"Habitual residence" as connecting factor in EU civil justice measures

In the EU’s recent Succession Regulation, habitual residence is the key connecting factor for determining both which courts have jurisdiction and what law is applicable to a transnational succession. Habitual residence is increasingly being used as a connecting factor in EU legislation which includes "conflict of laws" rules.

Conflict rules and their harmonisation

In any transnational legal relationship it is always necessary to determine which legal system should apply (conflict of laws) and which country's courts should decide a case (conflict of jurisdictions). For this purpose, various "connecting factors" are employed (e.g. the place where a contract was concluded). However, every country has its own system of conflict rules, often different from the systems of other countries. Therefore, the same case (e.g. a succession dispute) could be treated differently depending on the court which hears a case. This is because different national conflict-of-laws rules may use different connecting factors to determine which law applies, possibly leading to different outcomes. That frustrates the whole system of conflict rules, leading to unpredictability and incoherence.

In order to avoid such situations, member states of the Hague Conference on Private International Law have elaborated uniform conventions containing harmonised conflict rules, starting with the 1902 conventions on the conflict of laws regarding marriage and the conflict of laws and jurisdictions regarding separation and divorce. In recent years, unification of conflict rules has been fostered at EU level, in the form of regulations.

Personal connecting factors

Conflict rules can provide for various factors connecting a person with a legal system. Traditionally, the most frequently used ones include domicile (in common law countries), nationality (in civil law countries), place of residence, and place of temporary residence. The notion of "habitual residence" as a connecting factor emerged under the influence of the Hague Conference and was first used in 1902. As a matter of policy, the Hague Conventions do not define the notion, to avoid rigidity. The notion has been taken over by numerous national laws and, recently, by EU law.

Domicile versus nationality

Domicile is defined as a "permanent home". Every person obtains a domicile at birth and in order to prove a change, a court requires evidence not only of the new residence, but also of a firm intention to live there permanently, understood to be a person's actual state of mind. A person can have only one domicile at a time and cannot be without domicile. It is often impossible to ascertain domicile without a court decision, and the rules are often viewed as artificial and unpredictable.

In contrast to domicile, nationality is relatively easy to determine both for the interested person and for third parties. However, one person can have more than one nationality and a person may also be considered stateless. A perceived weakness of both nationality and domicile is their rigidity in connecting a person to their country of origin. This is considered inadequate especially in the context of free movement of persons. According to a recent report, over 12 million EU citizens live in a different Member State (MS) than that of their nationality and they are often integrated into the social environment of their country of residence. Therefore, determination of their capacity to marry or to make a will according to the law of the MS of their nationality is considered inappropriate. In particular, it could lead to discrimination of EU citizens who are residents but not nationals of a given MS.

Habitual residence is viewed as superior to nationality and domicile as a connecting factor owing to its flexibility. However, precisely because it is not defined strictly, it can be difficult to prove in more difficult cases.
Habitual residence occupies a prominent position in the recently adopted Succession Regulation. In particular, it provides that the courts of the state in which the deceased had their habitual residence at the time of death shall have, in principle, jurisdiction over the entire succession and that the applicable law should also, in principle, correspond to the deceased's habitual residence. (Details of the Regulation can be found in a December 2012 Policy Department note.)

The preamble to the Regulation indicates that when assessing habitual residence, all circumstances of the deceased’s life, both at and before their death, ought to be considered. Habitual residence should be based on a “close and stable connection” with a state. Factors to be taken into account include the duration, regularity, conditions and reasons for staying in a country. Habitual residence in someone’s country of origin can be maintained through social and family ties, despite their having moved abroad. The nationality of the deceased and the location of their assets could be a decisive factor in the case of persons who have lived in many states or travelled between different states without settling permanently.

Other EU legislation

Habitual residence has been used as principal or subsidiary connecting factor in EU legislation concerning conflict rules, including:

• Regulation on the law applicable to contractual obligations (Rome I);
• Regulation on the law applicable to non-contractual obligations (Rome II);
• Regulation on the law applicable to divorce and separation ("Rome III");
• Regulation on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility; and
• Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.

The notion of habitual residence also appears in a number of current legislative proposals in the field of conflict rules, including in the proposed regulations on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes and regarding the property consequences of registered partnerships; as well as in the proposal for amending the Insolvency Regulation.

Residence or habitual residence is also used as a connecting factor in EU public law legislation, including social security coordination, the European Arrest Warrant, as well as the Staff Regulations of EU officials.

Habitual residence in CJEU case law

Within the private international law field, the Court of Justice of the EU (CJEU) has shed some light on the notion of habitual residence in the context of child abduction. The Court underlined the importance of the integration of a child into their social and family environment, pointing out that habitual residence is a question to be decided by the national court in light of the specific factual circumstances. According to the CJEU, such factors may include the duration, regularity, conditions and reasons for the child's stay in a given place and the family's move there, the child's nationality, the place where they attend school, what languages they speak, as well as their family and social relationships.

CJEU case law in other fields of law could be of assistance in the area of private international law. Within the sphere of social security, the Court underlined that habitual residence has an autonomous meaning under EU law. It indicated that it corresponds to the habitual centre of interests of a person, adding that in order to assess where someone’s habitual residence is located, the length of residence, the length and purpose of absence, as well as the person’s apparent intention must be taken into account. Under the Staff Regulations of EU officials the CJEU has ruled that the place of habitual residence is the place where one has established a permanent centre of interests with the intention of giving it a lasting character. Finally, in the context of the European Arrest Warrant, the CJEU found that a person is "resident" in a MS when they have established their "actual place of residence" there.