

HABITUAL RESIDENCE PARTICULARITIES IN THE LIGHT OF NATIONAL CIVIL LAW AND E.U. LAW – COMPARATIVE APPROACH

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Abstract: *The article deals with the concept of “habitual residence” in the light of both national and E.U. legislation, according to the provisions of the Romanian Civil Code, as well as the Hague Convention on the Civil Aspects of International Child Abduction; The Regulation (EC) No. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility and The Regulation (EU) No 650/2012 of the European Parliament of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession.*

Key words: *habitual residence, national law, European Union law, jurisdiction, conflict.*

1. Introduction

The notion of “habitual residence” is a controversial one and criticized in doctrine in terms of lacking a clear definition or its vague meaning. Most of the documents referring to this concept, like *The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, the *Regulation (EC) No. 2201/2003 (Brussels II bis) concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility* or the *Regulation (EU) No 650/2012 of the European Parliament of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession* do not define this notion, but established some key elements that should be taken into account when defining the habitual residence by the authority entitled to determine it.

Thus, the EU legislation offers just a general framework for it.

On the one hand, this approach is meant to avoid any kind of rigidity, leaving the authority entitled to define the notion the freedom of interpretation based on the key elements, but on the other hand can't avoid the risk of an arbitrary interpretation.

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The main role in establishing the meaning of this notion has thus comes to the International and European courts, to the practice of which we will refer to in the present analysis.

As stated in the doctrine *"The Court of Justice has on several occasions fixed the landmarks of the habitual residence, stating that this is "the place where the interested person has fixed, with the intention of giving it a stable character, the permanent or usual center of its interests, being understood that, for the purpose of determining such residence, it is important to take into account all its constituent elements"* (D.A. Popescu, 2016, p. 203).

2. The notions of domicile, residence and habitual residence within the Romanian legislation

Having established the principle of freedom of establishment and change of domicile or residence, whether in the country or abroad, with the limitations expressly provided for by law, the Romanian legislator determines further on the uniqueness of both domicile and residence.

As far as the legal definition of residence is concerned, we find it an incomplete one, the legislator limiting on showing that "the residence of the individual is in the place where he has his secondary house", according to Art. 88 of the Romanian Civil Code.

The regulation of the right to residence at the national level is also found in Art. 25, par. (2) of the Romanian Constitution, according to which "every citizen is guaranteed the right to establish his/her domicile or residence in any locality in the country, to emigrate, and to return to the country."

In order to establish the meaning of "habitual residence", we will refer further on to the provisions of private international law in Book VII of the Civil Code, which, in the first paragraph of Art. 2570, states that *"the habitual residence of the individual is in the State where the person has his main house, even if he has not fulfilled the legal formalities for registration. The habitual residence of an individual acting in the exercise of his professional activity is the place where that person has his main place of business"*.

The legislator operates with the notion of main house, specifying in the next paragraph of the above-mentioned text the criteria according to which it is determined, namely "those personal and professional circumstances that indicate lasting ties with that state or the intention to establish such links".

As far as the legal person is concerned, its habitual residence is represented, according to Art. 2570, paragraph (3) of the Cod civil by "the state in which it has its main establishment", the latter being defined by the fourth paragraph of the same Article as "the place where it has established its central administration".

Regarding the proof of habitual residence, the legislator allows any evidence in this respect.

3. The habitual residence and the right to free movement

One of the most important freedoms that a citizen of the European Union enjoys is the

freedom of movement, freedom that is well connected to the freedom of residence.

According to the first paragraph of Article 45 of the Charter of Fundamental Rights of the European Union (2000/C 364/01), "Every citizen of the Union has the right to move and reside freely within the territory of the Member States", while the second paragraph establishes that "freedom of movement and residence may be granted, in accordance with the Treaty establishing the European Community, to nationals of third countries legally resident in the territory of a Member State".

The Treaty on the Functioning of the European Union, referring to the internal market in Article 26 (ex Article 14 TEC), establishes, in the second paragraph of the previous mentioned Article, that "the internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties".

One of the aims of the E.U. that the Treaty on the Functioning of the European Union establishes is, according to Art. 166 (ex. Art. 150 TEC), paragraph (2), to "facilitate access to vocational training and encourage mobility of instructors and trainees and particularly young people".

In the very same context of emphasising the idea of free movement, the Treaty on the Functioning of the European Union, in Art. 180 (ex 164 TEC), lit. d) includes the "stimulation of the training and mobility of researchers in the Union", among the activities that the European Union shall carry out.

4. The notion of habitual residence according to the Hague Convention on the Civil Aspects of International Child Abduction provisions

The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction which has been incorporated into Romanian law by Law no. 100/1992, is a reference document for the notion "habitual residence", although the Convention does not define it. in order "to avoid rigidity" (R. Mańk, 2013, p. 1).

As it was stated in *Holder v. Holder*, the lack of a definition "has helped courts avoid formalistic determinations but also has caused considerable confusion as to how courts should interpret 'habitual residence.'" [J Atkinson, 2011, p. 649].

According to the doctrine, maybe "the most influential definition of the term <habitual residence> comes from the English case of *In re Bates*, No. CA 122-89, High Court of Justice, Family Div I Ct. Royal Courts of Justice, United Kingdom (1989).

In this case, at first the court found that: "The notion of habitual residence is free from technical rules, which can produce rigidity and inconsistencies as between legal systems the facts and the circumstances of each case should continue to be assessed without resort to presumptions or presuppositions All that is necessary is that the purpose of living where one does have a sufficient degree of continuity to be properly described as settled." Then it gave the following definition: "[T]here must be a degree of settled purpose. The purpose may be one or there may be several. It may be specific or general. All that the law requires is that there is a settled purpose. That is not to say that the propositus intends to stay where he is indefinitely. Indeed, his purpose while settled may be for a limited period. Education, business or profession, employment, health,

family or merely love of the place spring to mind as common reasons for a choice of regular abode, and there may well be many others. All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled.” (Ilija Rumenov, 2013, p. 63)

5. The notion of habitual residence under the Regulation (EC) No. 2201/2003 (Brussels II bis) concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility

The Council Regulation (EC) No 2201/2003 of 27 November 2003 *concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility* refers to habitual residence as a fundamental concept in the matter of jurisdiction, but does not define this term.

According to The European Court of Justice interpretation in the case C-523/07: „the concept of ‘habitual residence’ under Article 8(1) of Regulation No 2201/2003 must be interpreted as meaning that it corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, in particular the duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State must be taken into consideration. It is for the national court to establish the habitual residence of the child, taking account of all the circumstances specific to each individual case.” [<http://curia.europa.eu/juris/document/document.jsf?jsessionid=6F712C221916BAB2091B4E7D1A1DAE7F?text=&docid=73639&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=838603>].

In the light of the ECJ interpretation, there is a complex of factors that should be taken into account when defining the concept of habitual residence, among which there could be emphasized the duration of the stay on the territory of a Member State, its regularity, the conditions or reasons for it, also the nationality or the linguistic knowledge.

6. The notion of “habitual residence” in the light of the *Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession* and, *Regulation(EC) No 862/2007 of the European Parliament and the Council, of 11 July 2007, on Community statistics on migration and international protection and repealing Council Regulation (EEC) No 311/76 on the compilation of statistics on foreign workers*

According to Recital (23) of the Regulation the habitual residence of the deceased at the time of his death should be “the general connecting factor for the purposes of determining both jurisdiction and the applicable law”.

The Regulation also indicates a series of factors, called “relevant factual elements” that

should be taken into account by the authority dealing with the succession while determining the habitual residence, namely "in particular the duration and regularity of the deceased's presence in the State concerned and the conditions and reasons for that presence", the aim being to reveal "a close and stable connection with the State concerned".

According to Article 2, par. (1), lit. (a) of the *Regulation (EC) No 862/2007 of the European Parliament and the Council, of 11 July 2007, on Community statistics on migration and international protection and repealing Council Regulation (EEC) No 311/76 on the compilation of statistics on foreign workers* the "usual residence" means the place at which a person normally spends the daily period of rest, regardless of temporary absences for purposes of recreation, holiday, visits to friends and relatives, business, medical treatment or religious pilgrimage or, in default, the place of legal or registered residence".

7. Conclusions

Despite all the critics generated by the lack of a legal definition of "habitual residence", it cannot be denied, as stated by the doctrine, that "in terms of today's globalised world, especially the EU's internal market which is characterised by free movement of its citizens, the criterion of habitual residence constitutes a suitable and better connecting factor for the purposes of determining jurisdiction of the competent authority, as well as for designating the applicable law" (Rohová, I., Drličková, K., 2015, p. 378).

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***Hague Convention on the Civil Aspects of International Child Abduction provisions.

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