

What is jurisdiction for divorce in the EU? The contradictory law and practice around Europe

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What is the jurisdiction for divorce in EU countries? This seems a strange question to ask 13 years after the ground-breaking introduction of identical divorce jurisdiction across the entire European Union.

Brussels II (known also as the Council Regulation¹ and referred to here as BII) has received justifiable and widespread criticism for creating the race to issue, *lis pendens*. But the introduction of common grounds for divorce jurisdiction in March 2001 was excellent and started our recognition of the benefits of cross-border EU laws for families.

However it has come to light that there is both a difference in the terminology in BII and the practice of the relevant law across various EU countries. With one of the primary benefits of EU involvement in family law being the creation of an autonomous law and practice, these contradictions need to be understood, examined and then resolved.

This article starts by looking at the relevant EU legislation, how the particular element of habitual residence has been interpreted in England vis-a-vis the other elements of residence, how the relevant legislation seems to be translated into different wording in different EU languages and then brings together the experience of specialist practitioners in a number of key EU countries. It concludes with possibilities for resolution.

This directly derives from research by my colleagues and I at iFLG for a Court of Appeal hearing. Frustratingly, the court did not take the opportunity to refer this difficult issue to the ECJ². But having researched it, we wanted to share with the wider international family lawyer community.

Moreover this issue does not relate only to international families with connections within Europe. Any lawyer advising a family with a connection with an EU country and any other country in the world needs to understand the jurisdictional issues affecting possible proceedings in the EU country.

Divorce jurisdiction legislation

This is found now³ in Art 3.1 BII:

“In matters relating to divorce, legal separation or marriage annulment, jurisdiction shall lie with the courts of the Member State

(a) in whose territory

- *the spouses are habitually resident, or*
- *the spouses were last habitually resident, insofar as one of them still resides there, or*
- *the respondent is habitually resident, or*
- *in the event of a joint application, either of the spouses is habitually resident, or*
- *the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made, or*
- *the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is either a national of the Member State*

¹ Council Regulation (EC) No 2201/2003 of 27 November 2003, “concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility”.

² European Court of Justice (also known as CJEU) which has the power to take decisions and give guidance on issues of interpretation of EU legislation and to which cases can be referred by domestic courts

³ Council Regulation (EC) No 2201/2003 replaced Council Regulation (EC) No 1347/2000, in force on 1 March 2001 but made no changes in respect of divorce jurisdiction

(b) in question or, in the case of the UK and Ireland, has his or her "domicile" there of nationality of both spouses or, in the case of the UK and Ireland, of the "domicile" of both spouses.

If jurisdiction does not exist in any EU member state pursuant to Art 3⁴, then jurisdiction is available on either sole nationality or sole domicile⁵, an element irrelevant for this article. As far as domicile and nationality is concerned, most of the EU uses nationality. The UK and the Republic of Ireland use domicile.

Art 3.1 (a) has 6 sub paragraphs. In the vast majority of divorce applications brought across the EU, there is no controversy. The default position is the first indent (sub-paragraph), namely both spouses are habitually resident in the country in which the divorce proceedings are commenced. Several indents have the potential to overlap. Some are very rarely used. Some are unavailable in some countries e.g. England and Wales has no possibility in law of a joint application for a divorce so the fourth indent cannot apply.

The potential difficulties inherent in Art 3 arise for the international family with simultaneous, parallel connections in more than one country. They find themselves being shoe-horned into legal categories which have no or little bearing on the reality of the lives of international families. The various indents may accord with legal concepts but they do not accord with modern international lives. The BII grounds for jurisdiction are in need of review.

This is compounded by the particular difficulty of interpretation of the 5th and 6th indents.

These indents are identically worded save that the 5th requires 12 months residence and the 6th only requires 6 months residence because it is coupled with domicile or nationality, as applicable. In contrast to the 3rd indent which requires the respondent to the divorce to be habitually resident, the 5th and 6th apply to the applicant for the divorce, known still as the petitioner in England and Wales. Hence the 5th and 6th indents have become the jurisdiction of choice of the forum shopper, seeking the more favourable outcome.

It is always harder to run a jurisdiction argument against a respondent party who denies they are habitually resident in a particular country. It is easier to assert one's own habitual residence especially, as happens, there has been secretive and tactical planning over a period of months to secure a connection which might be sufficient to prove habitual residence. So it is that, around Europe, a spouse unhappy in a marriage may return to their home country, or another country with which they have a connection, on the pretence of thinking through the prospects of saving the marriage, but in reality counting the days until either the 6 or 12 months have elapsed and a divorce can be issued to secure jurisdiction.

But the 5th and 6th indents are strangely worded. They start with a very simple basis that the applicant is habitually resident. This is potentially very straightforward. It accords with the 1st indent (namely that the spouses are both habitually resident), the 2nd indent (they were last habitually resident in that country and one still resides there), and the 3rd indent (the respondent is habitually resident). These three indents have no qualification as to periods of time: it is habitual residence at the date of issue of the divorce.

But the 5th and 6th, applicable to the applicant alone, require more. After reference to habitual residence, the English version adds the word "if". In the 5th indent it is 'if the applicant had resided for 12 months before the issue of the divorce' and in the 6th indent it is 6 months residence also with domicile/nationality. What does "if" mean? Specifically does it mean "and"? In other words with reference to the 5th indent, does it require that the applicant was habitually resident on the day of

⁴ or the more narrow circumstances of Arts 4, 5 and 6
⁵ Art 7

issue *and* (emphasis added) has resided for the previous 12 months? The problem is that “if” is found in the context of something which is conditional, an uncertain possibility, a reservation or restriction. It is not traditionally used for an accumulation of two items e.g. habitual residence and 12 months residence.

Another definition of “if” is in the context of a condition on which something depends as in e.g. “provided that” or “insofar as”. This then changes significantly the meaning of the 5th and 6th indents. It is now more of a qualifying condition of the habitual residence i.e. the applicant is habitually resident provided that they have resided for 12 months etc. This is no longer the habitual residence found in the other indents i.e. on the day of issue with no other surrounding qualifications. Being the applicant requires more than just habitual residence. It requires an additional period of residence. This additional period qualifies the habitual residence.

This has then caused uncertainty about what is the nature of that period. Is it habitual residence itself over the entire 6 or 12 month period? Or is it some lesser form of residency? If the former, it is creating a greater hurdle for the applicant choosing a particular country for proceedings. But if it is the latter i.e. habitual residence only on the day of issue and a lesser form of residency throughout the previous 6 or 12 month period then it has created very real opportunities for international families to forum shop. Where families have residencies in more than one country at any one time, as occurs, all that is required is for one party to choose on any particular day that one of those residencies is the habitual residence.

Moreover it is in the context of fairly established EU law (from the English perception although not necessarily shared across the EU) that a person can have only one habitual residence at any one time and that a person can have several ordinary, simple residencies in several countries at any one time. So the requirement of 6 or 12 months habitual residence is a high one because throughout that period it would have had to have been the sole centre of interests⁶ of the applicant.

This is the uncertainty. English lawyers have had a problem with this definition since its introduction. In England there have been contradictory decisions at High Court level and, as yet, has not been decided at appeal level. In our case for which we undertook this research, Aikens LJ in *Tan v Choy* (2014) EWCA 251 in the Court of Appeal accepted (para 30) that there could be a legitimate debate as to the precise construction of the relevant indents. He felt there were three possible constructions.

- 1 First, the petitioner has to have been habitually resident at the time when the proceedings were started and resided here for 12 months
- 2 secondly, the petitioner has been habitually resident here for 12 months
- 3 thirdly, the petitioner has to be habitually resident at the time when the proceedings were started and this fact is established by showing 12 months residency

As it happened, the court held that on the facts found by the first instance judge in his judgement, all three were satisfied and therefore no decision had to be taken so the issue will await another case on another day.

Marinos v Munro

These are two cases amongst about five first instance High Court decisions in England and Wales on this issue. In *Marinos*⁷, Munby J, now the President of the Family Division and England’s most senior family court judge, said that the test was habitual residence on the day of issue and either 6 months or 12 months ordinary residence. In *Munro*⁸, Bennett J preferred the test of habitual residence throughout the 6 or 12 months period rather than just the day of issue. Other decisions have tended to

⁶ See e.g. *Moore v McLean* (2005) 1 FLR 666 and *L-k v K* (No 2) (2007) 2 FLR 729

⁷ (2007) 2 FLR 1018

⁸ (2008) 1 FLR 1613

prefer the Marinós approach but not categorically so. Specifically it has not been tested at appeal level.

The issue can be seen most obviously in Marinós. An English wife married to a Greek husband was living in Greece with the children but left the family home on marital separation and returned to England where within a day or so of arrival she issued a divorce petition on the basis of her habitual residence in England with domicile and six months residence. The High Court found that over the previous 6 months and more she had been maintaining a residency in her parents' property in England, had been working part-time out of Heathrow airport (flying in from Greece) and had a number of other ongoing connections with England so that she had a residency in England and Greece simultaneously. Once she left Greece on marital separation she abandoned her habitual residence in Greece and created habitual residence in England on arrival, and hence able to issue the petition immediately. There was no need to wait to acquire 6 months of habitual residence. Her situation is quite similar to many other international families with one or both spouses having ongoing connections and available accommodation in other countries, including home countries, when they are working or living abroad.

This interpretation gave massive opportunities for greater forum shopping. Newly arriving spouses with ongoing connections with a country could claim their newly acquired habitual residence and issue immediately. A spouse with residencies in several countries could pick and choose which was the best for a divorce and opt for that residency as the habitual residency for the day of issue.

Was this what the EU intended in the creation of BII? What did the legislation say in other languages and what was practice across the EU?

Art 3 in other EU languages

As part of its process, the EU provides its legislation in all EU languages. We were specifically informed by the Directorate General for Justice that BII was originally drafted in English and thereafter translated into the constituent languages of the EU.

So what did the other EU language translations say? We arranged for Art 3 in all EU languages in each jurisdiction to be re-translated into English by our translation agency, asking them to identify the terms used for 'habitual residence' and 'residence' and highlight any changes from the English version, especially the 5th and 6th indents. We were surprised by the outcome.

Whilst undoubtedly a number of translations continue with the use of what in English is "if", others differ. In Finnish, the word habitual is completely missing throughout Art 3 so that the 1st indent is where the spouses have their residence and the 5th indent is the applicant has their residence if residing for at least 12 months. There is no linguistic difference between the quality of residence and the period of residence. In Hungarian, "if" is replaced by "insofar" which tends to qualify and define the habitual residence. In Italian, habitual residence and residence do not seem to tally with English equivalents. Latvian is the same as Finnish with no apparent distinguishing between habitual residence and ordinary residence. In Portuguese, residence is more closely associated with where a person lives rather than country. In Spanish, "if" is translated as "as long as", being similar to Hungarian. In Swedish, the term habitual is not used as such.

So some countries have variants of "if" which may or may not be relevant, some have no apparent reference to the habitual nature of the residency as the primary qualifying condition and some expect the habitual residency to be the same as the 6 or 12 month period, seemingly requiring therefore that the habitual residence is throughout the 6 or 12 month period. In other words, the various translations of Art 3 anticipate and require different factual matrixes to allow jurisdiction. This seems completely at odds with the intentions of the EU legislators and of BII.

(Tables showing the exact linguistic words used for residence and habitual residence and tables showing the primary differences from the English translation are available from dh@davidhodson.com for anyone taking this issue further)

So how does this translate into practice?

Experience of practice around Europe

We contacted a number of family lawyers operating in EU countries with whom we have worked on international cases over many years and who have considerable international family law experience. In their respective countries, they would have dealt with Art 3 cases. These are certainly not expert opinions as technically defined but they demonstrate local practice. Moreover space only permits a generalisation of the detailed opinions. We were exceedingly grateful to them.

In Austria, Alfred Kriegler reported that he considered there can be more than one simultaneous habitual residence and that there was no autonomous interpretation by the ECJ. The consequence is that it didn't really matter about a distinctive choice of one habitual residence for the day of issue because there could be parallel habitual residencies on the day of issue and during the previous 6/12 months

In Belgium, Soheila Goossens reported that to rely on the 5th indent there must be habitual residence throughout the 12 month period, with the centre of interests test deriving from France. The quality of residency on the day of issue and throughout the 12 months was the same. It followed closer to the Munro test. The Belgian judges were keen to have a strong connection whereas simple residency more easily and highly permits forum shopping

In France, Alexandre Boiche reported that the French courts have always interpreted the 5th and 6th indents as requiring 6 or 12 months habitual residence before the filing of the petition rather than a lesser form of residency. The definition of habitual residence as centre of interests derived originally from French case law.

In Germany, Katharina Jank-Dombey reported that there had been a decision of the Frankfurt Court of Appeal dated 27.10.10, 456 F 5196/09 and reported at www.beck-online.beck.de. This Anglo German case concerned the 6th indent. The Frankfurt Court of Appeal expected the habitual residency to be throughout the relevant 6 months. Simple, ordinary residency is insufficient.

In the Republic of Ireland, Dervla Browne SC reported that the fact of maintaining an ordinary residency for 12 months will deem a person to be habitually resident to enable jurisdiction under the 5th indent i.e. Marinos with a slight variant.

In Italy, Andrea Russo reported that habitual residence and residence tend to have the same meaning, supported by particular Italian court decisions. It is the place where a person persistently keeps their home and centre of family and social relations.

In Latvia, Dana Rone reported that although there are different terminology and definitions for habitual residence and residence, with the former more narrow and more factual than official, Art 3 is interpreted as referring throughout only to habitual residence and not a declared place of residence.

In Lithuania, Mindaugas Vaiciunas reported that there can only be one habitual residence which is based on central social and economic interests of the person with the country. So whilst a 12 month residency is required, there must also be personal connection found in habitual residency.

In the Netherlands, Marjet van Yperen-Groenleer reported that the habitual residence has to be throughout the 6 or 12 month period. It is where a person persistently keeps their home and centre of family and social life. Simple registration in a municipality is not sufficient.

In Portugal, Vicky Rodrigues reported that in her opinion the habitual residence was needed over the entire 6 or 12 month period and that a looser, ordinary residency was insufficient.

In Spain, Christopher Lee considered that Spain would expect the habitual residence to be throughout the 6 or 12 month period i.e. the Munro position rather than Marinos.

In Sweden, Mia Reich Sjogren reported that this was a not unusual situation given that many Swedes have some residencies in southern Europe. Like some Scandinavian countries, there are concepts of official residence i.e. where there is a registered residency for civic purposes. This registration may be presumed as the habitual residence unless the facts show otherwise whereupon the concept of domicile might be considered as understood under Swedish law.

What was particularly striking was how few countries had any decided cases on this issue. One lawyer explained that first instance decisions would rarely be reported and then relatively few people would be interested in the long delays and costs of the appeal process. Only a couple of countries have had appeal court rulings in this regard. Even England and Wales has only High Court decisions which are themselves contradictory.

But the overall impression is that many, perhaps most, EU countries expect the habitual residence to be not only a choice for the day of issue amongst several available residencies but to have prevailed throughout the 6 or 12 month period. A number of lawyers spoke in terms of expecting strong connections by having the habitual residency over the longer period rather than the choice on the day of issue. This was also the expectation of the EU legislation, according to many lawyers. Some countries distinguished the official residency where someone may have a registered address and the actual permanent long-term home.

Of course these reports were given informally and not to be relied on as statements of law. But this informal investigation seems to indicate many countries expect the habitual residency of the applicant in the 5th and 6th indents to prevail throughout the 6 or 12 month period. This is against some English case law, against some interpretation of “if” in Art 3 but seems consistent with the overall EU intention of the grounds for jurisdiction in the EU’s ground-breaking legislation in Brussels II.

Conclusion and a way forward

The EU rightly introduced identical divorce jurisdiction across the EU. It is hugely beneficial for international families. It saves national inconsistencies, conflicts and litigation. In many ways it has worked well. But what has become apparent is that across Europe there is a major difference in interpretation of a key part of the jurisdiction, namely the circumstances in which the applicant for the divorce has to show jurisdiction. How strong and long should be the connection? Many countries seem in practice to demand a long period of sole habitual residence of either 12 or 6 months as applicable. The translations in some countries create this practice. Translations in other countries are less certain but practice has expected this stronger connection.

But some countries have allowed a significantly weaker connection, being only ordinary residency, in parallel with a residency in another country, over the qualifying period and then habitual residency on the day of issue of the petition. This makes it much easier for forum shopping and to seize the divorce initiative from the (perhaps) unsuspecting spouse and pursue proceedings in the country with the significantly more advantageous financial outcome. One of these countries arguably allowing this significantly weaker connection and much more liberal interpretation is also the country with the reputation in Europe as the country of choice for forum shoppers seeking a large financial settlement. In doing so, England and Wales yet again seems to be setting its face against many other EU jurisdictions in its interpretation of EU legislation and nakedly throwing open wide its doors to any forum shopper.

One answer is a referral to the ECJ for a definitive cross-EU decision and guidance. This will take perhaps as much as two years from the domestic referral, along with costs which relatively few international families are willing to bear. Moreover domestic courts seem to be reluctant to make such referrals even when faced with evidence of these contradictory situations. It would be beneficial to know from any lawyer if any referral on Art 3 is en route.

Another answer is to abolish the importance of seizing jurisdiction first, which is at the heart of disputed definitions of Art 3. Instead of setting out a menu of jurisdictional choices available in several EU countries at the same time because Art 3 is so wide ranging, the EU should create a hierarchy of jurisdictional criteria so that, at any one time, only one EU country would have jurisdiction dependent upon the position within that hierarchy. This should overcome the specific difficulties, especially if accompanied by clarity from the EU legislature about the 5th and 6th indents.

The forthcoming changes in the EU Judgment Regulation (Brussels I) in 2015 create what is regarded as a more flexible approach to the application of jurisdictional criteria to civil disputes. Perhaps it is now time for the EU legislature to recognise the need for greater flexibility in the application of jurisdictional criteria in the family arena. In the recent *Mittal*⁹ decision, the English Court of Appeal retained the discretionary powers of the English court to stay a properly formed divorce petition on *forum non conveniens* grounds between England and a non-EU country despite an apparently contradictory ECJ dicta in *Owusu*¹⁰. Whilst I do not advocate that England seeks to impose on civil law Europe what is seen as the somewhat alien concept of discretionary forum criteria, the decision highlights a difference in approach which should be considered by the EU.

The EU is reviewing Brussels II as part of its regular review process. It should examine what exactly is intended and required in the 5th and 6th indents and the various conflicting translations around the EU and the different expectations in practice. It should also review the continued access to a wide range of jurisdictional criteria and instead create a hierarchy.

In the meantime international family lawyers must be aware of the conflicts and contradictions around the EU on these elements of Article 3.

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© 7 April 2014

⁹ (2013) EWCA 1255

¹⁰ *Owusu v. Jackson* ECJ Case C-281/02 [2005] QB 801 [2005] 2 All ER (Comm) 577