The Notion of Habitual Residence

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Abstract This contribution summarizes key aspects of habitual residence as a connecting-factor and a basis of jurisdiction in European private international and procedural law. It addresses its significance for avoiding discrimination based on nationality in the EU and its relevance for integrating migrants in the societies of the countries where they reside. Finally, the contribution discusses some key questions of habitual residence, i.e. the foreseeability of its application or the appropriateness of a uniform versus a differentiated interpretation of this term, as well as practical matters such as the habitual residence of children or its *ex officio* application by courts.

Keywords European family and succession law, habitual residence, connecting-factors.

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I. Introduction

European family and succession law applies to matters of personal life. As a consequence, private international law typically refers to personal factors as a means of referring to a certain legal system. Traditionally, there are three significant options: nationality, domicile, and residence. The instruments of European family and succession law, however, demonstrate a clear preference for habitual residence, in particular compared to the traditional preference for nationality in many Member States.

II. Reasons for preferring habitual residence over nationality

There are two main reasons for preferring habitual residence over nationality as a connecting-factor in the EU. One has to do with the avoidance of discrimination based on nationality, the other is an answer to the migration of workers in a more general manner.

1. Avoiding discrimination in the EU

It is a *leitmotiv* of European law that EU citizens must not be discriminated against on the basis of their nationality. This principle is closely related to the fundamental freedoms under the TFEU. In private international law, it is relevant for access to courts on a non-discriminatory basis as well as for integration into the civil society in cases where EU nationals live in another Member State. In other words, reference to a connecting-factor other than nationality is necessary for establishing a single market without establishing a single citizenship.

2. Migration in general

The latter aspect is relevant also for migrant workers in general.[1] From the perspective of those Member States which formerly preferred nationality as the main connecting-factor in international family and succession law, the result was that family and succession matters of foreign nationals were

1 For a short analysis see already *Pfeiffer*, IPRax 2016, 310 (311).

predominantly governed by the law of their home country. The preference for nationality was initially based on the idea that nationals are subjected to the laws of their nation. A more modern reason, however, was that most people rarely change their citizenship. Referring to nationality as a connecting-factor ensured a stable point of reference and thus served the goal of continuity in relation to questions of personal status. Moreover, nationality is easy to determine, and – unlike residence and domicile – difficult to manipulate. All in all, it served the purpose of legal certainty. Moreover, nationality was supposed to reflect the country with which a person's long-term life interests were associated. Especially in international family and succession law, these long-term life interests are at the same time interwoven with a person's cultural background. The legitimate expectations of those subject to the law are often that their personal lives will be governed by rules that correspond to their own cultural identity. On the other hand, the link to residence and domicile stands more for the aspects of integration and adaptation.

In recent decades, the effects of the principle of citizenship should be seen against the background of the broad European migratory flows. In practice, the principle of nationality has led above all to the fact that the family and inheritance relationships of foreign nationals have often been judged not according to the laws of the country where they live, but according to their home country's law. Behind this was a concept that for a long time shaped the typical view on migrant workers. Traditionally, many Member States did not see themselves as countries of immigration. The workers who were called from abroad were addressed as "guest workers". The general expectation was that these "guests" would work in their host country for a few years or sometimes a bit more, but then eventually return to their home countries. The principle of citizenship in private international law was a reflection of this idea. Migrants were not considered a permanent part of the society of their host State; the focus of their long-term life interests was seen to lie in their home countries. The principle of nationality was intended to respect not only these long-term life interests, but also their lasting cultural roots in their country of origin. At the same time, it was ensured that their family and succession matters were judged according to the same rules as in their home countries. This was intended to realize another important goal of private international law, namely the avoidance of so-called limping legal relationships, i.e. a situation in which, for example, a person is considered divorced in one country while still married in the other. The application of the principle of nationality was thus both an expression of respect for the native culture of foreigners and an expression of a policy aiming at

the non-integration of migrant workers into the societies of their host State. This was intended to maintain the ties of foreigners to their home countries as much as possible, to not impair their opportunities to return, but rather to promote their willingness to return. Today, this conception of legal policy has given way to a more integration-oriented approach which is reflected by an application of the laws of the country where persons habitually reside. It is a part of the personal integration of migrants, also of non-discrimination, that their family relations are governed by the rules of their country of residence.

3. The necessity of contractual options

Today's world is characterized by the coexistence of very different concepts of life. Migration of workers may in many cases result in the permanent residence in the host country, and in other cases a return to the home country, or in a move to yet another country. If migrant workers stay permanently in their host country, this will typically affect the next generation as well. This is very different in the case of the migration of retired persons, who may simply prefer living in a more pleasant or warmer area of Europe for the last period of their lives. This pluralism is the reason why a "one size fits all"-solution is not acceptable in private international law anymore. Applying habitual residence as the most significant connecting-factor in European private international law is acceptable only because the relevant instruments also offer the possibility to choose other options.

III. Short survey of EU provisions

1. Jurisdiction

Insofar as jurisdiction is concerned, habitual residence is referred to in Art. 3 Brussels II bis Regulation for matters relating to divorce or similar issues and Art. 8 Brussels II bis Regulation in relation to parental responsibility. Art. 3 Brussels II bis Regulation provides for several alternatives, partly based on the present or past habitual residence of the spouses or, with certain modifications, to the habitual residence of one of the spouses. Art. 8 Brussels II bis Regulation refers to the habitual residence of the child, not the parents. In the Maintenance Regulation, Art. 3 offers a choice between the habitual residence of the creditor and the defendant as a basis for jurisdiction. Art. 4

Succession Regulation refers to the habitual residence of the deceased at the time of death. The Matrimonial Property Regulation indirectly refers to habitual residence in case of the death of a spouse (Art. 4) and in cases of divorce or a similar issue (Art. 5). In other cases, there is a direct reference to the habitual residence of the spouses or their last habitual residence or the habitual residence of the respondent (Art. 6 Matrimonial Property Regulation). A jurisdictional reference to the place of habitual residence of the partners is also provided for in Art. 6 Partnership Property Regulation. Prior to the enactment of the Maintenance Regulation, the habitual residence of the person entitled to maintenance was referred to as a basis for jurisdiction in the original version of the Brussels Convention, and still is in Art. 5 no. 2 of the 2007 Lugano Convention.

2. Applicable law

It seems fair to say that, in European family and succession law, habitual residence has become the most significant statutory connecting-factor. For divorces, this can be derived from Art. 8 (a)–(c) Rome III Regulation. In relation to matrimonial property, Art. 26 (1) Matrimonial Property Regulation refers to the first common habitual residence of the spouses after their marriage. In addition, Art. 26 (3) (a) Maintenance Regulation refers to a previous longer common habitual residence as a possible ground for deviating from the reference to the first common habitual residence. Furthermore, the habitual residence of the spouses (or either spouse) is an option for a contractual choice of law under Art. 22 (1) Matrimonial Property Regulation. The situation is slightly different with regard to the Partnership Property Regulation, which – for political reasons – mainly refers to the law of the State of registration; however, even with regard to the cases covered by this instrument, habitual residence serves as a connecting-factor in exceptional cases under Art. 26 (2). Art. 21 (1) Succession Regulation, like the jurisdictional rule in its Art. 4, refers to the habitual residence of the deceased at the time of death. In cases under the Maintenance Regulation, a reference to the habitual residence of the creditor follows from its Art. 15 in conjunction with Art. 3 (1) Hague Maintenance Protocol.

IV. Key issues

Questions of habitual residence have been discussed intensively and extensively in private international law in general and European private international law in particular.[2] It is not the purpose of this contribution to repeat this discussion, but rather to point out those aspects of these discussions which cause the most significant practical problems.

1. Foreseeability – habitual residence as a general clause

The first and probably most significant problem is foreseeability. From a methodological perspective, the term "habitual residence" is a general clause and not a sharply defined notion. The theoretical as well as the practical answer to this problem seem to be identical: It is highly desirable to determine foreseeable, adequate criteria that define habitual residence. It can be seen from the national reports within the EUFams II project that national courts have understood and accepted this necessity.[3] However, defining criteria for determining a person's habitual residence is only a first step. It is typical for legal arguments that the relevance of certain facts may differ, depending on the presence or absence of other factors. This is particularly true for determining habitual residence. The workplace may be relevant for determining the habitual residence of a person who works full-time, but it will probably be less relevant in case of a student travelling around on a work-and-travel basis. The relevance of arguments also oscillates between form and substance. If a person's life is very stable and deeply rooted in a certain environment, it will, in many instances, suffice to find out this person's domicile in order to determine the habitual residence; considering a specific intent may be unnecessary if the objective factors are sufficiently clear.[4] The situation is much more complicated in cases of a more volatile lifestyle where all factors indicating personal, economic, and social integration may be relevant. It may even be that under Art. 12 Brussels II bis Regulation (choice of court

2 Most thoroughly *Rentsch,* Der gewöhnliche Aufenthalt im System des Europäischen Kollisionsrechts.

3 See e.g. *EUFams II Consortium,* Comparative Report on National Case Law, parts C.III.3 and D.III.1.a.

4 *EUFams II Consortium,* Comparative Report on National Case Law, part D.III.1.a.

agreement in the best interest of a child), factors other than the child's actual residence are accepted as being more important.[5]

In this context, a common feature of all general clauses is that their interpretation may be influenced by "fore-structured" understandings. To a certain extent, the project indicates that this is also the case in relation to habitual residence. From a bird's eye perspective, in hard cases, habitual residence as a connecting-factor serves the purpose of determining whether a person is part of this or of that society. French courts seem to include a person's nationality in the list of relevant criteria[6], which may have to do with the fact that nation on the one hand, and society on the other, are very closely related to each other in French legal and political thinking. By contrast, the German legal discussion would rather look at a person's intent in these situations in order to determine whether a person will, in the long run, rather be a part of this or that society.[7] However, a German argument would probably take into account a person's nationality indirectly, i.e. as a circumstance that may indicate a person's long-term plans and interest.

While these observations are not meant as a comprehensive methodological analysis of the problems raised by referring to habitual residence as a connecting-factor, they indicate the significance of legal thinking. Making use of general concepts such as habitual residence in European private international law results in a higher significance of different fore-structured legal understandings. Such different understandings may exist as a result of differences in legal, political, philosophical, cultural, economic or social thinking in different Member States, which is not per se a bad thing. To some extent, this situation will be mitigated by CJEU case law, which is available already[8] and will grow over time. However, in order to achieve greater and better harmonization, concepts such as habitual residence require more exchange and more common legal education.

A more difficult issue is whether rules of thumb[9] would be helpful. That may be the case if they really fit the purpose and are generally accepted

5 *EUFams II Consortium,* Comparative Report on National Case Law, part B.III.2; see also part F.III.10.

6 *EUFams II Consortium,* Comparative Report on National Case Law, part C.III.3.

7 *EUFams II Consortium,* Comparative Report on National Case Law, part D.III.1.a.

8 See in particular CJEU 29.11.2007, C-68/07 (*Sundelind Lopez/Lopez Lizazo*); CJEU, 02.04.2009, C-523/07 (*A*); CJEU, 22.12.2010, C-497/10 (*Mercredi/Chaffe*); CJEU, 09.10.2014, C-376/14 PPU (*C/M*); CJEU, 15.02.2017, C-499/15 (*W and V/X*); CJEU, 08.06.2017, C-111/17 PPU (*OL/PQ*); CJEU, 28.06.2018, C-512/17 (*HR*); CJEU, 17.10.2018, C-393/18 PPU (*UD/XB*); CJEU, 16.07.2020, C-80/19 (*EE*).

9 For an example, see *EUFams II Consortium,* Comparative Report on National Case Law, part D.III.1.b.bb.

throughout the Member States. The latter would usually require that these rules of thumb are backed by some European authority (CJEU case law; statements of the Commission or similar). Rules of thumb developed by national courts will help only where they are advocated in cross-border exchanges or legal writing and well-received in a majority of Member States. Experience indicates that this simply does not happen at all or, without intervention by the legislator, happens only in very rare cases.

2. Uniform or differentiated interpretation

Another standard question, namely whether a uniform or differentiated interpretation of habitual residence applies, has also been discussed within the Project, e.g. at the final conference.

To answer this question, one should have in mind that the reference to habitual residence is, by itself, made in a different manner in different European instruments. In particular, there are differences with regard to the persons concerned and with regard to time. A very good example is the Succession Regulation which refers to the habitual residence of the deceased (who will certainly not be a party to any proceedings relating to the estate under this instrument) at the time of death. By contrast, the Matrimonial Property Regulation refers to the spouses, i.e. the parties to the legal relationship governed by this Regulation. Moreover, it refers to the first common habitual residence after their marriage, so that the relevant habitual residence may be determined more easily.

As a consequence, the factors (or rather the weight of the various factors) relevant for determining habitual residence will, in any event, vary according to the differences in relation to the relevant persons or moment in time. Against this backdrop, the question of whether a uniform or differentiated concept of habitual residence should apply, depends on the level of abstraction. In the very specific normative settings of the various references to habitual residence, the relevance of criteria may differ. The overall duration of residence will be more relevant when persons travel back and forth between two different abodes[10] than in a case where the first habitual residence needs to be determined for purposes of the Matrimonial Property Regulation. The intent of an adult may be more relevant than the personal intent of a minor, whose residence is generally determined by persons having custody.[11]

10 *EUFams II Consortium,* Comparative Report on National Case Law, part C.III.3.

11 *EUFams II Consortium,* Comparative Report on National Case Law, parts D.III.1.a and b.

Moreover, since the habitual residence depends on a broad variety of factual elements, establishing the relevant facts will result in very specific problems with regard to different instruments. In relation to the Matrimonial Property Regulation, e.g. the determination of a couple's first common habitual residence may relate to events that occurred a long time ago[12]; the reference to the habitual residence of the deceased raises the problem that the most important source of information for its determination, i.e. the deceased himself, is not available anymore in case of any controversy.

3. Habitual residence of children

The most controversial specific issue seems to be determining the habitual residence in cases involving divorce, separation or custody. Firstly, this may have to do with the highly emotional and, sometimes, extremely controversial character of custody matters between parents in the course of their separation or divorce. Secondly, children typically do not decide themselves where they live, but depend on the decisions of others. As a consequence, it is more difficult to determine their long-term plans and interest; courts cannot and do not rely on the child's plans and intentions.[13] Thirdly, the habitual nature of a child's residence and its long-term perspective is influenced by its best interest, so that any decision on habitual residence seems to include substantive best-interest aspects.[14] Fourthly, in relation to children, the legal framework is more complicated than in other cases because of the relevance of further international instruments, such as the Hague Child Abduction Convention.

In general, however, it seems fair to say that these complications may be seen as a mere consequence of the general complexity of determining habitual residence. One of the answers to these problems is the option for a prorogation agreement in Art. 12 Brussels II bis Regulation and, as of 1 August 2022, Art. 10 Brussels II ter Regulation; it may be worthwhile discussing whether these options may be extended in the future.

12 *Baruffi/Danieli/Fratela/Peraro,* Report on the Italian Exchange Seminar, part F.III.

13 *EUFams II Consortium,* Comparative Report on National Case Law, parts C.III.3 and D.III.1.b.aa.

14 E.g. *EUFams II Consortium,* Comparative Report on National Case Law, parts F.III.2 and G.III.3.

4. *Ex officio* scrutiny of jurisdiction

The rules of European family law provide for a scrutiny of the jurisdiction of the court seized *ex officio* (Art. 17 Brussels II bis Regulation, Art. 10 Maintenance Regulation, Art. 15 Property Regimes Regulations). A different rule, however, is stated by Art. 9 Succession Regulation, which provides for jurisdiction based on appearance.

This difference is a consequence of third party interests involved in family law cases. Yet, the Comparative Report indicates that some courts seem to abstain from an *ex officio* scrutiny of their jurisdiction in cases where no party has raised any objections against the proceedings.[15] This certainly has to do with the circumstance that the existence of third party interests, including public interest aspects, is an abstract possibility; relevant third party interests do not necessarily exist in all cases. Therefore, these cases raise the question whether the underlying approach should be legalized, i.e. to enact a rule that a court may base its jurisdiction on an appearance without objection, if it is manifest that no relevant third party rights are at stake.

V. Conclusions

Very significant policy reasons underline that, for reasons of European integration and as an answer to problems of immigration, habitual residence is and should be the most significant connecting-factor in European family and succession law, as long as it is accompanied by contractual choice of law options. Most problems relating to habitual residence stem from its nature as a general clause; foreseeability and application will certainly be improved over time by CJEU case law. However, international exchange and the further development of a common European understanding are important factors as well. It may also be discussed whether the role of agreements between the parties should be enhanced in the future.

15 *EUFams II Consortium,* Comparative Report on National Case Law, parts B.III.4 and G.III.1.

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