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HABITUAL RESIDENCE V. DOMICILE: A CHALLENGE FACING AMERICAN CONFLICT OF LAWS

Mo Zhang

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HABITUAL RESIDENCE V. DOMICILE: A CHALLENGE FACING AMERICAN CONFLICT OF LAWS

Mo Zhang*

Abstract

Habitual residence has now become an internationally accepted connecting factor in conflict of laws and is widely being used as an alternative to, or replacement of, domicile. This concept, however, remains remote to American conflict of laws. Although the use of habitual residence in the U.S. courts is mandated by the codification of the Hague Child Abduction Convention, there is still a lack of general acceptance in American conflict of law literature. The Article argues that habitual residence should be adopted as a conflict of law connecting factor in American conflict of laws, and it would be unwise for the U.S. to stay isolated from the rest of the world. The ongoing drafting of the Restatement (Third) of Conflict of Laws provides a great opportunity to reposition American Conflict of Laws so that the international issues would be properly and adequately addressed. Habitual residence is such an issue that the Restatement (Third) could not, and should not, ignore.

I. INTRODUCTION

In conflict of laws, determination of an applicable law or jurisdiction often depends on a relationship between a person, thing or conduct and a certain geographic location or a particular sovereign nation.¹ Such a relationship is commonly called a connecting factor.² Among the connecting factors, domicile or nationality has been the notable factor that serves as a link between a person and a legal system,³ and affects choice of law as well as jurisdiction.⁴ Conceptually, the law to which a person is subject on the basis of affiliation is called personal law or law of person in the conflict of law literature. It is the law that often applies to such personal matters as civil capacity, marriage, inheritance, and other family relations, or personal status in general.⁵ A well-accepted notion in conflict of laws is that the personal law follows the person and determines the person's important legal interests.⁶ As a quite settled choice-of-law rule, personal law governs a particular person or class of persons wherever situated.⁷

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¹ See PETER HAY, PATRICK J. BORCHERS & SYMEON C. SYMEONIDES, *CONFLICT OF LAWS* 286 (5th ed. 2010).

² See generally Stephen Szász, *The Basic Connecting Factor in International Cases in the Domain of Civil Procedure*, 15 INT'L & COMP. L. Q. 436 (1966).

³ See *id.* at 475–76.

⁴ See David F. Cavers, “*Habitual Residence*”: *A Useful Concept?*, 21 AM. U. L. REV. 475, 475 (1972).

⁵ See GEORGE MOUSOURAKIS, *FUNDAMENTALS OF ROMAN PRIVATE LAW* 85–118 (2012).

⁶ See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 11 cmt. c (AM. LAW. INST. 1971).

⁷ See *id.*

Traditionally, in the common law countries, the personal law refers to the law of the place of the person's domicile, while in most civil law countries it is the law of the country of the person's nationality.⁸ In its application, domicile, in addition to its significance to choice of law, also constitutes a ground of personal jurisdiction due to its geographic nature.⁹ In the U.S., for example, it is commonly held that a defendant in a civil action is always amenable to the general jurisdiction of a court of the defendant's domicile.¹⁰ Nationality, however, is mainly concerned with the governing law. The proposition of making nationality a connecting factor is that the national law should govern the person with respect to status and capacity, family relations, and succession.¹¹ Under the 1803 French Civil Code, for example, the laws relating to the status and the capacity of persons were binding upon French subjects even when residing abroad.¹² At that time, the prevailing notion was that the "citizens can be governed personally only by the law of the community of which they are members."¹³

It has been observed that the contrast between nationality and domicile in determining personal status is "deeply rooted in . . . traditions and policies,"¹⁴ and that "the near future holds no prospect of its elimination" as far as the personal law is concerned.¹⁵ In the past decades, however, there has been a sweeping change in the civil law countries, particularly in Europe, in the area of personal law. As a result, the concept of habitual residence has been employed to replace nationality for purposes of choice of laws. In the meantime, this change also has great impacts on the application of domicile.

At the beginning, habitual residence was used to determine personal law in the international conventions mainly concerning the matters of family law, including guardianship, child custody, marital status, and other family issues.¹⁶ It has now become a major connecting factor in continental Europe for the matters of both jurisdiction and choice of law.¹⁷ During the course of change, the application of habitual residence has been expanded from family law to many other areas including contracts and torts. For instance, in the 2008 EU Regulation on the Law Applicable to Contractual Obligations (Rome I) and the 2007 EU Regulation on the Law Applicable to Non-Contractual Obligations (Rome II), habitual residence is

⁸ See *id.*

⁹ See L.I. DE WINTER, NATIONALITY OR DOMICILE? THE PRESENT STATE OF AFFAIRS, 3 *Recueil Des Cours*, 357 (1969); see also Cavers, *supra* note 4, at 475.

¹⁰ See WILLIAM M. RICHMAN, WILLIAM L. REYNOLD & CHRISTOPHER A. WHYTOCK, UNDERSTANDING CONFLICT OF LAWS 5 (4th ed. 2013).

¹¹ See Kurt H. Nadelmann, *Mancini's Nationality Rule and Non-Unified Legal Systems: Nationality versus Domicile*, 17 *AM. J. COMP. L.* 418 (1969).

¹² See Ernest G. Lorenzen, *The French Rules of Conflict of Laws*, 38 *YALE L. J.* 165 (1928).

¹³ DE WINTER, *supra* note 9, at 368.

¹⁴ *Id.* at 357.

¹⁵ *Id.*

¹⁶ See Kurt H. Nadelmann, *Habitual Residence and Nationality As Tests at the Hague: The 1968 Convention on Recognition of Divorces*, 47 *TEX. L. REV.* 766 (1969); see also Cavers, *supra* note 4, at 477-79.

¹⁷ See Pippa Rogerson, *Habitual Residence: The New Domicile*, 49 *INT'L & COMP. L. Q.* 86 (2000); see also Rafal Manko, "Habitual Residence" as Connecting Factor in EU Civil Justice Measures, LIBRARY OF THE EUROPEAN PARLIAMENT (Jan. 22, 2013), [http://www.europarl.europa.eu/RegData/etudes/ATAG/2013/130427/LDM_BRI\(2013\)130427_REV1_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/ATAG/2013/130427/LDM_BRI(2013)130427_REV1_EN.pdf) [https://perma.cc/KV2X-N8V2].

provided as a primary connecting factor for the determination of the governing law in contracts, torts, and related areas.¹⁸

Elsewhere outside Europe, the concept of habitual residence has also been accepted in many countries in their conflict of law legislation. In China, the 2010 Choice of Law Statute makes habitual residence a basic connecting factor for choice of law.¹⁹ In Japan, under the General Rules of Application of Law (as revised 2006), the governing law of the formalities of a consumer contract is the law of the consumer's habitual residence.²⁰ In addition, habitual residence is employed in Japan as an alternative to nationality in the determination of the law applicable to the effect of marriage.²¹ Canada has also adopted habitual residence as a major connecting factor as preferred to the common law concept of domicile.²²

In the U.S., however, application of habitual residence remains, in and of itself, an unsettled issue. The codification of the Hague Convention on the Civil Aspects of International Child Abduction ("Child Abduction Convention") in the U.S. requires that the courts apply habitual residence instead of domicile,²³ but there is no general acceptance of habitual residence as a common connecting factor in American conflict of laws. In addition, although it has been acknowledged in U.S. courts that habitual residence is "a well-established concept in the Hague Conference,"²⁴ the extent to which habitual residence is applied appears to be limited to the goal of meeting "the need for uniform international interpretation" of the conventions or treaties.²⁵

Ever since the U.S. ratified the Child Abduction Convention in 1988, there has been a question about whether habitual residence should be adopted as a connecting factor to replace, or at least as an alternative to, domicile in general.²⁶ In fact, even before the Child Abduction Convention was adopted, it had been suggested in the American conflict of laws community that habitual residence be employed to "aid in resolving conflicts between state laws and also interstate

¹⁸ See Monko, *supra*, note 17.

¹⁹ The Choice of Law statute of China refers to the Statute of Application of Law to Foreign Civil Relations. The Statute was adopted on October 28, 2010, effective April 1, 2011. For general discussion about the Choice of Law Statute, see Mo Zhang, *Codified Choice of Law in China: Rules, Processes and Theoretical Underpinnings*, 37 N.C. J. INT'L L. & COM. REG. 83 (2011).

²⁰ General Rules of Application of Law, art. 11, para. 5 (2006) (Japan); see Kent Anderson & Yasuhiro Okuda, *Translation of Japan's Private International Law: Act on the General Rules of Application of Laws*, 8 APLPJ 138, 145 (2006).

²¹ General Rules of Application of Law, art. 25 (2006) (Japan).

²² See James G. McLeod, DEP'T OF JUSTICE CAN., THE MEANING OF ORDINARY RESIDENCE AND HABITUAL RESIDENCE IN THE COMMON LAW PROVINCES IN A FAMILY LAW CONTEXT 3 (2006), http://justice.gc.ca/eng/rp-pr/tl-lf/divorce/rhro_cl/pdf/rhro_cl.pdf [https://perma.cc/KU9Z-SL8K].

²³ International Child Abduction Remedies Act, 42 U.S.C. §§ 11601-11 (1988). In the meantime, in other international treaties to which the United States is a member, application of habitual residence is also required. These treaties include, for example, the Convention on the Law Applicable to Trusts and on Their Recognition (1985), and the Convention on Protection of Children and Cooperation in Respect of Inter-Country Adoption (1993). For a general discussion, see Gadi Zohar, *Habitual Residence: An Alternative to the Common Law Concept of Domicile?*, 9 WHITTIER J. CHIL. & FAM. ADV. 169 (2009).

²⁴ See *Mozes v. Mozes*, 239 F.3d 1067, 1071 (9th Cir. 2001).

²⁵ See 42 U.S.C. §§ 11601-11.

²⁶ The United States was one of the first nations to sign the Convention in 1981, but the Convention did not enter into force for the United States until 1988 when it was ratified. See Zohar, *supra* note 23, at 203-04.

problems of judicial jurisdiction.”²⁷ It was believed that the concept of habitual residence would be “useful in domestic as well as international cases.”²⁸

Nowadays, the use of habitual residence as a major connecting factor in conflict of law has become a growing trend internationally.²⁹ This development indeed poses challenges to American conflict of law. It is natural to wonder whether the U.S. is going to join the mainstream or to stay isolated in this regard. In the Restatement (Second) of Conflict of Laws (“Second Restatement”), domicile is considered the predominant factor with regard to “judicial jurisdiction; choice of law . . . and governmental benefits and burdens.”³⁰ Following the common law tradition, the Second Restatement makes domicile, for purposes of choice of law, decisive “in matters where continuity of application of the same law is important, as family law and decedents’ estates,”³¹ leaving no room for habitual residence.

The Second Restatement was adopted in 1971. At that time, international issues were deemed to have “played a marginal role in American conflicts law.”³² As a result, the Second Restatement has much of its focus on the interstate matters and limited attention to international conflicts.³³ Because of its lack of international orientation, the Second Restatement is described as “a product . . . of the simultaneous heyday of parochialism in American conflicts theory.”³⁴ In many aspects, the Second Restatement is now considered inadequate to serve today’s needs given the dramatic changes in the conflict of laws both at home and abroad.³⁵ A number of approaches adopted in the Second Restatement, or even American conflict of laws in general, are in many respects incompatible with the common practices elsewhere in the world. One example is the connection requirement for the choice of law by the parties.³⁶ In the U.S., contractual choice of law is permissible only if the law of the jurisdiction chosen bears a certain relationship with the parties or the transactions involved.³⁷ In many other countries, however,

²⁷ See Cavers, *supra* note 4, at 491.

²⁸ See *id.* at 493.

²⁹ See HAY, *supra* note 1, at 299–300.

³⁰ See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 11, cmt. c (AM. LAW INST. 1971).

³¹ See *id.*

³² Mathias Reinmann, *A New Restatement – For the International Age*, 75 IND. L.J. 575, 579 (2000).

³³ See HAY, *supra* note 1, at 75–76.

³⁴ Reinmann, *supra* note 32, at 578. Fairly speaking, however, compared with its predecessor the Restatement (First) of Conflict of Laws, the Second Restatement does contain certain rules or approaches that are in common with international practices. The highly remarkable one is the doctrine of the most significant relationship, which is similar to the “closest connection concept” widely used in Europe and many other countries. The other one is the “party autonomy principle” that allows the parties to choose the law governing their contracts. Under the First Restatement, the parties were given no right to make a choice of law. See HAY, *supra* note 1, at 1086–87.

³⁵ See generally HAY, *supra* note 1, at 72–78; Gene R. Shreve, *Preparing for the Next Century—A New Restatement of Conflicts: Introduction*, 75 IND. L.J. 399, 399 (2000).

³⁶ Mo Zhang, *Rethinking Contractual Choice of Law: An Analysis of Relation Syndrome*, 48 STETSON L. REV. 831, 865 (2015).

³⁷ Under both the Second Restatement and UCC, a relationship between the chosen state and the parties or the transaction is a prerequisite for the law chosen by the parties to be applicable. Section 187 of the Second Restatement deals with the law of the state chosen by the parties, which provides that:

- (1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.
- (2) The law of the state chosen by the parties to govern their contractual rights

connection is not a factor when the contractual parties make a choice of governing law.³⁸

The missing of the habitual residence in American conflict of laws is another example implicating the disparity between the U.S. and the international community in the area of conflict of laws. In 2000, a group of leading American conflict of laws scholars gathered in a symposium discussing the possibility of, and the timing for, the Third Conflict of Laws Restatement.³⁹ Many of them believed that the Second Restatement had become obsolete and should be updated through adoption of the Third Restatement.⁴⁰ As a response, the American Law Institute ("ALI"), in 2014, put into place a project to draft the Third Restatement.⁴¹ According to the ALI, the project "will reexamine the increasingly important subject of conflict of laws in light of significant legal developments in the field since the influential Restatement Second was published in 1971."⁴²

The Third Restatement initiative provides a great opportunity to review and assess American conflict of laws from both interstate and international perspectives. This Article intends to take an analytical look at the concept of habitual residence and discusses the issues related to choice of law. It will examine the needs for which habitual residence necessarily becomes a connecting factor. The aim of this Article is to argue for adoption of habitual residence in American conflict of laws. To that end the Article offers for purposes of discussion a proposal of habitual residence rules.

and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either

- (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or
- (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (AM. LAW. INST. 1971).

³⁸ In Europe, the parties' freedom to choose the applicable law is considered as one of the cornerstones of the system of conflict of laws rules in matters of contractual obligations. Thus, under Rome I and Rome II, no relationship is necessary for the purposes of contractual choice of laws. According to Article 3(1) of Rome I,

A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract.

Council Regulation 593/2008, 2008 O.J. (L 177) 6, 10 (EC).

³⁹ See Symposium, *Preparing for the Next Century—A New Restatement of Conflicts*, 75 IND. L.J. 399 (2000).

⁴⁰ See *id.*, at 438–39.

⁴¹ See AM. LAW INST., *The American Law Institute Announces Four New Projects*, (Nov. 17, 2014), <https://www.ali.org/news/articles/american-law-institute-announces-four-new-projects> [https://perma.cc/KK9X-XCZZ].

⁴² *Restatement of the Law Third, Conflict of Laws*, AMERICAN LAW INSTITUTE, <https://www.ali.org/projects/show/conflict-laws/> [https://perma.cc/8CPR-CVV8].

Part II of the Article begins with a general review of the development of habitual residence in conflict of laws. It examines how habitual residence evolved as a choice of law connecting factor and its methodological merits. Part III analyzes the conceptual aspects of habitual residence and its distinctions as compared with domicile. The main theme of discussion is that as both practical and theoretical matters, the application of habitual residence represents a new and growing trend in the ascertaining of personal law as well as applicable law in other areas. Part IV turns to American conflict of law literature and judicial practices in respect to habitual residence. This Article argues that the application of habitual residence in U.S. courts as a result of implementing Hague conventions and the lack of general acceptance of habitual residence in the conflict of law literature pose a great challenge to American conflict of laws. It is the challenge that prompts a need for change.

Part V calls for adoption of habitual residence in the Third Restatement. It proposes to make habitual residence a necessary connecting factor for the choice of law in the U.S. The proposal takes into account the common practice in international conflicts, aiming at making American conflict of laws more harmonized with new developments internationally. In conclusion, the Article argues that the drafting of the Third Restatement is a unique process of reshaping American conflict of laws. The Second Restatement substantially departed from the First Restatement by incorporating the fruits of American conflict of law resolution.⁴³ It is hoped and expected that the Third Restatement will reorient American conflict of laws to meet the need of the global integration.⁴⁴

II. HABITUAL RESIDENCE AS A CONNECTING FACTOR: A METHODOLOGICAL EVOLUTION IN CONFLICT LAW

Habitual residence is a concept that evolved in the course of development of conflict of laws. In the early stage of the conflict of laws history, domicile served as a geographic link between a person and the law to which he was subject.⁴⁵ Under the statist theory that was developed by Medieval Italian jurists in the twelfth century to determine the governing law on the basis of statutory interpretation,⁴⁶ statutes were classified into three categories: real, personal, and mixed.⁴⁷ The real statutes governed property interests, which were territorially based.⁴⁸ The personal statutes controlled issues involving personal status and they followed the person wherever the person was.⁴⁹ The mixed statute covered other matters, including acts done within a given territory.⁵⁰

It was also believed that the key element in ascertaining personal statutes

⁴³ See generally, Willis Reese, *American Conflict of Laws and the Restatement Second*, 28 LAW & CONTEMP. PROBS., 679 (1963).

⁴⁴ See Symeon Symeonides, *The Need for a Third Conflicts Restatement (And a Proposal for Tort Conflicts)*, 5 IND. L.J. 437, 446–49 (2000).

⁴⁵ See Nadelmann, *supra* note 11, at 418.

⁴⁶ Joel Paul, *The Transformation of International Comity*, 71 LAW & CONTEMP. PROBS., 19, 21 (2008).

⁴⁷ P.M. NORTH, CHESHIRE & NORTH'S PRIVATE INTERNATIONAL LAW 20 (Butterworth & Co. 10th ed. 1979).

⁴⁸ See DAVID CAVERS, *THE CHOICE OF LAW PROCESS*, at 2 (1965).

⁴⁹ *Id.*

⁵⁰ *Id.*

was the citizenry because a person was subject to the particular law of the city-state where the person had citizenship.⁵¹ The legal connection between the city-state and the person was the person's domicile (domicilium). The idea was that the domicile was the place of the person's permanent residence and also the center of his private life.⁵² Thus, at that time the law governing a person was basically referred to as the law of the place of the person's domicile.⁵³ As a general rule, the law of domicile determined the legal aspects of the status of the person, or the personality of the person.⁵⁴

In the Nineteenth Century, however, domicile as a conflict of law connecting factor started to fade in its importance in continental Europe as a result of the emergence of the concept of nationality. A change then took place from domicile to nationality with respect to the law of the person. The theoretical basis cementing the change was the work of Pasquale Stanislao Mancini (1817-1888), the Italian jurist, who regarded nationality as the fundament of international law.⁵⁵ According to Mancini and his followers, the law of a nation shall be applicable to all the citizens of the nation, no matter where they may be.⁵⁶ Therefore, under the nationality doctrine, all matters concerning the status of a person, including capacity, family relation, as well as succession, shall be governed by the national law of the person.⁵⁷

The nationality doctrine soon triumphed in Europe and became a "golden standard of [p]rivate [i]nternational [l]aw" on the continent.⁵⁸ As part of the modern codification process in the civil law system,⁵⁹ many European countries, and non-European countries as well, adopted in their code the nationality as a conflict of laws rule,⁶⁰ making nationality "the principal connecting factor to determine choice of law and the jurisdiction of their courts."⁶¹ This development divided civil law countries and common law countries in the determination of personal law due to the common law's keenness on domicile. In England, for example, it was a settled rule that a person's rights, and the legal effect of his acts, were determined by reference to the law of the country where he had his home. In legal language, this was referred to as an individual's domicile, a place that was not necessarily the country where he was residing or of which he was a citizen.⁶²

In its application, however, the nationality doctrine triggered several problems that rendered its use ineffective. The first problem was its inability to

⁵¹ See DE WINTER, *supra* note 9, at 361.

⁵² See *id.*

⁵³ See Nadelmann, *supra* note 11, at 418.

⁵⁴ See generally ALBERT V. DICEY & J.H.C MORRIS, CONFLICT OF LAWS, Ch.7 (10th ed., 1980).

⁵⁵ See Nadelmann, *supra* note 11, at 420.

⁵⁶ See generally, JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS OR PRIVATE INTERNATIONAL LAW 69-70 (1916).

⁵⁷ Nadelmann, *supra* note 11, at 418.

⁵⁸ See DE WINTER, *supra* note 9, at 373.

⁵⁹ The modern codifications, which took place during the eighteenth and nineteenth centuries, refer to the process involving "a rationally organized statement of the whole field of law," as compared to the early codification that was simply "a restatement of the law." See generally, JAMES G. APPLE & ROBERT P. DEYLING, FED. JUD. CTR., A PRIMER ON CIVIL LAW SYSTEM (1995), <https://www.fjc.gov/sites/default/files/2012/CivilLaw.pdf> [<https://perma.cc/9927-MWKK>].

⁶⁰ See DE WINTER, *supra* note 9, at 373.

⁶¹ See Cavers, *supra* note 4, at 475.

⁶² See A.V. DICEY, THE LAW OF DOMICILE AS A BRANCH OF THE LAW OF ENGLAND, STATED IN THE FORM OF RULES 44-45 (1879).

cope with the situation where a person's nationality could not be identified or where the person had no nationality.⁶³ This phenomenon of "stateless" persons made it impossible to determine the applicable law based on nationality.⁶⁴ As a result, countries needed an alternative doctrine to deal with this issue. In France, for example, the law of domicile was considered to be the personal law of stateless persons.⁶⁵ In addition, the United Nations Convention Relating to the Status of Stateless Persons, adopted in 1954 (Stateless Person Convention), had a clear focus on domicile rather than nationality in order to overcome the profound vulnerability that affects people who are stateless and to help resolve the practical problems they face in their everyday lives.⁶⁶ Under Article 12 of the Stateless Person Convention, "the personal status of a stateless person shall be governed by the law of the country of his domicile or, if he has no domicile, by the law of the country of his residence."⁶⁷

The second problem of the nationality doctrine was the matter of dual citizenship. The territorial nature of the law of nationality made it possible for a person to legally acquire citizenship from more than one country.⁶⁸ As to a person with dual citizenship, difficulty arose when determining the national law of the person.⁶⁹ On the one hand, such a person would be deemed "as a national by each of the states whose nationality he possesses."⁷⁰ On the other hand, the determination would have to be made in association with other factors such as the principal residence of the person or the place with which the person was most closely related.⁷¹

A third problem of the nationality doctrine concerned the governing law of corporations. With the rapid growth of the international economy, corporations, as legal persons, became major players in international trade and investment.⁷² An important issue that was raised with the presence of corporations in the world market was the legal identity or personality of corporations.⁷³ From an international law perspective, there was a question of diplomatic protection of a corporation. In conflict of laws, the issue concerned which law should govern the activities of the corporation. Under international law, the legal identity of a corporation was tied to its nationality.⁷⁴ But because the idea of corporate personhood is a legal fiction, determining its nationality could be challenging in many cases.⁷⁵ In addition, unlike

⁶³ See Cavers, *supra* note 4, at 476.

⁶⁴ See BASEDOW, ET AL., *ENCYCLOPEDIA OF PRIVATE INTERNATIONAL LAW*, Ch. 2, Nationality, 1290–1301 (2017).

⁶⁵ See DE WINTER, *supra* note 9, at 382.

⁶⁶ Convention Relating to the Status of Stateless Persons, Sept. 28, 1954, 360 U.N.T.S. 117.

⁶⁷ *Id.* at art.12.

⁶⁸ See BASEDOW, *supra* note 64.

⁶⁹ See DE WINTER, *supra* note 9, at 384–85.

⁷⁰ Convention on Certain Questions Relating to the Conflict of Nationality Laws art. 3, Apr. 12, 1930, 179 L.N.T.S. 4137.

⁷¹ *Id.* at art. 5.

⁷² See FOLSOM, ET AL., *INTERNATIONAL BUSINESS TRANSACTIONS* 8 (11th ed. 2012).

⁷³ *Id.* (stating that a multinational corporation is easily defined).

⁷⁴ See Note, *The "Nationality" of International Corporations Under Civil Law and Treaty*, 74 HARV. L. REV. 1429 (1961).

⁷⁵ See R. L. Astorga, *The Nationality of Juridical Persons in the ICSID Convention in Light of Its Jurisprudence*, 11 MAX BLANCK Y.B. OF U.N. LAW 417, 429 (2007) (stating that there are at least three ways in international law to attribute nationality to juridical persons: the place of incorporation, the *siège social* or seat and the control, or substantial interest of the company).

the nationality of natural persons that was regulated by national law, there was a lack of provisions related to the nationality of corporations in most national laws.⁷⁶

Also problematic was the term “nationality” itself. Conceptually, nationality is a political rather than a civil term, and it refers to the legal relationship between a person and a sovereign state.⁷⁷ For purposes of public international law, nationality affords the person the protection of the state and also gives the state the right to protect him from other states.⁷⁸ In conflict of laws, however, the civil matter focus often makes the locale of presence more relevant than the personal affiliation with regard to the civil rights and obligations of the person, including personal status.⁷⁹ The reliance on nationality was further undermined by the increasing mobility of people crossing country borders.⁸⁰

The deficiency of nationality as a connecting factor in conflict of laws necessitated a call for alternatives. The choice was either to return to the principle of domicile or to search for another solution.⁸¹ Some countries, such as Italy and Brazil, simply switched back to the principle of domicile.⁸² Other countries started to explore a mixed approach under which only the “personal status of their own nationals was subject to the national law” while “that of all foreigners was to be governed by the law of their residence.”⁸³ Many seriously doubted that domicile would be an optimal choice because there had been a growing “objection . . . against a rule of conflicts of laws based on the domicile principle.”⁸⁴ As a result, a new and different concept of habitual residence, emerged.

The preference of habitual residence over domicile is due at least in part to the difficulties encountered with domicile. First, the concept of domicile as used in the common law system differs from that understood in the civil law system. In Great Britain, for instance, the concept of domicile is described as the place where a person considers where his roots are or where the person has his permanent home⁸⁵ and the focal point is the connection between a person and a given system or rule of law.⁸⁶ This concept is considered as more closely resembling “the

⁷⁶ See *id.* at 426.

⁷⁷ *Nationality*, BLACK’S LAW DICTIONARY (10th ed. 2014) (explaining that nationality determines the political status of the individual, especially with reference to allegiance); see also W. R. Bisschop, *Nationality in International Law*, 37 AM. J. INT’L L. 320 (1943).

⁷⁸ See Bisschop, *supra* note 77, at 321 (“Nationality, that is to say, membership of a State, is the link through which an individual can enjoy the benefits of the law of nations.”).

⁷⁹ See Law Reform Commission, *Domicile and Habitual Residence* 1, 7-15, http://www.lawreform.ie/_fileupload/consultation%20papers/wpHabitualResidence.htm [<https://perma.cc/MFS2-DA2K>] (“The law of the country of one’s permanent home, which is the notion of domicile, is arguably a more appropriate one by which to determine questions of status and property than that of one’s nationality, with which one may have little or no practical connection. For example, an Irishman emigrating to the United States may never obtain citizenship in that country but may live for fifty years in New York and never return to Ireland or have any interest in doing so. It may be argued that to apply Irish law to questions of that man’s status or of his property at the time of his death (which an application of nationality as a connecting factor would require) is less appropriate than to apply the law of New York, where he had long since become domiciled and with which he had . . . ‘the most real connexion [sic].’”).

⁸⁰ See Cavers, *supra* note 4, at 476.

⁸¹ See *id.* at 477.

⁸² See DE WINTER, *supra* note 9, at 407.

⁸³ See *id.* at 412–13.

⁸⁴ See *id.* at 419.

⁸⁵ See DICEY AND MORRIS ON THE CONFLICT OF LAWS, 78 (J. H. C. Morris ed., 8th ed. 1967).

⁸⁶ See *id.* at 79.

continental notion of nationality” than “the continental concept of domicile as residence.”⁸⁷

Secondly, the law of domicile is deemed to be “complex and in a number of respects” uncertain⁸⁸ because it is used to serve “too many diverse purposes.”⁸⁹ In common law systems, domicile is further divided into three categories: domicile of origin; domicile of choice; and domicile of dependency. Each of the categories is subject to different rules.⁹⁰ There are two basic rules pertaining to domicile: “no person can be without a domicile” and “no person can at the same time for the same purpose have more than one domicile.”⁹¹ The provisions governing domicile may vary dramatically in different countries. Thus, confusion often arises when a person possesses two or more “homes” and dispute always occurs in the case where the domicile of dependents is in question.⁹²

Thirdly, perhaps the most controversial aspect of domicile is the “subjective inferences” that are required to find a domicile.⁹³ In most cases, for the determination of a person’s domicile, domicile of choice in particular, the intention of the person as to his permanent or definite residence is an indispensable element.⁹⁴ Therefore, the state of mind by which a person regards a place as their permanent residence is decisive for finding domicile.⁹⁵ But it is often difficult to prove the intention. The question always raised is how to find the actual intent of a person. Courts in many cases would have to combine both subjective and objective factors in order to find a domicile, especially when the fact of residence of a person contradicts the person’s subjective choice,⁹⁶ or in the situation that the person has multiple homes.⁹⁷

Habitual residence is considered different from domicile although they are related in terms of residence.⁹⁸ Unlike domicile that contains uncertainties of meaning and requires proof of subjective intent,⁹⁹ habitual residence by its term is more intuitive, and is considered ascertainable based on “the ordinary and natural

⁸⁷ See DE WINTER, *supra* note 9, at 419.

⁸⁸ LAW REFORM COMM’N OF IR., DOMICILE AND HABITUAL RESIDENCE (1983), ch. 2, § 7, http://www.lawreform.ie/_fileupload/Reports/rHabitualResidence.htm [<https://perma.cc/6FAC-WA7K>].

⁸⁹ Russell J. Weintraub, *An Inquiry into the Utility of “Domicile” as a Concept in Conflicts Analysis*, 63 MICH. L. REV. 961, 984 (1965).

⁹⁰ See DICEY AND MORRIS, *supra* note 85, at 84, 86, 107.

⁹¹ *Id.* at 81–82.

⁹² See DE WINTER, *supra* note 9, at 421–22. With regard to domicile of dependency, the so-called proleptic (anticipatory) domicile is considered even more confusing; see LAW REFORM COMM’N OF IR., *supra* note 88, at 6 (“[A] wife has at common law the domicile of her husband. However, if her husband is domiciled abroad, she may, in England and in Scotland, if the marriage has been annulled or dissolved by a court of the domicile, seek a declaration or declarator as to the validity of the foreign annulment or foreign divorce, hoping that it will not be granted. The court in England and in Scotland, in order to assume jurisdiction, accepts without argument that the facts as alleged in her petition are correct, thus deeming her to have acquired an English or Scottish domicile and allowing her to have the court refuse recognition to her husband’s foreign decree.”).

⁹³ Weintraub, *supra* note 89, at 984.

⁹⁴ See DICEY AND MORRIS, *supra* note 85, at 86.

⁹⁵ See HAY, *supra* note 1, at 308.

⁹⁶ See Leon Trakman, *Domicile of Choice in English Law: An Achilles Heel?* 11 J. PRIV. INT’L L. 317, 325–26 (2015).

⁹⁷ See HAY, *supra* note 1, at 310–12.

⁹⁸ See Zohar, *supra* note 23, at 171. In one place for example, domicile is defined as the place where a person habitually resides. See Nadelmann, *Habitual Residence*, *supra* note 16, at 768.

⁹⁹ HAY, *supra* note 1, at 300.

meaning of the . . . words which it contains,” namely “habitual” and “residence.”¹⁰⁰ From a practical point of view, habitual residence, as compared with domicile, is deemed more factual and manageable.¹⁰¹ Therefore, after it was introduced, habitual residence soon became an important conflict of law connecting factor.¹⁰² Now habitual residence is being widely accepted as a basic rule in continental European countries through the Hague conventions and also incorporated into the legislation in many common law countries, including England and Canada.¹⁰³

III. CONCEPT OF HABITUAL RESIDENCE: DISTINCTIONS AND APPLICATION

Acceptance of habitual residence as a connecting factor for choice of law as well as jurisdiction represents a trend of development of modern conflict of laws.¹⁰⁴ A highly remarkable feature of this development is the role of the Hague Conference on Private International Law, “[a] melting pot of different legal traditions,”¹⁰⁵ to promote legal harmony in its member states. As the world organization for cross-border cooperation in civil and commercial matters, the Hague Conference whose work now encompasses 150 countries has elaborated a wide range of uniform conventions under its stated mission of “progressive unification” of private international law rules.¹⁰⁶ One of the Hague’s notable achievements is perhaps the adoption of habitual residence, making this connecting factor a well-accepted conflict of law rule.¹⁰⁷

A. *Habitual Residence in the Hague Conventions*

Habitual residence is generally understood to have been used for the first time, for conflict of laws purposes, in 1902 when the Hague Convention on the Settlement of Guardianship of Minors was adopted.¹⁰⁸ It has been observed, however, that the term had previously been used in a number of bilateral treaties, including a treaty in France and Prussia of 1880. Habitual residence was also contained in Hague Convention on Civil Procedures of 1896.¹⁰⁹ Under Article 3 of the 1902 Guardianship Convention, the guardianship of the minor who habitually resides abroad is established and exercised in accordance with the law of the place of the minor’s habitual residence.¹¹⁰ If the minor’s guardianship is not, or if it

¹⁰⁰ Re J. (A Minor) [1990] 2 AC 562 (HL) (appeal taken from Eng.).

¹⁰¹ Nadelmann, *supra* note 16, at 767.

¹⁰² See DAVID MCCLEAN & KISCH BEEVERS, *The Conflict of Laws* 24 (7th ed. 2009) (“Habitual residence has long been a favourite expression of the Hague Conference on Private International Law and appears in many Hague conventions . . .”).

¹⁰³ See generally McLeod, *supra* note 22.

¹⁰⁴ Rogerson, *supra* note 17, at 86.

¹⁰⁵ About HCCH, *A World Organization*, HCCH <https://www.hcch.net/en/about> [<https://perma.cc/9UXT-E8FC>].

¹⁰⁶ *Id.*

¹⁰⁷ See Elisa Perez-Vera Report, *Explanatory Report*, para. 66 (1981), <https://assets.hcch.net/upload/expl28.pdf> [<https://perma.cc/G24H-CXXX>] [hereinafter Perez-Vera Report].

¹⁰⁸ See RONA SCHUZ, *THE HAGUE CHILD ABDUCTION CONVENTION: A CRITICAL ANALYSIS* 176 (Hart Publishing Ltd., 2013); see also Manko, *supra* note 17; Cavers, *supra* note 4, at 477.

¹⁰⁹ See DE WINTER, *supra* note 9, at 423.

¹¹⁰ See CONVENTION OF 12 JUNE 1902 RELATING TO THE SETTLEMENT OF GUARDIANSHIP OF MINORS (2008), <https://www.hcch.net/en/instruments/the-old-conventions/1902-guardianship-convention> [<https://perma.cc/PXK6-ZPER>] (CONVENTION DU 12 JUIN 1902 POUR RÉGLER LA TUTELLE DES MINEURS).

could not be, settled according to his national law, then the law of his habitual residence shall apply.¹¹¹ Apparently, habitual residence as used in the 1902 Guardianship Convention was simply a supplement to the principle of nationality.

The Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (Children Protection Convention), which concluded in 1996, is regarded as the replacement of the 1902 Guardianship Convention.¹¹² In contrast to the 1902 Guardianship Convention, the 1996 Children Protection Convention took a more direct approach to utilizing habitual residence. It not only made habitual residence a primary connecting factor, but also extended application of habitual residence to the determination of jurisdiction as well.

Under Article 5 of the 1996 Children Protection Convention, the judicial or administrative authorities of the Contracting State of the child's habitual residence have jurisdiction to take measures directed to the protection of the child's person or property.¹¹³ In addition, "[i]n case of a change of the child's habitual residence to another Contracting State, the authorities of the State of the new habitual residence, [subject to certain conditions,] have jurisdiction."¹¹⁴ Pursuant to Article 16, "[t]he attribution or extinction of parental responsibility by operation of law, without the intervention of a judicial or administrative authority, is governed by the law of the State of the habitual residence of the child."¹¹⁵ Article 16 also provides that "[t]he attribution or extinction of parental responsibility by an agreement or a unilateral act, without intervention of a judicial or administrative authority, is governed by the law of the State of the child's habitual residence at the time when the agreement or unilateral act takes effect."¹¹⁶

The provisions of the 1996 Children Protection Convention that involve habitual residence reflect the overall favorable attitude of the member states of the Hague conventions toward the concept of habitual residence. As a matter of fact, since 1902, there have been at least fourteen Hague conventions that contain provisions of habitual residence in the areas of marriage, child protection, and succession with respect to governing law.¹¹⁷ In addition, several conventions

¹¹¹ *See id.*

¹¹² *See* TREVOR BUCK, *INTERNATIONAL CHILD LAW*, 51 n.30 (Rutledge, 3rd ed. 2014). In fact, the 1996 Children Protection Convention is a revision of the 1961 Convention concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Minors. *See* CONVENTION ON JURISDICTION, APPLICABLE LAW, RECOGNITION, ENFORCEMENT AND CO-OPERATION IN RESPECT OF PARENTAL RESPONSIBILITY AND MEASURES FOR THE PROTECTION OF CHILDREN (1996), <https://www.hcch.net/en/instruments/conventions/full-text/?cid=70#ch3> [<https://perma.cc/K72X-LK4R>].

¹¹³ CONVENTION ON JURISDICTION, *supra* note 110, art. 5(1).

¹¹⁴ *Id.* art. 5(2).

¹¹⁵ *Id.* art. 16(1).

¹¹⁶ *Id.* art. 16(2).

¹¹⁷ These conventions include Convention of 17 July 1905 on Deprivation of Civil Rights; Convention of 24 October 1956 on the Law Applicable to Maintenance Obligations towards Children; Convention of 5 October 1961 Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Infants; Convention of 5 October 1961 on the Conflicts of Laws relating to the Form of Testamentary Dispositions; Convention of 15 November 1965 on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions; Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations; Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes; Convention of 14 March 1978 on Celebration and Recognition of the Validity of Marriages; Convention of 25 October 1980 on the Civil Aspects of International Child Abduction; Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons; Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-

concerning other civil and commercial matters to which habitual residence is applicable have been adopted under the auspice of the Hague Conference.¹¹⁸ In those conventions, the principle of habitual residence is applied in four different ways: (1) application alone, meaning that habitual residence is the sole connecting factor;¹¹⁹ (2) application as one of options, using habitual residence along with other connecting factors;¹²⁰ (3) orderly application, either supplementing to or to be supplemented by other connecting factors;¹²¹ or (4) cross application, using habitual residence in conjunction with other connecting factors.¹²²

operation in Respect of Parental Responsibility and Measures for the Protection of Children; Convention of 13 January 2000 on the International Protection of Adults; Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance; and Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations.

¹¹⁸ *E.g.*, Hague Convention on the Law Applicable to Contracts for the International Sale of Goods, Dec. 22, 1986; Hague Convention on the Law Applicable to Agency, Mar. 14, 1978; Hague Convention on the Law Applicable to Products Liability, Oct. 2, 1973; Hague Convention on the Law Applicable to International Sales of Goods, June 15, 1955.

¹¹⁹ Under Article 1 of the 1956 Convention on the Law Applicable to Maintenance Obligations towards Children, the law of habitual residence of children determines whether, how, and to whom the child may claim maintenance. Hague Convention on the Law Applicable to Maintenance Obligations towards Children art. 1, Oct. 24, 1956, HCCH (The law of the habitual residence of the child determines whether, how and to whom the child may claim maintenance).

¹²⁰ According to the 1978 Hague Convention on the Law Applicable to Matrimonial Property Regimes, the matrimonial property regime is governed by the internal law designated by the spouses before marriage. Article 3 provides that the spouses may designate only one of the following laws: (1) the law of any State of which either spouse is a national at the time of designation; (2) the law of the State in which either spouse has his habitual residence at the time of designation; (3) the law of the first State where one of the spouses establishes a new habitual residence after marriage. Hague Convention on the Law Applicable to Matrimonial Property Regimes, art. 3, Mar. 14, 1978, HCCH.

¹²¹ Orderly application of habitual residence principle in the Hague conventions takes two forms: supplemental to, or supplemented by, another connecting factor. Article 3 of the 1902 Guardianship Convention exemplified the former. *See* Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and Measures for the Protection of Children, *supra* note 110. The latter is the one as provided in the Hague Convention on the Law Applicable to Maintenance Obligations:

The internal law of the habitual residence of the maintenance creditor shall govern the maintenance obligations referred to In the case of a change in the habitual residence of the creditor, the internal law of the new habitual residence shall apply as from the moment when the change occurs (art.4). If the creditor is unable, by virtue of the law referred to in Article 4, to obtain maintenance from the debtor, the law of their common nationality shall apply (art. 5). If the creditor is unable, by virtue of the laws referred to in Articles 4 and 5, to obtain maintenance from the debtor, the internal law of the authority seised shall apply (art. 6).

Hague Convention on the Law Applicable to Maintenance Obligations, art. 4, Oct. 2, 1973, HCCH.

¹²² Cross application refers to the situation where habitual residence applies in conjunction with another connecting factor. Take the 1973 Hague Convention on the Law Applicable to Products Liability for example. Article 4 reads as follows:

The applicable law shall be the internal law of the State of the place of injury, if that State is also –
a) the place of the habitual residence of the person directly suffering damage, or
b) the principal place of business of the person claimed to be liable, or
c) the place where the product was acquired by the person directly suffering damage.

Hague Convention on the Law Applicable to Products Liability, art. 4, Oct. 2, 1973, HCCH.

Article 5 further provides the following:

Notwithstanding the provisions of Article 4, the applicable law shall be the

Acceptance of habitual residence in Hague conventions started at first as a compromise of the contention between common law's domicile doctrine and civil law's nationality approach.¹²³ During the drafting of early Hague conventions, a considerable amount of debate was generated on the finding of a middle ground.¹²⁴ Given the rigid rules of domicile, the need of departing from nationality, and in light of promoting unification of conflict of law provisions, habitual residence was taken as an option to avoid "the notion of domicile so as to end all difficulties resulting from the definition of that term."¹²⁵ In this context, then, the law of habitual residence was suggested to replace the law of domicile to handle dual nationals.¹²⁶

However, the status of habitual residence as a major connecting factor was not firmly established in Hague conventions until 1956.¹²⁷ In the Convention on the Law Applicable to Maintenance Obligations towards Children adopted on October 24, 1956 ("1956 Children Maintenance Convention"), it was clearly provided that the obligations of child maintenance is determined by the law of habitual residence of children.¹²⁸ For the first time, the 1956 Children Maintenance Convention explicitly used habitual residence as the single principal connecting factor to determine applicable law.¹²⁹ Later, this approach again played "a main role" in the 1970 Convention on Divorces and Legal Separations for the determination of jurisdiction.¹³⁰

internal law of the State of the habitual residence of the person directly suffering damage, if that State is also –

- a) the principal place of business of the person claimed to be liable, or
- b) the place where the product was acquired by the person directly suffering damage.

Id., art. 5.

¹²³ See Nadelmann, *supra* note 16, at 767. See also Cavers, *supra* note 4, at 479.

¹²⁴ See Nadelmann, *supra* note 16, at 767–68. See also DE WINTER, *supra* note 9, at 422–23.

¹²⁵ See DE WINTER, *supra* note 9, at 424; Nadelmann, *supra* note 16, at 767.

¹²⁶ See DE WINTER, *supra* note 9, at 424.

¹²⁷ See Cavers, *supra* note 4, at 478.

¹²⁸ Convention on the Law Applicable to Maintenance Obligations Toward Children, The Hague Con. on Priv. Int'l L., art. 4, Oct. 22, 1956, www.hcch.net/en/instruments/conventions/full-text/?cid=37 [<https://perma.cc/4TBC-WLG3>].

¹²⁹ See *id.*

¹³⁰ Cavers, *supra* note 4, at 478–79. The Convention on the Recognition of Divorces and Legal Separations was adopted June 1, 1970. Under Article 2 of the 1970 Convention:

Such divorces and legal separations shall be recognized in all other Contracting States, subject to the remaining terms of this Convention, if, at the date of the institution of the proceedings in the State of the divorce or legal separation (hereinafter called "the State of origin"): (1) the respondent had his habitual residence there; or (2) the petitioner had his habitual residence there and one of the following further conditions was fulfilled - a) such habitual residence had continued for not less than one year immediately prior to the institution of proceedings; b) the spouses last habitually resided there together; or (3) both spouses were nationals of that State; or (4) the petitioner was a national of that State and one of the following further conditions was fulfilled - a) the petitioner had his habitual residence there; or b) he had habitually resided there for a continuous period of one year falling, at least in part, within the two years preceding the institution of the proceedings; or (5) the petitioner for divorce was a national of that State and both the following further conditions were fulfilled - a) the petitioner was present in that State at the date of institution of the proceedings and b) the spouses last habitually resided together in a State whose law, at the date of institution of the

With regard to the use of habitual residence, the Convention on the Civil Aspects of International Child Abduction (“Child Abduction Convention”) is highly notable and influential convention. Adopted October 24, 1980, the Child Abduction Convention makes habitual residence the key determinant of applicable law.¹³¹ Under the Child Abduction Convention, habitual residence not only affects the law that governs the right of child custody,¹³² but also determines the scope of the application of the Convention itself.¹³³ The Child Abduction Convention now has ninety-four member states,¹³⁴ and is viewed as one of the most successful family law instruments to be completed under the auspices of the Hague Conference on Private International Law.¹³⁵ According to the Hague Conference, “the operation of the [Child Abduction Convention] has been further strengthened by complementing provisions in the 1996 Convention on Children Protection.”¹³⁶ As noted, the Child Protection Convention firmly establishes habitual residence as a primary connecting factor in conflict of laws for the matters with which the Convention is intended to deal.¹³⁷

The most recent Hague convention was the 2007 Convention on the International Recovery of Child Support and Other Forms of Family Maintenance.¹³⁸ It was adopted along with the Protocol on the Law Applicable to Maintenance Obligations (“2007 Protocol”).¹³⁹ The former is mainly about recognition and enforcement of maintenance decisions. The latter concerns determination of the law applicable to maintenance obligations arising from a

proceedings, did not provide for divorce.

Convention on Divorces and Legal Separations, The Hague Conf. on Pri. Int’l L., art. 2, June 1, 1970, www.hcch.net/en/instruments/conventions/full-text/?cid=80 [<https://perma.cc/2DD8-EADW>].

¹³¹ Convention on the Civil Aspects of International Child Abduction, The Hague Con. on Priv. Int’l L., art. 3, Oct. 25, 1980, www.hcch.net/en/instruments/conventions/full-text/?cid=24 [<https://perma.cc/3XLE-XDY9>].

¹³² See *id.* Under Article 3 of the 1980 Child Abduction Convention:

[T]he removal or the retention of a child is to be considered wrongful where
a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

¹³³ *Id.* art. 4 (“The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.”).

¹³⁴ See Status Table, The Hague Con. on Priv. Int’l L., Convention of 25 October 1980 on the Civil Aspects of Int’l Child Abduction, Dec. 1, 1983, <https://www.hcch.net/en/instruments/conventions/status-table/?cid=24> [<https://perma.cc/RDK2-U2ZW>].

¹³⁵ Outline: Hague Child Abduction Convention, The Hague Conf. on Private Int’l L. (May 2014), <https://assets.hcch.net/docs/e6a6a977-40c5-47b2-a380-b4ec3a0041a8.pdf> [<https://perma.cc/D4P5-2FYL>].

¹³⁶ *Id.*

¹³⁷ See Peter Nygh, The New Hague Child Protection Convention, 11 INT’L J. OF L., POL’Y AND FAM., 344–59 (1997).

¹³⁸ HCCH, available at <https://assets.hcch.net/docs/14e71887-0090-47a3-9c49-d438eb601b47.pdf> [<https://perma.cc/JAF6-DL39>].

¹³⁹ Protocol on the Law Applicable to Maintenance Obligations, The Hague Conf. on Private Int’l L., art. 3, Nov. 23, 2007, <https://www.hcch.net/en/instruments/conventions/full-text/?cid=133> [<https://perma.cc/BN52-GFLX>].

family relationship, parentage, marriage or affinity, including a maintenance obligation in respect of a child regardless of the marital status of the parents. In both documents, habitual residence once again is the center of focus.¹⁴⁰ Under Article 3 of the 2007 Protocol, for example, the law of habitual residence of the creditor, as the general rule on applicable law, governs maintenance obligations.¹⁴¹

B. Habitual Residence: Definition and Distinctions

Despite its significance in the determination of applicable law as well as jurisdiction, habitual residence has, unfortunately, never been defined in Hague conventions, nor was any guidance given in the conventions for its interpretation.¹⁴² In fact, as it has been observed, the definition of habitual residence was deliberately left open in the conventions,¹⁴³ and it has also been suggested not to “dwell” upon the notion of habitual residence.¹⁴⁴ The rationale behind this omission was the fear of possible “loss of the advantages which would be derived from the latitude to adapt this notion to practical requirements.”¹⁴⁵ Therefore, a “purely pragmatic” approach has been employed to allow courts to make decisions “on the basis of all factual data available and guided by their common[sense].”¹⁴⁶

But a legitimate concern is that without a definition, habitual residence can be difficult to prove in certain cases.¹⁴⁷ For that reason, there have been efforts outside the Hague conventions to define the term. In one occasion, habitual residence is described as “an individual’s abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or long duration.”¹⁴⁸ In the other occasion, habitual residence is simply defined as the place where a person “regularly, normally, [and] customarily lives.”¹⁴⁹ Even though no definition is available, it is believed that the determination is a matter of judicial interpretation, and such interpretation requires analysis of criteria from the ordinary meaning of the composite expression.¹⁵⁰

Practically, however, no matter how the term habitual residence is defined or interpreted, a general understanding is that habitual residence is the place where

¹⁴⁰ *Id.*

¹⁴¹ *Id.* (“General rule on applicable law: (1) Maintenance obligations shall be governed by the law of the State of the habitual residence of the creditor, save where this Protocol provides otherwise. (2) In the case of a change in the habitual residence of the creditor, the law of the State of the new habitual residence shall apply as from the moment when the change occurs.”).

¹⁴² See JAMES D. GARBOLINO, *THE 1980 HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION: A GUIDE FOR JUDGES* 50, 50–53 (2d ed. 2015).

¹⁴³ See DE WINTER, *supra* note 9, at 429; Cavers, *supra* note 4, at 484–87; Perez-Vera Report, *supra* note 107, § 66.

¹⁴⁴ Perez-Vera Report, *supra* note 107, § 66.

¹⁴⁵ DE WINTER, *supra* note 9, at 429.

¹⁴⁶ *Id.* at 428–29; see also HAY, *supra* note 1, at 300.

¹⁴⁷ See DE WINTER, *supra* note 9, at 428–29.

¹⁴⁸ Peter Stone, *The Concept of Habitual Residence in Private International Law*, 29 *ANGLO-AM. L. REV.* 342, 347 (2000).

¹⁴⁹ See Gerald Goldstein, *The Concepts of Habitual Residence and Ordinary Residence in Light of Quebec Civil Law, the Divorce Act and the Hague Conventions of 1980 and 1996*, 52 *DEP’T OF JUST. CAN.* 6 (2006), http://justice.gc.ca/eng/rp-pr/fl-lf/divorce/rthro_qc/pdf/rthro_qc.pdf [https://perma.cc/X9SE-3F2W].

¹⁵⁰ JAMES STEWART, *FAMILY LAW: JURISDICTION COMPARISON* 29 (2011).

a person usually lives.¹⁵¹ Although its determination is heavily dependent on the facts of a case¹⁵² and its definition varies, habitual residence is believed to contain three basic elements: actual residence, continuity of stay, and persistence to remain.¹⁵³ Actual residence refers to one's current place of living, rather than a place where a person is passing through.¹⁵⁴ The second factor, "continuity of stay," refers to the duration of residence, so long as such duration is for an "appreciable period of time."¹⁵⁵ This is because habitual residence involves "a settled and enduring connection between a person and a place" and excludes temporary or brief stops.¹⁵⁶ The final factor, "persistence to remain," refers to the present mind of the person at issue, which must involve "a degree of settled purpose" to maintain his residence in the given location.¹⁵⁷

Despite the highly fact-based analysis for habitual residence, the element of persistence to remain has met criticism because its determination invites an investigation of a person's intention to remain.¹⁵⁸ Confusion may arise due to the element's seemingly similar nature to that of domicile. The primary concern of critics is that the finding of intention would be highly subjective, breeding uncertainty and resulting in the loss of the advantages associated with the habitual residence's factual situation capable of objective ascertainment.¹⁵⁹ Others, however, argue that, unlike domicile, habitual residence involves only the apparent rather than future intention, which implicates a weaker "*animus*" (mind).¹⁶⁰ Thus, its determination is principally circumstantial, affected by all surrounding facts that are present in a given case.¹⁶¹

Facing the issue of defining habitual residence, the European Union has taken a different approach by defining the term in connection with the subject matter to be dealt with in specific cases. For contractual obligations covered by Rome I, the habitual residence of a natural person acting in the course of business is defined as that person's principal place of business.¹⁶² With regard to companies and other entities, whether incorporated or unincorporated, habitual residence is defined by the place of their central administration or nerve center.¹⁶³ If a contract is made through and creates an obligation on a branch, agency, or any other establishment, the location of such branch, agency or establishment is treated as the place of habitual residence.¹⁶⁴ A similar habitual residence rule is also provided in

¹⁵¹ See Dep't of Soc. Servs. of the Commonwealth of Austl., Child Support Guide: Habitual Residency Under the Australia and New Zealand Agreement § 1.6.4 (rel. Jan. 2, 2018), <http://guides.dss.gov.au/child-support-guide/1/6/4> [https://perma.cc/W4Z6-MH9H].

¹⁵² See Manko, *supra* note 17, at 2 (noting that "habitual residence is a question to be decided by the national court in light of the specific factual circumstances.").

¹⁵³ See HAY, *supra* note 1, at 300.

¹⁵⁴ See Goldstein, *supra* note 149, at 6.

¹⁵⁵ See NICK WIKLEY, CHILD SUPPORT: LAW AND POLICY 251–52 (2006).

¹⁵⁶ See McLeod, *supra* note 22, at 7.

¹⁵⁷ *In re Bates*, CA 122/89, 1989 WL 1683783, at *7 EWHC (Fam) (Eng.).

¹⁵⁸ See Rogerson, *supra* note 17, at 90.

¹⁵⁹ See *id.*; see also DE WINTER, *supra* note 9, at 430.

¹⁶⁰ See McLeod, *supra* note 22, at 8.

¹⁶¹ See Manko, *supra* note 17.

¹⁶² Council Directive 593/2008, art. 19(1), 2008 O.J. (L 177) 6, 15 (EC).

¹⁶³ *Id.*

¹⁶⁴ *Id.* art. 19(2).

Rome II, which governs non-contractual obligations, referring to torts and other non-contract based civil obligations.¹⁶⁵

Definition aside, habitual residence apparently stands a better chance of having consensus than domicile in the international legal community, especially in the area of conflict of laws. It is also evident that the trend to maintain and expand the use of habitual residence as a connecting factor is growing. Compared with domicile, which is often hard to establish, habitual residence is considered “undeniably more reliable in a factual sense” because “it tends to denote a person’s presence over a fairly prolonged period in a certain place, and to assign only an incidental and non-essential role to the intention of remaining there.”¹⁶⁶ More specifically, the primary distinguishing characteristics of habitual residence include its fact-driven nature, past experience focus, flexibility in determination, actual connection emphasis, and ability to ascertain intention.

This fact-driven distinction goes to the very nature of habitual residence. Unlike domicile, which is deemed as “an idea of law” containing restrictive legal rules,¹⁶⁷ habitual residence is considered as a fact-specific inquiry¹⁶⁸ Given the high fluidity of modern society and in light of increasing internationality of civil and commercial activities, habitual residence “is intended to be a simple non-technical term, applied to the facts of each case.”¹⁶⁹ For example, under the general rule of domicile, a dependent person (e.g. a child) has the domicile of the person “on whom he is considered by law to be dependent.”¹⁷⁰ This rule, however, could not adequately deal with the situation where the child is abandoned or becomes an orphan. In addition, since the rule that governs domicile of children discriminates between legitimate and illegitimate children and also between their fathers and mothers,¹⁷¹ determination of their domicile must strictly and technically follow the provisions of law.

Under the Child Abduction Convention, the “lawfulness of the situation flouted by abduction” of a child is to be determined by the law of the habitual residence of the child.¹⁷² According to the Court of Justice of the European Union (“CJEU”), to determine the child’s habitual residence, the primary consideration is the social and family environment comprising various factors.¹⁷³ Thus, in the context of the Child Abduction Convention, the facts about where the child actually

¹⁶⁵ See Rome II, at art. 33, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:199:0040:0049:EN:PDF> [https://perma.cc/6WLZ-PERJ].

¹⁶⁶ See Peter Nygh & Fausto Pocar, *Report on Preliminary Draft of Convention on Jurisdiction and Judgment in Civil and Commercial Matters*, HAGUE CONF. ON PRIV. INT’L L. 40 (Aug. 2000), <https://assets.hcch.net/upload/wop/jdgmpl11.pdf> [https://perma.cc/TDJ8-FXQJ].

¹⁶⁷ See DICEY AND MORRIS, *supra* note 85, at 78.

¹⁶⁸ See Jeff Atkinson, *The Meaning of “Habitual Residence” Under the Hague Convention on the Civil Aspects of International Child Abduction and the Hague Convention on the Protection of Children*, 63 OKLA. L. REV. 647, 650 (2017).

¹⁶⁹ See Austl. Dep’t of Soc. Serv., *supra* note 151.

¹⁷⁰ See DICEY AND MORRIS, *supra* note 85, at 107.

¹⁷¹ See THE LAW COMMISSION & THE SCOTTISH LAW COMMISSION, *PRIVATE INTERNATIONAL LAW: THE LAW OF DOMICILE*, SCOT. LAW. COM. NO. 107, at 4–5 (1987), <http://www.scotlawcom.gov.uk/files/3212/7989/6557/rep107.pdf> [https://perma.cc/FC4L-L9CJ].

¹⁷² See Perez-Vera Report, *supra* note 107, § 66; Convention on the Civil Aspects of International Child Abduction, *supra* note 131.

¹⁷³ Case C-497/10, *Mercredi v. Chaffe*, 2010 EUR-Lex CELEX LEXIS 610CJ0497 (Dec. 22, 2010).

lives are central to the inquiry. As opined by the CJEU, the general rule is that the family environment of a young child is essentially “determined by the reference person(s) with whom the child lives, by whom the child is in fact looked after and taken care of.”¹⁷⁴

The distinction of past experience focus implicates that determination of habitual residence is based primarily on the factual analysis of actual residence. Under the rule of domicile, the intent of a person to reside in a place indefinitely is required in order to make that place his domicile.¹⁷⁵ Therefore, when a person who is domiciled in country A accepts employment in country B on a long-term basis and moves his whole family to country B, he would still be considered as a domiciliary in country A if he is found to have an intent to return to country A after his employment in country B ends.¹⁷⁶ In addition, in certain cases, determination of domicile relies on the provision of law of the country in which he resides “whether or not he has his permanent home in it.”¹⁷⁷

In contrast, habitual residence of a person mainly concerns where the center of the personal and family life of the person is as evidenced by the facts of that person’s activities, or the past experience pertaining to his residence.¹⁷⁸ These facts include family status and relations, place where the person lives, duration in that place, situation of employment, exercise of non-remunerated activities, as well as others that vary on a case-by-case basis. In international child abduction cases, attention is paid to the place of the child’s habitual residence, which is determined by looking at where the child was habitually residing at the time “immediately before the removal or retention”¹⁷⁹ The determination requires a case-by-case “fact-specific inquiry”¹⁸⁰ with a focus on where the rights of custody were actually exercised, either jointly or alone, at the time of removal or retention.¹⁸¹

The distinction of flexibility in determination further reflects the factual character of habitual residence. The flexibility is needed to adjudicate civil cases involving foreign elements because it enables the court to make a finding most suitable to the particular case.¹⁸² In conflict of laws, a reasonable balance between flexibility and certainty is always a concern in the determination of jurisdiction and choice of law.¹⁸³ Insofar as habitual residence is concerned, the variety of facts in each case makes determination of it dependent more on circumstantial evidence than on that of domicile. To maintain such flexibility is perhaps a major reason why the term “habitual residence” is intentionally left undefined in the Hague conventions.¹⁸⁴

¹⁷⁴ *Id.* ¶ 54.

¹⁷⁵ See DICEY & MORRIS, *supra* note 85, at 78.

¹⁷⁶ See *id.* at 80, illustration (1).

¹⁷⁷ See *id.* at 79.

¹⁷⁸ See HAY, *supra* note 1, at 300.

¹⁷⁹ See Hague Convention on the Civil Aspects of International Child Abduction, *supra* note 128, art. 3(a).

¹⁸⁰ See Atkinson, *supra* note 168, at 650 (quoting *Miller v. Miller*, 240 F.3d 392, 400 (4th Cir. 2001)).

¹⁸¹ See Hague Convention on the Civil Aspects of International Child Abduction, *supra* note 131, art. 3(b).

¹⁸² See SCHUZ, *supra* note 108, at 116.

¹⁸³ See SYMEON C. SYMEONIDES, CODIFYING CHOICE OF LAW AROUND THE WORLD: AN INTERNATIONAL COMPARATIVE ANALYSIS 217 (2014).

¹⁸⁴ See SCHUZ, *supra* note 108, at 219.

Further, to maintain flexibility is purposed to allow the habitual residence to be determined on the basis of “the context in question” of the case.¹⁸⁵ The underlying notion is that habitual residence is not purely a legal concept but rather a factual test.¹⁸⁶ On the other hand, the factual basis of habitual residence would help overcome the difficulty faced by domicile when, for example, the domicile of dependency is involved.¹⁸⁷ However, flexibility does not mean uncertainty. It is believed that the adoption of habitual residence in international conventions as a connecting factor is an indication that the use of habitual residence would help achieve “an acceptable balance between [the] two extremes.”¹⁸⁸

Emphasis on actual connection involves the process of determination of habitual residence. Since the term “habitual” does not mean a mere presence but implicates “a degree of permanence”¹⁸⁹ the actual connection between a person and a place becomes a key issue in finding whether the person has habitually resided in that place. In child abduction cases, for example, the major consideration in determining the habitual residence of a child is the child’s actual relationship or real and active connection with the country at issue.¹⁹⁰ More generally, habitual residence implies an “enduring” connection or “durable ties” between a person and a place.¹⁹¹ Therefore, a question about a person’s habitual residence is in fact a question about where the person lives on a daily and regular basis,¹⁹² or where is the center of the person’s main interest.¹⁹³

There is a concern that, compared to domicile, the connection between a person and a country in habitual residence is not strong enough to “justify the person’s civil status and affairs,” particularly in the case where foreign expatriates are involved.¹⁹⁴ The concern typically arises in the expatriate situation, which is that the use of habitual residence in lieu of domicile would cut the links between the affected expatriates and their homeland.¹⁹⁵ This concern, though legitimate, seems to confuse habitual residence with the concept of nationality because it actually is the nationality of a person that serves as a legal link between the person and his homeland.¹⁹⁶

¹⁸⁵ MAEBH HARDING, *CONFLICT OF LAWS* 30 (5th ed. 2014).

¹⁸⁶ See Goldstein, *supra* note 149, at 7.

¹⁸⁷ See 1980 Child Abduction Convention, *supra* note 128, art. 3. Under the 1980 Child Abduction Convention, the focus is on the place in which the “child was habitually resident immediately before the removal or retention”, but not on the complicated concept as in domicile.

¹⁸⁸ SCHUZ, *supra* note 108, at 137.

¹⁸⁹ Goldstein, *supra* note 149, at 17.

¹⁹⁰ *Id.* at 14; see generally Paul Beaumont & Jayne Holliday, *Recent Developments on the Meaning of “Habitual Residence” in Alleged Child Abduction Cases*, https://www.abdn.ac.uk/law/documents/Recent_Developments_on_the_Meaning_of_Habitual_Residence_in_Alleged_Child_Abduction_Cases_.pdf [<https://perma.cc/HBL7-3FA2>].

¹⁹¹ McLeod, *supra* note 22, at 11.

¹⁹² See Goldstein, *supra* note 149, at 6.

¹⁹³ See HAY, *supra* note 1, at 300; see also Steven Kennedy, *the Habitual Residence Test, The House of Commons’ Library*, May 18, 2011, <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN00416> [<https://perma.cc/S76D-EBCD>].

¹⁹⁴ THE LAW COMMISSION AND THE SCOTTISH LAW COMMISSION, *supra* note 171, at 9.

¹⁹⁵ *Id.* at 10.

¹⁹⁶ Robert D. Sloane, *Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality*, 50 HARV. INT’L L. J. 1 (2009) (“Because states were conventionally the principal subjects of international law, nationality became an indispensable legal concept, ‘the link between the individual and the law of nations.’”).

Actually, the expatriates may encounter a dilemma when domicile is used as a connecting factor. Their prolonged stay overseas may cause a problem as to where their domicile would be because residence is a required element for finding a domicile unless the concept of the domicile of origin is employed. Under this circumstance, habitual residence clearly has certain advantages over domicile because the fact of prolonged stay would help make it more efficient to ascertain the law under which the civil status and affairs of the person are to be determined. This fact would also help enable the court to resolve the issues that are raised in this regard in a pragmatic and reasonable way.

Ability to ascertain a person's intention is perhaps the most distinctive feature of habitual residence as opposed to domicile. To acquire a domicile, the *animus manendi* (intention of remaining) is an indispensable factor, which requires that the domiciliary have an "intention to reside permanently or for an unlimited time in a country."¹⁹⁷ Intent is also an element in the finding of habitual residence because to justify a habitual residence, a settled purpose or settled intention would be needed to indicate a contemplation to stay in a place for an appreciated period of time.¹⁹⁸ Although the *animus manendi* is relevant in both domicile and habitual residence, the differences can be seen in a number of aspects.

First, the degree of reliance on intention differs. Unlike determination of domicile, establishing a person's habitual residence is less dependent on intention of the person.¹⁹⁹ Since the finding of habitual residence weighs more on facts of residence and connection, it requires a simpler inquiry into the intention or a weaker *animus* in contrast to the finding of domicile.²⁰⁰ As some have indicated, habitual residence "tends to denote a person's presence over a fairly prolonged period in a certain place, and to assign only an incidental and non-essential role to the intention of remaining there."²⁰¹

Second, the focus of intention differs. Domicile has a focus on the future intention while habitual residence attaches importance to the present or apparent intention.²⁰² To determine a domicile, a considerable concern is about whether the person intends to live elsewhere in the future. To illustrate, a domiciliary in Blue State intends to settle in Orange State. He sells his house in Blue State, and taking all his effects with him, embarks for Orange State. Under the rule of domicile, he immediately becomes a domiciliary in Orange State upon his arrival there because his intention to live in Orange State in the future controls.²⁰³ In habitual residence, however, the intention or settled purpose is judged by the activities of his current living, not by his express declaration.²⁰⁴ The primary issues in determining habitual residence involve where the person is presently living (residence) and how long the person has been living in that place (habitual).²⁰⁵

¹⁹⁷ DICEY & MORRIS, *supra* note 55, at 112.

¹⁹⁸ HAY, *supra* note 1, at 302; Atkinson, *supra* note 168, at 649–50.

¹⁹⁹ THE LAW COMMISSION AND THE SCOTTISH LAW COMMISSION, *supra* note 171, at 9; Law Reform Commission, *supra* note 79, at 11.

²⁰⁰ McLeod, *supra* note 22, at 8.

²⁰¹ See Peter Nygh & Fausto Pocar, *The Hague Preliminary Draft Convention on Jurisdiction and Foreign Judgments*, 40 (2000).

²⁰² McLeod, *supra* note 22, at 8.

²⁰³ See DICEY & MORRIS, *supra* note 85, at 114.

²⁰⁴ Atkinson, *supra* note 168, at 650.

²⁰⁵ See Tai Vivataraphol, *Back to Basics: Determinating a Child's Habitual Residence in International Child Abduction Cases Under the Hague Convention*, 77 FORDHAM L. R., 3325, 3338

Third, determination of intention differs. Under the rule of domicile, determining intention requires “an attitude of mind by which the person regards the place as home,”²⁰⁶ or in short, the mind of man.²⁰⁷ This process is often considered quite subjective²⁰⁸ because it heavily depends on the person’s subjective choice or his state of mind.²⁰⁹ In determining habitual residence, however, the test is quite objective, since attention is called to “a person’s physical connection to a place.”²¹⁰ In other words, the determination of habitual residence does not emphasize “expressed intent,”²¹¹ but rather, evidence of objective matters.²¹² If a person has his home in a certain country, “his ‘hidden mental attitude towards [another] place’ can in no way alter the fact that he has his habitual residence in that country.”²¹³

C. Habitual Residence in Application

Though not defined, habitual residence as a connecting factor “has been consistently used in Hague conventions.”²¹⁴ The growing trend in favor of habitual residence is readily discernable—not only in areas of family law, but also in the areas of commercial law in general.²¹⁵ Realizing that habitual residence is less complex and more pragmatic than domicile, countries have shown great interest in making habitual residence one of the principal connecting factors in their conflict of law rules or at least using it as a necessary supplement to domicile. In conflict of law literature, habitual residence has also become a hot subject of discussion.

There has been a debate over application of habitual residence. At the center of the debate is whether determination of habitual residence is a question of fact or a matter of law. From the viewpoint of the Hague Conference, it is regarded as “a question of pure fact,” as far as the habitual residence of a child is concerned.²¹⁶ The underpinning ideology is that “habitual residence has to be a matter of fact so that there will be uniform interpretation in all the member states.”²¹⁷ Opponents, however, argue that the determination is a mix of fact and law. Their concern is that without a certain legal standard, there will be a lack of guidance for interpreting fact, and, in addition, it might be difficult for having an appellate review when needed.²¹⁸

(2009); see also McLeod, *supra* note 22, at 9. Although duration of residence is only one factor to be considered in deciding if a person is habitually resident in a place, it is unlikely that habitual residence can be acquired based upon a very brief period of residence, regardless of the person’s intention since habitual residence implies a significant period of presence together with an intention to live in a place.

²⁰⁶ HAY, *supra* note 1, at 308.

²⁰⁷ Rogerson, *supra* note 17, at 90.

²⁰⁸ See RICHARD FRIMPONG OPPONG, PRIVATE INTERNATIONAL LAW IN COMMONWEALTH AFRICA, 37 (2013).

²⁰⁹ See generally Trakman, *supra* note 96.

²¹⁰ See *id.* at 319.

²¹¹ HAY, *supra* note 1, at 300.

²¹² Stone, *supra* note 212, at 355.

²¹³ See DE WINTER, *supra* note 9, at 430.

²¹⁴ NYGH & POCAR, *supra* note 201, at 40.

²¹⁵ Rome I and Rome II take the habitual residence to realm of both contractual and non-contractual obligations.

²¹⁶ ELISA PEREZ-VERA, EXPLANATORY REPORT ON THE 1980 HAGUE CHILD ABDUCTION CONVENTION para 66 (1982), at 445.

²¹⁷ Rhona Schuz, *Policy Consideration in Determining the Habitual Residence of a Child and the Relevance of Context*, 11 J. TRANSNAT’L L. & POL’Y 101, 105 (2001).

²¹⁸ See *id.* at 107–08.

Although the debate is not necessarily fruitless and each argument has its own merits, it is generally agreed that the determination of habitual residence has “a largely factual emphasis.”²¹⁹ It is also found that “there has never been any real difficulty in applying it in practice.”²²⁰ Many countries, including those in the common law system, have now adopted the concept of habitual residence, either through legislation or by court decisions. But in order to avoid confusion, the legislature or courts of each country, as discussed below, tended to deal with habitual residence as factually specific as possible.

In civil law countries, there has been a growing trend of extensive application of habitual residence. Take the European Union for example. Habitual residence has become a primary connecting factor in determining the law applicable to both contractual obligations (Rome I) and non-contractual obligations (Rome II). In addition, habitual residence has also been adopted as a choice of law factor in other areas such as divorce and separation (Rome III), matrimonial matters and parental responsibility,²²¹ maintenance obligations,²²² insolvency,²²³ as well as pending legislative proposals concerning matrimonial property,²²⁴ and property consequences of registered partnerships.²²⁵ In these regulations, habitual residence is taken as an important, though not the sole, connecting factor for both jurisdiction and choice of law.

In practice, the CJEU has ruled on the notion of habitual residence not only in the context of child abduction but also in other fields of law.²²⁶ Additionally, the CJEU has endeavored to define the habitual residence through its interpretation. According to the CJEU, the concept of habitual residence means the place where the person concerned has established, and intends to maintain, the permanent or habitual center of their interests.²²⁷ Also, to help assess a person’s habitual residence, the CJEU has provided a guidance containing essential factors for the determination, including, among others, the length of residence, the length and purpose of absence, and the person’s apparent intention.²²⁸ Here, the CJEU clearly states that for the purpose of determining habitual residence, the past experience of residence and apparent intention of the person in question are decisive, implicating no future intention.

²¹⁹ *Id.* at 107 (quoting PAUL R. BEAUMONT & PETER E. MCELEAVY, *THE HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION* 90 (Oxford, 1999)).

²²⁰ Nygh & Pocar, Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, art. 3, ¶ 1, Oct. 30, 1999, HCCH.

²²¹ See Council Regulation 2201/2003 of Nov. 27, 2003, Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, repealing Regulation (EC) No. 1347/2000, 2003 O.J. (L 338) 1 (EC).

²²² See Council Regulation 4/2009 of Dec. 18, 2008, On Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Cooperation in Matters Relating to Maintenance Obligations, 2009 O.J. (L 7) 1 (EC).

²²³ See Regulation 2015/848, of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings, 2015 O.J. (L 141) 19 (EU).

²²⁴ See Council Regulation No. 2016/1103 of 24 June 2016, 2016 O.J. (L 183) 1.

²²⁵ Council Regulation 2016/1103 of June 26, 2016, Implementing Enhanced Cooperation in the Area of Jurisdiction, Applicable Law and the Recognition and Enforcement of Decisions Regarding the Property Consequences of Registered Partnerships, 2016 O.J. (L 183) 1.

²²⁶ See Manko, *supra* note 17.

²²⁷ See Case 13/73, *Angenieux v. Hakenberg*, 1973 E.C.R. 935; Case 76/76, *Di Paolo v. Office Nat’l de L’Emploi*, 1977 E.C.R. 315; Case 284/87, *Schäfflein v. Comm*, 1988 E.C.R. 4475. See also, Case C-297/89, *Rigsadvokaten v. Ryborg*, 1991 E.C.R. I-1943, ¶ 19.

²²⁸ See Manko, *supra* note 17.

Besides the European Union, the provision of habitual residence can also be seen in the legislation of other civil law countries. In China, as noted, the 2010 Choice of Law Statute for the first time makes habitual residence a general connecting factor in foreign civil relations, applicable in all major areas of civil activities and affairs.²²⁹ The Choice of Law Statute is a significant piece of legislation in modern China that forms the basic framework of Chinese private international law with respect to the determination of applicable law in foreign civil and commercial relations. The Choice of Law Statute regards the principle place of business as the habitual residence of a legal person but leaves habitual residence of a natural person undefined.²³⁰

In its judicial interpretation, the Supreme People's Court of China, in order to implement the Choice of Law Statute, defines habitual residence of a natural person as a place in which the person has lived for more than one year and has used as the center of his living at the time the related foreign civil relation occurs, changes, or terminates, except for seeking medical treatment, job dispatching, or business purposes.²³¹ In addition, under the Supreme People's Court's interpretation, a Chinese national who is a habitual resident in some place outside of China shall be considered as a "foreign element" which would trigger the application of the Choice of Law Statute.

In 2005, Bulgaria adopted its first Code on Private International Law. Under Article 48 of the Code, the national law of a person who has dual foreign nationalities, is a stateless person, or is a refugee shall be the law of his habitual residence.²³² For purposes of the Code, habitual residence is meant to be "the place where the said person has settled predominantly to live without this being related to a need of registration or authorization of residence or settlement."²³³ Pursuant to the Code, in order to determine habitual residence "special regard must be had to circumstances of personal or professional nature arising from sustained connections of the person with the said place or from the intention of the said person to establish such connections."²³⁴

Major common law countries, like England, have a tradition of adherence with domicile.²³⁵ This tradition however, appears to have changed in the past decades. The change at least partly is a result of implementation of the Hague conventions. In the United Kingdom, given the difficulties of proving intention as required with domicile, there was a call for a reform on the law of domicile as early as 1952.²³⁶ Since the 1960s, as a factor supplemental to domicile, habitual residence has been adopted in several statutes concerning succession and domestic

²²⁹ See Mo Zhang, *Codified Choice of Law in China: Rules, Processes and Theoretic Underpinnings*, 37 N.C. J. INT'L L. & COM. REG., 83, 130–39 (2011).

²³⁰ Choice of Law Statute of China, *supra* note 19, art. 14.

²³¹ Sup. People's Ct., Interpretations on Several Issues Concerning Application of Choice of Law Statute of People's Republic of China (I), art. 15 (2012), <http://www.66law.cn/tiaoli/1094.aspx> [<https://perma.cc/KYC2-LLR4>].

²³² See generally, Bulgarian Private Int'l L. Code (May 17, 2005), <http://www.ifrc.org/Docs/idrl/868EN.pdf> [<https://perma.cc/4R3X-BH2F>].

²³³ *Id.*, art. 48(7).

²³⁴ *Id.*

²³⁵ See Trakman, *supra* note 96, at 318 (English courts routinely apply common law principles of domicile in determining important issues such as the validity of a marriage, the legitimacy of children, and the validity of will).

²³⁶ See Law Commission and Scottish Law Commission, Private International Law - the Law of Domicile, (Law COM, No. 168) (Scot. Law Com., No. 107) at 2.

relations.²³⁷ Under the 1963 Wills Act, for example, habitual residence is used as one of the connecting factors to determine the law that governs the formal validity of a will.²³⁸ Moreover, the United Kingdom has also adopted a statutory residence test to determine other purposes such as taxation and social benefits.²³⁹

In addition to the statutory provisions, English courts, as well as the House of Lords, have developed a set of case law on habitual residence, mostly with respect to children. In the landmark case of *Re J (A Minor) (Abduction: Custody Rights)*, the House of Lords was asked whether a child had ceased to be habitually resident in Western Australia when his mother took him away with the settled intention of living in England. Lord Brandon of Oakbrook addressed, among others, two basic rules.²⁴⁰ First, the expression “habitually resident” shall be understood according to the ordinary and natural meaning of the two words that it contains.²⁴¹ Second, the question whether a person is or is not habitually resident in a specified country is a question of fact to be decided by reference to all the circumstances of any particular case.²⁴²

In the past few years, to further clarify the particular issue concerning the habitual residence of a child, the UK Supreme Court (former the Appellate Committee of the House of Lords) took several cases and ruled on habitual residence concerning such matters as jurisdiction,²⁴³ factual determinations,²⁴⁴ intentions of child,²⁴⁵ and circumstances of loss of a child’s habitual residence (the requisite degree of disengagement from his social and family environment).²⁴⁶ In *In the Matter of A.*, the court reiterated that habitual residence is “essentially factual” and “should not be glossed with legal concepts which would produce a different result from that which the factual inquiry would produce.”²⁴⁷ In a 2016 decision, the same court addressed a shift from a traditional dependence on parental intention to focusing on the child’s situation (*i.e.*, the degree of integration by the child in a social and family environment) in order to better serve the interests of the child.²⁴⁸

Note, however, that the concept of habitual residence in the United Kingdom is distinct from how the concept is understood in continental Europe. In one respect, habitual residence is often intertwined with the term “ordinary residence” used in British law.²⁴⁹ It is believed in the United Kingdom that “there is no real distinction between the two concepts,” or at least that “they share a

²³⁷ Those statutes include the Wills Act 1963, the Recognition of Divorce and Legal Separation Act 1971, the Domicile and Matrimonial Proceedings Act 1973, Family Law Act 1986, and Family Law Act 1996 (divorce and marriage).

²³⁸ Wills Act 1963 § 1 (“A will shall be treated as properly executed if its execution conformed to the internal law in force in the territory where it was executed, or in the territory where, at time of its execution or of the testator’s death, he was domiciled or had his habitual residence, or in a state of which, at either of those times, he was a national.”).

²³⁹ See Trakman, *supra* note 96, at 332.

²⁴⁰ *Re J. (A Minor)* [1990] 2 A.C. 562, at 570.

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *In the Matter of A (Children)* [2013] UKSC 60, ¶ 1.

²⁴⁴ *Re L (A Child) (Habitual Residence)* [2013] UKSC 75, ¶ 20.

²⁴⁵ *In the Matter of LC (Children)* [2014] UKSC 1, ¶ 37.

²⁴⁶ *In the Matter of B (Child)* [2016] UKSC 4, ¶ 45.

²⁴⁷ *In re A.*, [2013] UKSC at [54(vii)].

²⁴⁸ See *In re B.*, [2016] UKSC at [42]–[43].

²⁴⁹ See Rogerson, *supra* note 17, at 96; see McLEOD, *supra* note 22, at 11, 24.

common core of meaning.”²⁵⁰ According to the House of Lords, ordinary residence means a regular habitual mode of life in a particular place for the time being, adopted for a settled purpose.²⁵¹ Perhaps from this perspective, habitual residence is a “relatively new concept in English domestic law.”²⁵² There is an ongoing debate on whether and how these two terms differ from each other.²⁵³ But the UK Supreme Court has taken the position that “the interpretation in [the English courts] of the concept of habitual residence should be consonant with its international interpretation.”²⁵⁴ The UK Supreme Court has also held that the English concept of habitual residence should be governed by the criteria set out in the jurisprudence of CJEU.²⁵⁵

Despite this, under British domestic law, it is possible that a person could be regarded as having two habitual residences because, when deciding jurisdiction, an English court must determine if the person in question is habitually resident in England, regardless of whether the person has habitually resided elsewhere.²⁵⁶ This situation may also occur in the case of a person who has spent roughly equal amounts of time in England and another country.²⁵⁷ According to the EU rule based on Brussels II Revised, however, a person cannot be a habitual resident in more than one country at the same time.²⁵⁸ The basic test—center of interests—holds that a person can have only one center of his interests.²⁵⁹

In Canada, the concept of habitual residence via the Hague convention has now become part of Canadian law.²⁶⁰ The adoption of habitual residence in Canada is said to “avoid the rigid and arbitrary rules that have come to surround the concept of ‘domicile.’”²⁶¹ Most provinces in Canada that have adopted Hague conventions have accepted “habitual residence” in preference to “domicile.”²⁶² As a result, habitual residence is employed in Canada as a major connecting factor in resolving “international or interprovincial jurisdiction and choice of law issues.”²⁶³ The province of Quebec follows the civil law tradition that habitual residence is held as the place where he or she regularly, normally, and customarily lives, which requires more durable ties than mere residence.²⁶⁴

²⁵⁰ See MCCLEAN & BEEVERS, *supra* note 102, at 24.

²⁵¹ Ordinary Residence, U.K. GOV’T (Jan. 5, 2011), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/258236/ordinaryresidence.pdf [<https://perma.cc/S3B8-FHWC>].

²⁵² See Rogerson, *supra* note 17, at 96.

²⁵³ *Id.* at 96–97.

²⁵⁴ *In re B.*, [2016] UKSC 4, [31].

²⁵⁵ See *id.* at [38].

²⁵⁶ See Rogerson, *supra* note 17, at 101.

²⁵⁷ C. M. V. CLARKSON & JONATHAN HILL, *CONFLICT OF LAWS* 340 (4th ed. 2011).

²⁵⁸ See *id.* at 339; see generally Council Regulation 2201/2003, 2003 O.J. (EC). (Brussels II Revised is also known as EU Regulation concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility).

²⁵⁹ See Geert Van Calster, *EUROPEAN PRIVATE INTERNATIONAL LAW* (2nd ed, 220 (Hart 2016)

²⁶⁰ See Goldstein, *supra* note 149, at 6; see also MCLEOD, *supra* note 22, at 8.

²⁶¹ See MCLEOD, *supra* note 22, at 8.

²⁶² *Id.*, at 3.

²⁶³ See MCLEOD, *supra* note 22, at 3.

²⁶⁴ See Goldstein, *supra* note 149, at 6.

Habitual residence in both Australia and New Zealand is “intended to be a simple non-technical term, applied to the facts of each case.”²⁶⁵ It is commonly held in these two nations that “a person’s country of habitual residence is the country in which a person usually lives.”²⁶⁶ For the purpose of habitual residence, “residence” refers to “a place where a person resides or lives for a settled period” and “habitual” implicates that “something more than occasional or short-term residence is required.”²⁶⁷ Thus, to find habitual residence, “something more than occasional or short-term residence is required,” but the presence may not necessarily be a “continuous” one.²⁶⁸ Obviously then, a person “who is present in a country as a tourist or in transit is not habitually resident in that country.”²⁶⁹

IV. HABITUAL RESIDENCE IN AMERICAN CONFLICT OF LAWS: AN UNDEVELOPED AREA

Habitual residence as a connecting factor is an area yet to be developed in American conflict of laws. First, the concept of habitual residence has received barely any attention in American conflict of law literature. In major conflict of law textbooks and commentaries, habitual residence is mentioned at most as a “subject of frequent use in international matters and international conventions.”²⁷⁰ In many law journals, habitual residence becomes a topic of discussion only when the Hague Convention is involved, and the discussions are almost always constrained to the provisions of relevant convention as well as the convention cases in U.S. courts. Even during the drafting of the third restatement of conflicts, a proposal to substitute habitual residence for domicile met strong resistance, and as a result the concept of domicile was reinstated in the draft of the new restatement.²⁷¹

Second, the current Second Conflict of Law Restatement, which has a strong influence on the conflict of law rules nationwide, contains no provision on habitual residence. Although the Second Restatement does mention “residence” or “legal residence,” the term as used in the Second Restatement is understood as “the equivalent of domicile.”²⁷² In the Second Restatement, there is an illustration about “home,” but the illustration is mainly to help determine domicile.²⁷³ It has also been observed that as developed in modern usage in the U.S., the concept of home is “fairly close to the concept of domicile.”²⁷⁴

Third, the U.S. ratified the Child Abduction Convention in 1988.²⁷⁵ In the same year, the International Child Abduction Remedies Act (ICARA) was adopted.

²⁶⁵ See DEP’T OF SOC. SERVS. OF THE COMMONWEALTH OF AUSTL., *Child Support Guide: Habitual Residency Under the Australia and New Zealand Agreement* §1.6.4 (rel. Jan. 2, 2018), <http://guides.dss.gov.au/child-support-guide/1/6/4> [<https://perma.cc/BRU4-35HF>].

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ See HAY., *supra* note 1, § 4.14, at 299.

²⁷¹ See Robert Felix, Ralph Whittern, and Richard Seamon, AMERICAN CONFLICT OF LAW (6th ed.), 2017-2018 Supplement at p 11.

²⁷² RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 11 cmt. k (AM. LAW INST. 1971).

²⁷³ See *id.* cmt. h.

²⁷⁴ See HAY., *supra* note 1, at 300.

²⁷⁵ See HCCH 1980 Convention on the Civil Aspects of International Child Abduction Status Table, available at <https://www.hcch.net/en/instruments/conventions/status-table/?cid=24> [<https://perma.cc/KR96-3CDK>].

Under ICARA, an application of the concept of habitual residence in U.S. courts in the convention related cases is required.²⁷⁶ During the past decades, however, the acceptance of habitual residence remained primarily within the realm of the Hague conventions and there has been no case in which the U.S. Supreme Court takes a view on habitual residence as opposed to domicile.²⁷⁷ In short, the recognition and application of habitual residence in the U.S. is limited.

Nevertheless, the U.S. participation in the Hague conventions makes it possible, and also creates a real need, to accept the concept of habitual residence in the U.S. In fact, the concept of habitual residence as used in the U.S. law can be seen as early as in the Refugee Act of 1980.²⁷⁸ In the context of the Refugee Act, however, habitual residence was used mainly to help determine the refugee status, and applied only to a stateless person.²⁷⁹ Thus, for purposes of conflict of laws, the use of habitual residence as a connecting factor in the U.S. actually began with the ratification of the Child Abduction Convention.

Like in all other common law countries, domicile is a principal connecting factor of conflict of laws in the U.S., and it is viewed as “an enduring and persistent relationship” between a person and a place.²⁸⁰ As noted, under the Second Restatement, domicile in conflict of laws serves the functions of determining, among others, judicial jurisdiction and choice of law.²⁸¹ In choice of law, for example, a general rule is that the law of a person’s domicile at death determines the distribution of movable property of the person.²⁸² With regard to jurisdiction, domicile plays an indispensable role. In divorce cases, for example, a stated rule is that “a state may not exercise judicial jurisdiction to grant a divorce if neither spouse is domiciled in the state.”²⁸³

But there has long existed a voice disfavoring the use of domicile in the U.S. The critics have argued that the “domiciliary concept is used for too many diverse purposes.”²⁸⁴ The point of the concern has been that the “finding of domicile is too dependent upon subjective inferences drawn from the facts, even undisputed facts, for the meaning of that concept not to vary with its context.”²⁸⁵ For this reason, a question that was raised long ago is whether “domicile is a useful concept which assists proper analysis or is an albatross around our necks that we would be better to be quit of.”²⁸⁶ One suggestion has been that “we should find the concept of ‘habitual residence’ useful in domestic as well as international cases”²⁸⁷

²⁷⁶ 22 U.S.C. §§ 9001–9011

²⁷⁷ In *Mitchell v. United States*, the Supreme Court defined domicile as “a residence at a particular place accompanied with positive or presumptive proof of an intention to remain there for an unlimited time.” 88 U.S. (21 Wall.) 350, 352 (1874). Ever since the 1874 case, the definition of “domicile” has not changed. See HAY, *supra* note 1, at 302 n.2.

²⁷⁸ Section 201 of the Refugee Act provides that the term “refugee” means “any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided” 8 U.S.C. § 1101(a)(42)(A) (2012).

²⁷⁹ *Id.*

²⁸⁰ See HAY, *supra* note 1, at 286.

²⁸¹ See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 11, cmt. c (AM. LAW INST. 1971).

²⁸² *Id.*

²⁸³ See *id.* § 72 cmt. a.

²⁸⁴ See Weintraub, *supra* note 89, at 984

²⁸⁵ *Id.*

²⁸⁶ *Id.* at 961.

²⁸⁷ See Cavers, *Habitual Residence*, *supra* note 4, at 493.

With the implementation of the Child Abduction Convention, the U.S. courts must deal with the determination of habitual residence. The convention cases often involve questions as to whether the child has been removed or retained from their habitual residence, and whether the parents requesting return have custody rights, which are determined by the law of habitual residence of the child.²⁸⁸ When making this determination, the U.S. courts are confronted with at least four major questions, and the answer to each of these questions reflects, at least from the judicial viewpoint, the current attitude towards habitual residence in the U.S.

The first question concerns the difference between habitual residence and domicile. As discussed, habitual residence is not commonly used in the U.S. There is also a belief in the U.S. conflict of law literature that “habitual residence is quite a bit like domicile.”²⁸⁹ Behind the belief is a notion that “in most circumstances habitual residence has the same essential meaning that is usually associated with one’s home.”²⁹⁰ Under the Second Restatement, “a person’s domicile [sic] is usually the place where he has his home.”²⁹¹ In this regard, the line between domicile and habitual residence seems blurred and appears to diminish the necessity of separating habitual residence from domicile.

When hearing the Hague Convention cases, the U.S. courts have recognized that “[t]he concept of habitual residence must be distinguished from ‘domicile.’”²⁹² Courts have also realized that earlier decisions were wrong to have “equated the concept of habitual residence to that of domicile.”²⁹³ In *Friedrich v. Friedrich*, the Sixth Circuit explicitly held that “habitual residence must not be confused with domicile.”²⁹⁴ In *Kijowska v. Haines*, a Polish citizen brought a suit in the federal district court in Chicago, seeking an order to have her daughter who lived with her father in Illinois, be returned to Poland.²⁹⁵ In applying the Hague Convention and its implementing federal statute, the Seventh Circuit was of the opinion that “equating habitual residence to domicile would re-raise the spectre [sic] of forum shopping by encouraging a parent to remove the child to a jurisdiction having a view of domicile more favorable to that parent’s case.”²⁹⁶ In *Koch v. Koch*, it was held by the Seventh Circuit that “‘habitual residence’ should bear a uniform meaning, independent of any jurisdiction’s notion of domicile.”²⁹⁷

The second question is about the concept of habitual residence. Since no definition of habitual residence is offered in the Hague Convention, it would be up to the courts of particular jurisdiction to interpret the term.²⁹⁸ However, due to the lack of a body of case law developed in the U.S., the courts, while struggling to

²⁸⁸ See HON. JAMES GARBOLINO, *THE 1980 HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION: A GUIDE FOR JUDGES* 50 (2d ed. 2015).

²⁸⁹ See HAY, *supra* note 1, § 4.14, at 302.

²⁹⁰ *Id.* at 300.

²⁹¹ See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 11, cmt. a (AM. LAW INST. 1971).

²⁹² GARBOLINO, *supra* note 288, at 52.

²⁹³ *Id.* at 52 n.204.

²⁹⁴ *Friedrich v. Friedrich*, 983 F.2d 1396, 1401 (6th Cir. 1993).

²⁹⁵ 463 F.3d 583, 586 (7th Cir. 2006).

²⁹⁶ *Id.* at 587.

²⁹⁷ 450 F.3d 703, 712 (7th Cir. 2006).

²⁹⁸ *Holder v. Holder*, 392 F.3d, 1009, 1015 (9th Cir. 2004) (“The term ‘habitual residence’ was intentionally left undefined in the Convention. . . . This omission has helped courts avoid formalistic determinations but also has caused considerable confusion as to how courts should interpret ‘habitual residence.’”).

define the concept,²⁹⁹ have followed a 1989 British case (*In re Bates*) where it was held that for the purpose of habitual residence “there must be a degree of settled purpose” and “[a]ll that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled.”³⁰⁰ Then, the “settled purpose” becomes, and continues to be, a “hallmark” of habitual residence determination in the U.S. courts.³⁰¹

In a number of cases, the U.S. courts have attempted to define habitual residence, especially for the purpose of the Child Abduction Convention. As early as 1993, the Sixth Circuit in *Friedrich* held that “habitual residence pertains to customary residence prior to the removal.”³⁰² Under the Sixth Circuit’s opinion, when making a determination, the “court must look back in time, not forward.”³⁰³ In the 1995 case of *Feder v. Evans-Feder*, the Third Circuit ruled that the habitual residence of a child is “where he or she has been physically present for an amount of time sufficient for acclimatization”³⁰⁴ With a caution, however, the courts seem to have restrained themselves from developing “detailed and restrictive rules as to habitual residence,” for the concern of making it “as technical a term of art as common law domicile.”³⁰⁵

The third question that the U.S. courts have encountered is how to determine habitual residence. Since the U.S. Supreme Court has taken no position on habitual residence, the determination of it in the U.S. courts is not subject to uniform authority. Although there is a debate among the courts as to whether the determination should be treated as a question of “fact” or “mixed fact and law,”³⁰⁶ it is generally agreed that determination of habitual residence “is a fact-specific inquiry that should be made on a case-by-case basis.”³⁰⁷ In child abduction cases, many courts consider habitual residence of a child a fact-driven issue that requires a factor analysis.³⁰⁸ The factors to be considered include: the environment the child has acclimated to and their social life; the period of the child’s residing in a particular place; the age of the child and the child’s relationship with the family and friends; the place of the child’s schooling and medical care; and the language the child speaks.³⁰⁹

When analyzing the factors, the U.S. courts are often trying to find two important elements—the actual residence and the settled purpose.³¹⁰ The U.S. Department of Homeland Security, for the purpose of determining habitual residence in the U.S. for children from Hague Convention countries, issued a “Policy Memorandum” (PM) that sets forth the criteria intended to guide the

²⁹⁹ See Zohar, *supra* note 23, at 177.

³⁰⁰ [1989] CA 122/89, 1989 WL 1683783 (cited from the speech of Lord Scarman in *R. v. Barnet London Borough Council ex parte Shah* [1983] 2 A.C. 309). A handful of U.S. cases have cited *in re Bates* in their decisions. See Robert Spector, A Guide to United States Case Law under the Hague Convention on the Civil Aspects of International Child Abduction, 12 *International Yearbook of Private International Law*, 139, 144 n.19 (2010).

³⁰¹ See Garbolino, *supra* note 288, at 51.

³⁰² *Friedrich v. Friedrich*, 983 F.2d 1396, 1401 (6th Cir. 1993).

³⁰³ *Id.*

³⁰⁴ 63 F.3d 217, 224 (3d Cir. 1995).

³⁰⁵ *Friedrich*, 983 F.2d at 1401.

³⁰⁶ *Evans-Feder*, 63 F.3d at 227 (Sarokin, J., dissenting).

³⁰⁷ *Miller v. Miller*, 240 F.3d 392, 400 (4th Cir. 2001).

³⁰⁸ See Garbolino, *supra* note 288, at 51.

³⁰⁹ See *id.*

³¹⁰ See Garbolino, *supra* note 288, at 51-52.

determination in November 2013.³¹¹ The PM criteria explicitly provide the tests of actual residence and intention.³¹² Under the PM criteria, the actual residence test looks for “compelling ties” to the U.S. “for a substantial period of time,” while the intent test focuses on the “entry for purposes other than adoption” at the time the child entered in the U.S.³¹³

In *Friedrich*, the Sixth Circuit adopted certain rules to help determine habitual residence. First, habitual residence shall not be made as technical a term of art as common law domicile, and its determination shall depend on “the facts and circumstances of each case.”³¹⁴ Second, when determining the habitual residence of a child, the court must focus on the child, not the parents. Third, the determination shall be based on the child’s “past experience,” but not on any future plans that the parents may have. Fourth, “a person can have only one habitual residence” at any given time. Fifth, habitual residence may be “altered” only “by a change in geography and the passage of time.”³¹⁵ These rules are also taken as “guiding principles” for the determination of habitual residence.³¹⁶

The fourth question is about ascertainment of intention. As noted, one key factor in determining habitual residence is the “settled purpose.” To identify such purpose, a very basic inquiry is whether there is intent to make a place the habitual residence. In their adjudication of child abduction cases, the U.S. courts are quite divided on the finding of intention. In *Mozes v. Mozes*, the Ninth Circuit concentrated on the parental intention and held that the determination of a child’s habitual residence in a place would depend on (a) a shared intention of parents to abandon the former habitual residence and (b) a change in geography for an appreciated period of time.³¹⁷

Other courts, however, believe that the parental intention shall be considered in light of the circumstances of the child. In *Gitter v. Gitter*, the Second Circuit set forth a two-step standard.³¹⁸ Under this standard, to determine a child’s habitual residence, the court shall first look into “the shared intent of those entitled to fix the child’s residence (usually the parents),” and then inquire whether “the child has acclimatized to the new location and thus has acquired a new habitual residence, notwithstanding any conflict with the parents’ latest shared intent.”³¹⁹ Similarly, in *Feder* the Third Circuit held that the determination of any particular place as habitual residence “must focus on the child and consist[] of an analysis of child’s circumstances in that place and the parents’ present, shared intentions regarding their child’s presence there.”³²⁰

In the recent case of *Martinez v. Cahue*, the Seventh Circuit considered the determination of habitual residence as “a ‘mixed’ question of law and fact.”³²¹

³¹¹ See DEPARTMENT OF HOMELAND SECURITY, *Criteria for Determining Habitual Residence in the United States for Children from Hague Convention Countries*, (November 23, 2013), available at <https://www.uscis.gov/sites/default/files/USCIS/Outreach/Interim%20Guidance%20for%20Comment/Habitual-Residence-PM-Interim.pdf> [<https://perma.cc/J8LS-G5ZB>].

³¹² See *id.*

³¹³ See *id.*

³¹⁴ *Friedrich*, 983 F.2d at 1401-02.

³¹⁵ *Id.*

³¹⁶ See Zohar, *supra* note 23, at 186.

³¹⁷ *Mozes v. Mozes*, 239 F.3d 1067, 1078 (9th Cir. 2001).

³¹⁸ *Gitter v. Gitter*, 396 F.3d 124, 134 (2d Cir. 2005).

³¹⁹ *Id.*

³²⁰ *Evans-Feder*, 63 F.3d at 224.

³²¹ *Martinez v. Cahue*, 826 F.3d 983, 989 (7th Cir. 2016) (Plaintiff and defendant have a child but

It is the Seventh Circuit's view that the inquiry into habitual residence is "a 'practical, flexible, factual' one that 'accounts for all available relevant evidence and considers the individual circumstances of each case.'"³²² The court held that "[t]he two most important factors in the analysis are parental intent and the child's acclimatization to the proposed home jurisdiction,"³²³ and that because "the intention or purpose which has to be taken into account is that of the person or persons entitled to fix the place of the child's residence,"³²⁴ the "shared intent 'has less salience when only one parent has the legal right' to determine residence."³²⁵

The Sixth Circuit took a totally different approach. The court downplayed the parental intent inquiry and looked instead into the child's past experience. In *Friedrich*, the Sixth Circuit opined that "[t]o determine the habitual residence, the court must focus on the child, not the parents, and examine the past experience, not future intentions."³²⁶ In *Robert v. Tesson*, the Sixth Circuit further held "that a child's habitual residence is the place where he or she has been physically present for an amount of time sufficient for acclimatization and which has a degree of settled purpose from the child's perspective."³²⁷ Thus, according to the Sixth Circuit, for determination of the child's habitual residence, the objective standard of the time and place where the child physically resides, rather than subjective intent, shall be employed.

The diverse opinions in the U.S. courts with respect to the determination of habitual residence suggest the fact that habitual residence as a concept has received judicial recognition in the U.S. but its application remains multi-faceted. This phenomenon is expected to continue until the Supreme Court of the U.S. takes position on the issue of habitual residence, although the approach of combined parental intent and child's circumstances is deemed to be the majority view.³²⁸ Nevertheless, the use of habitual residence in the judicial practice necessarily raises a question about what the American conflict of law community would need to do in order not to be left behind in this respect.

V. HABITUAL RESIDENCE AND THE THIRD CONFLICT OF LAWS RESTATEMENT: A PROPOSAL

The last few decades have witnessed an international acceptance of habitual residence and a growing trend of application of habitual residence in conflict of laws. Although certain issues remain subject to further debates or

never married. The child was born in Chicago in 2006 and lived with his mother, the Plaintiff, in Illinois for his first seven years. The custody and visitation rights were provided by a private arrangement not formalized through a court order. In 2003, the Plaintiff moved to Mexico with the child. The defendant in 2014 persuaded the plaintiff to send the child to Illinois for a visit and then refused to return the child to Mexico. Emphasizing the absence of shared parental intent, the district court dismissed the Plaintiff's petition and held that Illinois had remained the child's habitual residence during the year her spent in Mexico. The Seventh Circuit reversed for the reason that since at all times, the Plaintiff had sole custody either under Illinois Law or the Hague Convention, only the Plaintiff's intent matters.).

³²² *Id.* at 989–90 (quoting *Redmond v. Redmond*, 724 F.3d 729, 732 (7th Cir. 2013)).

³²³ *Id.* at 990 (quoting *Redmond*, 724 F.3d at 747).

³²⁴ *Id.*

³²⁵ *Id.*

³²⁶ *Friedrich*, 983 F.2d at 1401 (6th Cir. 1993).

³²⁷ *Robert v. Tesson*, 507 F.3d 981, 998 (6th Cir. 2007) (quoting *Evans-Feder*, 63 F.3d at 224).

³²⁸ See GARBOLINO, *supra* note 288, at 54.

clarification, it is without question that habitual residence has in fact eclipsed, or to a certain extent has even replaced, domicile and it has become an important connecting factor and indispensable part of conflict of laws. The development of general acceptance of habitual residence should not be ignored during the drafting of the *Third Conflict of Laws Restatement*. In addition, the judicial recognition of habitual residence in the U.S. provides the necessity, as well as the legal basis, to have habitual residence included in the new restatement.

Some may have a concern that since the rules on habitual residence have not quite been well-developed in the U.S., it might be premature to address them in the *Third Restatement* because the purpose of a restatement is to restate the legal rules that constitute the common law in a particular area, or to state what are believed to be the consensus of American courts on particular points of law.³²⁹ As a matter of fact, there is a sufficient ground to have habitual residence “restated.” First, habitual residence is a well-established rule in the international treaties that the U.S. has ratified. Second, there are a sufficient number of cases in which U.S. courts have ruled on habitual residence. Although the court rulings are almost all related to the treaties, the underlying doctrinal analysis has the significance of a general application. Third, with the increase of the international use of habitual residence, it is reasonable to predict that more attention will be called to the use of habitual residence in the area of conflict of laws in the U.S. both academically and practically.

The following is a proposed set of habitual residence rules for consideration. The proposal is based on the foregoing discussion and contains the general practice in the international community and the majority view held by the U.S. courts. The proposal intends to suggest that habitual residence be formally adopted in the *Third Restatement* as a conflict-of-law connecting factor. There are two options under the proposal. One option is to replace domicile with habitual residence. An alternative option is to take habitual residence in conjunction with domicile and to apply it in the case where the uncertainty of a domicile appears.

Rules of Habitual Residence

1. Habitual Residence in General

The habitual residence of a person is a place to which the rules of conflict of laws accord significance in the specified legal areas because of the person’s connection with that place.³³⁰

2. Definition of Habitual Residence

³²⁹ Restatements (2d, and 3d) and Principles of the Law, with Appendices, THOMAS REUTERS, <http://legalsolutions.thomsonreuters.com/law-products/Restatements-of-the-Law/Restatements-2d-and-3d-and-Principles-of-the-Law-with-Appendices/p/100029655> [<https://perma.cc/DD6K-VKXS>] (“In each restatement, the authors, who are noted scholars in their fields, state what they believe to be the consensus of American courts on particular points of law.”).

³³⁰ Alternatively, habitual residence in general can be provided as follows: Habitual residence of a person is a place that possesses significance in conflict of laws and is supplemental to the person’s domicile. If the domicile of a person cannot be ascertained, or is difficult to ascertain, the habitual residence of such person will be used instead.

- (1) The habitual residence of a natural person is the place where the person has settled to live for an appreciable period of time and which under all circumstances has become the center of that person's life.³³¹
- (2) The habitual residence of a legal person is the place where the central administration, or nerve center, of the legal person is located.
- (3) If a legal person operates a branch, agency, or any other establishment, the place where the branch, agency, or any other establishment is located shall be treated as the place of habitual residence of such branch, agency, or establishment.

3. Determination of Habitual Residence

- (1) The determination of habitual residence is regarded mainly as a question of fact subject to consideration of all the circumstances.
- (2) The law of forum governs the determination of habitual residence.

4. Change of Habitual Residence

- (1) A natural person may change their habitual residence by living in a new place for an appreciable period of time with a settled purpose to make it the center of their life.
- (2) Once the new habitual residence is acquired, the prior habitual residence is abandoned.

5. Continuity of Habitual Residence

- (1) For purposes of conflict of laws, a person can have only one habitual residence at a given time.
- (2) An existing habitual residence of a person is presumed to continue unless a new habitual residence has been acquired.

6. Habitual Residence of Minors

- (1) The habitual residence of a minor generally follows that of the parent or parents.
- (2) The habitual residence of a minor who does not live with any parent is, in general, that of a person or persons who have the parental responsibility for the minor and with whom the minor lives.
- (3) The determination of the habitual residence of a minor shall be made by reference to the circumstances of the minor with a consideration of the parental intention pertaining to the minor's residence.
- (4) The primary focus of the determination of a minor's habitual residence is on the social and family environment in which the minor lives, or the degree of the settled purpose from the minor's perspective.³³²

³³¹ The factual test of habitual residence of a person should focus on the continuity of the connection between a person and the place of the person's residence. Factors to consider include family status and ties; duration and continuity of stay; employment; exercise of a non-remunerated activity; intention of the person; location of the school of children; source of income and location of income tax payments; as well as the intention of the person.

Several points are worth mentioning. First, habitual residence as a connecting factor may be provided as a rule of general application or the rule that applies to specific area. As a general rule, habitual residence would replace domicile and become a primary connecting factor. If applied in specific areas, habitual residence could be used as a supplement to domicile or as a gap-filler when the domicile can hardly be determined or ascertained. Alternatively, habitual residence and domicile could co-exist and be applied to different issues. For example, when personal status is involved, habitual residence mainly applies, while in some other cases (*e.g.*, dispute concerning corporate internal affairs), domicile may control.

Second, determination of habitual residence is a matter of fact analysis. For the habitual residence of a natural person, the focal point is on the circumstantial factors, including actual presence, length of living, purpose of residing, center of activities, axis of family relations, and continuity of stay, regardless of future intention. A person may have more than one residence but only one habitual residence in light of conflict of laws. A husband and a wife may each have their own habitual residence if they are legally separated. For a legal person, the habitual residence will be the place of its headquarters, or its principal place of business if the place of headquarters could not be ascertained.

Third, the habitual residence of a minor normally is the place of habitual residence of the minor's parents. If the parents are divorced, the minor's habitual residence will depend on which parent the minor actually lives with on the regular basis. The right of custody will be the key element for the determination. In case of joint custody, the place where the minor's best interest will be served and maintained will take the priority. Again, all considerations given are factually based and its determination will not rely on the intention of parent(s) but on the actual residence and regular activities of the minor.

Fourth, the habitual residence of a person, natural or legal, is to be determined according to the law of forum (*lex fori*). Since the determination of habitual residence is factually based, the forum applies its own rules of habitual residence for the purpose of both jurisdiction and choice of law. Application of forum law would also help minimize the possible conflict between the forum law and foreign law because the rules of habitual residence and the interpretation of such rules differ from jurisdiction to jurisdiction. The foreign rules of habitual residence may be applied in certain cases where the validity of habitual residence is a preliminary question pertaining to the merits of the claim. Once the habitual residence of a person is ascertained, the status and its legal attributes of such person will be determined by the law of the place of the person's habitual residence.

³³² Factors relevant to judge the social and family environment of a child include "[(1)] a change in geography combined with the passage of an appreciable period of time[; (2)] age of the child[; (3)] immigration status of child and parent[; (4)] academic activities[; (5)] social engagements[; (6)] participation in sports programs and excursions[; (7)] meaningful connections with the people and places in the child's new country[; (8)] language proficiency[; and (9)] location of personal belongings." GARBOLINO, *supra* note 288, at 67-68 (footnotes omitted).

VI. CONCLUSION

Habitual residence has now become an internationally accepted conflict of laws connecting factor, and the trend to have it to replace, or act as an alternative to, domicile in many legal areas continues to grow. The fact that habitual residence as a connecting factor is well received in the global community implies the significance and importance of its application in conflict of laws. There is no doubt that with respect to all three subjects of conflict of laws, namely, jurisdiction, choice of law, and enforcement of foreign judgment, the role that habitual residence is playing, and will continue to play, will not only be quite meaningful but also indispensable.

With the international acceptance of habitual residence, American conflict of laws is facing a challenge. The drafting of the *Third Restatement* provides a great opportunity to reconsider American conflict of laws. Although the very focus of the *Restatement* is on American Law, the international common practice should not be ignored because the increasing integration of the world economy requires each country look more externally for harmonization. Thus, it would be unwise for any country to be separated from the rest of the world, and the U.S. is no exception.

The *First Restatement of Conflict of Laws* represented traditional American conflict of laws. The *Second Restatement* substantially altered the *First Restatement* as an outcome of the revolution of conflict of laws in America. The first two restatements, however, did not pay much attention to the international conflict of laws rules and practices. The world is now more different than ever before. Hopefully, the *Third Restatement* will echo the changes in conflict of laws both domestically and internationally, and fairly position American conflict of laws to meet the needs in the globalized world. Among the changes and needs, of course, is the adoption of habitual residence.

