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Treatment of Domicile Concept in International Private Law

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Abstract: In this article the question of the conflict of qualifications of definition of a residence in the international private law is considered. The residence in the international private law very great value takes a place, the choice of the personal law or a national treatment have functionally various appointment. Approaches of the states to understanding of this legal term significantly differ. The author investigates, on the basis of what factors criteria of continuous or primary residence in the different countries are defined or established. Such factor first of all is in the international private law six-months term of stay. In article the various points of view on the concept "residences" are considered and critical evaluation is given them. The author notes that recently is tended to residence replacement by "a usual residence". In article the ratio of concepts the residence and domitsiliya also is considered. On the example of the legislation of the Republic of Kazakhstan it is proved that for recognition of a permanent residence it isn't enough to be based only on a temporary factor. It is important also the subjective moment – understanding by the person of this place as the constant dwelling chosen without coercion. Only at such approach can find justification the right to free movement and the residence choice, fixed by the Constitution. Lack of serious distinctions in a formulation and residence regulation by the obkshchy rule would exclude the possible conflict of natsioknalny laws.

Key words: Place of residence · Domicile · Habitual residence · proper law · National regime · Registration · Territorial principle

INTRODUCTION

Regulation of private law relations that involve entities as physical persons by means of the conflicts norms has been and will always be the most relevant and principal matter for many international private law institutes [1, 2, 3, 4]. When considering one component of a status of a person such as the place of residence one may note that application of this special legal term does not enjoy universal interpretation and recognition. All states tend to specify this element of the civil status in their own way and proceeding from their own legal position and treatment with all that making possible occurrence of collisions including determination of a legal relationship classification [5]. However, here, as concerns to the matter of place of residence we do not mean to engage in more detailed consideration of what legal meaning this concept might have in every country of the world. Bearing in mind that the notion of place of residence exists in every national legal system it is important for us to determine based on which factors there determined or established criteria of permanent or predominant residence. One should note that in some jurisdictions it is intended only for domestic uses: like identification of a body where conclusion of marriage can be made, laying of venue in taxation cases etc. In this case what it means is a place of residence at a specific place in the territory of a country that is normally determined by an accommodation address of an individual. [6] In some countries together with this narrowly set concept there is in use a broader one that has to do with the domicile connecting factor implying living at any place in the territory of a specific country. In case of international private law at large it is important to substantiate a normative content of such a concept with reference to a foundation that establishes only under which specific country's jurisdiction an individual falls.

The concept of a place of residence may differ depending from a branch law. According to a position that prevails in the international private law the "*habitual*

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place of residence" shall mean a main or a principal place of residence of a person [7]. The international procedural law also shares that same position. At the same time, depending on circumstances, it should be clear that the person is not staying there temporarily.

Besides, in case of six month stay at one place a presumption shall apply that the place is the "*habitual place of residence*". The international private law recognizes the six month term as a factor showing that a habitual place of residence was founded. Thus, the place of residence shall be stay of a person at a certain point (place) over his/her life (for a great while), i.e. the *permanent place of residence* and the place of stay shall be a place where the person is staying at the moment. It is argued that a physical person is better acquainted with the principle of place of residence rather than with his/her nationality principle (*though the nationality principle may be the same as the place of permanent residence),* the state interest of the state in which the person lives is also attached to this.

Those, who are against application of the principle of place of residence, argue that the principle is a fluid concept that changes from one country to another and often it is impossible to distinguish the permanent place of residence principle from actual place of stay principle and it is easier to transfer one's place of residence from one country rather than changing allegiance.

An "improved" concept of place of residence is proposed by Rabel and some other authors, suggesting that certain "minimal duration of stay at a given place" could serve as a condition to use the place of residence as a feature, though, Braga speaks against it as a fixed term is always accompanied with its own hazards [8].

The domicile of a person shall be a place or a country that is viewed by the law as a place of his/her abode, as his/her center of gravity. This concept is common for all legal systems though they differently determine the place that shall be considered as a place of abode. Thus, for example, according to the indication in the Article 36 of the Algerian law if the principal place of residence is not avaialbe then the "habitual residence" (abode) can be reckoned with. There is a certain similarity between the concepts of domicile and residency. One may say that the domicile is a residence where, possibly, a professional activity is carried out yet along with a mandatory intention to "settle". This cannot be always determined precisely, therefore in case a lawmaker brings together the concepts of domicile and residency then it rather becomes a matter of the conflict of jurisdictions than the conflict of laws [9].

Recently a trend can be observed towards replacing the place of residence with the "habitual residence" so that to avoid a difficulty in connection with a concept that is a derivative of the place of residence. Thus, earlier on, in 1928 the Sixth Hague Conference on International Private Law in its draft convention also provided for tying in with the habitual residence and not with the place of residence [10].

The habitual place of permanent stay is a basis on which the concept of domicile of choice (domicilium voluntarum) is built including cases when the domicile is established by operation of law (domicilium necessarium), as is the case in respect of a wife, - such a domicile in the vast majority of cases is the same as the place of habitual permanent stay.

As it follows from this there is no uniform concept of domicile in the world. In the legal systems based upon the Roman law the domicile means a habitual place of residence, yet in the common law system it viewed as an equivalent of a given person's permanent home.

According to the English law each person should have a domicile. The law allots a fictitious home to persons that have neither habitual place of abode nor permanent accommodation and it turns into their legal domicile that determines their civil status. Three factors are essential for acquiring domicile of choice: capacity (legal capacity and capacity to act), place of permanent abode and intent. The place of permanent abode (residency) can be determined as a habitual physical stay at a certain place. The place of permanent abode is something that is greater than a physical presence in a certain place yet it is something smaller than the domicile. However, there are certain disadvantages to the system of domicile. M. Wolf wrote: "…often it is considerably difficult to determine the domicile with certainty as this to a considerable degree depends on the intent that is difficult to prove… Further, the domicile concepts markedly differ from one another: not only in different states but even within the limits of the same state often arise serious differences in interpretation of this concept… Finally, in those jurisdictions where the domicile principle prevails there always a danger of fictitious change of domicile is present [10].

According to the Article 16 of the Civil Code of Kazakhstan the concept of place of residence expressed as follows "…shall be recognized to be that locality where the individual permanently or predominantly lives", this being fully used in the private law, whereas the public law gives absolutely different definition of the place of residence (for example, in the administrative law, tax law

etc.) Thus, for example, the Tax Code of Kazakhstan does not formalize the concept of place of residence, though from the concept of *resident* one may deduce the meaning of place of residence as it says in paragraphs 1,2 of the Article 176: "permanently staying in the Republic of Kazakhstan… over at least one hundred eighty three calendar days…".

In effect, resolution of matters in respect of an individual's the place of residence depends on many different factors judgment upon which can be and must be done only by the court.

Accordingly, One May Come to a Conclusion: Firstly, the concept of *permanent or predominant living* is of not absolute but rather of relative nature: it is not important how long within the year or within any other fixed term a person lived in Kazakhstan in absolute terms but rather it is important if that person lived in Kazakhstan longer time as opposed to living outside Kazakhstan. Hence, even if a national of Kazakhstan lived in Kazakhstan for seven calendar days and lived for five days in every other foreign states then it is believed that it was Kazakhstan where he lived.

Secondly, even though the definition, *the place of residence – a permanent or predominant place of residence,* does not directly indicate subjective aspect, one cannot regard the latter as absent. In effect, a person's place of residence is not only about the fact that the person lives at that place permanently or predominantly but it is also about the fact that the person regards such a place as his/her long term dwelling he/she selected without any coercion. Only this subjective intent may substantiate the right for free movement and choice of domicile provided in the Constitution of the Republic of Kazakhstan. Otherwise military service personnel or prison community could have been considered as having their place of residence in the military installations or in prisons.

From what was said above it follows that the formula provided in Kazakhstan's law, *the place of residence – a permanent or predominant place of residence,* is not perfect and it would have been well to mention in it about such an important element as *animus manendi*.

Thus, if a physical person indicates that he/she permanently or predominantly lives at a certain place and that place was registered as his/her domicile at his/her request then nobody may claim that the person does not permanently or predominantly lives there. That is why "the domicile registration bodies may only certify a declaration of free will by a person in choosing by him of a place of stay and accommodation". By the same token, that is the reason why the Government Decree #1063 as of 12.07.2000 "Concerning approval of the Rules for documenting and registration of population in the Republic of Kazakhstan" allows removal of a citizen of the Republic of Kazakhstan from domicile registration at his/her relocation upon receipt of his/her written statement concerning his/her registration at a new place of residence.

Certainly, judgment on the matter whether a place of lengthy stay of a person away from his/her place of residence is just a place of stay or a new place of residence depends on a great number different factors and no answer *a priori* can be given to that.

Fourthly, if a physical person is a citizen of the Republic of Kazakhstan and stays in the Republic of Kazakhstan less than 183 days in the calendar year due to his/her trips to different foreign states concurrently having no permanent place of residence abroad for one or another reason (would it be due to his/her own will or due to denial of authorities in foreign state to permit such permanent living) then may such a person be regarded as having no permanent place of residence in the Republic of Kazakhstan in circumstances where he/she has a domicile registration in it and states that he/she never changed his/her place of residence? It is evident that the answer is no. Otherwise it would conflict with the intent of the Constitution of the Republic of Kazakhstan (Article 21).

Those matters considered above in respect of the place of residence bring up a question: if the place of residence as it is provided in the civil law is not identical to that of provided in the tax law or any other branch of public law then what is its practical significance for the international private law whatsoever? This question would seem natural the same as an answer to it: the place of residence plays a very important role in the international private law. The choice of personal law or national regime (or the most favored nation treatment regime) are intended for different purposes: the first one determines applicable legislation as a rule based upon germaneness (proper law), the second one serves as a safeguard of non-discrimination of a foreign person as opposed to home nationals and nationals of another foreign state and, what is most essential, protects own legal system and own sovereignty, i.e. corresponds to the territorial principle of defense. [5] Consequently, there is no struggle between territorial and personal laws and that means that there is no conflict as such over a common rule concerning the place of residence of physical persons.

Nevertheless, each state when selecting a way or principle of public relations regulation complicated with a foreign element, inevitably proceeds from its economic, political and national interests that certainly possess their special features. Absence of serious differences in formulation and regulation of the place of residence based upon a common rule could prevent potential conflict between national laws.

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