile, Habitual Residence and Establishment*. Eds. J. Basedow, G. Rühl, F. Ferrari, P. de Miguel Asensio. Cheltenham 2017, p. 556.

²⁸ Ibidem.

²⁹ Ibidem.

³⁰ Riigi Feataja, Riigi Teataja, Eesti Vabariigi ja Ukraina leping õigusabi ja õigussuhete kohta tsiviil- ning kriminaalasjades. Vastu võetud 15.02.1995, <https://www.riigiteataja.ee/akt/13119066> [accessed: 28.05.2022].

³¹ Nam H Nguyen: *Essential 25000 English-Estonian Law Dictionary*, 2018, Number of the term: 7785—7787.

³² M. Atallah: *Surnud isiku viimane alaline elukoht kui peamine ühendav tegur Pärismääruse (650/2012) kontekstis. The Last Habitual Residence of the Deceased as the Principal Connecting Factor in the Context of the Succession Regulation (650/2012)*, <https://digikogu.taltech.ee/et/item/12ef6230-1018-4a15-ac33-12fa812896e1> [accessed: 28.05.2022].

2.2. Factors taken into account for the determination of “residence,” “permanent residence,” and “last permanent residence” of displaced persons during the war

As was already shown, the concepts of “resident,” “permanent resident,” and “last permanent resident,” employed by the agreements on legal assistance, are similar to the concept of “habitual residence” or very close to it. Despite the fact that the understanding of the concept of “habitual residence” may vary depending on what category of cases it relates to,³³ it can be assumed that the determination of habitual residence requires an analysis of the circumstances of a person’s stay in a particular country, and since “there is some uncertainty as to the degree of importance to be given to the intention in deciding whether the residence is habitual,”³⁴ one should be cautious when assessing whether a person’s intentions can be taken into account when determining their habitual residence. Such intentions must be proved by the actual circumstances of the case. They usually include: the duration of the stay in a particular country; the status a person has obtained (for which status they have applied); the degree of the integration into the society of the country in which that person stays. At the same time, given the fact that today many activities can be carried out online, one can foresee the difficulty of determining habitual residence based on the degree of integration into the societies of a particular country. For example, a child who left Ukraine with their mother because of the war, can study at a Polish or German school, but at the same time can have online lessons at a Ukrainian school. The mother may work a few hours per day for a Polish or German company and another few hours per day online for a Ukrainian company. Therefore, the country in which a person works or studies may be taken into account for the determination of the place of habitual residence of a person. However, this factor needs to be considered very carefully along with the remaining circumstances of the case.³⁵

³³ P. Lagarde, in: *EU Regulation on Succession and Wills*. Eds. U. Bergguist, D. Damascelli, R. Frimston, P. Lagarde, F. Odersky, B. Reinhartz. Köln 2015. Commentary to Article 21, p. 122.

³⁴ D. Hayton: *The Problems of Diversity*. In: *European Succession Laws*. Ed. D. Hayton. Bristol 2002, p. 5.

³⁵ Yet, if a Polish court, for example, had the jurisdiction for the purposes of Article 23(2) of Rome I, it should establish if a refugee (e.g. a physical therapist) has moved his or her principal place of business to Poland, and if so, Polish law should be applied without an exception, no matter if such a person is willing to come back to a home country or not.

In addition, although habitual residence was introduced, among other things, to avoid the application of nationality principle,³⁶ nationality can be used as one of the factors for determining habitual residence.³⁷ Perhaps, the nationality factor will play a decisive role in determining the habitual residence of people who were forced to leave their country due to war, when the other factors cannot be applied to the specific case.

If a place of habitual residence is defined for the purpose of determination of the law applicable to property relations (including succession relations), the location of the property or a significant portion thereof may be an important factor in its determination. Of course, property can be severely damaged during war, but if someone is still interested in acquiring property rights to it (e.g. by accepting an inheritance), it means that the property is of some value to that person even in a damaged form. Therefore, the location of the property can be taken into account for the determination of the habitual residence in the cases connected with property relations.

And, of course, if the conflict of laws rule refers to the law of the country of habitual (permanent) residence, it is not enough to analyse the external factors to determine the applicable law. It is also necessary to find out whether a particular person has the intention to live in the future in the country to which they moved due to war when the war ends. In succession matters where it is not possible to establish the intention of the deceased in person, their intention to have habitual (permanent) residence in a certain country, in which they arrived because of war in their country of origin, should be evidenced by the circumstances of their life (e.g. learning the language of the respective country, being gainfully employed in this country (or trying to find an employment), and involvement in social life.

2.3. The consequences of a change of “residence,” “permanent residence,” “last permanent residence,” and of the impossibility to determine them

Obviously, a change of “residence,” “permanent residence,” and “last permanent residence” will lead to a change in the applicable law in cases where the conflict of laws rule uses a respective connecting factor. In addition, in some cases, such a change will increase the number of

³⁶ R. Frimston: *A practical guide to the EU Succession Regulation outside the EU: the regulation and its impact on inheritance, and estate administration and planning in the United Kingdom and other third states*. Minehead 2020, p. 43.

³⁷ A. Dutta: *Domicile, Habitual Residence...*, p. 557.

alternatives in the choice of applicable law by the enforcing authority. For example, under Article 28(2) of the Agreement between Ukraine and Romania on legal assistance and legal relationships in civil matters from 30.01.2002, “the legal relations between parents and children shall be governed by the legislation of the Party to the Agreement, whose nationality a child possesses. If the child’s place of residence is in the territory of another party to the Agreement, the legislation of this Party may apply, if it is more favourable to the child’s interests.” Thus, the change of the place of residence of a child — citizen of Ukraine — from Ukrainian to Romanian opens up the possibility of choosing between Ukrainian and Romanian law, depending on which of these laws is more favourable for the child.

At the same time, we accept that there may be situations in which it will not be possible to determine a person’s place of residence. None of the legal assistance agreements we have examined contains a solution to this issue. Therefore, in such a case, one can refer to the EU law³⁸ (if the issue arises before a court or an EU Member State official). If, however, the EU law does not contain relevant rules, the answer should be sought in the national law of a respective Member State. If a court or an official in Ukraine face such a question, they have to solve it on the basis of the UPILA (which case will be further discussed in the present article’s subsection 3.3).

3. How the forced displacement of natural persons during war influences the applicable law when it is determined on the basis of the UPILA

3.1. The connecting factors of UPILA “sensitive” to the displacement of persons

It should be noted that the connecting factors of UPILA operate within some concepts “sensitive” to the displacement of persons: *mistse*

³⁸ It can lead, for example, to the application of the law of the country with which the relationship is closer (See e.g. Article 4(4) of Rome I Regulation). However, the number of the EU regulations do not answer the question what law should be applied if the place of the individual’s habitual residence cannot be determined. For example, the EU Succession Regulation does not contain such a rule, although it is possible to apply the law of the state with which the deceased was manifestly closer connected at the time of death (in comparison with the state where they had their habitual residence at the time of death).

prozhyvannia ('place of residence'),³⁹ *mistse perebuвання* ('place of sojourn')⁴⁰ and *zvychnaine mistse perebuвання* ('place of habitual sojourn').⁴¹

³⁹ The law of the state where the party who has made an offer has the residence — is one of the connecting factors applicable to the form of the transaction (Article 31(1) of UPILA). The law of the state, where the party required to effect the characteristic performance of the contract has his residence, can be recognised as the law which is most closely connected with the transaction, unless otherwise is provided for or arising out of the terms and the substance of the transaction or the circumstances of the case (Article 32(3) of UPILA). (The law that has the closest connection to the transaction is the main connecting factor for the determination of the law applicable to the contracts that are not consumer contracts in the absence of parties' choice). The law of the state in which the consumer has his residence is applicable in the absence of the parties to consumer contract choice of law (Article 45(3) of UPILA). If the parties to the obligation arising out of the infliction of harm abroad have their residence in one state, the rights and duties under this is governed by the law of that state (Article 49(2) of UPILA). The claim for damages, at victim's choice can be submitted to the law of the state where he/she has their place of residence or where the main place of his/her activity is located; or to the law of the state in which manufacturer of goods or the performer of work (service) has their place of residence (Article 50(1) (1,2) of UPILA). If the spouses do not have a common personal law, the legal effects of the marriage are governed by the law of the state in which the spouses last had their common residence (Article 60(1) of UPILA). Maintenance obligations arising from family relationships (other than child maintenance) may be governed by the law of the state in which the person entitled to maintenance resides (Article 67(1) of UPILA), or the law of the state, in which the person obliged to provide maintenance resides (Article 67(3) of UPILA). A claim for maintenance of relatives and other family members (other than parents and children) cannot be satisfied if, according to the law of residence of the person obligated to provide maintenance, no such obligation of maintenance exists (Article 68 of UPILA).

Some variations of the 'place of residence' are used to determine the law applicable to succession relations. The succession relations are governed by the law of the state where the deceased had their last place of residence (Article 70 of UPILA). However, since Ukraine follows a dualistic approach in conflict of laws regulations for succession, this connecting factor is applicable only to succession of movable property which is not a subject to state registration in Ukraine. This conclusion follows from Article 71 of UPILA, which provides special connecting factors applicable to the succession of immovable property or assets, subject to state registration in Ukraine (Article 71 of UPILA provides *lex loci rei sitae* for succession of immovable property and the law of Ukraine for the assets subject to state registration in Ukraine). In addition, the law of permanent residence of the deceased at the time of making a will or at the time of death is one of the connecting factors applicable to the form of will by virtue of Article 72 of UPILA.

⁴⁰ A legal entity may not invoke restrictions on the powers of its body or representative to enter into a transaction that are not known to the law of the state in which the other party has its place of sojourn or location, unless the other party knew or could not have been unaware of such restrictions under all the circumstances (Article 28 of UPILA).

⁴¹ The law of the state in which one of the spouses has his or her habitual sojourn may be chosen by the spouses to govern the property consequences of the marriage by virtue of Article 61(1) of UPILA (Under Article 61(2) of UPILA, if such habitual sojourn changes, that law shall cease to apply). The law of the state where the deceased had his

As for the term 'habitual sojourn', in our opinion, the legislator used it by mistake. Since the content of the term 'sojourn' does not allow us to speak of its 'habitualness'. Most likely, what is meant here is 'the habitual residence'. This idea is confirmed by the fact that, for example, in the Ukrainian doctrine it is considered that Article 61 of UPILA repeats the approaches of the Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes,⁴² which, among other things, allows spouses to choose the law of the country of their 'habitual residence' as applicable to matrimonial property regime.

At the same time, UPILA does not define the notion of the place of residence or the place of sojourn. According to Article 7(1) of UPILA to determine the applicable law, a court or other authority is guided by the interpretation of rules and notions according to the law of Ukraine. The foreign law may be taken into account if the rules and notions that are to be characterised are unknown to Ukrainian law or are known under another name or have another content and cannot be determined by interpretation under Ukrainian law (Article 2) of UPILA. Therefore, due to the fact that the place of residence and sojourn of an individual is known to Ukrainian legislation, according to one point of view, the terms of UPILA should be interpreted in accordance with the definitions of these terms in the other laws, namely in Civil Code of Ukraine⁴³ (hereinafter: CCU) or in Law of Ukraine on Foreign Economic Activity from 16.04.1991 and the Law of Ukraine on Freedom of Movement and Free Choice of Place of Residence in Ukraine from 29.06.2004⁴⁴ (hereinafter: the Law on Freedom of Movement).

Article 29(1) of the Civil Code of Ukraine defines a place of residence of an individual as a dwelling in which he/she resides permanently or temporarily. However, in our opinion, this understanding of the place of residence is not very suitable for the purposes of the UPILA as it applies to both permanent and temporary residence and, therefore, does not allow to separate domicile from residence.

Paragraph 44 of Article 1 of the Law of Ukraine on Foreign Economic Activity defines permanent residence as a place of residence of an individual in the territory of any state for at least one year, if this individual

habitual sojourn is one of the laws to which the form of the will may correspond (Article 72 of UPILA).

⁴² V.I. Kalakura: *Mizhnarodne simejne pravo*. In: *Mizhnarodne pryvatne pravo: pidruchnyk*. Eds. A.S. Dovherta, V.I. Kysilia. Kyiv 2014, p. 537.

⁴³ V. Vasylchenko: *Naukovo-praktychnyi komentar Zakonu Ukrainy 'Pro mizhnarodne pryvatne pravo'*. Kyiv 2007, p. 59.

⁴⁴ V. Kysil: *Mizhnarodne spadkove pravo*. In: *Mizhnarodne pryvatne pravo: pidruchnyk*. Eds. A. Dovherta, V. Kysilia. Kyiv 2014, p. 349.

has no permanent residence in the territory of other states and has the intention to reside in the territory of this state for an unlimited period, without limiting such residence to a certain purpose, and provided that such residence is not the result of the performance of official duties or obligations under the contract.

This definition has characteristics that can be used when examining whether a person has a permanent residence; at the same time it includes the attributes that in some cases will make it difficult to determine permanent residence for the purposes of private international law. In particular, we agree that a person's intention to reside in a certain state without a particular purpose must be taken into account when determining the permanent residence. At the same time, we cannot agree that the law must set a clear minimum period of residence in order it can be considered as permanent. Moreover, it cannot be accepted that the performance of a person's official duties or contractual obligations in a certain country would necessarily preclude their ability to have a permanent residence in that country in all cases.

The Law on Freedom of Movement distinguishes between the place of residence and place of sojourn. Place of residence is determined here as a housing with a legally assigned address, where the person lives as well as an institution for the homeless or another provider of social services and accommodation, residential social and medical institution and other institutions of social support (care), in which the person receives social services (Article 3(5) of the Law of Freedom of Movement). Place of sojourn is defined as a housing or a specialised social institution for homeless persons, another provider of social services and accommodation, in which the person who received a certificate of application for protection in Ukraine, lives for less than six months a year or receives social services (Article 3(4) of the Law of Freedom of Movement).

However, as follows from the title of the said Law and its content, it determines these concepts only within the territory of Ukraine. According to the Preamble of this Law, it governs relations regarding the freedom of movement and free choice of residence in Ukraine, guaranteed by the Constitution of Ukraine and enshrined in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the Convention for the Protection of Human Right and Fundamental Freedoms and protocols to it, other international treaties of Ukraine. Besides, it determines the procedure for exercising freedom of movement and free choice of residence and provides the grounds for their restriction. Therefore, this Law governs the issues of administrative law exclusively. That is why, in our opinion the definitions of the terms "residence" and "sojourn" given by this Law cannot be employed for the interpretation of UPILA's provisions.

Unfortunately, in case law, the place of residence of an individual or variations thereof (e.g. the place of last residence of the deceased) for the purposes of UPILA is understood simply as the place where he was registered,⁴⁵ that is, where a person had their residence under the Law on Freedom of Movement; or as a place of residence in accordance with Article 29 of CCU.⁴⁶

In this regard, it is interesting to refer to the opinion of the drafters of UPILA. Thus, for example, A. Dovgert, while describing the process of creation of UPILA notes that “since the concepts of ‘residence’ and ‘sojourn’ in international private law differ from those sounding similarly in domestic civil law, our version of the draft codification of international private law contained the definitions of their content. In particular, it was proposed to consider that an individual has his residence in the country in which he lives with the intention of residing there permanently; his sojourn is in the country in which he lives for a certain period of time, even if that time was originally limited. Unfortunately, these provisions did not find their way into UPILA.”⁴⁷ Thus, according to the drafters of UPILA, the criterion for distinguishing “place of residence” and “place of sojourn” should be the intention of the individual.

On this basis, it can be noted that according to the drafters of UPILA, the concept of “residence” is very close to the concept of “domicile,” and the concept of “sojourn” is close to the concept of “residence,” as the Council of Europe recommends them to be understood in the international field.⁴⁸

Namely, according to the Council of Europe “the concept of domicile imports a legal relationship between a person and a country governed by a particular system of law or a place within such a country. This relationship is inferred from the fact that that person voluntarily establishes or retains their sole or principal residence within that country or at that place with the intention of making and retaining in that country or place the centre of their personal, social and economic interests. This intention

⁴⁵ *Rishennia Shevchenkivskoho raionnoho sudu m. Lvova vid 30 lypnia 2011 roku. Sprava № 2-26/11*, Yedynyi derzhavnyi reiestr sudovykh rishen <https://reyestr.court.gov.ua/Review/17573419> [accessed: 1.07.2022].

⁴⁶ *Lyst Vyshchoho Spetsializovanoho Sudu Ukrainy z rozghliadu tsyvilnykh i kryminalnykh sprav vid 16.05.2013 № 24-754/0/4-13 ‘Pro praktyku rozghliadu sudamy tsyvilnykh sprav z inozemnym elementom’*. Zakonodavstvo Ukrainy, <https://zakon.rada.gov.ua/laws/show/v-754740-13#Text> [accessed: 1.07.2022].

⁴⁷ A. Dovhert, A. Merezhko: *Kodyfikatsiia mezhdunarodnoho chastnoho prava v Ukrainy*. In: *Ocherky mezhdunarodnoho chastnoho prava*. Ed. A. Dovherta. Kharkiv 2007, p. 48.

⁴⁸ Council of Europe, Committee of Ministers: *Resolution (72) 1 On the Standardization of the Legal Concepts of “Domicile” and of “Residence”*. 18 January 1972, <https://www.refworld.org/docid/510115e12.html> [accessed: 1.07.2022].

may be inferred, inter alia, from the period of his residence, past and prospective, as well as from the existence of other ties of a personal or business nature between that person and that country or place.” It is recommended to determine the term “residence” “solely by factual criteria; it does not depend upon the legal entitlement to reside. A person has a residence in a country governed by a particular system of law or in a place within such a country if he dwells there for a certain period of time. That stay need not necessarily be continuous.”⁴⁹

It seems to us that of all the possible interpretations of “residence” and “sojourn” used in UPILA, the interpretation of these terms by its drafters is the only one suitable for the purposes of private international law. It also seems important to take into account the Resolution of the Council of Europe, because the explanation of the drafters of UPILA shows that the concepts of “residence” and “sojourn” were inspired by the concepts of “domicile” and “residence” of the Resolution.

Therefore, the main characteristics of the state where the person has their residence in understanding of this term by UPILA are as follows: 1) a person voluntarily lives in that state; 2) this country is the centre of their vital interests. In turn, the state of a person’s sojourn is the state where a person lives for a certain period of time; this place is not the centre of the person’s vital interests, nor does it depend on whether they go there voluntarily or not.

3.2. Factors which should be analysed for the determination of “sojourn” or “residence” of displaced natural persons during war

The place of sojourn is acquired by simply staying in the territory of a country for a certain period and does not depend on other factors. That is why to determine whether Ukrainians have acquired a place of sojourn in the territory of a foreign state, one should analyse if they have stayed there for a certain period of time (e.g. six months).

The answer to the question of whether they have changed their residence is however not so simple. First of all, it requires an analysis to what extent an individual’s stay in a certain country is voluntary. If a person is there solely because they cannot return to their home country due to the war, in our view, the place of residence has not been changed. Second, the answer to this question depends on whether the person wishes the

⁴⁹ Council of Europe, Committee of Ministers: *Resolution (72)*..., see also — discussing Polish PIL — M. Świerczyński, in: *Prawo prywatne międzynarodowe. Komentarz*. Ed. M. Pazdan. Warszawa 2018, p. 105.

country in which he/she is now to be the centre of their life interests, and whether the external circumstances of their life confirm such a wish. Third, the period of time, during which he/she stays in a particular country must be taken into account. Although we are not in favour of the view that the residence requires living in a country for a fixed period of time, in our opinion, it is not possible to assert that the place of residence of a person who left his country three or four months ago has changed. Even if a person does have such an intention, it is likely that he/she has not yet had such a strong link with the country of its stay to assert that the external circumstances of their life confirm the change in the place of residence.

At the same time, we admit that there may be situations where a person does not have a place of residence at all. For example, if a person definitely does not want to return to the country of their nationality, even when the war is over, and if he/she has nothing to do with it other than a passport (none of their relatives no longer lives in the country of their nationality, all their property in this country is destroyed, so that person has no longer a job in the country of his/her nationality). However, that person may still not have any particular links with the country in which he/she stays (has neither property nor job in this country; their family is partly in the same country with him/her, partly — in the other country).

3.3. The consequences of a change of sojourn or residence and impossibility to determine the residence

Obviously, a change of sojourn or residence will change the applicable law where the connecting factor refers to the law of the state in the territory of which a person has its sojourn or residence. In addition, changing the place of residence of a Ukrainian will lead to the emergence of a foreign element in the relationship, since UPILA considers a citizen of Ukraine residing abroad as one of the possible manifestations of a foreign element in the subject composition of the relation.⁵⁰ Consequently, conflict of laws rules of UPILA may be applied to the private-law relations of such a citizen of Ukraine with another citizen of Ukraine or a legal entity registered in Ukraine. This, in turn, may refer to the application

⁵⁰ According to Article 1 of UPILA, the “foreign element” appears in relationships in which: at least one of the parties to the legal relationship is a citizen of Ukraine, who resides abroad, a foreigner, a stateless person or a foreign legal entity; the object of the legal relationship is in the territory of a foreign state; or a legal fact that creates, changes or terminates legal private relationship exists in the territory of the foreign state.

of foreign law (even if there are no other foreign elements in the private relationship).

Third, sometimes the change of state of sojourn or residence will lead to the change of personal law, since they are used as criteria for determination the personal law of an individual in certain cases.⁵¹ Based on the fact that the personal law of a refugee is determined as the state in which he/she has their place of sojourn (Article 16(4) of UPILA), it can be argued that the citizens of Ukraine, who received the status of refugees in another state, have changed their personal law to the law of the state where they have their sojourn now. However, since Article 16(4) of UPILA refers only to refugees, it has no effect on the personal law of citizens of Ukraine who received temporary protection status in foreign countries.

Since personal law is a connecting factor used to determine the applicable law in many cases,⁵² its change will lead to the change of the applicable law to all the relationships which are governed by a personal law.

⁵¹ Namely, according to Article 16(2—4) of UPILA: “2. If an individual is a citizen of two or more states, their personal law shall be that of the state with which he/she has the closest connection, in particular their place of residence or main activity. 3. The personal law of a stateless person is the law of the state in which that person has their place of residence or, failing that, their place of sojourn. 4. The personal law of a refugee is the law of the state in which he/she has his (her) sojourn.”

⁵² The personal law of the natural person governs: the emergence and termination of their civil passive legal capacity (Article 17(1) of UPILA); their civil active legal capacity (Article 18(1) (the first sentence) of UPILA (at the same time, civil legal capacity of a natural person with regard to transactions and obligations arising out of infliction of harm may also be governed by the law of the state, where the transactions were concluded or where obligations arising out of infliction of harm arose, unless otherwise stipulated by law (Article 18(1) (the second sentence) of UPILA); the grounds and legal consequences of declaring a natural person legally incapable, or limiting his (her) civil legal capacity (Article 18(2) of UPILA); the natural person’s right to his or her name, its use and protection (Article 21 of UPILA). The grounds and legal consequences of recognition of a natural person missing or declared him or her dead are governed by the last of the known personal laws of that natural person (Article 20 of UPILA). The establishment and cancellation of guardianship and custody over minors, juveniles, incapacitated persons, and persons whose civil legal capacity is limited, is governed by the personal law of the ward. The obligation of the guardian (custodian) to accept guardianship (custody) is governed by the personal law of the person who is appointed guardian (Article 24(1,2) of UPILA). The right to marry is governed by the personal law of each person who applies for marriage (Article 55(1) (the first sentence) of UPILA). The common personal law of spouses is one of the connecting factors applicable for the determination of the law applicable to the legal consequences of marriage (Article 60(1) of UPILA). The personal law of one of the spouses is one of the connecting factors that spouses may choose to govern the property consequences of marriage (Article 61(1) of UPILA). At the same time, such a law ceases to be applied in the event of a change such a personal law (Article 61(2) of UPILA). Establishment and contestation of paternity is governed by the personal law of the child at the time of birth (Article 65 of UPILA). The rights and duties of parents and children

In cases where the conflict of laws rule refers to the place of residence of the person, and it is impossible to determine such a place, the law applicable to the relevant relationship will be the law of the state with which the relationship has the closest connection.⁵³

We must also mention that natural persons, forced to live their country because of war, are treated as refugees, therefore some factors as to the understanding of the notion of “residence” or “habitual residence” can be found in the Convention Relating to the Status of Refugees of 28.07.1951⁵⁴ (hereinafter: Geneva Convention). In the light of Article 12(1) of this Convention, which is clearly a conflict of laws rule, the personal status of a refugee shall be governed by the law of the country of his domicile or, if he has no domicile, by the law of the country of his residence.⁵⁵ Therefore if a person has home country based on a well-founded fear of prosecution for example based on nationality, it can obtain an international protection in a country of residence. Also the EU Common European Asylum System (CEAS), based on Article 78 of EU Treaty and the Directive of the European Parliament and the Council no. 2011/95 of 13.12.2011 on standards for the qualification of third-party nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (hereinafter: the qualification Directive),⁵⁶ provides the refugees with the protection. The CEAS provides

are governed by the child's personal law (Article 66 of UPILA). Personal law plays an important role in determining the law applicable to the adoption relationship. In particular under Article 69 of UPILA: “1. Adoption and its revocation are governed by the personal law of the child and the personal law of the parent. If the adoptive parents are spouses who do not have a common personal law, the law that governs the legal consequences of marriage is to be applied. 2. A person's capacity to be an adoptive parent is determined according to their personal law. 3. The legal consequences of adoption and its termination are determined by the personal law of the adoptee. 4. The care and registration of adopted children shall be governed in accordance with the personal law of the child.”

⁵³ This conclusion follows from the Article 4(1, 2) of UPILA, under which: “The law to be applied to private legal relations with a foreign element is determined in accordance with the conflict of laws rules and other provisions of this law, other laws, international treaties of Ukraine. (2.2) If, in accordance with paragraph 1 of this Article, it is impossible to determine the law to be applied, the law, which is more closely connected to the private legal relations shall be applicable.”

⁵⁴ Available at <https://www.unhcr.org/3b66c2aa10> [accessed: 25.08.2022].

⁵⁵ As some Authors point out — the ‘domicile’ should be nowadays interpreted as ‘habitual residence’ and ‘residence’ as a “simple residence” (Polish *pobyt prosty*) — see M. Pilich: *Uchodźcy w prawie prywatnym międzynarodowym* [Refugees in Private International Law]. “Gdańskie Studia Prawnicze” 2022, no. 1, p. 26 and the references to the German literature.

⁵⁶ Official Journal of 20.12.2011, L 337/9.

also the possibility to obtain a subsidiary protection. Moreover, in some cases a person who cannot be treated as a refugee in the light of Geneva Convention, can obtain a subsidiary protection, if that person cannot return to the home country as there is a risk of “serious harm” (see Article 15 of the qualification Directive). Moreover, the law of a Member State can provide some regulations on asylum or some other forms of temporary protection.⁵⁷ It is clear that various statuses in the light of public law can influence the determination of applicable law, especially when it comes to the personal status of a foreigner (having a refugee status or not). In the light of Polish law, the Geneva Convention prevails over the Polish PIL, if the latter contradicts with the international law (see Article 93 of the Polish Constitution of 1997). The notion of “personal status” used in Article 12(1) of the Geneva Conventions seems to encompass various cases, connected to a natural person, which can be seen as too wide,⁵⁸ such as legal status, legal capacity, family affairs, affairs between spouses and the inheritance cases, however the interpretation of ‘personal status’ may differ in the convention countries.⁵⁹ On the other hand, the qualification Directive treats similarly non-refugees and the refugees to whom the Geneva Convention applies, so perhaps the common interpretation of ‘residence’ should be applied.⁶⁰ It also seems, taking into account the purposes of the Convention, that the forced displacement should not be a determining factor (usually when taking about the ‘habitual residence’ or simple ‘residence’ (sojourn), it is underlined that it should be voluntary⁶¹ for the purposes of applying PIL⁶²), so even if a natural person was forced to leave the home country, he obtains at least a ‘simple residence’ or even a habitual residence in the “new” country.

Moreover, Polish PIL envisions in Article 3(1) that if the statutory law provides that the law of a person’s nationality shall apply, and the nationality of this person cannot be determined, or this person is not a national of any country, or the content of their national law cannot be ascertained,

⁵⁷ In Poland — see Ustawa o udzielaniu cudzoziemcom ochrony na terytorium Rzeczypospolitej Polskiej (Act on protection of foreigners by the Republic of Poland) of 13.06.1993, Dz.U. (Official Journal) of 2003 no. 128, item 1176.

⁵⁸ M. Pilich: *Uchodźcy w prawie prywatnym międzynarodowym...* pp. 17—20, 23.

⁵⁹ *Ibidem*, pp. 24—25 and the literature cited there.

⁶⁰ *Ibidem*, p. 24.

⁶¹ See M. Pazdan: *Prawo prywatne międzynarodowe*. Warszawa 2017, pp. 72—73; *idem*, in: *Prawo prywatne międzynarodowe. Komentarz*. Ed. M. Pazdan. Warszawa 2018, p. 41.

⁶² However D. Baetge argues that voluntariness is not a prerequisite of having “habitual residence” in most cases — *idem*, in: *Rome Regulations. Commentary...*, p. 313. The same point of view is presented by J. von Hein, *ibidem*, p. 416, based on cited German cases.

then the law of the country of their place of domicile shall apply; in the absence of the place of domicile, the law of the place of their habitual residence shall apply. Provision of Paragraph (1) shall accordingly apply to a person who was granted the protection in the country other than the country of their nationality due to the fact that its links with the country of nationality were breached because of violations of fundamental human rights in the latter country (Article 3.2 of Polish PIL). As a consequence it is likely that such person will integrate easier in a welcoming country as well as the “closer” law (of a country of de facto residence) will be applied. Article 3 of Polish PIL provides therefore norms to non-convention refugees and is complementary with the Geneva Convention.⁶³ If neither domicile nor habitual residence can be applied, the law of the country most closely connected shall apply (Article 10.1 Polish PIL, however some authors argue that this article does not apply to personal status, treating Article 3.2 as *lex specialis*⁶⁴). The need to interpret the notions of ‘(habitual) residence’ more functionally, poses a question if a “traditional” understanding of them, as encompassing only voluntary residence, is still practical, especially during an on-going war, without any signs as to the possible date of its end and result. We believe that it can be argued that the notion of ‘habitual residence’ should be interpreted functionally, focusing on the factual factors, even if the displacement of persons was not voluntary. If therefore the life of a person is *in casu* centred in a welcoming country, for instance, for the purposes of applying Article 6 of Rome I Regulation (habitual residence of a consumer when there was no choice of law clause in a sales contract), we could argue that for example Polish law applies. On the other hand, it seems that the future practice of courts of officials in Poland or other countries which have become “new homes” for millions of Ukrainians since February 2022, will determine how the notion of “breach of links with the country of nationality” will be interpreted. As we discussed earlier, it is almost certain that many of those who have left Ukraine are willing to come back, hoping for the rapid end of the war. It seems that the need for functional and practical interpretation of law might lead to a broader understanding of ‘(habitual) residence’, encompassing also cases when the displacement was forced, but lasting many months or years, leading to the concentration of life in the welcoming country. As we do not need to analyse the willingness to stay in a country (no *animus manendi* is needed, as opposed to domicile), only facts should be taken into account, even if the change of residence was

⁶³ M. Pilich: *Uchodźcy w prawie prywatnym międzynarodowym...*, p. 30.

⁶⁴ See M. Świerczyński, *ibidem*, p. 101. On the contrary — J. Poczobut, in: *Prawo prywatne międzynarodowe. Komentarz*. Ed. J. Poczobut. Warszawa 2017, pp. 257—260.

not voluntary (that can be especially an argument in cases when a person knows that perhaps there is no possibility of going back as for example their house was destroyed or the whole town/city is no longer habitable).

We could also argue, taking into account the traditional understanding of (habitual) residence as being voluntary,⁶⁵ that in the light of Article 10(1) of Polish PIL, as well as for the purposes of Rome I Regulation, in many cases when applying the law of the country the most closely connected, we would apply the law of the welcoming country (e.g. of the consumer, of the place of where the contract was concluded or performed etc., or where the movables were placed when for example the pledge was made). The same would be grounded when applying Article 4(3) of Rome II Regulation (instead of common habitual residence of parties — law with the closest connection). Perhaps that would be a bit contrary to the autonomous interpretation of EU law, however it seems well based in the discussed circumstances.

4. Conclusions

The displacement of natural persons during the war may affect the determination of applicable law if the conflict of laws rule links it to domicile, habitual residence, permanent residence, residence or sojourn of natural person. In addition, it may affect the determination of the personal law, where it is defined as the law of the country of domicile, habitual residence, permanent residence, residence or sojourn of natural person. The displacement due to the war also affects the factors that will be analysed to determine domicile, habitual residence, permanent residence, and residence per se. Some of the factors (such as the location of property, the place where the family lives, etc.) that would normally be analysed cannot be applied. There may be situations in which a person has lost links with the country of his or her nationality because of the war but has not acquired strong links with any other country. In such cases, the it may not be feasible to determine either a habitual place of residence or, for that matter, a permanent residence. Legal assistance agreements do not contain an answer to the question of how to act in such a case, so the answer must be based on the rules of the EU law (should such a question arise before a court or an official of the EU member state); while in

⁶⁵ See also K. Bagan-Kurluta: *Prawo prywatne międzynarodowe*. Warszawa 2021, p. 129.

the absence thereof — on the basis of the national law of the concerned member state; or on the rules of UPILA (should the question arise before a court or an official of Ukraine). In the last mentioned case, the applicable law will be determined as the law which is more closely connected with the respective relationship.

References

- Bagan-Kurluta K.: *Prawo prywatne międzynarodowe*. Warszawa 2021.
- Callies G.P. (Ed.): *Rome Regulations. Commentary on the European Rules of the Conflict of Laws*. Alphen aan den Rijn 2011.
- Czepelak M.: *Międzynarodowe prawo zobowiązań Unii Europejskiej*. Warszawa 2012.
- Dovhert A., Merezhko A.: *Kodyfikatsiia mezhdunarodnoho chastnoho prava v Ukrainy*. In: *Ocherky mezhdunarodnoho chastnoho prava*. Red. A. Dovherta. Kharkiv—Odysee 2007.
- Dutta A.: *Domicile, Habitual Residence and Establishment*. In: *Encyclopedia of Private International Law*, Vol. 1. Eds. J. Basedow, G. Rühl, F. Ferrari, P. de Miguel Asensio. Cheltenham 2017.
- Frimston R.: *A practical guide to the EU Succession Regulation outside the EU: The regulation and its impact on inheritance, and estate administration and planning in the United Kingdom and other third states*. Minehead 2020.
- Hayton D.: *The Problems of Diversity*. In: *European Succession Laws*. Ed. D. Hayton. Jordans, 2002.
- Kalakura V.Ia.: *Mizhnarodne simeine pravo*. In: *Mizhnarodne pryvatne pravo: pidruchnyk*. Eds. A.S. Dovherta, V.I. Kysilia. Kyiv 2014.
- Kalus S., in: *Kodeks cywilny. Komentarz. Tom I. Część ogólna (art. 1—125)*. Eds. M. Habdas, M. Fras. Warszawa 2018.
- Kysil V.: *Mizhnarodne spadkove pravo*. In: *Mizhnarodne pryvatne pravo: pidruchnyk*. Eds. A.S. Dovherta, V.I. Kysilia. Kyiv 2014.
- Lagarde P.: *Commentary to Art. 21*. In: *EU Regulation on Succession and Wills*. Eds. U. Bergguist, D. Damascelli, R. Frimston, P. Lagarde, F. Odersky, B. Reinhartz. Verlag Dr. Otto Schmidt, 2015.
- Magnus U., Mankowski P. (Eds.): *European Commentaries on Private International law. Commentary. Volume III. Rome II Regulation*. Ed. O. Schmidt. Köln 2019.
- Di Marzio M., Matteini Chiari S.: *Comunicazioni e notificazioni nel processo civile*. Giuffrè Editore, 2008.
- Nový Z. : *Evolutionary Interpretation of International Treaties*, “Czech Yearbook of International Law” 2017, Vol. VIII.

- Nguyen Nam H.: *Essential 25000 English-Estonian Law Dictionary*. 2018.
- Pazdan M.: *Prawo prywatne międzynarodowe*. Warszawa 2014.
- Pazdan M.: *Prawo prywatne międzynarodowe*. Warszawa 2017.
- Pazdan M. (Ed.): *Prawo prywatne międzynarodowe. Komentarz*. Warszawa 2018.
- Pilich M., *Uchodźcy w prawie prywatnym międzynarodowym* [Refugees in Private International Law]. “Gdańskie Studia Prawnicze” 2022, no. 1.
- Poczobut J. (Ed.): *Prawo prywatne międzynarodowe. Komentarz*. Warszawa 2017.
- Vasylchenko V.: *Naukovo-praktychnyi komentar Zakonu Ukrainy ‘Pro mizhnarodne pryvatne pravo’*. Kyiv 2007.

Online sources

- Atallah M.: *Surnud isiku viimane alaline elukoht kui peamine ühendav tegur Pärismääruse (650/2012) kontekstis. The Last Habitual Residence of the Deceased as the Principal Connecting Factor in the Context of the Succession Regulation (650/2012)*, available at: <https://digikogu.taltech.ee/et/item/12ef6230-1018-4a15-ac33-12fa812896e1>
- Council of Europe: Committee of Ministers: *Resolution (72) 1 On the Standardization of the Legal Concepts of “Domicile” and of “Residence”*, 18.01.1972, available at: <https://www.refworld.org/docid/510115e12.html>
- European Commission: Employment, Social Affairs and Inclusion: *Poland — Place of Residence*, available at: <https://ec.europa.eu/social/main.jsp?catId=1124&langId=en&intPageId=4731>
- EUR-Lex, an official website of the European Union: *Primacy of EU Law*, available at: <https://eur-lex.europa.eu/EN/legal-content/glossary/primacy-of-eu-law.html>
- Joireman S.F.: *Ukrainian Refugees Might Not Return Home, Even Long After The War Eventually Ends*, The Conversation, 5.04.2022, available at: <https://theconversation.com/ukrainian-refugees-might-not-return-home-even-long-after-the-war-eventually-ends-180294>
- Lyst Vyshchoho Spetsializovanoho Sudu Ukrainy z rozghliadu tsyvilnykh i kryminalnykh sprav vid 16.05.2013 № 24-754/0/4-13 ‘Pro praktyku rozghliadu sudamy tsyvilnykh sprav z inozemnym elementom’, Zakonodavstvo Ukrainy, available at: <https://zakon.rada.gov.ua/laws/show/v-754740-13#Text>
- Operational Data Portal: *Ukraine Refugee Situation*, available at: <https://data2.unhcr.org/en/situations/ukraine>
- Rishennia Shevchenkiivskoho raionnoho sudu m. Lvova vid 30 lypnia 2011 roku. Sprava № 2-26/11, Yedynyi derzhavnyi reiestr sudovykh rishen, available at: <https://reyestr.court.gov.ua/Review/17573419> [access: 01.07.2022].
- The Number of refugees in Germany as of May 14, 2022. Over 700,000 refugees from Ukraine registered in Germany*. Welt am Sonntag reports, available at: <https://www.reuters.com/world/europe/over-700000-refugees-ukraine-registered-germany-welt-2022-05-14/> [access: 22.05.2022].