Building the bridge between “habitual residence” and “substantial connection”: Facts; Policy Objectives; and the Appropriate Forum

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Habitual Residence –
the Ubiquitous Connecting Factor

Habitual Residence (HR) has long been the connecting factor of choice for all contemporary international and EU family law instruments.

Why?

Perception it responds to the demands of a modern mobile society.
Cavers in 1972:

“... since habitual residence does not come to us with nearly two centuries of definitional disputation, the use of the term in lieu of domicile may make it easier for courts on appeal and in recognition cases to encourage the concept’s common-sense application...”
Perceived to be a simple, factual concept, one which would be simple to recognise and easy to apply:

De Winter 1969, it had:

“the advantage that the courts have the latitude to decide on the basis of all the factual data and on the basis of common sense whether or not a person has his habitual residence in a certain country.”
Anton (1969), the habitual nature of residence was to be:

“regarded simply as a question of fact, making definition otiose.”
Habitual Residence & 1996 Hague Convention

By 1996 a corpus of case law had emerged and at the Eighteenth Session there was some discussion of HR and the desirability of providing a definition (or partial definition) of the connecting factor.

These attempts rejected – no willingness to disturb established case law; desire to retain maximum flexibility for the concept.
Habitual Residence Today

Significantly, diverging interpretations – nationally and internationally;

Uncertainty over whether HR should be considered a factual concept or a legal concept, or some form of hybrid;

Reluctance on the part of courts / policy makers to reflect on the purpose of HR and the role of policy in its interpretation.
Can there be a connecting factor which is truly factual?

Presence is clearly a factual concept – either one is present in a place or one is not present.

Residence connotes presence which has a particular quality. Characterizing that quality calls into question whether residence can be truly factual.
Once residence is qualified by the adjective “habitual”, then it clearly is no longer a matter of pure fact.

At most basic level there needs to be some understanding as to the parameters of the “habit”: short term; medium term; long term?

To what extent, if at all, should this classification be influenced by the legislative context in which HR is used?
The Recalibration of HR in the United Kingdom

In 2013/14, in 3 judgments, the Supreme Court of the United Kingdom reversed 27 years of practice as regards the determination of the HR of children.

The “parental rights” model for the determination of HR was abandoned for an enhanced “child centric” model, whereby regard might even be paid to the state of mind of older children in certain instances.

Inspiration - CJEU case law: A and Mercredi.
Re R (Children) (Reunite International Child Abduction Centre and others intervening) [2015] UKSC 35, [2015] 2 W.L.R. 1583

4 months into an agreed 12 month stay in Scotland the mother of the 2 children decided to remain and issued custody proceedings.

Father in France issued return proceedings. Retention not wrongful – children were deemed to have become habitually resident in Scotland
“...following the children’s move with their mother to Scotland, that was where they lived, albeit for what was intended to be a period of 12 months. Their life there had the necessary quality of stability. For the time being, their home was in Scotland. Their social life was there. Their family life was predominantly there. The longer time went on, the more deeply integrated they had become into their environment in Scotland.”

How does such an interpretation of HR fit with policy objectives underpinning the 1980 Hague Convention?
C v M (Wrongful Retention: Habitual Residence) (C-376/14 PPU) [2015] Fam. 116 – AG Szpunar at [83]

“…there is no reason to depart from the overwhelmingly accepted classification of habitual residence as a factual concept. There is no need to overlay this concept with legal constructs. Legal certainty calls for a concept that can easily be applied. If it were accepted that the habitual residence of a child cannot change because of the existence of pending proceedings, this would effectively lead to the acquisition of habitual residence being impeded for an uncertain period of time. It would also mean that in cases such as the present the mere existence of an appeal would outweigh all the other matters of fact referred to above.”
Judgment – strong emphasis on policy?

55 “When examining in particular the reasons for the child’s stay in the Member State to which the child was removed and the intention of the parent who took the child there, it is important, in circumstances such as those of the main proceedings, to take into account the fact that the court judgment authorising the removal could be provisionally enforced and that an appeal had been brought against it. Those factors are not conducive to a finding that the child’s habitual residence was transferred, since that judgment was provisional and the parent concerned could not be certain, at the time of the removal, that the stay in that Member State would not be temporary.”
Can a balance be achieved between fact & policy when interpreting habitual residence?

Herein lies the benefit of the transfer mechanism.