PRIVATE INTERNATIONAL LAW OF EMPLOYMENT

Connecting Factor

(Domicile, Nationality, Habitual Residence)

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This article will shed light on the difference between three connecting factors (Domicile, Nationality, Habitual Residence) which will be considering when assessing an employment case having a foreign element.

The concept of transnational employment within Europe changes the traditional Private International Law (PIL) norms, especially with the European Union regulations laying down rules within the internal market.

The European Union PIL rules of employment are laid down in regulations dealing with issues of civil and commercial matters. Matters touching jurisdiction of employment contracts within the European Union are regulated by the Brussels I Recast Regulation (EU) No 1215/2012 [2] whilst issues related to the choice of law are regulated by the Rome I Regulation (EC) No 593/2008. [3] The aforementioned regulations are complimented by the Posted Workers Directive 96/71/EC. [4] On the other hand the Court of Justice of the European Union (CJEU) plays a crucial role in the interpretation of such regulations.

In the European Union labour migration is one of the pillars of the internal market function. Both temporary posting of employees and permanent migration of

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[2] Brussels I Recast Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

[3] Rome I Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)

[4] Posted Workers Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services

workers are protected by the Treaty on the Functioning of the European Union (TFEU).[5] However, the regulations dealing with labour migration can be considered as key characteristics of sovereignty.

The Brussels I Recast Regulation explains that when an employee is employed with by an employer who is not domiciled in the European Union, however the employer having a branch, agency or other establishment in any the Member States shall be deemed to be domiciled in that Member State, ergo fictionally considered to be within the European Union. [6] This implies that an employer having no branch, agency or other establishment in any the Member States would be subject to the traditional PIL rules, therefore in such case which connecting factor would apply?

Domicile, Nationality, Habitual residence?

It is an accepted principle that issues effecting the status of a human being must be decided on the basis of one system of law, regardless of where the person is, or where the facts giving rise to the dispute arise. There is also disagreement as to which connecting factor must be used, hence whether one shall apply the doctrine of domicile, nationality or habitual residence.

The Maltese legal system developed over the years having the original Roman Law domicile doctrine applied to understand which legal system shall be applied of a particular case having a foreign element. In 1923 the Maltese Courts shifted towards the Common Law approach to domicile in the case of ***A. Warrington vs E. Carter noe*** [7]**,** where the court opined that the fact that an individual changed country, even if this was together with his family, this did not imply change or prove of the fact that the person's *animus* was to never returning to once domicile of origin.

The Warrington (supra) case introduced the animus, this the Maltese Courts started adopting the Common law approach to domicile. Therefore, the shift from a more tolerant interpretation of the doctrine of domicile which merely required a simple residence, even if merely for commercial matters, to a more stringent approach directed and based on the intention of the individual. The latter is a vital element to the Common law interpretation of the doctrine.

In the case of ***Loreto Camilleri vs Avv. Dr. George DeGiorgio et. ne***,[8] the court held that:

> *'Kull persuna għandha jkollha domiċilju, u għandha d-domiċilju tagħha malli titwieled, li huwa dak ta' l-oriġini, u li ma jista' qatt jiġi*

[5] Treaty on European Union and the Treaty on the Functioning of the European Union 2012/C 326/01.
[6] Brussels I Recast Regulation (EU) No 1215/2012 (n2) – Chapter II - Section 5 - Jurisdiction over individual contracts of employment - Article 20(2) - *Where an employee enters into an individual contract of employment with an employer who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States, the employer shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State.*
[7] A. Warrington v. E. Carter noe (1923) 25 II 433
[8] Loreto Camilleri v. Avv. Dr. George DeGiorgio et. ne (1949) 33E II 349 FH

abbandunat imma biss pożitivament soppjantat favur ta' domiċilju ieħor li jkun id-domiċilju tal- għażla. U l-ebda persuna ma jista' jkollha aktar minn domiċilju wieħed simultaneament.'

The abovementioned Camilleri case the Court listed five principles regulating the notion of domicile. Firstly, no person shall be without a domicile. To give effect to this, at birth one is assigned a domicile of origin. Secondly, no person can have more than one domicile at the same time. Thirdly, domicile connects a person to a territorial system of law. Fourthly, there is a presumption in favour of continuing existence of a domicile. Thus, a change in domicile must be proved by person alleging the change. Lastly, the Court held that we are to adopt the English approach to domicile.

The two requisites of domicile are residence and *amimus manendi*.[9] Although they must both exist, they must not come into being at the same time. The *amimus manendi* may precede or come after the residence.

A distinction must be made between the domicile of origins and domicile of choice. The first is acquired *ex-lege*, the second is acquired by choice. The nature of the domicile of origin is different to the domicile of choice. The former is stronger and it is very difficult renounce to, as seen in the English case of ***Winans vs AG***.[10]

A similar Maltese case is ***Saviour Chircop et vs Avv. Dottor Rene` Frendo Randon nomine*** [11] the court held that mere abandonment, or removal from a country with the intention not to return suffices to prove abandonment of domicile of choice.

The Brussels I Recast Regulation embraces the concept of domicile. The latter regulation makes the distinction between domicile of natural persons, and domicile of legal persons. Whereas for the former, Article 62 of the Brussels I Recast Regulation holds the court of Member States are allowed to determine the domicile of natural persons, accordingly to its national rules, [12] Article 63 holds that the domicile of a legal person is determined by where it has its statutory seat, central management or principle place of business. [13]

On the other hand, Nationality refers to the state to which a person owes his political allegiance.

Therefore, nationality is closely linked to parentage at birth. It follows that a person may have a different nationality than his domicile. By way of example one can

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[9] means the' intention of remaining.' In order to establish, or acquire, a domicile a person one should assess the residence of that person at a particular place and the intention of that individual to remain there.

[10] Winans v. AG (1904) AC 287, 73 LJKB 613 HL

[11] Saviour Chircop et vs Avv. Dottor Rene` Frendo Randon nomine (12/10/1979)

[12] Brussels I Recast Regulation (EU) No 1215/2012 (n2) – Chapter V – General Provisions- Article 62(2) '*If a party is not domiciled in the Member State whose courts are seised of the matter, then, in order to determine whether the party is domiciled in another Member State, the court shall apply the law of that Member State.'*

[13] Brussels I Recast Regulation (EU) No 1215/2012 (n2) – Chapter V – General Provisions- Article 63(1) *'For the purposes of this Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its: (a) statutory seat; (b) central administration; or (c) principal place of business.'*

have a non-Maltese (being or not Third Country National) who acquired Citizenship in Malta following a successful Individual Investors Programme (IIP) [14] application. In such case the nationality will be Maltese, nevertheless if applicant`s animus is not to relocate for good to Malta his domicile of origin may still not change.

Nationality has been used as a connecting factor by the Maltese Courts in a number of cases for example, it is the nationality of the father at the time of marriage that is to determine the law which governs parental authority. In the case of the Marriage Act [15]it prescribes that the personal connecting factors for the recognition for a foreign decision is the link between either (not both) of the parties and his/her domicile or citizenship.

Although the use of nationality may be beneficial as it is easily ascertainable, there are a number of disadvantages of using nationality over domicile. One such disadvantage is that by using nationality as a connecting factor, a person may be tied to a system of law of a particular state with which he has a weak connection, or no connection at all. Another disadvantage is that nationality may be weak. The doctrine of domicile holds that a person shall always have a domicile, and no person can have more than one domicile at the same time. In the case of nationality, as seen in the case of an IIP applicant, a may have two or more nationalities or even worst no Nationally at all. One can therefore opine that this may give to rise to difficulties.

On the other hand, the habitual residence inception allows on to elect which law would apply according to the geographical place which can be considered 'home' for a reasonably period of time. This notion was also introduced, and survives together with the domicile doctrine, under the Brussels I Recast Regulation in situations dealing with the jurisdiction of the courts in matters touching cross-border employment. Notwithstanding the fact that the doctrine of domicile is applied for analysing if an employer is domiciled in the European Union, according to the Brussels I Recast Regulation an employer may be sued in a court where the employee habitually carries out his work.[16] In First Hall Civil Court in the case of ***VistaJet Limited vs Silvia Pusceddu*** [17] held that:

> *'Il-Qorti tirrileva illi n-notifika mis-soċjetà attriċi lil-konvenuta fil-fatt saret f' Sardegna. Dan jidher li kien u għadu ddomicilju oriġinali tal-konvenuta u ma hemmx prova li ġie mibdul. l-Qorti tqis illi minn dawn il-fatti mhux kontradetti Malta mhix id-domicilju talkonvenuta u b'hekk l-eċċezzjoni tal-konvenuta hi ben fondata u għandha tintlaqa'.*

[14] The Individual Investor Programme of the Republic of Malta Regulations Subsidiary Legislation 188.03 provides for the granting of citizenship rights by the Government of Malta by a certificate of naturalisation issued to individuals and their families expected to contribute to the economic and social development of Malta.

[15] Marriage Act, Chapter 255 of the Laws of Malta

[16] Brussels I Recast Regulation (EU) No 1215/2012 (n2) – Chapter II - Section 5 - Jurisdiction over individual contracts of employment - Article 21(1) - *An employer domiciled in a Member State may be sued:* (b) *in another Member State:* (i) *in the courts for the place where or from where the employee habitually carries out his work or in the courts for the last place where he did so; [omissis].*

[17] VistaJet Limited vs Silvia Pusceddu – Sworn Application 1152/2015 - (05/10/2016)

The CJEU in ***Petrus Wilhelmus Rutten vs Cross Medical Ltd*** [18] held that habitual place of work:

> *'must be understood to refer to the place where the employee has established the effective centre of his working activities and where, or from which, he in fact performs the essential part of his duties vis-à-vis his employer.'*

When considering that the labour migration is one of the fundamental driving force in the continuous development of the internal market project the above blended mythology adopted by the legislator in the Brussels I Recast Regulation to ascertain jurisdiction of courts in employment matters can be argued to be ideal.

When analysing the difference between domicile and habitual residence it transpires that like nationality the variance lies in the animus. Whereas in domicile one must have an intention to reside permanently which intention shall also refer to the future, in habitual residence the present intention suffices. On the other hand, nationality is acquired at birth through parentage, or marriage or nationalisation.

Rome I Regulation dealing with contractual obligations in Civil and Commercial matters, use the concept of habitual residence to determine the applicable law.[19] In the situation of employment agreements the choice of law is considered according to the habitual place of work. [20]

The CJEU in ***Herbert Weber vs Universal Ogden Services Ltd*** [21] held that:

> *'where an employee performs the obligations arising under his contract of employment in several Contracting States the place where he habitually works, within the meaning of that provision, is the place where, or from which, taking account of all the circumstances of the case, he in fact performs the essential part of his duties vis-à-vis his employer'*

The concept of habitual residence van also be traced in chapter 12 of the Laws of Malta the Code of Organization and Civil Procedure (COCP). In ***Catharina Harvey vs Dr Peter Caruana Galizia nominee*** [22] the wife claimed maintenance from the husband, the defendant claimed that he was not liable to pay as he was not domiciled nor habitually resident, nor present in Malta as required Article 742(1)(b) of the COCP. The Court, however, found that he was habitually resident and was therefore bound to pay. Thus, it can be opined that the introduction of habitual residence has extended the jurisdiction of the Maltese Courts.

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[18] Case C-383/95 (09/01/1997)
[19] Rome I Regulation (EC) No 593/2008 (n3)
[20] Rome I Regulation (EC) No 593/2008 (n3) -Article 8(2) *To the extent that the law applicable to the individual employment contract has not been chosen by the parties, the contract shall be governed by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract.*
[21] Case C-37/00 (27/02/2002)
[22] Catharina Harvey vs Dr Peter Caruana Galizia nominee – Sworn Application 2670/99 – (22/07/2001)

In the words of Cheshire domicile still remains relevant, despite the rise of habitual residence, as in some cases, the connecting factor of the habitual residence is not strong enough to justify a person being regulated by the law of the state of his habitual residence all the time. [23]

In conclusion, it can be argued that limiting a legal system solely to domicile would be a fallacy, however, domicile can be complemented with other connecting factors so to avoided possible prejudicial erroneous results.

[23] Cheshire, G. North, P. Fawcett, J. `Private International law' (fourteenth Edition, Oxford University Press 2008) pg 182