



Présentation / Intervention

2018

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How to cite

BUMBACA, Vito. Habitual residence in International family law. In: Suzhou Conference. Renmin University - Suzhou. 2018.

This publication URL: <https://archive-ouverte.unige.ch/unige:105916>

CIVIL CODIFICATION IN CHINA AND IN EUROPE

Renmin University - Suzhou

19th of May 2018 – afternoon session

Vito Bumbaca

Good afternoon everybody,

I am very honoured to be part of the Unige team, Faculty of Law. A special thanks for this goes to Professor Chappuis and Professor Romano. I would also like to thank the University of Renmin and the Chinese delegation indeed for the great welcome they provided us; I was very much looking forward to coming to China, nice food and very nice people by the way. Beyond food which is fundamental but not for my presentation, it is important to make an **initial premise**: Many European and US experts are too focused on their regional cross-border issues, sometimes mono-national issues; however, I do believe it is important today, especially for young generations, young professional legal experts, to develop their international and transnational thinking. This is truer in such an international globalised context, as in today's world, where international mobility and intercountry marriages take place in a cross-border dimension – *proof is many Renmin students coming to Geneva every year, very smart students by the way, to learn the fundamentals of Western legal methodologies and bring home important insights to be able to deal with intercountry issues involving China or outside the borders of China.*

In this sense, private International law needs to satisfy and facilitate through predictable and just rules those fundamental rights and needs for which individuals seek international protection. Such rules need to define above all, the cross-border provisions to determine competence – *international competence I would say.* I will be talking about the latter and I am very pleased and happy to

discuss with you such an important topic as is the one of habitual residence in Private International Family law.



Habitual residence has prevailed nowadays over other connecting factors such as domicile and nationality. This has been the wave of the Hague Conference on Private International law whose activity – *more particularly the impacts of its advocacy* – in family law, particularly child custody proceedings, is renowned in Europe, less in the US, and much less I would say in the Arabic peninsula and Asian continent. Connecting factors mean the particular legal social nexus between the person and the State authorities – *this nexus determines international competence*.

The problems with domicile were caused in the past by the permanent nature of such criterion that was not realistic vis-à-vis international mobility, particularly the principle of free movement that is fundamentally present in the EU (TFEU, art. 21). Regarding nationality, the unrealistic nature was related to bi-national couples, therefore bi-national children, over whom competence could have been retained by two States – *this would have generated the possibility of cross-border positive and negative conflicts*.

In order to guarantee efficient and effective international administration of justice – *by preserving the nexus between individual needs and the appropriate protection for them* – the criterion of habitual residence responds to current issues of international mobility, migration and cross-cultural marriages, by assessing and identifying international competence within a cross-border dimension. I am thinking about the 1996 Hague Child Protection convention according to which 48 States among which Russia, Cuba, Dominican Republic and Morocco agreed to apply habitual residence as a prevailing connecting factor –

different socio-legal cultures achieving harmonised cross-border solutions. The same can be said for the Hague Child Abduction convention that applies to 98 States, among others to South Africa, Tunisia, Brazil, Macao, Hong Kong and Japan. Again the 2007 Hague Convention on child support and maintenance that applies, among others, to Kazakhstan, US, Turkey, Bosnia and Herzegovina.

Lastly, the 1978 Hague Convention on the Law applicable to Matrimonial Property regimes and the 1989 Hague Convention on the law applicable to Succession and estates which were unfortunately unsuccessful in terms of their ratification – *in fact only a few EU States + Argentina acceded to them.*

All these international instruments apply the criterion of habitual residence with primary importance prevailing, therefore, over nationality and domicile both in terms of cross-border conflicts but the influence is noted also in national legislations. I am thinking about Switzerland (LDIP, art. 20), US (UCCJEA, sec. 102), China (PILA, art. 21 and 31), Russia (Civil code, art. 20).



Habitual residence does not contain specific uniform definition in any of the contexts mentioned above - *Maintenance, Succession, Property regimes, divorce*; nor is it harmonised in terms of legislative references – *some States refer to their civil code provisions others to PILA provisions by providing different definitions.* i.e.

Chinese PILA arts.21 and 31 say: *'the place where the party has continuously resided for more than one-year period of time and as the party's central place of life can be identified as the habitual residence, unless the party stays at the place solely for the purpose of medical treatment, dispatched work or official duty'* **(SPC judicial interpretation of CPILA)**

Switzerland PILA art. 20 says: *'habitual residence in the state where he or she lives during a certain period of time, even if this period initially appears to be of limited duration'*.

US UCCJEA, sec.102 says: *'Home State means the State in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding. In the case of a child less than six months of age, the term means the State in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period'*.

Russia, Civil Code art. 20 says: *'the place where an individual permanently or primarily lives'*.

In absence of a Hague guidance – *de lege ferenda for orienting purposes* – the harmonisation of habitual residence is therefore left to the judicial authorities depending on the context (i.e. Succession, Property regimes, Divorce) and through a case-by-case approach – *case-by-case means that each authority, judicial or administrative, such as central authorities define habitual residence based on a different typology of elements.*

The CJEU said in a parental responsibility 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**'.*

The Seychelles Supreme Court said in a divorce case called *Dituro v. Dituro*: *'In determining whether a person is habitually resident in a place account shall be taken of the duration and continuity of the residence as well as of other facts of a personal or professional nature which point to durable ties between a person and his residence. [...] **The residence of a person shall be the place in which he resides in fact and shall not depend upon his legal right to reside in a country.**'*

The Swiss Federal Tribunal in the case 889/2011 on alimony proceedings said: *La Convention de Lugano ne contient aucune définition de la notion de résidence habituelle. [...] Selon la définition qu'en donne en règle générale la jurisprudence, **la notion de résidence habituelle est basée sur une situation de fait et implique la présence physique dans un lieu donné**; la résidence habituelle de l'enfant se détermine ainsi d'après le centre effectif de sa propre vie et de ses attaches En conséquence, outre la présence physique de l'enfant, doivent être retenus d'autres facteurs susceptibles de faire apparaître que cette présence n'a nullement un caractère temporaire ou occasionnel et que la résidence de l'enfant traduit une certaine intégration dans un environnement social et familial; sont notamment déterminants la durée, la régularité, les conditions et les raisons du séjour sur le territoire et du déménagement de la famille, la nationalité de l'enfant, le lieu et les conditions de scolarisation, les connaissances linguistiques ainsi que les rapports familiaux et sociaux de l'enfant **Un séjour de six mois crée en principe une résidence habituelle, mais celle-ci peut exister également sitôt après le changement du lieu de séjour, si, en raison d'autres facteurs, elle est destinée à être durable et à remplacer le précédent centre d'intérêt**'.*

The common denominator elements in the above cases are durability and regularity – *however it is said in all three cases that these need to be interpreted according to the circumstances of each case.* This may cause fragmentation across borders.



The idea would be to consider the methodology used by the EU Succession Regulation guidance (applies to 25 States) which says: *'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. 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'.*

The EU regulation provides a sort of explanatory guidance of how to determine habitual residence – *this is not a legal definition as for domicile, this is as I said an 'explanatory guidance' which remains however ephemeral vis-à-vis the identification of elements and especially distinction between key elements and complementary elements.* **A further protocol to the 1996 Hague Convention or a general comment within the UNCRC aimed at orienting judicial and administrative authorities to identify key elements and complementary elements to determine habitual residence, would allow streamlined and less expensive proceedings.**

In addition, it should be said that the Succession Regulation does provide guidance but it makes a *renvoi* to the judicial interpretation of habitual residence

given by the ECJ within the Brussels IIA on parental responsibility. This brings not simple mere confusion because **a)** *it means that the legislators intend to harmonise the interpretation at the EU level, which is not the case in practice; b)* *the two contexts of succession and parental responsibility are different, in terms of individuals – deceased and child – therefore the interpretation of habitual residence cannot be harmonised based on the circumstances of the case – case-by-case – as the discrepancies arising from the assessment approach would be huge.*



In the Asian continent, Private International Law indeed refers to the criterion of habitual residence to determine international competence. Nonetheless there are two diverse elements that do not allow for regional harmonisation: **a)** the hierarchical importance of habitual residence vis-à-vis nationality which changes in relation to the country – *in China, habitual residence is at the centre of important criticism but its role is topical in solving cross-border family disputes in both transnational marriages and succession proceedings. In Korea, nationality still prevails over habitual residence (PILA, art. 18); same for Japan (PILA, art. 26).* **b)** the definition of habitual residence according to which *in China both subjective and objective interpretations are used in support of its determination. In Korea the subjective element is absent.*



The absence of the Chinese ratification of important Hague Conventions, as well as for other Asian States, notably Korea (that has for instance acceded to but not ratified THC-1980 and neither acceded to nor ratified THC-1996), Japan (that has neither acceded to nor ratified THC-1996), Taiwan, Mongolia – these two States never ratified the majority of the international Hague conventions – potentially

represents the reason for such non-harmonisation of the criterion of habitual residence, and therefore of the rules determining international competence. However the Permanent Bureau is not the only inter-governmental organisation advocating for the harmonisation, unification and uniformity of PIL – I could refer **a)** to *the European Union and the Council of Europe* that have done a great job of harmonisation in the past years at the regional level, both legislatively and judicially thanks to the important number of Regulations and Conventions applicable today in Europe, I'll name just two of them: the Council Regulation 2201/2003 known as *Brussels IIA* that provides uniform rules to regulate, among others, the *regional competence* in divorce and parental responsibility in 28 MS and the Council Regulation 650/2012 known as the *Succession Regulation* that applies in 25 MS; **b)** to *the International Social Service* with more than 140 members across the globe, notably in Asia it is present in Hong Kong, Japan, Korea and other countries and whose work is based on a *child centred approach* whereby the nexus between the State and the child must be the most appropriate and familiar with the needs of a child-family relationship with both parents. This approach applied uniformly among 140 Members allows uniform rules of international competence beyond the Hague borders, I would dare to say, although always in the fullest respect of the Conventions' safeguards; **c)** *the UNCRC* which is the base for any Hague Family Convention (i.e. 2007 Maintenance Convention, Abduction, Child Protection) and encourages the substantive enjoyment of familial and children's fundamental rights worldwide.

All this gives good hope for PIL harmonisation, particularly in relation to rules determining competence which are indispensable for predictability and justice. If those experts sitting in this prestigious room would decide tomorrow to discuss the foundations of a regional inter-governmental institution that would be responsible to promote and approve harmonised, unified and uniform

instruments, **such as a Protocol or general principles** to determine *regional competence* in the Asian region this would **a)** not only be appreciated by us, young western individuals firstly, before experts, wishing to get closer to Asia – as myself who has recently gotten married to a Euro-Asian lady from Siberia (not very far away from here), a very nice lady by the way who came to this region last year to develop and promote harmonisation of trade standards for the International Trade Center – *again harmonisation* – as well as not always citing Europe or US in our research; and **b)** it would be considered as the quantum leap in Asian PIL reaching more efficient and effective cross-border Chinese, Korean and Japanese proceedings reducing costs and delays.

In conclusion it is encouraged in today's world, and in absence of a private international law court, to provide a harmonised *protocol guidance* in the spirit of good and genuine administration of judicial and administrative justice – I would say – across international borders. An *intercountry habitual residence* whereby it is proven that the individual concerned – *de cujus or child or couple* – is *enraciné et entouré* in that given State per *traditions, cultures, origins, education, social security, economic stability, fiscal taxation, family and professional life*. Furthermore, it would be reasonable to provide orienting components, notably a) **key elements** (i.e. *matrimonial life, principal home property, professional and social life; specifically for children: proper exercise of parental custody rights, age of the child, their integration such as concerns social and family life, school, comprehension and use of the language*); b) **complementary elements** (i.e. *period of time and durability of the stay – as provided in Chinese law ≈1 year - parental intention*) - in order to predict the determination of habitual residence. I would like to leave you with a question - *are these protocol guidance and related orienting components possible?*

Thank you