



GOVERNING INHERITANCE STATUTES
AFTER THE ENTRY INTO FORCE
OF EU SUCCESSION REGULATION



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DEFINITIONS OF HABITUAL RESIDENCE

HABITUAL RESIDENCE IN EUROPEAN PRIVATE INTERNATIONAL LAW

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Unit 1

THE ORIGIN OF “HABITUAL RESIDENCE”



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I. THE ORIGIN OF “HABITUAL RESIDENCE”

Habitual residence is an **international connecting criterion**, aiming at identifying a stable and actual link between a person and a given geographical area.

Actually, there are domestic private international law provisions that adopt such criterion, but they have been passed following the international success of this concept, and do not always adopt its essential elements.

- See, for instance, Art. 44 of the Belgian Code of Private International Law.



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The earliest adoption of this criterion can be traced back to the proceedings of the Hague Convention of 1900:

- as **simple residence** in the second session;
- and defined as **habitual residence** during the third session.



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The introduction of the new (habitual) residence criterion was due to the attempt to overcome the problems arising from the use of **domicile** as a connecting factor.

In fact, the domicile concept is traditionally a juridical one; therefore, it varies depending on the legal system under consideration.

The habitual residence criterion (which is established based on factual elements) allows overcoming the differences in the interpretation of the domicile concept, thus establishing a genuinely international connecting factor, whose interpretation is not linked to or, as it is usually said, is independent from the national legal systems.



In other words, the habitual residence criterion was introduced in order to overcome the **conflicts of qualification** that arose in the past with respect to the **domicile criterion**, due to its many different definitions in the various national systems.



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Residence has been qualified as **habitual** in order to stress the idea that this criterion should establish an actual and genuine geographical connection between the person under consideration and a given place.



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The **Hague Convention of June 15, 1955** relating to the settlement of conflicts between the law of nationality and the law of domicile, **is the latest** of all the Hague Conference Conventions to use **domicile** as a connecting factor.

It defines domicile as «*le lieu où une personne réside habituellement*» (Art. 5)



In the European Union, **Regulation (EU) 1215/2012** on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (so called Reg. **Bruxelles I bis**) is the only one using domicile as a general connecting factor (**Art. 4**) (Before, **Regulation (EC) 44/2001** abrogated by Reg. 1215/2012 employed the same concept).



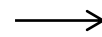
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The general habitual residence criterion is also introduced in the following pieces of legislation:

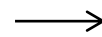
- **Reg. (EC) 2201/2003**, on matrimonial matters and matters of parental responsibility (**Bruxelles II bis**)



Art. 3: for separation and divorce [*domicile* if UK or Ireland]

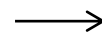
Art. 8: In matters of parental responsibility → **Jurisdiction titles**

- **Reg. (EC) 864/2007** on the law applicable to non-contractual obligations (**Rome II**)



Art. 4: Applicable law

- **Reg. (EC) 593/2008** on the law applicable to contractual obligations (**Rome I**)



Art. 4: Applicable law



- **Reg. (EC) 4/2009** on food and contractual obligation matters
(Food Regulation) → **Art. 3:** Jurisdiction
Art. 15: Applicable law
The Hague Protocol of 2007 : → **Art. 3:** Food creditor's habitual residence

- **Reg. (EU) 1259/2010 (Rome III)** on the law applicable to divorce and legal separation → **Art. 8:** Applicable law

- **Reg. (EU) 650/2012 (Succession Regulation)** on jurisdiction and applicable law in matters of succession → **Art. 4:** Jurisdiction
Art. 21: Applicable law

- **Reg. (EU) 1103/2016** on jurisdiction and applicable law in matters of matrimonial property regimes →

Art. 4: Jurisdiction
Art. 21: Applicable law

- **Reg. (EU) 1104/2016** on jurisdiction and applicable law in matters of the property consequences of registered partnerships →

Art. 6: Jurisdiction
(Pursuant to **Art. 26**, the applicable law shall be the **law of the State under whose law the registered partnership was created**)



Unit 2

THE CONCEPT OF HABITUAL RESIDENCE



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II. THE CONCEPT OF HABITUAL RESIDENCE :

A. LACK OF A DEFINITION IN THE LEGISLATION

There is no definition of «habitual residence» in the Hague Conference Conventions, nor is there any in the EU private international law Regulations.

The international regulator was confronted with:

- The need to provide a standardised definition of habitual residence, for legal certainty's sake; and
- The need to keep habitual residence a flexible concept, which is easy to apply to real-life cases.

And the second need prevailed.



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B. AUTHORS AND AUTHORITIES

The authorities have **interpreted** the concept by identifying the habitual nature of the residence with **two elements** – an **objective** and a **subjective** one.



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OBJECTIVE ELEMENT

Quantitative aspect

Qualitative aspect

It measures the (time) **duration** of the **stay** of a person in the State's territory

It focuses on the **nature** and on the **characteristics of the stay**

SUBJECTIVE ELEMENT



It investigates the **person's intention** to **establish** his/her **main stable centre of life and business interests**



It may lead to conclude that one is the habitual residence **even if the duration** of the stay **is not significant**



It is different from the qualitative aspect of the objective element, which considers the **nature of the stay**

C. THE EU COURT OF JUSTICE CASE LAW

The EU Court of Justice has not been involved in interpreting the concept of habitual residence in the framework of the Succession Regulation, yet.

However, there are many decisions on this matter, which relate to Regulation Brussels II bis.



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The **EU Court of Justice**, with reference to the **minor's habitual residence** pursuant to Regulation (CE) 2201/2003, deemed the following elements relevant, to be assessed considering all the factual circumstances of each case:

- **Proximity criterion**
(the minor must be physically located in the State)

- {
- case **W, V c. X** (C-499/15);
 - case **O.L.** (C-111/17);
 - case **UD c. XB** (C-393/18).

- **Duration, regularity, conditions and reasons for the stay, and for moving**

- {
- case **A** (C-523/07);
 - case **HR** (C-512/17);
 - case **UD c. XB** (C-393/18).

- Minor's
nationality, place,
school attendance
and conditions,
social and cultural
bonds



- caso **A** (C-523/07);
- caso **HR** (C-512/17);
- caso **UD c. XB** (C-393/18).



BUT



NO major relevance for **cultural bonds and nationality, to the detriment of objective geographical considerations** [case **HR** (C-512/17)]

- The **will of the person concerned** to establish in a State the **permanent or habitual centre of his interests**, with the intention that it should be of a **lasting character**

→ ***Mercredi*** case (C-497/10)

↓
BUT

- The parent's intention shall be **manifested by tangible steps** (such as the purchase or rental of accommodation in the State)

→ {
- case **A** (C-523/07);
- case **O.L.** (C-111/17).

Unit 3

HABITUAL RESIDENCE IN THE SUCCESSION REGULATION



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III. HABITUAL RESIDENCE IN THE SUCCESSION REGULATION

Regulation (EU) 650/2012 on successions by reason of death adopts the habitual residence criterion:

- Both as general jurisdiction title (Art. 4);
- And as objective connecting factor (Art. 21)

Which ensure the *forum* and *ius* to coincide.



This was an advisable choice in many respects.

Habitual residence is to be preferred over the nationality principle, for the following reasons:

- It better fits the situation of high-immigration Countries such as the EU Member States;
- It fits the EU legislation, which:
 - * prohibits any regulatory inequality in socioeconomic relations based on nationality (Art. 12 TUE);
 - * promotes the free movement of people;
- It is more in line than nationality with the proximity principle;
- It prevents technical problems that would have arisen with the adoption of the nationality of the deceased at the time of death as objective connecting factor.



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The enforcement of the habitual residence principle in succession matters should be consistent with its interpretations by the authorities and case-law :

a) *The objective element.* whereas clause n. 23:

1. «In order to determine the habitual residence, the authority dealing with the succession should make an overall assessment of the circumstances of the life of the deceased during the years preceding his death and at the time of his death, taking account of all relevant factual elements, in particular the duration and regularity of the deceased's presence in the State concerned and the conditions and reasons for that presence.»
2. «The habitual residence thus determined should reveal a close and stable connection with the State concerned taking into account the specific aims of this Regulation.»



b) *Subjective element*: whereas clause n. 24:

«(...) where the deceased for professional or economic reasons had gone to live abroad to work there, sometimes for a long time, but had maintained a close and stable connection with his State of origin(...) the deceased could, depending on the circumstances of the case, be considered still to have his habitual residence in his State of origin in which the centre of interests of his family and his social life was located.»



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The habitual residence rule may be disregarded not only when the person concerned has made his/her choice of law, but also **pursuant to the exception clause** of Article 21, § 2, which:

- It allows **applying to the succession, by way of exception**, not the law of the State where the deceased had his habitual residence at the time of death but, rather, the law of the (other) State with which the deceased was, at the time of death, «manifestly more closely connected».
- It assumes the existence of an habitual residence of the deceased;
- It only applies to «the determination of the law applicable to the succession» (Whereas clause n. 25)».

The general **jurisdiction title** still remains the **habitual residence**, pursuant to Article 4.



- c) *Exception clause:* Whereas clause n. 24:
- c) «Other complex cases may arise where the deceased lived in several States alternately or travelled from one State to another without settling permanently in any of them. If the deceased was a national of one of those States or had all his main assets in one of those States, his nationality or the location of those assets could be a special factor in the overall assessment of all the factual circumstances»

Other provisions of Regulation (EU) 650/2012 adopting the habitual residence connecting factor :

- Art. 10, par. 1, lett. b): subsidiary jurisdiction title;
- Art. 13: Court jurisdiction to receive a declaration concerning the acceptance or waiver of the succession, of a legacy or of a reserved share;
- Art. 24, par. 1: admissibility and substantive validity of last wills and testaments;
- Art. 25, par. 1 e 2: admissibility and substantive validity of agreements as to succession;
- Art. 27, par. 1, lett. d): Formal validity of dispositions of property upon death;
- Art. 64: Competence to issue the European Succession Certificate.

