CHAPTER 3

PERSONAL CONNECTING FACTORS

3–001 In the opening chapter, a number of examples referred to "English" or "French" parties, and the reader will have understood those terms as referring to people who, in some sense "belong to" or are connected to England or France. International travel means that some individuals move between countries very frequently, and while they may at all times regard themselves as English or French they have connections, stronger or weaker in character, with a range of countries. An illustration will make this clear:

> Carlos is a Venezuelan businessman working in the oil industry. He has dealings with Shell, which has offices in London and in the Netherlands. He flies to Europe for lengthy negotiations with Shell executives. Suppose that his aircraft is diverted from its intended direct route to Amsterdam by an incident of 'air-rage'[1] to Heathrow for the malefactors to be deplaned; it stays there for 45 minutes before resuming its journey. Or, he had all along booked via Heathrow, and he has one and a half hours in the transit lounge before his onward flight to Amsterdam. Or, he has two days in London, having preliminary discussions with Shell executives based in London.
>
> He arrives in Amsterdam and spends a fortnight in a hotel. Or two months in an apartment hotel. Or six months in a company flat. Or, as his brother works in the Brazilian embassy in The Hague, he stays for those periods with his brother and sister-in-law.
>
> Suppose further that he arranges to stay on in the Netherlands because of an economic downturn in Venezuela; or because he fears arrest there for some political offence; or because he wishes to marry a Dutch girl. Ten years later, he is still in the Netherlands.

Each variation of the basic facts indicates a link of a certain strength between Carlos ("a Venezuelan") and England or the Netherlands. At some point, the strength of these links may be such that he may no longer be thought of, by others or even by himself, as Venezuelan at all. The permutations are of course endless, but if we are to have a manageable system of rules we have to make use of a limited number of categories, which are explored in this chapter.

RESIDENCE

3–002 The most basic link between an individual and a country is mere physical presence, even if it be for 45 minutes spent wholly in an aircraft parked on an airport apron. Though factually clear-cut, it creates so limited a link as to have little or no significance in the conflict of laws. We will, however, hear rather more of "residence". Residence is basically a question of fact; in some contexts it means very little more than physical presence. But it does mean something more,

[1] Perhaps as in *Li v Quraishi*, 780 F Supp 117 (EDNY, 1992) where a drunken passenger exposed himself and urinated over some of his fellow-passengers.

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for a person passing through a country as a traveller is clearly not resident there.[2] If someone becomes resident in a country, the link of residence may remain during brief periods of absence.[3]

It is difficult to be more specific, for a great deal depends on the context in which the term "residence" is used. In a case which held that university students were "resident" in their university town for electoral registration purposes,[4] Widgery LJ pointed out that, "In any seaside town in the summer the population divides itself into the residents who live there all the year round and the visitors who merely come for a period"; but the visitors' hotel-keeper would expect those visitors to use a room called the "residents' lounge". In the same way, "residence" means different things for different legal purposes.[5] To distinguish it from "ordinary residence" or "habitual residence" the concept is sometimes referred to as "residence *simpliciter*". It may be that a person will relatively easily be held resident in a country if the issue is one of the jurisdiction of that country's courts, but less easily if the context is one of residence during a fiscal year.[6] Even in a single context, "the pattern of, and reasons for, time being spent in the UK and elsewhere may be infinitely various. Decided cases illustrate a great variety of examples, and the result of one case cannot normally be used as a guide to how another should be decided, even if the two have some factors in common".[7]

ORDINARY RESIDENCE

3–003 Ordinary residence, a term often used in tax statutes, "connotes residence in a place with some degree of continuity and apart from accidental or temporary absences."[8] "If it has any definite meaning I should say it means according to the way in which a man's life is usually ordered."[9] It refers to a person'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 or her life for the time being, whether of short or long duration.[10]

Ordinary residence can be changed in a day,[11] but there is no reason, on appropriate facts, for a person not to be held to be ordinarily resident in more than one country at the same time. Thus in *IRC v Lysaght*,[12] a man whose home was in the Republic of Ireland, and who came to England for one week in every month for business reasons, during which time he stayed in an hotel, was held to be

[2] *Matalon v Matalon* [1952] P. 233.
[3] *Sinclair v Sinclair* [1968] P. 189.
[4] *Fox v Stirk* [1970] 2 Q.B. 462.
[5] McClean, (1962) 11 I.C.L.Q. 1153.
[6] *Levene v IRC* [1928] A.C. 217; even there, relatively brief visits were held to amount to residence.
[7] *Grace v HMRC* [2009] EWCA Civ 1082 at [3] per Lloyd LJ.
[8] *Levene v IRC* [1928] A.C. 217 at p.225, per Lord Cave.
[9] ibid., at p.232, per Lord Warrington of Clyffe.
[10] *R.v Barnet LBC, Ex p. Nilish Shah* [1983] 2 A.C. 309.
[11] *Macrae v Macrae* [1949] P. 397, 403, per Somervell LJ.
[12] [1928] A.C. 234. It would be unfair to blame the House of Lords for this extraordinary decision, for they felt constrained to hold that a finding by the Special Commissioners was one of fact and so could not be disturbed on appeal.

resident and ordinarily resident in England for income tax purposes. But clearly he was also resident and ordinarily resident in the Republic.

It has been said that a child of tender years "who cannot decide for himself where to live" is ordinarily resident in his or her parents' matrimonial home, and that this ordinary residence cannot be changed by one parent without the consent of the other. If the parents are living apart and the child is, by agreement between them, living with one of them, the child is resident in the home of that parent and that ordinary residence is not changed merely because the other parent takes the child away from that home.[13]

It would, however, be wrong to assume that the term "ordinary residence" always bears the same meaning. As Lord Carnwath observed in *R. (on the application of Cornwall Council) v Secretary of State for Health*,[14] its meaning may be strongly influenced by the particular statutory context. Decisions in one context cannot be assumed to apply in others.

HABITUAL RESIDENCE

3–004 Habitual residence has long been a favourite expression of the Hague Conference on Private International Law. It appears in many Hague Conventions and therefore in English statutes giving effect to them; but it is increasingly used in other statutes as well. No definition of habitual residence has ever been included in a Hague Convention; this has been a matter of deliberate policy, the aim being to leave the notion free from technical rules which can produce rigidity and inconsistencies as between different legal systems. The expression is not to be treated as a term of art but according to the ordinary and natural meaning of the two words it contains.[15] However, there is a regrettable tendency of the courts, despite their insistence that they are not dealing with a term of art, to develop rules as to when habitual residence may and may not be established: "the English courts have been tempted to overlay the factual concept of habitual residence with legal constructs".[16] The Law Commission has spoken of the "allegedly undeveloped state" of habitual residence as a legal concept, citing, in particular, uncertainties as to the place of intention and as to the length of time required for residence to become habitual.[17]

The relationship between the two concepts of habitual residence and ordinary residence is an issue which the courts have frequently addressed, but the opinions expressed are bewildering in their variety. In *Mark v Mark*[18] Baroness Hale noted

[13] *Re P. (G.E.) (An Infant)* [1965] Ch. 568, 585–586.
[14] [2015] UKSC 46, [2015] 3 W.L.R. 213, at [43], a case on the National Assistance Act 1948. See, for another example, *R. v West Middlesex University Hospital* [2008] EWHC 855 (Admin.), (2008) 11 C.C.L. Rep. 358 for the meaning of ordinary residence for the purposes of the National Health Service Acts of 1997 and 2006.
[15] *ReJ (A Minor) (Abduction)* [1990] 2 A.C. 562; *Re M (Minors) (Residence Order: Jurisdiction)* [1993] 1 F.L.R. 495; Clive, 1997 Jur. Rev. 137. See also Resolution (72)1 of the Committee of Ministers of the Council of Europe on the Standardisation of the Legal Concepts of "Domicile" and "Residence" Annex, r.9.
[16] *A v A (Children: Habitual Residence)* [2013] UKSC 60; [2014] A.C. 1 at [39].
[17] *The Law of Domicile* (Law Com. No. 168), paras 3.5–3.8.
[18] [2005] UKHL 42; [2006] 1 A.C. 98, at [33].

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that it was common ground that habitual residence and ordinary residence were interchangeable concepts; but also that habitual residence "may have a different meaning in different statutes according to their context and purpose."[19] In *Nessa v Chief Adjudication Officer*[20] Lord Slynn reserved the question whether the terms were always synonymous: each might take a shade of meaning from the context in which it was used, though they did share "a common core of meaning". Although the Court of Appeal expressly held in *Ikimi v Ikimi (Divorce: Habitual Residence)*[21] that the two concepts are synonymous where family law statutes are concerned, Baroness Hale's most recent observation[22] is that the Law Commissions deliberately adopted "habitual" rather than "ordinary" residence in reviewing family law issues,[23] because the latter frequently occurred in tax and immigration statutes and they thought that its use in the wholly different context of family law was a potential source of confusion.

It would seem that so far as the habitual residence of adults is concerned, especially in contexts other than those of EU law, the test to be applied will again be that of a person's abode in a particular country which he or she has adopted voluntarily and for settled purposes as part of the regular order of life for the time being[24]; the burden of proof being on the party alleging the change.[25]

As in the case of ordinary residence, the issue is essentially one of fact. From time to time, judgments place glosses on the concept of habitual residence; cited in subsequent cases, the judicial pronouncements seem to provide rules. Then comes along a case where the supposed "rule" is unhelpful, and it is discarded or qualified. So it was held in the House of Lords case of *Re J. (A Minor) (Abduction)*[26] that habitual residence cannot be acquired in a single day, as an appreciable period of time[27] and a settled purpose are required. The Supreme Court expressed doubts about these propositions in *A v A (Children: Habitual Residence)*[28]. They were, said Lord Hughes, much better regarded as helpful generalisations of fact than as propositions of law. Baroness Hale agreed; the propositions would usually but not invariably be true. She deplored the tendency to construe them as they were in a statute, and so debate the meaning of "appreciable time"; she would not accept that it is impossible to become habitually resident in a single day.[29] For many years it was thought that to acquire

[19] [2005] UKHL 42; [2006] 1 A.C. 98, at [15].

[20] [1999] 1 W.L.R. 1937 (HL).

[21] [2001] EWCA Civ. 873; [2002] Fam 72.

[22] *A v A (Children: Habitual Residence)* [2013] UKSC 60; [2014] A.C. 1 at [38].

[23] Law Com No 138, para.15.

[24] i.e.,the test adopted in *R. v Barnet LBC, Ex p. Nilish Shah* [1983] 2 A.C. 309, 344; *Kapur v Kapur* [1984] F.L.R. 920.

[25] *Re R (Wardship: Child Abduction)* [1992] 2 F.L.R. 481 at 487.

[26] [1990] 2 A.C. 562, strictly obiter as the issue in the case was the loss rather than the acquisition of habitual residence.

[27] In *Ikimi v Ikimi (Divorce: Habitual Residence)* [2001] EWCA Civ. 873; [2002] Fam 72, residence for 161 days in the year was sufficient in the circumstances for the acquisition of habitual residence; whereas 71 days in *Armstrong v Armstrong* [2003] EWHC 777 (Fam); [2003] 2 F.L.R. 375 was not. cf. *Re A (Abduction; Habitual Residence)* [2009] EWCA Civ 1021, [2010] 1 F.L.R. 1146 (seven–eight weeks sufficed; emphasis that movement between different EU countries).

[28] [2013] UKSC 60; [2014] A.C. 1.

[29] [2013] UKSC 60; [2014] A.C. 1 at [73] and [44] respectively.

habitual residence, a person's residence must be lawful,[30] but the House of Lords in *Mark v Mark*[31] has confirmed that it is indeed possible to acquire habitual residence, at least for tax purposes, even though the residence is not lawful. The person must live in the relevant country for a period which shows that the residence has become habitual[32]; the length of that period is not fixed; it must depend on the circumstances.[33] Habitual residence can, however, in appropriate circumstances, be lost in a day.[34] Habitual residence may continue during temporary absences,[35] but in most contexts a person can be without any habitual residence[36]; or have more than one habitual residence at any one time.[37] That habitual residence should be "adopted voluntarily" is not usually an issue; but in *Breuning v Breuning*[38] it was held that the continued presence in England of someone who had no choice but to remain in England for medical treatment did not constitute habitual residence. The Court of Session has doubted whether the element of voluntariness is always needed, using as examples the fictional case of Robinson Crusoe and the real example of Nelson Mandela as a prisoner.[39]

Although the "settled intent" has been identified as one to take up long-term residence in the country concerned,[40] the better view seems to be that evidence of intention or purpose may be important in particular cases (e.g., in establishing habituation when the actual period or periods of residence have been short) but is not essential. If long-term residence is established in a new country, the habitual residence will be there even if the individual concerned lives in an exclusively expatriate group (as in a forces' base) which simulates ordinary life in the individual's home country.[41]

[30] *R. v Barnet LBC, Ex p. Shah* [1983] 2 A.C. 309 at 343, Lord Scarman refusing unlawful ordinary residence on the grounds of public policy.

[31] *Mark v Mark* [2005] UKHL 42; [2006] 1 A.C. 98 at [36]. Baroness Hale did, however, leave open the caveat that a person's residence may need to be lawful for other purposes, for example, entitlement to State benefit. See *R. v Secretary of State for Health* [2009] EWCA Civ 225; [2010] 1 W.L.R. 279 (entitlement to health services; failed asylum seeker held not ordinarily resident).

[32] *Nessa v Chief Adjudication Officer* [1999] 1 W.L.R. 1937.

[33] ibid., citing the dictum of Butler-Sloss LJ in *Re AF (a Minor) (Child Abduction)* [1992] 1 F.C.R. 269, 277 that "a month can be . . . an appreciable period of time".

[34] *Re M. (Minors) (Residence Order: Jurisdiction)* [1993] 1 F.L.R. 495, 500; *Al Habtoor v Fotheringham* [2001] EWCA Civ. 186; [2001] 1 F.C.R 185.

[35] *Oundjian v Oundjian* (1979) 1 F.L.R. 198 (habitual residence throughout period of one year despite absences totalling 149 out of 365 days); *Re H (A Child) (Abduction: Habitual Residence: Consent)* [2000] 2 F.L.R. 294; *C v FC (Brussels II: free-standing application for parental responsibility)* [2004] 1 F.L.R. 317, where an absence of two years was not fatal to the continuance of habitual residence.

[36] *Hack v Hack* (1976) 6 Fam. Law 177: "unless one led a nomadic life" one had to have a habitual residence somewhere; *Re J (A Minor) (Abduction)* [1990] 2 A.C. 562. In some contexts, a piece of legislation may only be workable if there is no possibility of a gap in habitual residence: *Nessa v Chief Adjudication Officer* [1999] 1 W.L.R. 1937; *W and B v H (Child Abduction: Surrogacy)* [2002] 1 F.L.R. 1008.

[37] *Ikimi v Ikimi (Divorce: Habitual Residence)* [2001] EWCA Civ 873; [2002] Fam 72; *Armstrong v Armstrong* [2003] EWHC 777 (Fam), [2003] 2 F.L.R. 375; *C v FC (Brussels II: free-standing application for parental responsibility)* [2004] 1 F.L.R. 317; *Mark v Mark* [2005] UKHL 42; [2006] 1 A.C. 98.

[38] [2002] EWHC 236 (Fam); [2002] 1 F.L.R. 888.

[39] *Cameron v Cameron*, 1996 S.C. 17.

[40] *A v A (Child Abduction: Habitual Residence)* [1993] 2 F.L.R. 225, 235.

[41] *ReA (Minors) (Abduction: Habitual Residence)* [1996] 1 W.L.R. 25 (US serviceman in Iceland).

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European autonomous meaning

3–005 The connecting factor of habitual residence has also been widely adopted by the legislators of EU law, and the leading ECJ case of *Swaddling v Adjudication Officer*[42] has held that, in the context of social security law, the term has a Community-wide meaning, being where the person's "habitual centre of their interests is to be found."[43] In *Tan v Choy*[44] this interpretation was considered as very influential. The common core of interpretation of the term 'centre of interests' is to be applied following the test set in *Marinos v Marinos*.[45]

In a particular social security context, the European legislation lists a number of factors to be considered in determining the centre of interests of the person concerned. They may include, as appropriate: the duration and continuity of presence on the territory of the Member States concerned; the person's situation (including the nature and the specific characteristics of any activity pursued, in particular the place where such activity is habitually pursued, the stability of the activity, and the duration of any work contract); his family status and family ties; the exercise of any non-remunerated activity; in the case of students, the source of their income; his housing situation, in particular how permanent it is; the Member State in which the person is deemed to reside for taxation purposes. If it is still impossible to reach agreement on the person's centre of interests, the person's intention, as it appears from such facts and circumstances, especially the reasons that led the person to move, is to be considered to be decisive for establishing that person's actual place of residence.[46]

Habitual residence of a child

3–006 The law on the habitual residence of a child was greatly changed by a series of decisions of the Supreme Court which aligned the English law with that adopted by the Court of Justice of the European Union (hereinafter CJEU). In *Proceedings brought by A*[47] that court held

> "The concept of 'habitual residence' under article 8(1) of Council Regulation (EC) No 2201/2003 must be interpreted as meaning that it corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, in particular the duration, regularity, conditions and reasons for the stay on the territory of a member state and the family's move to that state, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that state must be taken into consideration. It is for the national court to establish the habitual residence of the child, taking account of all the circumstances specific to each individual case."

[42] Case C-90/97 [1999] E.C.R. I-1075. The case concerned social security entitlement under Regulation 1408/71. See Lamont [2007] 3 J.Priv.I.L. 261 where it is questioned whether the *Swaddling* definition can be suitably adapted for use in the family law context.

[43] At para.29.

[44] [2014] EWCA Civ 251; [2015] 1 F.L.R. 492 (habitual residence for the purposes of Regulation 2201/2003 art.3(1)(a) indent five; see further para.12–003.

[45] [2007] EWHC 2047 (Fam); [2007] 2 F.L.R. 1018 (at para.11).

[46] European Parliament and Council Regulation 987/2009 of 16 September 2009 laying down the procedure for implementing Regulation (EC) No.883/2004 on the coordination of social security systems, [2009] O.J. L 284, p. 1, Article 11.

[47] Case C-523/07 [2009] 2 E.C.R. I-2805; [2010] Fam. 42, developing the approach in Case C-497/10 *Mercredi v Chaffe* [2012] Fam 22.

The court also noted:

> "An infant necessarily shares the social and family environment of the circle of people on whom he or she is dependent. Consequently, where … the infant is in fact looked after by her mother, it is necessary to assess the mother's integration in her social and family environment. In that regard, the tests stated in the court's case law, such as the reasons for the move by the child's mother to another member state, the languages known to the mother or again her geographic and family origins may become relevant."

That approach was endorsed by the Supreme Court in *A v A (Children: Habitual Residence)*[48]:

> F and M married in Pakistan but then settled in England. Three children were born in England, but then the marriage broke down. F returned to Pakistan, M and the children remained in England. On a visit to Pakistan with her children, she was (on her account) forced by her family to return to live with F, by whom she then had a fourth child. She was eventually able to return to England, but on her own. The English court ordered the return of the children to her, holding that all the children were habitually resident in England for the purposes of section 3(1) of the Family Law Act 1986: applying a well-established rule of English law, the habitual residence in England of the three older children could not be changed by the unilateral action of one parent without the consent or acquiescence of the other. The youngest child, who had never been physically in England, was habitually resident there by reason of the habitual residence of his mother and siblings.

The Supreme Court rejected this reasoning.[49] It held that habitual residence was a question of fact and not a legal concept such as domicile. There was no legal rule akin to that whereby a child automatically took the domicile of his parents; nor a rule that a child's *habitual* residence could not be changed by the unilateral action of one parent without the consent or acquiescence of the other.[50] The essentially factual and individual nature of the inquiry should not be glossed with legal concepts that would produce a different result from that which the factual inquiry would produce. The approach of the European Court was preferable to that earlier adopted by the English courts, being focused on the situation of the child, with the purposes and intentions of the parents being merely one of the relevant factors. The test derived from *R. v Barnet LBC, Ex p. Shah*[51] should be abandoned when deciding the habitual residence of a child. Instead in cases under the Family Law Act 1986, the Hague Abduction Convention and the Brussels IIa Regulation, the approach of the European Court should be followed.

[48] [2013] UKSC 60; [2014] A.C. 1.

[49] See especially the summary by Baroness Hale at [54]. Note also Lady Hale's explanation at [51], approving the analysis in *DL v EL (Hague Abduction Convention: Effect of Reversal of Return Order on Appeal)* [2013] 2 F.L.R. 163, that any reference to "permanence" in the CJEU's judgment did in fact mean "stability".

[50] On this point, see also *Re H (Children) (Jurisdiction: Habitual Residence)* [2014] EWCA Civ 1101; [2015] 1 W.L.R. 863. This was reiterated in *Re R (Children)* [2015] UKSC 35; [2016] A.C. 76.

[51] [1983] 2 A.C. 309.

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The Supreme Court addressed the issues again in *Re B (A Child)*.[52] The issue in that case concerned the possibility, recognised by the CJEU in *Proceedings brought by A*,[53] that it might be impossible to establish the Member State in which the child has his habitual residence. The Supreme Court interpreted this to refer to cases in which the child had no habitual residence, and not merely that it was difficult to establish where that was. It was not in the best interests of the child that it should be in a sort of limbo. Lord Wilson noted[54] that the test did not require the child's full integration in the environment of the new state but only a degree of it. He concluded[55] that the modern concept of a child's habitual residence, based on the European approach, operated in such a way as to make it highly unlikely, albeit conceivable, that a child would be in the limbo:

> "The concept operates in the expectation that, when a child gains a new habitual residence, he loses his old one. As, probably quite quickly, he puts down those first roots which represent the requisite degree of integration in the environment of the new state, up will probably come the child's roots in that of the old state to the point at which he achieves the requisite de-integration (or, better, disengagement) from it".

The views of the child

3–007 The state of mind of the child is relevant to the issue of integration. Lord Wilson addressed the issue in *Re LC (Children)*[56] and offered a very clear analysis:

> "Where a child of any age goes lawfully to reside with a parent in a State in which that parent is habitually resident, it will no doubt be highly unusual for that child not to acquire habitual residence there too. The same may be said of a situation in which, perhaps after living with a member of the wider family, a child goes to reside there with both parents. But in highly unusual cases there must be room for a different conclusion; and the requirement of some integration creates room for it perfectly. No different conclusion will be reached in the case of a young child. But, where the child is older, in particular one who is an adolescent or who should be treated as an adolescent because she (or he) has the maturity of an adolescent, and perhaps also where (to take the facts of this case) the older child's residence with the parent proves to be of short duration, the inquiry into her integration in the new environment must encompass more than the surface features of her life there. I see no justification for a refusal even to consider evidence of her own state of mind during the period of her residence there. Her mind may—possibly—have been in a state of rebellious turmoil about the home chosen for her which would be inconsistent with any significant degree of integration on her part. In the debate in this court about the occasional relevance of this dimension, references have been made to the 'wishes', 'views', 'intentions' and 'decisions' of the child. But, in my opinion, none of those words is apt. What can occasionally be relevant to whether an older child shares her parent's habitual residence is her state of mind during the period of her residence with that parent."

Baroness Hale and Lord Sumption felt that this applied not just to adolescent children but to all children.

[52] [2016] UKSC 4.
[53] Case C-523/07 [2009] 2 E.C.R. I-2805; [2010] Fam. 42, at [43].
[54] [2016] UKSC 4 at [39].
[55] [2016] UKSC 4 at [45].
[56] [2014] UKSC 1; [2014] A.C. 1038, especially at [37].

The case of the never-present child

3–008 An issue much discussed in *A v A (Children: Habitual Residence)* was whether a child could be said to be habitually resident in a country in which it had never been physically present. This was the position of the fourth child in the instant case; as another basis of jurisdiction was available, the court did not have to resolve the issue.

The earlier cases were influenced by ideas, repudiated in *A v A (Children: Habitual Residence)*, that a child's habitual residence followed that of whoever had parental responsibility and could not be changed by the unilateral action of one parent without the consent or acquiescence of the other. Reasoning of that sort led Charles J to hold in *B v H (Habitual Residence: Wardship)*[57] (on facts very similar to those in *A v A (Children: Habitual Residence)* that a child who was, at the date of the judgment, nearly two years old, having been born in Bangladesh and having lived there all her short life, was habitually resident in England. In *A v A (Children: Habitual Residence)* itself in the Court of Appeal, Thorpe LJ gave the example of an English mother habitually resident in England who gave birth to a child in France. As a result of complications mother and child were hospitalised for an extended period before they are fit to come home; he would hold the child habitually resident in England.[58]

On the other hand, in *W and B v H (Child Abduction: Surrogacy)*[59]:

> the relationship between an English surrogate mother and the Californian prospective parents broke down when they discovered that the mother was carrying twins, and the surrogate mother returned to England where she gave birth. The Californian couple applied under the Hague Convention on International Child Abduction for the summary return of the babies to the jurisdiction of the Californian court. The Convention could only apply if the twins had been habitually resident in California immediately before being brought to England.

Hedley J reiterated that habitual residence was a question of fact and that each case must stand alone,[60] but that it was not possible for someone to acquire a habitual residence in one country when they remain physically present in another at all times. Therefore, on the particular facts of the case, the twins were not habitually resident anywhere.[61]

In the state of the law as clarified in *A v A (Children: Habitual Residence)*, there is much force in the view expressed by Baroness Hale, that presence is a necessary pre-cursor to residence and thus to habitual residence.[62]

[57] [2002] 1 F.L.R. 388.
[58] [2012] EWCA Civ 1396; [2013] Fam. 232 at [29]. See also *Re T (A Child) (Care Proceedings: Request to Assume Jurisdiction* [2013] EWHC 521 (Fam); [2013] 2 W.L.R. 1263.
[59] [2002] 1 F.L.R. 1008. See also *Re G (abduction: withdrawal of proceedings, acquiescence, habitual residence)* [2007] EWHC 2807 (Fam.) and *Re F (Abduction: Unborn Child)* [2006] EWHC 2199 (Fam.); [2007] 1 F.L.R. 627.
[60] [2002] 1 F.L.R. 1008 at [23].
[61] This meant that the application under the Hague Convention failed. W then brought an action for the summary return of the twins, and in *W and W v H (Child Abduction: Surrogacy) (No.2)* [2002] 2 F.L.R 252 the children were returned to California as the forum conveniens for their future to be decided.
[62] [2013] UKSC 60; [2014] A.C. 1 at [55].

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> "It is one thing to say that a child's integration in the place where he is at present depends upon the degree of integration of his primary carer. It is another thing to say that he can be integrated in a place to which his primary carer has never taken him. It is one thing to say that a person can remain habitually resident in a country from which he is temporarily absent. It is another thing to say that a person can acquire a habitual residence without ever setting foot in a country. It is one thing to say that a child is integrated in the family environment of his primary carer and siblings. It is another thing to say that he is also integrated into the social environment of a country where he has never been."

DOMICILE

3–009 In most systems of the conflict of laws the notion of "belonging to" a country in some strong sense is of great importance: it identifies an individual's personal law, which governs questions concerning the personal and proprietary relationships between members of a family. Place of birth is an inadequate criterion by which to identify the personal law. In many (but not all) continental European countries, the personal law has traditionally been instead the law of an individual's nationality. In England and almost all common-law countries it is the law of the domicile.

Domicile is easier to illustrate than it is to define. The root idea underlying the concept is the permanent home. "By domicile we mean home, the permanent home", said Lord Cranworth,[63] "and if you do not understand your permanent home, I'm afraid that no illustration drawn from foreign writers or foreign languages will very much help you to it." The notion of home, or of permanent home, takes colour from particular facts. An Englishwoman aged 70 years, left a widow after living all her life in Somerset, goes to New Zealand to live with her married daughter; although that move may be, in practical terms, irreversible, is she not likely to regard England as her home country?

In fact, domicile cannot be equated with home, because as we shall see a person may be domiciled in a country which is not and never has been his home; a person may have two homes, but only have one domicile; a person may be homeless, but he or she must have a domicile. Indeed there is often a wide gulf between the popular conception of home and the legal concept of domicile. Domicile is "an idea of law".[64] Originally it was a good idea, but the once simple concept has been so overloaded by a multitude of cases that it has been transmuted into something further and further removed from the practical realities of life.[65] Important proposals for the reform of the law of domicile made by the Law Commission in 1987,[66] reflecting in part reforms adopted in a number of Commonwealth countries overseas[67] and examined at various points in this chapter, would narrow this gap; but unfortunately they were rejected by the Government in 1996. Partial reform has, however, been effected in Scotland with regard to the domicile of persons under the age of 16.[68]

63 *Whicker v Hume* (1858) 7 H.L.C. 124, 160.
64 *Bell v Kennedy* (1868) L.R. 1 Sc. & Div. 307, 320, per Lord Westbury.
65 Anton, *Private International Law* (2nd edn) (Edinburgh: W Green & Son Ltd, 1990), p.125.
66 *Law of Domicile* (Law Com. No. 168); this is a joint report with the Scottish Law Commission.
67 See McClean, (1996) 260 *Recueil des cours* 36–54.
68 Family Law (Scotland) Act 2006, s.22. cf McEleavy [2007] I.C.L.Q. 453.

Since the Civil Jurisdiction and Judgments Act 1982, there has been a further complication. This Act introduced a new concept which describes a certain type of link between an individual, or a company, and a country. It is called "domicile", but it is quite unlike the traditional, personal law, concept of domicile developed in English law and still important in many matters of family law and succession. It is very unfortunate that the same term had to be used to describe these two different concepts; in this chapter, it is the traditional concept which is to be examined.[69]

There are three kinds of domicile:

- *domicile of origin*, which is the domicile assigned by law to a child at birth is born;
- *domicile of choice*, which is the domicile which any independent person can acquire by a combination of residence and intention; and
- *domicile of dependency*, which means that the domicile of dependent persons (children under 16 and mentally disordered persons) is dependent on, and usually changes with, the domicile of someone else, e.g., the parent of a child.

The object of determining a person's domicile is to connect that person with some legal system for certain legal purposes. To establish this connection it is sufficient to fix the domicile in some "country" in the sense of the conflict of laws, e.g., England or Scotland, California or New York. It is not necessary to show in what part of such a country an individual is domiciled[70]; but it is usually insufficient to show that he or she is domiciled in some composite state such as the UK, the US, Australia or Canada, each of which comprises several "countries" in the conflict of laws sense. A person who emigrates, e.g., to the UK with the intention of settling either in England or Scotland, or to Canada with the intention of settling either in Nova Scotia or British Columbia, only acquires a new domicile by deciding in which country to settle and by actually settling there.[71]

This rule is unsatisfactory and the Law Commission recommended the adoption in England of rules based on those in the modern Australian legislation, so that a person who is present in a federal or composite state with the intention to settle in that state for an indefinite period should, if he is not held under the general rules to be domiciled in any country within that state, be domiciled in the country therein with which he is for the time being most closely connected.[72]

General principles

3–010 There are four general principles fundamental to the law of domicile.

69 For domicile in the sense of the 1982 Act, see below, para.6–007.
70 *Re Craignish* [1892] 3 Ch. 180, 192.
71 *Bell v Kennedy* (1868) L.R. 1 Sc. & Div. 307; *Attorney General for Alberta v Cook* [1926] A.C. 444; *Gatty v Attorney General* [1951] P. 444.
72 *The Law of Domicile*, paras 7.1–7.8.

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(1) No person can be without a domicile.[73] This rule springs from the practical necessity of connecting every person with some system of law by which a number of legal relationships may be regulated.

(2) No person can at the same time have more than one domicile, at any rate for the same purpose.[74] This rule springs from that same necessity.

(3) An existing domicile is presumed to continue until it is proved that a new domicile has been acquired. Hence the burden of proving a change of domicile lies on those who assert it.[75] Varying views have been expressed as to the standard of proof required to rebut the presumption. According to Scarman J, the standard is that adopted in civil proceedings, proof on a balance of probabilities—not that adopted in criminal proceedings—proof beyond reasonable doubt.[76] There is little doubt that the test of balance of probabilities is applied in practice,[77] despite some dicta suggesting a higher standard.[78] However, as we shall see, the burden of proving that a domicile of origin has been lost is a very heavy one. Moreover, as Scarman J himself added,[79]

> "two things are clear: first, that unless the judicial conscience is satisfied by evidence of change, the domicile of origin persists; and secondly, that the acquisition of a domicile of choice is a serious matter not to be lightly inferred from slight indications or casual words."

The presumption of continuance of domicile varies in strength according to the kind of domicile which is alleged to continue. It is weakest when that domicile is one of dependency[80] and strongest when the domicile is one of origin, for "its character is more enduring, its hold stronger, and less easily shaken off".[81] More recently, Cazalet J reviewed this dictum and concluded that as far as the abandonment and acquisition of a domicile of choice is concerned "… the standard is the civil standard of proof; but … the judicial conscience will need particularly convincing evidence to be satisfied that the balance of probabilities has been tipped."[82] Similarly, Arden LJ, dealing

[73] *Bell v Kennedy* (1868) L.R. 1 Sc. & Div. 307, 320; *Udny v Udny* (1869) L.R. 1 Sc. & Div. 441, 448, 453, 457.

[74] *Udny v Udny* (1869) L.R. 1 Sc. & Div. 441, 448; *Garthwaite v Garthwaite* [1964] P. 356, 378–379, 393–394.

[75] *Bell v Kennedy* (1868) L.R. 1 Sc. & Div. 307, 310, 319; *Winans v Attorney General* [1904] A.C. 287; *Ramsay v Liverpool Royal Infirmary* [1930] A.C. 588; *In the Estate of Fuld (No.3)* [1968] P. 675, 685; *Irvin v Irvin* [2001] 1 F.L.R. 178, 185B; *Cyganik v Agulian* [2006] EWCA Civ. 129, [2006] 1 F.C.R. 406.

[76] *In the Estate of Fuld (No.3)* [1968] P. 675, at pp.685–686; cf. *Re Flynn (No.1)* [1968] 1 W.L.R. 103, 115; *Re Edwards* (1969) 113 S.J. 108; *Buswell v IRC* [1974] 1 W.L.R. 1631, 1637.

[77] See, e.g., *Holliday v Musa* [2010] EWCA Civ 335; [2010] 3 FCR 280; *Haji-Ioannou vFrangos* [2009] EWHC 2310 (QB); [2010] 1 All E.R. (Comm) 303.

[78] *Henderson v Henderson* [1967] P. 77, 80 per Sir Jocelyn Simon P: "the standard of proof goes beyond a mere balance of probabilities"; *Steadman v Steadman* [1976] A.C. 536, 563.

[79] *In the Estate of Fuld (No.3)* [1968] P. 675, at p.686.

[80] *Harrison v Harrison* [1953] 1 W.L.R. 865; *Re Scullard* [1957] Ch. 107; *Henderson v Henderson* [1967] P. 77, at pp.82–83.

[81] *Winans v Attorney General* [1904] A.C. 287, 290, per Lord Macnaghten; cf. *Henderson v Henderson* [1967] P. 77, 80 per Simon P.

[82] *Irvin v Irvin* [2001] 1 F.L.R. 178, 189, per Cazalet J.

with the standard of proof, concluded: "… there is no need for any higher standard of proof … because the civil standard has the inbuilt flexibility to take the seriousness of an allegation into account. Accordingly the more serious an allegation the more substantial will need to be the evidence to prove it on a balance of probabilities."[83]

The Law Commission's proposals for the reform of the law of domicile would leave unchanged the rule that the burden of proving the acquisition of a new domicile falls on the person alleging it. However, the normal civil standard of proof on a balance of probabilities would apply in all disputes about domicile and no higher or different quality of intention would be required when the alleged change of domicile was from one acquired at birth than when it was from any other domicile.[84]

(4) For the purposes of a rule of the conflict of laws, "domicile" means domicile in the English sense. The question as to where a person is domiciled is determined solely in accordance with English law. Thus, persons domiciled in England may acquire a French domicile of choice regardless of whether French law would regard them as domiciled there,[85] and English law alone determines when a Frenchman acquires a domicile in England.[86]

It is too wide a formulation to say that in an English court, domicile means domicile in the English sense. Under the *renvoi* doctrine,[87] English courts sometimes refer to the whole law of a foreign country, including its rules of the conflict of laws, and then accept a reference back to English law either because (i) the foreign conflict rule refers to the law of the nationality, and the person concerned is a British citizen; or (ii) because the foreign conflict rule refers to the law of the domicile, and the foreign court regards the person as domiciled in England. In the latter case, it is not true that domicile in an English court always means domicile in the English sense; but it is still true that it means domicile in the English sense for the purpose of an English rule of the conflict of laws.

[83] *Henwood v Barlow Clowes* [2008] EWCA Civ 577; [2008] N.P.C. 61 at para.88.

[84] *The Law of Domicile*, paras 5.4, 5.6, 5.9.

[85] *Collier v Rivaz* (1841) 2 Curt, 855; *Bremer v Freeman* (1857) 10 Moo.P.C. 306; *Hamilton v Dallas* (1875) 1 Ch.D. 257; *Re Annesley* [1926] Ch. 692. Article 13 of the Code Napoléon, which required a foreigner to obtain the authorisation of the French Government before he could establish a domicile in France, was repealed in 1927. See, by way of exception, Family Law Act 1986 s.46(5), which refers, in the alternative, either to domicile in a country in the English sense, or domicile in a country in the sense of that country's law.

[86] *Re Martin* [1900] P. 211.

[87] Below, para.20–011.

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CHAPTER 7

JURISDICTION: THE TRADITIONAL ENGLISH RULES

7–001 The traditional English approach to civil jurisdiction is based on the principle that the exercise of jurisdiction to adjudicate is essentially discretionary. This discretion is used cautiously and with a view to enhance efficiency and procedural justice.[1] The traditional approach is based on a set of well-established rules and it is subject to a number of important qualifications. First and foremost, where a claim relates to a civil and commercial matter[2] within the meaning of the European regime, the traditional rules apply to the extent that the Brussels I *bis* Regulation permits. As discussed in the previous chapter, art.6(1) of the Brussels I *bis* Regulation enables the national courts of Member States to apply their own jurisdictional rules in certain circumstances not falling within the Regulation. These cases are where the defendant is not domiciled in a Member State and art.24 (exclusive jurisdiction) does not apply and there is no valid choice of court agreement conferring jurisdiction to the courts of a Member State.[3] It is important to appreciate that the jurisdictional rules of the European regime and the "traditional rules" now to be considered apply to different categories of case. The first step in considering the issue of jurisdiction is always to decide which set of rules applies. If there turns out to be no jurisdiction under the applicable rules that is the end of the matter: there can be no switching to the other (by definition inapplicable) set of rules. Furthermore, it has been held that the exercise of jurisdiction under the English traditional rules is potentially qualified by the principles underpinning the Regulation, including the *lis pendens* rules provided in arts 29 and 30 of the Brussels I *bis* Regulation.[4]

The traditional rules, enshrined in the Civil Procedure Rules, base jurisdiction on (a) the presence of the defendant in England; (b) the submission of the defendant to the jurisdiction; and (c) several special jurisdiction grounds connecting the forum to defendants outside of the jurisdiction, justifying in certain circumstances, the service of process abroad.

It is well established that ultimately the foundation of jurisdiction in personam in England is service of process.[5] Viewed critically, and especially through the eyes of foreign lawyers, this appears to rest upon a confusion of ideas. Service of

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[1] R. Fentiman, *International Commercial Litigation*, 2nd edn (Oxford: University Press, 2015) p.299.

[2] See para.6–006.

[3] European Parliament and Council Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351/1, 20.12.2012, (hereafter "reg.1215/2012"), art.25.

[4] Fentiman, *International Commercial Litigation* (2015) p.293.

[5] See Dicey, Morris and Collins, *The Conflict of Laws*, 15th edn (London: Sweet & Maxwell, 2012) rule 29(1); [11-02] p 412.

a claim form, in the jurisdiction or abroad, serves a vital procedural purpose, that of putting the defendant upon notice of the claim being brought, and every legal system makes some provision to that end (in this chapter these rules are examined under the headings on 'effecting service', in England and abroad, respectively). But there is a distinct logical leap in moving from the proposition that a claim form is a necessary procedural step to that which makes it a sufficient basis for jurisdiction. As a basis for jurisdiction, it is sometimes regarded as exorbitant,[6] and its use is excluded under the European regime.[7] Technically, it would be possible to argue that the basis of jurisdiction in the case of defendants present in England and Wales is the actual presence in the jurisdiction, and service of the claim form is the mechanism to give legal notice to a defendant of a court's exercise of its jurisdiction over the defendant, enabling him to respond to the proceedings before the court. On the same lines, there is a range of jurisdictional bases identified in the Civil Procedural Rules as potentially enabling the court to exercise jurisdiction over defendants located outside the jurisdiction; these connecting factors constitute the bases of jurisdiction and service of process abroad materializes the exercise of that jurisdiction.

PRESENCE OF THE DEFENDANT IN THE JURISDICTION

7–002 Every civil action governed by the Civil Procedure Rules, whether in the High Court or a county court, is started when the court issues a claim form at the request of the claimant.[8] The claim form must then be served on the defendant in England within four months of the date of issue.[9] When a claim form cannot be served on a defendant, the court cannot exercise jurisdiction over the claim; conversely, when a defendant has been served with the claim form, the court can in principle exercise jurisdiction, although in certain scenarios the defendant may request the court to decline jurisdiction based on forum non conveniens.[10]

The rule that service of the claim form establishes jurisdiction is a central feature of the traditional rules. In general, therefore, in any case to which those traditional rules apply, any person who is in England and served there with the claim form is subject to the in personam jurisdiction of the court. The application of this principle depends on whether the defendant is an individual, a partnership firm, or a corporation.

[6] See Fernández Arroyo, *Compétence exclusive et compétence exorbitante dans les relations privées internationales*, (2006) 323 *Recueil des cours* 9 (Leiden: Martinus Nijhoff, 2008). But cf. Collins, (1991) 107 L.Q.R. 10, 13–14; Fentiman, *International Commercial Litigation* (2015) p.301; *Abela v Baadarani* [2013] UKSC 44.

[7] These 'exorbitant' jurisdiction rules are to be listed in the Official Journal following notification to the European Commission (reg.1215/2012; art.76). These rules were previously listed in Annex I to the Brussels I Regulation.

[8] CPR r.7.2.

[9] CPR r.7.5; the period may be extended: r.7.6. The period is of six months in cases of service out of the jurisdiction: r.7.5(2).

[10] See para.7-031.

Individuals

7–003 Any individual who is present in England is liable to be served with a claim form, however short may be the period for which he or she is present in the jurisdiction, and irrespective of nationality, or domicile, or usual place of residence, or of the nature of the cause of action.

Thus in *Maharanee of Baroda v Wildenstein*[11]:

> An Indian princess, resident in France, brought an action against an American art dealer, also resident in France, for rescission of a contract to sell her a picture. The contract was made in France and governed by French law. The writ (the document now known as the claim form) was served on the defendant at Ascot races during a temporary visit to England. It was held that the court had jurisdiction.

Effecting Service in England: individuals

7–004 A claim form may be served on an individual by (a) personal service, by leaving it with that individual[12]; (b) first class post, document exchange or other service which provides for delivery on the next business day; (c) in certain cases, leaving it at the address of the defendant's solicitor or "European Lawyer", or at an address the defendant has given as an address at which service may be effected, or at the defendant's usual or last known residence[13]; (d) fax or other means of electronic communication including email.[14] In *Varsani v Relfo Ltd*[15] the determination of the defendant's "usual" residence for this purpose was not based on the consideration of duration of periods of occupation of that address as compared to the defendant's other residences. The defendant was a British citizen who had a business in Kenya. His family lived in a property owned by him and his wife in London and he visited as work permitted, staying for a month or two in each of the few years previous to the case. The court held that it was possible to have more than one "usual" residence; the fact that the premises were occupied permanently by the defendant's family was considered as material, hence the premises could be described as his "usual" residence.[16]

Where it appears to the court that there is a good reason to authorise service by some other method or at some other place, the court may make an order for "service by an alternative method",[17] for example publication in newspapers. It is common practice for the claimant to serve the claim form to the defendant,

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[11] [1972] 2 Q.B. 283. The actual decision would now be different because the case would fall under the Brussels I Regulation as a result of the defendant's domicile in France; cf. *Colt Industries Inc v Sarlie* [1966] 1 W.L.R. 440.

[12] CPR r.6.5(3)(a).

[13] CPR rr.6.7 and 6.8; "European Lawyer" has a technical meaning set out in the European Communities (Services of Lawyers) Order 1978 (SI 1978/1910) art.2.

[14] CPR r.6.3(1) which needs to be read with Practice Direction 6A.

[15] [2010] EWCA Civ 560; [2010] 3 All E.R. (Comm)1045.

[16] See *Levene v Inland Revenue Commissioners* [1928] A.C. 217.

[17] CPR r.6.15 (formerly known as "substituted service").

although the court is in principle responsible for service.[18] However, in the Commercial Court service is to be effected by the parties and not the court registry.[19]

Partnerships

7–005 Claims against partners of any nationality[20] who carried on business within England and Wales when the cause of action arose must in principle be brought against the partnership.

Effecting Service in England: partnerships

7–006 Where partners are being sued in the name of their firm, the claim form can be served on any partner or any other person who, at the time of service, has the control or management of the partnership business at its principal place of business.[21] Where personal service is not effected, because the defendant does not give an address at which it may be served, and the claimant does not wish to effect personal service, it is possible to serve the individual being sued in the business name of a partnership, in the usual or last known residence of the individual; or principal or last known place of business of the partnership.[22] In fact, this may result in an extension of the exercise of jurisdiction over defendants who are not present in the jurisdiction. A partnership without a place of business in England cannot be sued in the firm's name. A limited liability partnership may also be served by any of the methods of service permitted under the Companies Act 2006.[23]

Companies and other corporations

7–007 The notion of service on a defendant "present" in England is readily understood when the defendant is an individual, but the presence of a corporation is, like its nationality or domicile or residence, to some extent a fiction.[24] Companies registered in England are deemed to be "present" in the jurisdiction by virtue of its incorporation. In relation to foreign companies the situation may differ depending on the company's domicile. If the foreign company is domiciled in an EU Member State or a Lugano Convention State, jurisdiction will depend on the rules of the European regime. In cases outside the scope of the European regime, if a foreign company has a branch in England, it may be served in England even

[18] CPR r.6.4.
[19] Practice Direction 58 para.9; Admiralty and Commercial Courts Guide (2014), para.B.7.1.
[20] *Worcester, etc Banking Co v Firbank* [1984] 1 Q.B. 784 (CA).
[21] CPR r.6.5(3)(c).
[22] CPR r 6.9(2)–(3).
[23] CPR r.6.3(3). For these modes of service see below; their application is subject to modification by regulations made under the Limited Liability Partnerships Act 2000.
[24] See Fawcett, (1988) 37 I.C.L.Q. 644, and the exhaustive treatment in *Adams v Cape Industries Plc* [1990] Ch. 433.

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if the claim has no connection with the branch or with England.[25] Neither the Civil Procedure Rules nor the Companies Act 2006 provide a definition for the connecting factor 'place of business'[26] but it is interpreted widely.[27]

Effecting Service in England: Companies and other corporations

7–008 The Companies Act 2006 contains special rules as to service on companies. The Civil Procedure Rules preserve those statutory options,[28] but it is almost always preferable to use the simpler methods in the CPR.

If the company is registered in England under the companies legislation, it is present in the jurisdiction, even if it only carries on business abroad, and service of a claim form can always be effected by leaving it at, or sending it by post to, the company's registered office in England.[29] Similarly, if a company registered in Scotland carries on business in England, a claim form may be served on it by leaving it at, or sending it by post to, the company's principal place of business in England, with a copy to the company's registered office in Scotland.[30] An overseas company whose particulars are registered may be served by leaving the claim form at, or sending it by post to, the registered address of any person resident in the UK who is authorised to accept service of documents on the company's behalf, or if there is no such person, or if any such person refuses service or service cannot for any other reason be effected, by leaving it at or sending by post to any place of business of the company in the UK.[31]

Service under these provisions does not depend upon the subject matter of the action being substantially concerned with the activity of the place of business in the UK.[32]

Under the Civil Procedure Rules, a document is served personally on a company or other corporation by leaving it with a person holding a senior position within the company or corporation,[33] or by leaving it at the company's principal office or any place of business within the jurisdiction which has a real connection with the claim.[34] Service may be effected on a company other than one registered in England at any place within the jurisdiction where it carries on its activities, or at any place of business of the company within the jurisdiction.[35]

[25] CPR r.6(9); however, the lack of connection of the claim with the branch or place of business in England may be a ground for a stay of proceedings under CPR r.38.
[26] *Saab v Saudi American Bank* [1999] 1 W.L.R. 1861 (CA); see also *Actavis Group HF v Eli Lilly & Co* [2013] EWCA Civ 517; [2013] R.P.C. 985.
[27] See further Dicey, Morris and Collins, para.[11-118].
[28] CPR r.6.3(2)(b).
[29] Companies Act 2006 s.1139(1).
[30] Companies Act 2006 s.1139(4). However, see the different applicable periods: The time limit for serving a claim form on a company whose registered office is in Scotland is six months, rather than the four months that would have applied for service within the jurisdiction (*Ashley v Tesco Stores Ltd* [2015] EWCA Civ 414; [2015] 1 W.L.R. 5153).
[31] Companies Act 2006 s.1139(2), (3).
[32] *Saab v Saudi Arabian Bank* [1999] 1 W.L.R. 1861.
[33] CPR r.6.5(3)(b); "person holding a senior position" is defined in Practice Direction 6A, para.6.2 as including, in the case of a company, a director, the treasurer, secretary, chief executive, manager or other officer of the company.
[34] CPR r.6.9(2). Similar rules apply to corporations which are not companies.
[35] CPR r.6.9(2); *Lakah Group v Al Jazeera Satellite Channel* [2003] EWHC 1231(QB).

Whether the defendant is an individual, a partnership firm, or a corporation, where a dispute arises out of a contract, and a claim form is issued containing only a claim relating to that contract, it may be served by any method specified in the contract.[36]

Service by contractually agreed method

7–009 Whether the defendant is an individual, a partnership firm, or a corporation, where a dispute arises out of a contract, and a claim form is issued containing only a claim relating to that contract, it may be served by any method specified in the contract.[37]

Service on agent of overseas principal

7–010 In respect of a particular contract entered into within the jurisdiction with or through an agent of a defendant who is overseas, the court may on application permit a claim form to be served on an agent of an overseas principal.[38] A copy of the claim form and of the order permitting service on the agent must be sent to the principal[39] but the effective service is that within the jurisdiction. Service in these circumstances is regarded as exceptional and will usually only be permitted if service on the defendant overseas cannot be effected. Service may be effected on the agent if the business is that of the corporation and not solely the personal business of the agent or representative. For example, if the agent is empowered to make contracts on behalf of the company and displays its name on its premises in England, this would possibly contribute to establishing that the 'place of business' is that of the corporation.

SUBMISSION TO THE JURISDICTION

7–011 A person who would not otherwise be subject to the jurisdiction[40] of the court may preclude him or herself by conduct from objecting to the jurisdiction, and thus give the court jurisdiction which, but for his or her submission, it would not possess.[41] The court must be satisfied that the defendant's conduct indicates "an intention on the part of the defendant to have the case tried in England."[42]

This submission may take place in various ways. A person who begins an action as claimant in general gives the court jurisdiction to entertain a counterclaim (classed in the Civil Procedure Rules as a "Part 20 claim") by the

[36] CPR r.6.11.
[37] CPR r.6.11.
[38] CPR r.6.12.
[39] CPR r.6.12(4).
[40] The person does not need to be present in the jurisdiction at the time of issue or service of the claim form; he may, for example, have instructed his solicitor to accept service on his behalf.
[41] cf. reg.44/2001. art.26; reg.1215/2012, art.26.
[42] *Future New Developments Ltd v B&S Patente Und Marken GmbH* [2014] EWHC 1874 (IPEC), at [29].

defendant in some related matter, but not an action on an independent ground.[43] If the court considers that justice requires the counterclaim to be dealt with separately, it may so order; and in exercising this power it has in mind, amongst other factors, the connection between the Part 20 claim and the claim made by the claimant.[44]

A defendant who wishes to dispute the court's jurisdiction to try the claim must first file an acknowledgment of service and then make the application, with supporting evidence, for an order by which the court declares that it has no jurisdiction.[45] The mere filing of the acknowledgment of service does not deprive the defendant of any right to dispute the court's jurisdiction,[46] but a defendant who does not make an application within the period prescribed in the Rules is treated as having accepted that the court has jurisdiction to try the claim.[47] There is no submission, however, if the defendant applies and is granted an extension of the time limit pursuant to the court's general case management powers.[48] If the court does not make the declaration that it has no jurisdiction, the original acknowledgment of service ceases to have effect. If the defendant then files a further acknowledgment of service (to avoid a default judgment being given) that is treated as an acceptance that the court has jurisdiction to try the claim.[49] If a claim form has been validly served (including some method agreed in a contract to which the defendant is party) and no acknowledgement of service or defence is filed, the jurisdiction cannot be contested.

It must be emphasised that the principle of submission cannot give the court jurisdiction to entertain proceedings that are beyond the competence or authority of the court, for instance, where the courts of another EU Member State have exclusive jurisdiction. Furthermore, submission only applies to actions in personam: it does not apply, for instance, to petitions for a decree of divorce or nullity of marriage.[50]

SERVICE OUT OF THE JURISDICTION

7–012 At common law, if the defendant was not served with the claim form while present in England and did not submit to the jurisdiction, the court had no jurisdiction to entertain an action in personam. The Common Law Procedure Act 1852 modified the position and gave the court a discretionary power to permit service out of the jurisdiction.[51] The power to do so, which as we have seen is a

[43] *South African Republic v Compagnie Franco-Belge du Chemin de Fer du Nord* [1987] 2 Ch. 487; [1898] 1 Ch. 190; *Factories Insurance Co v Anglo-Scottish Insurance Co* (1913) 29 T.L.R. 312; *High Commissioner for India v Ghosh* [1960] 1 Q.B. 134.
[44] CPR rr.3.1 and 20.9.
[45] CPR r.11(1), (2), (4).
[46] CPR r.11(3).
[47] CPR r.11(5).
[48] CPR r.3.1(2)(a); *The Alexandros T* [2013] UKSC 70. Such an application can be made even when the time limit has expired (*Chris Sawyer v Atari Interactive Inc* [2005] EWHC 2351 (Ch)).
[49] CPR r.11(7).
[50] Domicile and Matrimonial Proceedings Act 1973 s.5(2) and (3); below, paras 12–004 and following.
[51] The power may be exercised retrospectively: *Kosa v Nesheim* [2006] EWHC 2710 (Ch).

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power to establish jurisdiction, was until 2008 regulated by rules of court. Now the issue is dealt with in the Civil Procedure Rules and the detailed grounds for permitting service out of the jurisdiction (heads of jurisdiction) are contained in para.3.1 of Practice Direction 6B of the Rules. Some of these heads of jurisdiction have a very long history in the rules of court in England, and many of them are 'connecting factors' internationally recognised as providing a strong enough connection between the forum and the parties, or the forum and the cause of action.

In modern times, service out of the jurisdiction is considered to be an essential feature of international litigation. In *Abela v Baadarani*[52] Lord Sumption summarised the view of the UK Supreme Court:

> "This characterisation of the jurisdiction to allow service out is traditional, and was originally based on the notion that the service of proceedings abroad was an assertion of sovereign power over the Defendant and a corresponding interference with the sovereignty of the state in which process was served. This is no longer a realistic view of the situation. The adoption in English law of the doctrine of forum non conveniens and the accession by the United Kingdom to a number of conventions regulating the international jurisdiction of national courts, means that in the overwhelming majority of cases where service out is authorised there will have been either a contractual submission to the jurisdiction of the English court or else a substantial connection between the dispute and this country. … It should no longer be necessary to resort to the kind of muscular presumptions against service out which are implicit in adjectives like "exorbitant". The decision is generally a pragmatic one in the interests of the efficient conduct of litigation in an appropriate forum."[53]

If the English traditional rules are applicable the exercise of jurisdiction in relation to a defendant that is located out of the jurisdiction is discretionary and permission to serve out of the jurisdiction must be sought based on the heads of jurisdiction provided for in para.3.1. of Practice Direction 6B.[54]

There is an essential difference between cases where the defendant is in England and served there with the claim form, or where the defendant submits to the jurisdiction, and the cases which are about to be considered. If the defendant is in the jurisdiction, or submits to the jurisdiction, the claimant may proceed "as of right"; but under r.6.36 the jurisdiction of the court is essentially discretionary, and will only be exercised if England is the most appropriate forum.[55]

[52] [2013] UKSC 44; [2013] 1 W.L.R. 2043.

[53] [2013] UKSC 44; [2013] 1 W.L.R. 2043, per Lord Sumption, at [53].

[54] Outside the scope of application of the English traditional rules, a claim form may be served on a defendant out of the jurisdiction without the permission of the court where (a) each claim included in the claim form made against the defendant to be served is a claim which the court has power to determine under the European regime; *and* no proceedings between the parties concerning the same claim are pending in the courts of any other part of the UK or any other Member State; *and* the defendant is domiciled in the UK or in any Member State, or (b) there is jurisdiction under art.24 (exclusive jurisdiction) or art.25 (jurisdiction agreements) of the Brussels I *bis* Regulation (CPR r.6.33(1); *DSG International Sourcing Ltd v Universal Media Corp (Slovakia) SRO* [2011] EWHC 1116 (Comm); [2011] I.L.Pr. 33). A claim form may be also served on a defendant out of the jurisdiction without the permission of the court where each claim made against the defendant to be served is a claim which, under any other enactment, the court has power to determine, although (a) the person against whom the claim is made is not within the jurisdiction; or (b) the facts giving rise to the claim did not occur within the jurisdiction (CPR r.6.33(3)).

[55] *VTB Capital Plc v Nutritek International Corp* [2013] UKSC 5; [2013] 2 A.C. 337, at paras [13], [44], [80] and [190]. See further below.

Before we examine the specific connecting factors (heads of jurisdiction) justifying the exercise of this discretionary power, certain principles of general application must first be considered.

1. Pragmatism in the interests of the efficient conduct of litigation in an appropriate forum. In *Abela v Baadarani*[56] the notion that the service of proceedings abroad was an assertion of sovereign power over the defendant and a corresponding interference with the sovereignty of the State in which process was served, was considered to be out-dated. In the past, it was considered that the court ought to be exceedingly careful before it allowed a claim form to be served on a defendant located outside England because of the apparent interference with the sovereignty of the foreign state concerned.[57] The UK Supreme Court considered in *Abela* that the decision whether to permit service out of the jurisdiction is generally a pragmatic one in the interests of the efficient conduct of litigation in an appropriate forum.[58]

2. Construction of heads of jurisdiction in favour of the defendant. The courts have long held that if there is any doubt in the construction of any of the connection factors enshrined in the heads of jurisdiction now included in the Practice Direction, the doubt ought to be resolved in favour of the defendant.[59]

3. Full and fair disclosure by the claimant of all relevant facts. Since applications for permission are made without notice to the defendant, the claimant must make a full and fair disclosure of all relevant facts.[60]

4. Permission should not be given if the case is within the letter but outside the spirit of the Rule.[61] This is emphasised by a provision in the Rules that the court must not give its permission unless the claimant satisfies it that England is a proper place in which to bring the claim.[62] The court will consider whether England is the forum conveniens,[63] taking into account the nature of the dispute, the legal and practical issues involved, such questions as local knowledge, availability of witnesses and their evidence, and expense.[64]

[56] [2013] UKSC 44; [2013] 1 W.L.R. 2043.

[57] *Société Générale de Paris v Dreyfus Bros* (1887) 37 Ch.D. 215.

[58] [2013] UKSC 44; [2013] 1 W.L.R. 2043, See Dickinson (2014) 130 L.Q.R. 197; Collins (2014) 130 L.Q.R. 555; Folkard [2014] L.M.C.L.Q. 492.

[59] *Société Générale de Paris v Dreyfus Bros* (1887) 37 Ch.D. 215.

[60] See, e.g., *Trafalgar Tours v Henry* [1990] 2 Lloyd's Rep. 298.

[61] *Johnson v Taylor Bros* [1920] A.C. 144 at 153; *Rosler v Hilbery* [1925] Ch. 250 at 259–260; *George Monro Ltd v American Cyanamid Corporation* [1944] K.B. 432 at 437 and 442. See also *Conductive Inkjet Technology Ltd v Uni-Pixel Displays Inc* [2013] EWHC 2968 (Ch.), at [59].

[62] CPR r.6.37(3). See r.6.37(4) for special factors when service is to be in Scotland or Northern Ireland.

[63] *Société Générale de Paris v Dreyfus Bros* (1887) 37 Ch.D. 215; *Rosler v Hilbery* [1925] Ch. 250; *Kroch v Rossell* [1937] 1 All E.R. 725.

[64] *Spiliada Maritime Corp v Cansulex Ltd* [1987] A.C. 460, adopting the approach of Lord Wilberforce in *Amin Rasheed Shipping Corp v Kuwait Insurance Co* [1984] A.C. 50 at 72; *Roneleigh Ltd v M.I.I. Exports Inc* [1989] 1 W.L.R. 619; *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* [1990] Q.B. 391.

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5. Interlocutory proceedings on jurisdiction should not become a mini-trial. In *VTB Capital Plc v Nutritek International*[65] Lord Neuberger[66] noted that hearings concerning the issue of appropriate forum should not become a mini-trial, that is, they should not involve masses of documents, long witness statements, detailed analysis of the issues, and long argument.[67] Notwithstanding the foregoing there is an inherent tension surrounding the scale of jurisdiction disputes: on the one hand, jurisdictional disputes are interlocutory, but on the other hand, pragmatically, they influence dramatically the outcome of the dispute on the merits, justifying the parties' attempts to litigate such issues fully, and the risks of doing so before the facts and law are fully established.[68]

Requirements and Standards

7–013 The courts have spelt out carefully the considerations which govern the exercise of the discretion,[69] including the general cautionary point that the court ought to be exceedingly careful before it allows a claim form to be served on a foreigner outside England because of the apparent interference with the sovereignty of the foreign state concerned. In words dating from 1887[70] but repeatedly approved by later courts[71]:

> "[I]t becomes a very serious question ... whether this court ought to put a foreigner, who owes no allegiance here, to the inconvenience and annoyance of being brought to contest his rights in this country, and I for one say, most distinctly, that I think this court ought to be exceedingly careful before it allows a writ to be served out of the jurisdiction".

Perhaps this sort of consideration carries less weight with the much greater speed of international travel and the growth of multinational corporations; but the cautionary note is still relevant.[72]

The modern approach of the English court was well summarised by Lord Collins of Mapesbury in *AK Investment CJSC v Kyrgyz Mobil Tel Ltd*,[73] a Privy Council appeal from the Isle of Man:

[65] [2013] UKSC 5; [2013] 2 A.C. 337.

[66] At [82]–[83].

[67] The risk of allowing these interlocutory proceedings to determine jurisdiction to become too expensive and time-consuming, is that they may be used as a litigation tactic by a richer party to wear down a poorer party, or by a party with a weak case to prevent, or at least to discourage, a party with a strong case from enforcing its rights.

[68] Rogerson, (2013) 9 J.Priv.Int.L. 387; R Fentiman, *International Commercial Litigation* (2015), pp.309 and following.

[69] *Société Générale de Paris v Dreyfus Bros* (1887) 37 Ch.D. 215; *The Hagen* [1908] P. 189; *Re Schintz* [1926] Ch. 710.

[70] *Société Générale de Paris v Dreyfus Bros* (1885) 29 Ch.D. 239 at 242–243.

[71] *Brownlie v Four Seasons Holdings Inc* [2015] EWCA Civ 665; [2015] C.P. Rep. 40, at [17].

[72] Cf. the decision of the Court of Appeal in *Brownlie v Four Seasons Holdings Inc* [2015] EWCA Civ 665; [2015] C.P. Rep. 40, where the passage from *Société Générale de Paris v Dreyfus Bros* (1885) 29 Ch.D. (at 242–243) was quoted (at [17]) with the approach of the UK Supreme Court in *Abela v Baadarani* [2013] UKSC 44; [2013] 1 W.L.R. 2043, per Lord Sumption, at [53] (see para.7-012, above).

[73] [2011] UKPC 7, reported as *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2012] 1 W.L.R. 1804 at paras [71] and [81]). See also *Global 5000 Ltd v Wadhawan* [2012] EWCA Civ 13.

> "On an application for permission to serve a foreign defendant ... out of the jurisdiction, the claimant ... has to satisfy three requirements.[74] First, the claimant must satisfy the court that in relation to the foreign defendant there is a serious issue to be tried on the merits, i.e. a substantial question of fact or law, or both. The current practice in England is that this is the same test as for summary judgment, namely whether there is a real (as opposed to a fanciful) prospect of success. Second, the claimant must satisfy the court that there is a good arguable case that the claim falls within one or more classes of case in which permission to serve out may be given. In this context 'good arguable case' connotes that one side has a much better argument than the other.[75] Third, the claimant must satisfy the court that in all the circumstances [England] is clearly or distinctly the appropriate forum for the trial of the dispute, and that in all the circumstances the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction ... However, if a question of law arises on an application in connection with service out of the jurisdiction, and the question of law goes to the existence of jurisdiction, the court will normally decide it, rather than treating it as a question of whether there is a good arguable case."[76]

A serious issue to be tried on the merits (real prospect of success)

7–014 The Civil Procedure Rules require the claimant to offer evidence stating that he believes that the claim has a reasonable prospect of success against the defendant that is outside of the jurisdiction.[77] It has been sustained that the standard is the same as if the claimant was resisting an application by the defendant for summary judgment.[78]

A good arguable case that the claim falls within one of the heads of jurisdiction

7–015 The question before the court in relation to this point is normally decided on affidavits from both sides and without cross-examination; mini-trials on jurisdiction issues are to be discouraged. The court needs to be satisfied—in the context of an interlocutory process—that connecting factors exist which allow the court to exercise jurisdiction.[79] Proceedings may fall within more than one of the headings of jurisdiction provided for in the Civil Procedure Rules.

The established standard is known as the "*Canada Trust* gloss", as it has been drawn from the following passage in the judgment of Waller LJ in *Canada Trust Co v Stolzenberg (No.2)*[80]:

> "'Good arguable case' reflects in that context that one side has a much better argument on the material available. It is the concept which the phrase reflects on which it is important to concentrate, i.e. of the court being satisfied or as satisfied as it can be having regard to the limitations which an interlocutory process imposes that factors exist which allow the court to take jurisdiction."

[74] *Seaconsar Far East Ltd v Bank Markazi Jomhouri Ilami Iran* [1994] 1 A.C. 438 at 453–457.

[75] See *Canada Trust Co v Stolzenberg (No.2)* [1998] 1 W.L.R. 547 at 555–7 per Waller LJ (affd [2002] 1 A.C. 1); *Bols Distilleries BV v Superior Yacht Services* [2006] UKPC 45; [2007] 1 W.L.R. 12.

[76] *Hutton (EF) & Co (London) Ltd v Mofarrij* [1989] 1 W.L.R. 488 at 495 (CA); *Chellaram v Chellaram (No.2)* [2002] EWHC 632 (Ch); [2002] 3 All E.R. 17 at 36.

[77] CPR r. 6.37(1)(b).

[78] *AK Investment CJSC v Kyrgyz Mobil Tel Limited* [2011] UKPC 7, reported as *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2012] 1 W.L.R. 1804.

[79] CPR r.6.37(1)(b).

[80] [1998] 1 W.L.R. 247.

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The court must be satisfied that England is the appropriate forum[81]

7–016 In relation to the determination of England as the appropriate forum in *VTB Capital Plc v Nutriek International Corp*[82] the UK Supreme Court reinforced the applicability of the *Spiliada* test. In the words of Lord Mance, giving the leading judgment on the jurisdiction issue:

> "The ultimate over-arching principle is that stated in the *Spiliada*, and, if a court is not satisfied at the end of the day that England is clearly the appropriate forum, then permission to serve out must be refused or set aside."[83]

The standard is substantially the same as that developed for the use of the power, formerly extensively used, to stay in English proceedings on the ground of forum non conveniens,[84] that England was *not* the appropriate forum. That the test was the same in both types of case was recognised in the leading House of Lords case, *Spiliada Maritime Corp v Cansulex Ltd*.[85] This means that it is legitimate to draw on the forum non conveniens cases in the present context, but this must be done with care. Not only has the scope for pleas of forum non conveniens been drastically reduced since the decision of the CJEU in *Owusu v Jackson*[86] but it has also to be remembered that in r.6.36 cases, unlike those dealing with pleas of forum non conveniens, the burden of proof is on the claimant: the claimant must persuade the court that the case is a proper one for service out of the jurisdiction and that England is clearly the appropriate forum.

In assessing the claimant's arguments, the court will seek to identify the "natural forum", meaning "that with which the action has the most real and substantial connection",[87] and will examine not only factors affecting convenience or expense (such as the availability of witnesses), but also such matters as the law governing the transaction, and the places where the parties reside or carry on business.[88] On the governing law, the courts take the common-sense view that difficult legal issues are best dealt with by judges familiar with them.[89] For example, in *Wright v Deccan Chargers Sporting Ventures Ltd*[90]:

[81] CPR r.6.37(1)(b).
[82] [2013] UKSC 5; [2013] 2 A.C. 337, at paras [13], [44], [80] and [190].
[83] [2013] UKSC 5; [2013] 2 A.C. 337, at para [18].
[84] See below, paras 7–031 and following.
[85] [1987] A.C. 460. See for criticism, Arzandeh (2014) 10 J.Priv.Int.L. 89. The *Spiliada* test has been confirmed as 'the test' for determining whether England is the appropriate forum by the UK Supreme Court in *VTB Capital Plc v Nutriek International Corp* [2013] UKSC 5; [2013] 2 A.C. 337.
[86] Case C-281/02 *Owusu v Jackson* [2005] E.C.R I-1383; [2005] Q.B. 801.
[87] A formulation used by Lord Keith in *The Abidin Daver* [1984] A.C. 398 at 415.
[88] e.g., *Chellaram v Chellaram (No.2)* [2002] EWHC 632; [2002] 3 All E.R. 17 (trusts probably governed by Hindu or Bermudan law; defendants domiciled in Bermuda, Gibraltar, Hong Kong, India and Spain; Indian forum more appropriate than English).
[89] e.g., *Smay Investments Ltd v Sachdev* [2003] EWHC 474; [2003] 1 W.L.R. 1973 (dispute over ownership of Indian company best dealt with by Indian courts; *VTB Capital Plc v Nutriek International Corp* [2013] UKSC 5; [2013] 2 A.C. 337; applied in *Navig8 Pte Ltd v Al-Riyadh Co for Vegetable Oil Industry* [2013] EWHC 328 (Comm.); [2013] 2 Lloyd's Rep. 104; *Caresse Navigation Ltd v Office National de L'Electricité* [2013] EWHC 3081 (Comm.); [2014] 1 Lloyd's Rep. 337, aff'd (but not on this point): [2014] EWCA Civ 1366; [2015] Q.B. 366. For a critical analysis of this approach, see M Hook (2014) 63 I.C.L.Q. 963.
[90] [2011] EWHC 1307 (QB); [2011] I.L.Pr 37.

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> W had entered into a contract of employment with D, an Indian company. The contract stated that D required W's services in the development of a business model and plan to support an initial public offering of D's stock on the English market. It provided that W would be based initially in England and would travel to India and elsewhere as necessary and that D would establish an office in England for W. The contract also stated that it was to be governed by English law. The contract was terminated. W alleged there had been a breach of contract and sought to serve proceedings in England. D had never established an office in England for W.

It was held that the matters were relatively evenly balanced but marginally favoured English jurisdiction for two reasons: the English courts would be preferable in applying English law (as there were issues in the case that suggested the application of English law would not be straightforward); and D's agreement that W should remain resident in England and that it would establish an office in England.

Nevertheless, the applicability of English law as the governing law to the merits is not determinant in establishing that England is clearly the appropriate forum for the sake of granting permission to serve a defendant out of the jurisdiction. It may be outweighed by other factors, including the location of witnesses and evidence.[91]

It may be relevant that particular courts have special expertise in the relevant type of case. For example, if a city or region is known as the centre of a specialised industrial process, its courts may be more familiar with the types of damage that may be sustained by workers in that industry. In cases involving insurance policies negotiated in accordance with the practices of the London market, the English courts will usually be held to be the appropriate forum.[92] If a court has already dealt with a related aspect of some specialised or very complex litigation, it may well be appropriate that other aspects are dealt with by that court.[93] It is important in complex litigation involving multiple parties to identify where possible a forum in which all the issues can be resolved, and so minimise the risk of inconsistent judgments in different jurisdictions.[94]

Although every case must turn on its own facts, the natural forum for a claim in tort is likely to be held to be the country in which the tort occurred,[95] not least because the relevant evidence is likely to be there. The place of the tort will not always be the natural forum: in a case the apt name of which alone justifies its mention here, *The Forum Craftsman*,[96] the Angolan owners of a Panamanian ship

[91] *VTB Capital Plc v Nutriek International Corp* [2013] UKSC 5; [2013] 2 A.C. 337.
[92] e.g., *Lincoln National Life Insurance Co v Employers Reinsurance Corp* [2002] EWHC 28; [2002] Lloyd's Rep I.R. 853. See also *Travelers Casualty and Surety Co of Europe Ltd v Sun Life Assurance Co of Canada (UK) Ltd* [2004] EWHC 1704 (Comm); [2004] Lloyd's Rep. IR 846 (relevance of involvement of regulatory authority in England).
[93] *Spiliada Maritime Corpn v Cansulex Ltd* [1987] A.C. 460, where there is discussion of the so-called "Cambridgeshire factor", the fact that related litigation involving a ship of that name had already been dealt with by the English court.
[94] See, e.g., *JSC BTA Bank v Granton Trade Ltd* [2010] EWHC 2577 (Comm); [2011] 2 All E.R. (Comm) 542.
[95] See *MacShannon v Rockware Glass Ltd* [1978] A.C. 795 (accident in factory in Scotland) and the line of cases following *Cordoba Shipping Co Ltd v National State Bank, Elizabeth, New Jersey, The Albaforth* [1984] 2 Lloyd's Rep 91 (negligent misstatement) and endorsed in *Berezovsky v Michaels* [2000] 1 W.L.R. 1004 (defamation); and *King v Lewis* [2004] EWCA Civ 1329; [2005] I.L.Pr. 16 (internet material originating in New York downloaded in England and so published there).
[96] [1984] 2 Lloyd's Rep. 102.

with a Greek crew sued in respect of damage to cargo as the vessel was about to set sail from Yokohama, Japan; the argument that Japan was the natural forum failed.

If the court gives permission for the service of the claim form out of the jurisdiction, the defendant has the opportunity to challenge the decision by applying for the service to be set aside.[97] The application will then be heard with both parties present, the initial decision having been made only on the submissions of the potential claimant.[98]

Connecting factors: heads of jurisdiction

7–017 The various sub-heads of para.3.1 of the Practice Direction, listing the cases in which permission may be given for service out of the jurisdiction, will now be examined in turn[99].

General grounds

7–018 (1) a claim is made for a remedy against a person domiciled within the jurisdiction.[100]

"Domicile", here and throughout Pt 6 of the Civil Procedure Rules, is to be determined not in accordance with the rules of common law but in accordance with the provisions of the European regime and paras 9 to 12 of Sch.1 to the Civil Jurisdiction and Judgments Order 2001.[101] This means that the test for domicile is the same whichever set of jurisdictional rules applies. If the case falls within the scope of the Brussels I *bis* Regulation, the domicile of the defendant will give the English courts jurisdiction[102] and permission to serve the claim form will not be required.[103]

(2) a claim is made for an injunction ordering the defendant to do or refrain from doing an act within the jurisdiction.[104]

The injunction need not be the only relief sought, and it is immaterial whether or not damages are also claimed; but the injunction must be the substantial relief sought: permission will be refused if the claim for an injunction is not made bona fide but merely to bring the case within the sub-head.[105] Permission will also be refused if a foreign court can more conveniently deal with the question,[106] or if

[97] CPR Pt 11.

[98] See the discussion on forum non conveniens below, para.7–031 and following.

[99] The 81st Update to the Civil Procedure Rules introduced a number of changes to these sub-heads. The new wording is indicated in italics. The majority of the amendments came into force on 1 October 2015. Furthermore, two new sub-headings (4A) and (21) were introduced.

[100] Practice Direction 6B, 3.1 (1).

[101] CPR r.6.31(i); see above, para.6–008.

[102] See above, para.6–007.

[103] CPR r.6.33(3).

[104] Practice Direction 6B, para.3.1(2).

[105] *De Bernales v New York Herald* [1893] 2 Q.B. 97n.; *Watson v Daily Record* [1907] 1 K.B. 853; contrast *Dunlop Rubber Co Ltd v Dunlop* [1921] 1 A.C. 367.

[106] *Société Générale de Paris v Dreyfus Bros* (1887) 37 Ch.D. 215; *Rosler v Hilbery* [1925] Ch. 250.

there is no real ground to anticipate repetition of the action complained of,[107] or if the injunction cannot be made effective in England.[108]

(3) a claim is made against a person ("the defendant") on whom the claim form has been or will be served and (a) there is between the claimant and the defendant a real issue which it is reasonable for the court to try[109]; and (b) the claimant wishes to serve the claim form on another person who is a necessary or proper party to that claim.[110]

(4) a claim is an additional claim under Pt 20 and the person is a necessary or proper party to the claim or additional claim.[111]

(4a) a claim is made against the defendant in reliance on certain specific sub-heads of jurisdiction[112] and a further claim is made against the same defendant which arises out of the same or closely connected facts[113]

These sub-heads are important, and have given rise to much litigation. The most obvious cases covered are cases where joint debtors or joint tortfeasors are alleged to be liable to the claimant[114]; or where the claimant has alternative claims against two persons, for example a claim against a principal for breach of contract, and against an agent for breach of warranty of authority.[115]

The new general ground introduced in (4a) aims to enable claims which have a close factual relationship to be brought together in one jurisdiction against the defendant. This expansion is justified due to the sheer practical advantages of trying closely related claims against the same defendant to be tried together[116], bearing in mind that permission to serve out the jurisdiction will only be given if the court is also satisfied that England is the appropriate forum for the closely related claim.

The person whom it is sought to serve out of the jurisdiction must be a "necessary or proper" party to the action. These terms are alternative, and a person may be a proper party although he or she is not a necessary party. The question whether B is a proper party to an action against A is simply answered: suppose both A and B had been in England, would they both have been proper parties to the action? If they would, and only one of them, A, is in England, then B is a proper party, and permission may be given to serve B out of the jurisdiction.[117] For instance, if defective goods are manufactured by B abroad,

[107] *De Bernales v New York Herald* [1893] 2 Q.B. 97n.; *Watson v Daily Record* [1907] 1 K.B. 853.

[108] *Marshall v Marshall* (1888) 38 Ch.D. 330.

[109] See *Erste Group Bank AG (London) v JSC (VMZ Red October)* [2015] EWCA Civ 379.

[110] Practice Direction 6B, para.3.1(3).

[111] Practice Direction 6B, para.3.1(4).

[112] Practice Direction 6B, para.3.1(4A). The specific sub-heads of jurisdiction are those provided for in paragraphs (2), (6) to (16), (19) or (21) of para.3.1 of Practice Direction 6B.

[113] This new sub-head came into force on 1 October 2015.

[114] *Williams v Cartwright* [1895] 1 Q.B. 142.

[115] *Massey v Heynes* (1888) 21 Q.B.D. 330.

[116] See Civil Procedure Rule Committee, *Gateways for service out of the jurisdiction*, CPR (15) 28, 12 June 2015.

[117] *Massey v Heynes* (1888) 21 Q.B.D. 330 at 338; *The Elton* [1891] P. 265; *Osterreichische Export etc. Co v British Indemnity Co Ltd* [1914] 2 K.B. 747; *The Goldean Mariner* [1990] 2 Lloyd's Rep. 215.

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and supplied to A in England, and sold by A to the claimant, the claimant can bring an action for breach of contract against A and in tort against B.[118]

Claims for interim remedies

(5) a claim is made for an interim remedy under s.25(1) of the Civil Jurisdiction and Judgments Act 1982.[119]

7–019 In the past there were technical difficulties concerning applications for a freezing (*Mareva*) injunction in respect of the defendant's assets. Where permission to serve documents was needed, it was formerly sought under a sub-head dealing with injunctions. It was held at one time that this was not possible where the defendant was not otherwise amenable to the jurisdiction and the substantive proceedings had been brought, or were to be brought, in another country.[120] However, this limitation was removed, first in relation to proceedings in other Contracting States to the Brussels and Lugano Conventions,[121] and then in respect of proceedings in any country.[122] The application can now be made under this sub-head, first introduced in 2000.

Claims in relation to contracts

7–020 (6) a claim is made in respect of a contract where the contract:
- (a) was made within the jurisdiction;
- (b) was made by or through an agent trading or residing within the jurisdiction;
- (c) is governed by English law; or
- (d) contains a term to the effect that the court shall have jurisdiction to determine any claim in respect of the contract.[123]

There is an initial characterisation issue: is this a "contract" case? It has been held, for example, that the relationship between a company and a director of that company is not a matter of contract.[124] The text of the predecessor provision in the former Order 11 spoke of claims "brought to enforce, rescind, dissolve, annul, or otherwise affect a contract, or to recover damages or obtain other relief in respect of the breach of a contract": the current rule can be no less wide in scope and it has indeed been held that the current formulation is "deliberately wider" than its predecessor.[125] So this sub-head will be available where the claimant seeks a declaration that a contract has been frustrated,[126] and where the claim is

[118] *The Manchester Courage* [1973] 1 Lloyd's Rep. 386.
[119] Practice Direction 6B, para.3.1(5).
[120] *The Siskina v Distos Compania Naviera* [1979] A.C. 210; *Mercedes Benz AG v Leiduck* [1996] A.C. 284.
[121] Civil Jurisdiction and Judgments Act 1982 s.25(1).
[122] SI 1997/302, made under ibid., s.25(3).
[123] Practice Direction 6B, para.3.1(6).
[124] *Newtherapeutics Ltd v Katz* [1991] Ch. 226.
[125] *Albon v Naza Motor Trading Sdn Bhd* [2007] EWHC 9 (Ch); [2007] 1 W.L.R. 2489; *Global 5000 Ltd v Wadhawan* [2011] EWHC 853 (Comm); [2011] 2 All E.R. (Comm) 190.
[126] *BP Exploration (Libya) Ltd v Hunt* [1976] 1 W.L.R. 788.

for restitution, the repayment of money paid under a mistake of fact in circumstances related to, but not arising under, a contract.[127] The position was further clarified in *Greene Wood & McLean LLP v Templeton Insurance Ltd*[128]:

> Large numbers of miners brought claims in respect of lung disease and vibration white finger. Their solicitors, G, made an unsuccessful application in the course of the litigation and costs were ordered against the miners. The solicitors accepted liability to pay those costs but brought a claim against T, an insurance company based in the Isle of Man, for contribution. The claim alleged that G and T were liable for the same damage, G under their contract with the miners, T under an After The Event insurance policy taken out in the name of the miners. G argued that their contribution claim arose in respect of a contract (the insurance policy) which was governed by English law. T argued that there was no contractual relationship between G and T, and that the power to permit service out of the jurisdiction applied only where claimant and proposed defendant were parties to the relevant contract.

The Court of Appeal rejected T's argument. To say that, for a claim to be "in respect of a contract", it must be "in respect of a contract between the intended claimant and the intended defendant" would be to add words to the rule which were not there. Since the Contracts (Rights of Third Parties) Act 1999, there were cases in which a third party could sue on a contract made between two persons for his or her benefit; such a third party should be able to rely on the contractual aspects of the rules as to service out of the jurisdiction. The claim in the instant case clearly had a connection with a contract governed by English law, even though it was not a claim brought under the contract. No doubt some connections with contracts were more remote than others; that could be taken into account in considering whether England was the appropriate forum.

This sub-head is very important in practice: its four branches require separate discussion.

(a) Contracts made in England

A contract concluded by postal correspondence is made where the letter of acceptance is posted.[129] Many contracts are now made by "instantaneous" means of communication, telephone, fax or email, in which case the contract is made where the acceptance is communicated to the offeror.[130] In *Brinkibon Ltd v Stahag Stahl und Stahlwaren-handelgesellschaft mbH*[131]:

> The contract concerned the supply of steel bars by S (an Austrian company) to B (an English company acting as agent (though it had not disclosed this fact) for a Swiss company. The steel was to be delivered by sea from Alexandria in Egypt. The contract was not performed after a dispute about the financial arrangements, and B sought to sue in England claiming that the contract was made in England. The acceptance of the terms was by a telex message from London to Vienna. The House of Lords confirmed that the postal communication rules did not apply to instantaneous communications. On the facts, the contract was made in Vienna.

[127] *Albon v Naza Motor Trading Sdn Bhd* [2007] EWHC 9 (Ch); [2007] 1 W.L.R. 2489.
[128] [2009] EWCA Civ 65; [2009] 1 W.L.R. 2013.
[129] *Wansborough Paper Co Ltd v Laughland* [1920] W.N. 344; *Benaim v Debono* [1924] A.C. 514 at 520; *Clarke v Harper and Robinson* [1938] N. Ir. 162; *Williams v Society of Lloyd's* [1994] 1 V.R. 274; *Lewis Construction Co Ltd v M Tichauer SA* [1996] V.R. 341.
[130] *Entores Ltd v Miles Far East Corporation* [1955] 2 Q.B. 327; *Surrey (UK) Ltd v Mazandaran Wood & Paper Industries* [2014] EWHC 3165 (Comm.).
[131] [1983] 2 A.C. 34.

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CHAPTER 12

ENDING MARRIAGES

12–001 Not every marriage succeeds; one or both parties may decide to end the relationship. Legal systems have to recognise and respond to that, though the responses are remarkably varied.

Some legal systems treat the ending of a marriage as entirely a matter for the parties, though there may be some requirement of registration to ensure that the State's civil status records are updated. In some systems of Islamic law, the ending of a marriage is entirely a matter for one party, the husband, who can divorce his wife by uttering a prescribed form of words.[1] Other States seek to control or limit the circumstances in which a marriage may be ended: an application may have to be made, by one or both parties, for a court order or decree, which may only be granted on proof of certain facts; or there may be a waiting period in which the parties are required to use the services of a mediator.

The process of ending a marriage will commonly lead to a divorce, a dissolution of the legal relationship created by the marriage. There are other possibilities. In many systems, some defect in the marriage may lead to its annulment. The parties are free thereafter to regard themselves for most purposes as never having been married; though pragmatism may triumph over strict logic in that the law may continue to recognise some legal consequences of the annulled marriage, for example by regarding any children as legitimate. Again many systems provide for the case in which parties to a marriage decide to live apart permanently without actually obtaining a divorce: the parties may obtain a judicial or legal separation (confusingly referred to in the older cases as divorce *a mensa et thoro* (from bed and board)) in which issues as their property rights and the future of any children may be resolved.

Those issues, as to financial matters and as to the children of the marriage, are often the most difficult aspects of marital breakdown. There is material in the two following chapters relevant to those issues. Here we are concerned with the conflict of laws aspects of the court procedures and alternative processes for ending the marriage. Where court proceedings are involved they are often referred to as matrimonial causes, a term which also includes proceedings for proceedings for the presumption of death and dissolution of marriage, or for a declaration as to status.

[1] The *talak* divorce, discussed below.

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JURISDICTION

12–002 Before 1858 jurisdiction in England over matrimonial causes (except divorce) was vested in the ecclesiastical courts. Their jurisdiction depended on the residence of the respondent within the relevant diocese. They had no power to dissolve a marriage; that could only be done by private Act of Parliament. In 1857 the Matrimonial Causes Act introduced judicial divorce and transferred the matrimonial jurisdiction to the secular courts.

The Act contained no rules as to jurisdiction in divorce. After a long period of uncertainty, the Privy Council held in *Le Mesurier v Le Mesurier*[2] that the only court which had jurisdiction to dissolve a marriage was the court of the common domicile of the parties. As the domicile of the wife during marriage was at common law the same as that of her husband, an Englishwoman whose husband had, or acquired, a foreign domicile would not have access to the divorce jurisdiction of the English courts. Legislation in 1937 and 1949[3] mitigated this hardship, but substantial reform came only with the reform of the law of domicile to allow married women an independent domicile.

The Domicile and Matrimonial Proceedings Act 1973 created a new set of jurisdictional principles applying to divorce and (with slight modifications) to other matrimonial causes.[4] The English court had jurisdiction if either party was domiciled in England on the date on which proceedings were instituted or had been habitually resident in England for at least 12 months on that date. These rules applied until the coming into force of a European Regulation on 1 March 2001.[5] That Regulation was later revised, though with no changes of substance so far as matrimonial matters were concerned.

The governing rules

12–003 Jurisdiction in respect of most matrimonial causes is now governed by Council Regulation No.2201/2003[6] (commonly known as the Brussels IIa Regulation) which came into force on 1 March 2005.[7] The Regulation contains a set of rules applicable in all Member States except Denmark but allows national law to apply in certain cases. It provides a uniform set of jurisdictional rules and almost

[2] [1895] A.C. 517, 540.

[3] Matrimonial Causes Act 1937 s.13 (deserted wives whose husbands had been domiciled in England) and Law Reform (Miscellaneous Provisions) Act 1949 s.1 (wives ordinarily resident for three years in England).

[4] For the background to this Act, see Law Com. No.48 (1972).

[5] Council Regulation No.1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses, referred to as the "Brussels II Regulation". For text see [2000] O.J. L160/19. The Regulation was based on a draft Convention, agreed in 1998 but never brought into force.

[6] Council Regulation No.2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation No.1347/2000. For text see [2003] O.J. L 338/1.

[7] See generally McEleavy, (2004) 53 I.C.L.Q. 605; Boele-Woelki and González Beilfuss (eds), *Brussels IIbis: Its impact and application in the Member States* (Antwerp: European Family Law Series No.14, Intersentia). For a critique of the original Brussels II Convention and ensuing Regulation see: Karsten, [1998] I.F.L. 75; and Mostyn, [2001] Fam. Law 359.

automatic recognition of matrimonial judgments throughout the EU. It applies, whatever the nature of the court or tribunal, in civil matters relating to divorce, legal separation or marriage annulment as long as the matter is not excluded by art.1(3).[8] As Recital (8) makes clear, the Regulation applies "only to the dissolution of matrimonial ties and should not deal with issues such as the grounds for divorce, property consequences of the marriage or any other ancillary measure". It is treated in English law as applicable only to marriages between a man and a woman.[9]

Grounds of jurisdiction The Regulation bases jurisdiction primarily on habitual residence, deploying this connecting factor in a variety of ways, but also preserves jurisdiction based, so far as the UK and Ireland are concerned, on the common domicile of the parties—the traditional rule established in *Le Mesurier v Le Mesurier*,[10] and for other Member States on the common nationality of the parties—a feature of the traditional approach of many civil law States.

Article 3 of the Regulation contains a list of grounds on which the courts of a Member State have jurisdiction in divorce, legal separation and marriage annulment. Jurisdiction is given to the courts of the Member State:

"(a) in whose territory:
- (i) the spouses are habitually resident, or
- (ii) the spouses were last habitually resident, insofar as one of them still resides there, or
- (iii) the respondent is habitually resident, or
- (iv) in the event of a joint application, either of the spouses is habitually resident, or
- (v) the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made,[11] or
- (vi) 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 in question or, in the case of the United Kingdom and Ireland, has his or her "domicile"[12] there;

(b) of the nationality of both spouses or, in the case of the UK and Ireland, of the "domicile" of both spouses."

Additionally, where proceedings are pending in a court on the basis of art.3, that same court will also have jurisdiction to examine a counterclaim coming within the scope of the Regulation[13]; and where a court of a Member State has granted a legal separation, that court also has jurisdiction to convert the legal separation into divorce.[14] Article 20 allows for provisional, including protective, measures to be taken in urgent cases even if the courts of another Member State have jurisdiction under the Regulation as to the substance of the matter, but this provisional jurisdiction ceases to apply when the court of the Member State

[8] Article 1; art.1(3) excludes maintenance obligations and trusts or succession. Recital (10) also explains that the Regulation does not apply to matters of social security, asylum and immigration.

[9] Domicile and Matrimonial Proceedings Act 1973 s.5(1) as amended by the Marriage (Same Sex Couples) Act 2013, Sch.4, para.6(1). For same-sex relationships, see para.12–006, below.

[10] [1895] A.C. 517, 540.

[11] As in *Sulaiman v Juffali* [2002] 1 F.L.R. 479, a case under the Brussels II Regulation.

[12] Domicile is declared to have the same meaning as it has under the legal systems of the UK and Ireland: art.3(2).

[13] Article 4.

[14] Article 5.

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having jurisdiction under the Regulation takes the measures it considers appropriate.[15] The situation where the parties seek to begin proceedings in two different states is considered below.

Perceived problems with these rules Before we look in more detail at particular features of these rules, it should be noted that the European Commission has repeatedly recognised that the rules are not entirely satisfactory. In the very month the Regulation came into force, March 2005, the Commission issued a consultation paper,[16] which was followed in July 2006 by a Proposal for a replacement Regulation. That proposal failed to garner sufficient support for it to be taken further. The eventual outcome was limited to applicable law, and then only between certain Member States, not including the UK.[17] In a 2014 report on the application of the Brussels IIa Regulation,[18] the Commission spelt out several perceived difficulties in relation to jurisdiction in matrimonial causes. First, the non-hierarchical grounds of jurisdiction set out in the Regulation in conjunction with the absence of harmonised choice of law rules in the entire EU seemed to offer a potential incentive for a spouse to rush to court to apply for divorce proceedings before the other spouse did, to ensure that the law applied in the divorce proceedings would safeguard his or her own interests. This was seen as undesirable as it might result in the application of a law to which the defendant did not feel closely connected or which failed to take into account his or her interests. It could also hinder efforts at reconciliation and mediation. Secondly, the Regulation does not provide for choice of court agreements and the Commission considered that limited party autonomy in this sphere could be particularly useful in cases of divorce by mutual consent.

Habitual residence The primary connecting factor of habitual residence is not defined in the Regulation. The Hague Conference has repeatedly declared the term a question of fact, but courts in England and many other countries have developed various legal criteria for the establishment of habitual residence depending on the nature of the claim under consideration. In the context of art.3 of the Brussels IIa Regulation, habitual residence is to be given a European autonomous definition derived from the Borrás report on the preceding Brussels II Convention, from decisions of the European Court in other contexts,[19] and by

[15] European Parliament and Council Regulation 606/2013 of 12 June 2013 on mutual recognition of protection measures in civil matters ([2013] O.J. L181/4) does not apply to protection measures falling within the scope of the Brussels IIa Regulation: art.2(3).
[16] COM(2005)82 final.
[17] See para.12–012.
[18] COM(2014) 225 final, p.5.
[19] In Case C–523/07 *A (Applicant) (sub nom Re A (Area of Freedom, Security and Justice* [2009] 2 F.L.R. 1) at [38], the European Court indicated that decisions on the meaning of habitual residence in one area of EU law could not always be transposed so as to apply in another area (in the instant case the question of the habitual residence of a child). That case was distinguished in *Z v Z (Divorce: Jurisdiction)* [2009] EWHC 2626 (Fam.); [2010] 1 F.L.R. 694, where the context was art.3 of Brussels II *bis* rather than art.8.

the French Cour de Cassation.[20] The meaning derived from these authorities is that a person is habitually resident in the place which is the habitual centre of his or her interests. The interests to be weighed, the importance of which will vary from case to case, may include employment, educational, emotional, personal and family interests, a balancing exercise more difficult than the assessment undertaken by the English courts in considering habitual residence in other contexts. In this context, a person may only have one habitual residence.[21] The test is an objective one, the stated intentions of the parties being merely one factor in the assessment.[22]

The text of the fifth and sixth indents of art.3(1) of the Regulation use both "habitual residence" and "residence". The courts are divided as to whether in this context the latter term is to be interpreted as meaning habitual residence. In *Munro v Munro*[23] Bennett J thought it should be so interpreted, relying essentially on the dominant role given to habitual residence in art.3 as stressed in the Borrás report on the equivalent material in the earlier draft Convention. In *Marinos v Marinos*[24] Munby J took a different view, believing that the authors of the Regulation had deliberately distinguished between the two concepts, so that for the period of six or 12 months only residence simpliciter need be established. In neither case was a resolution of this issue essential. In *V v V (Divorce: Jurisdiction)*,[25] where the issue was only lightly argued, Peter Jackson J. favoured the *Marinos* view. In *Tan v Choy*[26] Aikens LJ identified three possible readings of the fifth indent, without having to decide which was correct:

> "First, it could mean that the person seeking to found jurisdiction has to be 'habitually resident' in the territory concerned at the date the proceedings are started and he also has to have 'resided' there for at least a year before the relevant proceedings are started. Secondly, it could mean that the person seeking to found jurisdiction has simply to have been 'habitually resident' for one year prior to the start of the proceedings. Thirdly, it could mean that the person seeking to found jurisdiction has to establish that he/she is 'habitually resident' at the time the proceedings are started and that this fact is proved by establishing that he/she has 'resided' in that territory for at least a year immediately before the proceedings were started ('... application was made')."

The domicile basis. Article 3(b) of the Regulation gives jurisdiction on the basis of the common nationality, or in the case of the UK and Ireland, the

[20] *L-K v K (No.2)* [2006] EWHC 3280 (Fam.); [2007] 2 F.L.R. 729; *Marinos v Marinos* [2007] EWHC 2047 (Fam.); [2007] 2 F.L.R. 1018; *Munro v Munro* [2007] EWHC 3315 (Fam.); [2007] 1 F.L.R. 1613.
[21] *Marinos v Marinos* [2007] EWHC 2047 (Fam.); [2007] 2 F.L.R. 1018 (not following *Armstrong v Armstrong* [2003] EWHC 777 (Fam.); [2003] 2 F.L.R. 375); *Munro v Munro* [2007] EWHC 3315 (Fam.); [2007] 1 F.L.R. 1613. See Lamont (2007) 3 J.Priv.Int.L. 261.
[22] *Z v Z (Divorce: Jurisdiction)* [2009] EWHC 2626 (Fam.); [2010] 1 FLR 694; *V v V (Divorce: Jurisdiction)* [2011] EWHC 1190 (Fam.), [2011] 2 F.L.R. 778.
[23] [2007] EWHC 3315 (Fam.); [2007] 1 F.L.R. 1613 at [45] to [53].
[24] [2007] EWHC 2047 (Fam.); [2007] 2 F.L.R. 1018 at [45] to [49].
[25] [2011] EWHC 1190 (Fam.); [2011] 2 F.L.R. 778 at [41] to [47].
[26] [2014] EWCA Civ 251; [2015] 1 F.L.R. 492.

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common domicile of the spouses. In the case of the two named states, only domicile may be relied upon; nationality is irrelevant.[27]

Exclusivity of the rules In many cases the rules just considered are exclusive: no other jurisdictional rules can be relied upon. So, a spouse who is either habitually resident or a national of a Member State, or has his or her domicile in the UK or Ireland, may only be sued in accordance with the rules in arts 3 to 5 of the Regulation[28]; and only where none of the connecting factors in those provisions point to a Member State may a spouse be sued according to the traditional rules found in the national law of the forum State.[29] It follows that where the respondent is a national of a Member State but habitually resident in a non-Member State (and not domiciled in the UK or Ireland), and the applicant cannot satisfy one of the jurisdictional criteria in arts 3 to 5, no Member State will have jurisdiction to grant a divorce, legal separation or annulment.[30] It may be, of course, that the non-Member State will have jurisdiction, a matter governed by its national law.

Residual jurisdiction Where the jurisdictional rules of arts 3 to 5 are not exclusive and no court of a Member State has jurisdiction under those rules,[31] jurisdiction may be exercised in accordance with the national law of the Member State before which the proceedings are begun.[32] The scope of national law is indeed extended by the Regulation: as against a respondent who is not habitually resident and is not a national of a Member State (or not domiciled in the UK or Ireland), any national of a Member State who is habitually resident within the territory of another Member State may, like the nationals of that State, avail him- or herself of the rules of jurisdiction applicable in that State.[33] The effect of these provisions is that as against such respondents, pre-existing national bases of jurisdiction remain in force and are available to nationals of other Member States, the resulting judgments having the benefit of the recognition provisions of the Regulation. This has rightly been described by one commentator as "a very unprincipled grab for excessive matrimonial jurisdiction."[34]

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[27] *Re N (Jurisdiction)* [2007] EWHC 1274 (Fam.); [2007] 2 F.L.R. 1196. Where nationality is relevant and the parties are both dual nationals of the same two Member States, the parties may invoke the jurisdiction of either State: C–168/08 *Hadadi v Hadadi* [2009] E.C.R. I–6871.

[28] Article 6. A pre-nuptial agreement including a clause that the parties will only litigate in a particular State has no effect; *C v C (Divorce: Jurisdiction)* [2005] EWCA Civ. 68; (2005) 149 S.J.L.B. 113 although the point was not expressly argued.

[29] Article 7; Case 68/07 *Lopez v Lizazo* [2007] E.C.R. I–10403; [2008] Fam. 21. See below for the English traditional rules.

[30] This was one of the problems that the rejected 2006 Proposal for a replacement Regulation aimed to remedy.

[31] Emphasised in Case 68/07 *Lopez v Lizazo* [2007] E.C.R. I–10403; [2008] Fam. 21. See Kruger and Samyn, (2016) 12 J.Priv.Int.L 132 at 140, suggesting that the residual jurisdiction under the national law rules be replaced by a *forum necessitatis* prescribed by the Regulation.

[32] Article 7(1).

[33] Article 7(2).

[34] Beaumont, in evidence to a House of Lords committee: H.L. Paper 19, Session 1997–98.

The traditional rules in English law

Divorce and judicial separation

12–004 Where the provisions of arts 6 and 7 of the Regulation allow for residual jurisdiction under the domestic laws of each Member State, s.5(2) of the Domicile and Matrimonial Proceedings Act 1973[35] provides that English courts have jurisdiction to entertain proceedings for divorce and judicial separation if (and, subject to s.5(5) considered below, only if):

(a) the court has jurisdiction under the Brussels IIa Regulation; or
(b) no court of a Contracting State has jurisdiction under the Brussels IIa Regulation and either of the parties to the marriage is domiciled in England and Wales on the date when proceedings are begun.

Thus the residual jurisdiction under the traditional rules will only arise if the respondent is not habitually resident in a Member State, is not a national of a Member State other than the UK and Ireland, and is not domiciled in the UK or Ireland, but the applicant is domiciled in England.

Section 5(5) of the Act is, on first reading, a complex provision, but is the counterpart under the traditional rules to art.4 of the Regulation regarding counterclaims. The basic idea is that once the English court is properly exercising jurisdiction over a marriage, it retains that jurisdiction even if the nature of the relief sought changes. Section 5(5) provides that the court has jurisdiction to entertain proceedings for divorce, judicial separation or nullity of marriage, notwithstanding that the jurisdictional requirements of the section are not (when those particular decrees are sought) satisfied, if they are begun at a time when proceedings which the court has jurisdiction to entertain[36] are pending in respect of the same marriage for divorce, judicial separation or nullity of marriage. This subsection contemplates (a) supplemental petitions by the petitioner for the same relief on a different ground, or for a different form of relief, and (b) cross-petitions by the respondent. The court will have jurisdiction to entertain the supplemental or cross-petition, even though the applicant is not domiciled in England, provided it had jurisdiction to entertain the original petition and that petition is still pending.

The exercise of the English courts' jurisdiction in proceedings for divorce is subject to rules requiring or enabling the court to stay those proceedings in certain circumstances. These rules are considered later in this chapter.

[35] As substituted by the European Communities (Matrimonial Jurisdiction and Judgments) Regulations 2001, SI 2001/310. Note that the definition of "Council Regulation" in s.5(1A) has been amended by the European Communities (Jurisdiction and Judgments in Matrimonial and Parental Responsibility Matters) Regulations 2005, SI 2005/265.

[36] By virtue of s.5(2),(3) or (5).

Nullity of marriage

12–005 Before 1974 the jurisdiction of the English courts to entertain petitions for nullity of marriage was one of the most vexed and difficult questions in the whole of the English conflict of laws. An enormous simplification of the law was effected by the Domicile and Matrimonial Proceedings Act 1973.[37] Section 5(3) of the Act[38] provides that English courts have jurisdiction to entertain such petitions[39] if (and, subject to s.5(5), only if):

> "(a) the court has jurisdiction under the Brussels IIa Regulation; or
> (b) no court of a Contracting State has jurisdiction under the Brussels IIa Regulation and either of the parties to the marriage:
> (i) is domiciled in England and Wales on the date when the proceedings are begun; or
> (ii) died before that date and either was at death domiciled in England and Wales or had been habitually resident in England and Wales throughout the period of one year ending with the date of death."

Subsection (b)(ii) is intended to cover the rare but still theoretically possible case where a person with sufficient interest petitions for a decree that a marriage is void after the death of one or both of the parties thereto. In theory, that can be done during the lives of the parties.

The provisions of s.5(5) of the 1973 Act on jurisdiction to entertain supplemental or cross-petitions apply to nullity of marriage as they apply to divorce and judicial separation. There is therefore no need to repeat here the earlier discussion.

The exercise of the English courts' jurisdiction in proceedings for nullity of marriage is subject to rules enabling the court to stay those proceedings in certain circumstances. These rules are considered later in this chapter.

Same-sex relationships

12–006 An increasing number of legal systems, in both EU and non-EU States, now provide for marriages or civil partnerships (or both) between couples of the same sex. On the assumption that the Brussels IIa Regulation does not apply to such relationships, provision has been made to give the English courts jurisdiction.[40]

The Civil Partnership Act 2004 makes provision for the English court to make dissolution, separation or nullity orders. The design of the Act is such that some of the grounds on which jurisdiction may be taken, grounds similar to those in art.3(a) of the Brussels IIa Regulation, are prescribed by Regulations and others

[37] Implementing the recommendations of the Law Commission: Law Com. No.48 (1972), paras 49–62.

[38] As substituted by the European Communities (Matrimonial Jurisdiction and Judgments) Regulations 2001, SI 2001/310.

[39] The bases for jurisdiction are the same whether the marriage is alleged to be void or voidable.

[40] See Woelke [2004] I.F.L. 111 (doubting the wisdom of extending the comprehensive régime of jurisdictional rules in matrimonial matters to civil partnerships) and Kruger and Samyn, (2016) 12 J.Priv.Int.L 132 at 135ff (examining the arguments for interpreting the regulation as applicable to same-sex marriages).

by the Act itself. So far as dissolution and annulment are concerned the English courts have jurisdiction under the Civil Partnership (Jurisdiction and Recognition of Judgments) Regulations 2005[41] where:

(a) both civil partners are habitually resident in England;
(b) both civil partners were last habitually resident in England and one of the civil partners continues to reside there;
(c) the respondent is habitually resident in England;
(d) the petitioner is habitually resident in England and has resided there for at least one year immediately preceding the presentation of the petition; or
(e) the petitioner is domiciled and habitually resident in England and has resided there for at least six months immediately preceding the presentation of the petition.

Section 221 of the Act provides that where no court has jurisdiction under the 2005 Regulations, there is jurisdiction to make a dissolution order if either party is domiciled in England on the date the proceedings are begun and the parties are registered as civil partners of each other in England, and it appears to the court to be in the interests of justice to assume jurisdiction in the case.[42] Similarly, if no court has jurisdiction under the 2005 Regulations the English court will have jurisdiction to grant a nullity order, where either party is domiciled in England on the date when the proceedings are begun, or died domiciled or habitually resident for one year in England and the parties are registered as civil partners of each other in England, and it appears to the court to be in the interests of justice to assume jurisdiction in the case.[43] Additionally, where proceedings are pending and the court has jurisdiction in respect of one of the orders, the court may also take jurisdiction to make a different type of order even if jurisdiction was not exercisable at that time.[44]

The Marriage (Same Sex Couples) Act 2013 made similar, but not identical, provision in respect of same sex marriages. Provision is made in the Marriage (Same Sex Couples) (Jurisdiction and Recognition of Judgments) Regulations 2014[45] for jurisdiction on grounds corresponding to those in the equivalent civil partnership Regulations and also where both spouses are domiciled in England. The 2004 Act inserted a new Sch.A1 to the Domicile and Matrimonial Proceedings Act 1973 which contains provisions corresponding to those in s.221 of the Civil Partnership Act 2004 dealing with cases in which there is no jurisdiction under the 2014 Regulations and with the making of different orders from that originally sought.

[41] SI 2005/3334.

[42] Section 221(1).

[43] Section 221(2).

[44] Section 221(3).

[45] SI 2014/543.

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Declarations as to status

12–007 Declarations as to status are not covered by the Brussels IIa Regulation. Accordingly, jurisdiction is governed by English law. Declarations as to status can be important as the procedural method of testing whether a foreign divorce or other matrimonial decree is entitled to recognition. Pt III of the Family Law Act 1986,[46] implementing a report of the Law Commission,[47] enacted a comprehensive code of statutory rules as to declarations of status.[48] It applies to five types of declarations as to marital status specified in s.55(1) of the 1986 Act. These are declarations (a) that a marriage was at its inception a valid marriage; (b) that a marriage subsisted on a date specified in the application; (c) that a marriage did not subsist on a date so specified; (d) that the validity of a divorce, annulment or legal separation obtained in any country outside England in respect of a marriage is entitled to recognition in England; and (e) that the validity of a divorce, annulment or legal separation so obtained in respect of a marriage is not entitled to recognition in England. No court may make a declaration that a marriage was at its inception void[49]; such an allegation must be made in a petition for a decree of nullity of marriage.[50]

There is jurisdiction to make such a declaration if, and only if, either of the parties to the marriage concerned is domiciled in England on the date of the application, or was habitually resident in England throughout the period of one year ending with that date, or died before that date and either was at death domiciled in England, or had been habitually resident in England throughout the period of one year ending with the date of death.[51] The domicile and habitual residence of an applicant who is not a party to the marriage is immaterial; the court must, however, refuse to hear an application made by such a person if it considers that he or she does not have a sufficient interest in the determination of the application.[52]

The manner in which the court is to exercise its jurisdiction is dealt with in s.58(1) of the 1986 Act. Where the proposition to be declared is proved to the satisfaction of the court, the court must make the declaration unless to do so would be manifestly contrary to public policy. The Law Commission indicated that the reference to the court being satisfied was intended to make clear that the standard of proof is high and that the evidence must be clear and convincing.[53] It may be doubted whether the statutory words actually convey that meaning.

[46] For a critique of the Family Law Act 1986, see Lowe, (2002) 32 Fam. Law 39.
[47] Declarations in Family Matters, Law Com. No.132 (1984).
[48] The inherent jurisdiction of the High Court formerly relied on as a basis for making certain types of declarations as to status is excluded: Family Law Act 1986 s.58(4).
[49] Family Law Act 1986, s.58(5)(a); *A Local Authority v X* [2013] EWHC 3274 (Fam.); [2014] 2 F.L.R. 123 (distinguishing "non-marriage" cases as to which see para.11–011, above). *Toy v Chan* [2014] EWCA Civ 251; [2015] 1 F.L.R. 492.
[50] See, for example, *KC v City of Westminster Social and Community Services Dept* [2008] EWCA Civ. 198; [2008] 2 F.C.R. 146; *XCC v AA* [2012] EWHC 2183 (COP); [2013] 2 All E.R. 988.
[51] Family Law Act 1986 s.55(2). These jurisdictional rules correspond to those which governed jurisdiction to grant a decree of nullity of marriage before the European Regulations were adopted. See below for jurisdiction in respect of same-sex relationships.
[52] Family Law Act 1986 s.55(3).
[53] Law Com. No.132, para.3.57, n.265.

Same-sex relationships. The Civil Partnership Act 2004 provides that any person with sufficient interest may apply to the English court for a declaration of validity or otherwise of a civil partnership, or the validity or otherwise of the dissolution of a civil partnership.[54] However, the court may make such a declaration if, and only if, either of the partners is domiciled in England and Wales on the date of the application, or has been habitually resident throughout the period of one year ending with that date, or died domiciled or habitually resident for one year in England and Wales, and the two people concerned are civil partners of each other and it appears to the court to be in the interests of justice to assume jurisdiction.[55]

The Marriage (Same Sex Couples) Act 2013 made similar provision in respect of same sex marriages. In the case of a same-sex marriage, the English courts may make declarations (a) as to the validity of the marriage, (b) as to the subsistence of the marriage, or (c) as to the validity of a divorce, annulment or judicial separation obtained outside England in respect of such a marriage.[56] There is jurisdiction if, and only if, either of the parties to the marriage to which the application relates is domiciled in England on the date of the application, or has been habitually resident in England throughout the period of one year ending with that date, or died before that date and either was at death domiciled in England or had been habitually resident in England throughout the period of one year ending with the date of death, or the two people concerned married each other under the law of England and it appears to the court to be in the interests of justice to assume jurisdiction in the case.[57]

Other types of declaration. Despite the existence of this statutory code, other declarations relating to the validity of marriage are possible under the inherent jurisdiction of the High Court. So, declarations that an adult lacked capacity to enter a marriage on account of a mental condition have been made in a number of cases[58]; a declaration that the marriage was not recognised as a valid marriage in the jurisdiction of England and Wales (used in cases of forced marriages abroad)[59]; or that there never has been a marriage between the parties, when any ceremony or event involving the parties can be regarded as within the "non-marriage" category.[60]

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[54] Civil Partnership Act 2004 s.58.
[55] Civil Partnership Act 2004 s.224.
[56] Domicile and Matrimonial Proceedings Act 1973 Sch.A1, para.6 as inserted by Marriage (Same Sex Couples) Act 2013 Sch.4, para.8
[57] Domicile and Matrimonial Proceedings Act 1973 Sch.A1, para.4 as inserted by Marriage (Same Sex Couples) Act 2013 Sch.4, para.8.
[58] *X City Council v MB* [2006] EWHC 168 (Fam.); [2006] 2 F.L.R. 968; *Local Authority X v MM* [2007] EWHC 2003 (Fam.); [2009] 1 F.L.R. 443; *Ealing LBC v S* [2008] EWHC 636 (Fam.), sub nom *Re K* [2008] 2 F.L.R. 720; *XCC v AA* [2012] EWHC 2183 (COP); [2013] 2 All E.R. 988.
[59] *SH v NB* [2009] EWHC 3274 (Fam); [2010] 1 F.L.R. 1927; *Re P (Forced Marriage)* [2010] EWHC 3467 (Fam); [2011] 1 F.L.R. 2060.
[60] *Hudson v Leigh* [2009] EWHC 1306 (Fam.); [2009] 2 F.L.R. 1129; *B v I (Forced Marriage)* [2010] 1 F.L.R. 1721. For "non-marriages" see para.11–011, above.

Staying of Matrimonial Proceedings

12–008 As a result of the many and various grounds of jurisdiction available for divorce, legal separation and nullity, it is quite possible that the parties may each start proceedings relating to the same matrimonial matters in the courts of different countries. The effect of the rules governing any possible stay of the English proceedings has been much reduced by the Brussels IIa Regulation.

The Regulation provisions

12–009 The Brussels IIa Regulation, following the model first found in the 1968 Brussels Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (now replaced by the Brussels I *bis* Regulation), adopts a civil law approach to the question of *litispendence,* the existence of two (or more) proceedings in relation to the same matter in different countries.

Article 19 provides that, where proceedings relating to divorce, legal separation or marriage annulment between the same parties are brought before courts of different Member States,[61] the court second seised must of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.[62] Where the jurisdiction of the court first seised is established, the court second seised must decline jurisdiction in favour of that court. In that case, the party who brought the relevant action before the court second seised may bring that action before the court first seised.[63] For this purpose, a court is seised (a) at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the applicant has not subsequently failed to take the steps he or she was required to take to have service effected on the respondent; or (b) if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the applicant has not subsequently failed to take the steps he or she was required to take to have the document lodged with the court.[64] "Lodge" in this context means that the documentation was filed and proceeded with in a manner accepted by the court and which led to the issue of a petition by the proceedings by the court.[65] Proceedings are

[61] In contrast to the position in civil and commercial matters, the two sets of proceedings need not have the same cause of action: Case C 489/14 *A v B* (CJEU, 6 October 2015) (proceedings for judicial separation in one State; divorce petition in the other).

[62] art.19(1). See *Leman-Klemmers v Klemmers* [2007] EWCA Civ 919; [2008] 1 F.L.R. 692 (English court first seised); *Re N (Jurisdiction)* [2007] EWHC 1274 (Fam.); [2007] 2 F.L.R. 1196 (French court first seised). cf. *Bentinck v Bentinck* [2007] EWCA Civ 175; [2007] 2 F.L.R. 1, decided under the Lugano Convention 1988. It was held in *Jefferson v O'Connor* [2014] EWCA Civ 38; [2014] 2 F.L.R. 759 that the effect of art.19 could not be defeated by an agreement between the parties or by estoppel.

[63] Article 19(3).

[64] Article 16.

[65] See *L-K v L-K (No.3)* [2006] EWHC 3281 (Fam.); [2007] 2 F.L.R. 741 (where failure to produce marriage certificate did not prevent there being a sufficient "lodging" in the English court).

continuing in another jurisdiction when they have been commenced there and have not been dismissed[66] and have not lapsed as a result of inaction by the applicant.[67]

Whether preliminary proceedings are proceedings relating to a divorce, legal separation or marriage annulment, is a matter for the characterisation of the court seised of those preliminary proceedings, and a court potentially second seised should ascertain the decision of the court potentially first seised by direct judicial cooperation.[68]

Although it could be argued that the absolute nature of the *lis pendens* rule serves to promote a race to litigate in the country perceived to give the applicant a particular advantage and in *L-K v L-K (No.3)*[69] Singer J described the "first past the post" régime as arbitrary and as having the potential to be unfair to one party or the other, it must be remembered that the jurisdictional rules do provide for a real connection between the applicant and the forum. A spouse who wishes to avail him- or herself of the jurisdiction of a Member State to which the respondent has no connection has to have been habitually resident in that state for one year, or for six months if also a national of that state (or domiciled in that state in the case of the UK and Ireland), thereby limiting the race to court to situations in which the marriage has true connections to more than one Member State.[70] It may, however, be doubted whether any sort of race to court is desirable in the context of matrimonial disputes, especially in the light of the promotion of mediation as a family dispute solving mechanism.[71]

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English law

Obligatory stays

12–010 Paragraph 8 of Sch.1 to the 1973 Act contains provisions obliging the English courts in certain circumstances to stay proceedings where other proceedings in respect of the same marriage[72] are pending in a "related jurisdiction". Related

[66] See *C v S (Divorce: Seisin and Jurisdiction)* [2010] EWHC 2676 (Fam.); [2011] 2 F.L.R. 19 (where the foreign court had rejected the petition before it and was held no longer seised).

[67] Case C 489/14 *A v B* (CJEU, 6 October 2015).

[68] *Chorley v Chorley* [2005] EWCA Civ 68; [2005] 1 W.L.R. 1469, per Thorpe LJ at para.44. The case involved a French judicial hearing designed to enable the possibility of reconciliation to be explored and seen as distinct from possible divorce proceedings.

[69] [2006] EWHC 3281 (Fam.); [2007] 2 F.L.R. 741.

[70] See generally Truex, [2001] Fam. Law 233; Mostyn, [2001] Fam. Law 359.

[71] See, for example, Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters; and see the earlier report *Parental Separation: Children's Needs and Parents' Responsibilities: Next Steps. Report of the Responses to Consultation and Agenda for Action*, Cm 6452 (2005), which stated at p.11: "The Government does not mean to make mediation compulsory but will strongly promote its use."

[72] Similar rules apply in cases involving civil partnerships: see the Family Proceedings (Civil Partnership: Staying of Proceedings) Rules 2010, SI 2010/2986. the rules in the text apply in same sex marriage cases: Domicile and Matrimonial Proceedings Act 1973 s.5(6) as amended by Marriage (Same Sex Couples) Act 2013 Sch.4, para.6(4); and Domicile and Matrimonial Proceedings Act 1973 Sch.1 para.2, as amended by Marriage (Same Sex Couples) Act 2013 Sch.4 para.9.

jurisdictions are those within the British Isles.[73] They include Scotland and Northern Ireland;[74] but Guernsey, Jersey and the Isle of Man, not Member States, are also "related jurisdictions": if the English court has jurisdiction under art.7, the rules as to obligatory stays would be applicable.

Paragraph 8 provides that where before the beginning of the trial or first trial in any proceedings for divorce which are continuing in an English court it appears to the court:

(a) that proceedings for divorce or nullity of marriage in respect of that marriage are continuing in another jurisdiction in the British Isles; and
(b) that the parties to the marriage have resided together after its celebration; and
(c) that the place where they resided together when the proceedings in the English court were begun, or last resided together before those proceedings were begun, is in that other jurisdiction; and
(d) that either of the parties was habitually resident in that jurisdiction throughout the year ending with the date on which they last resided together before the date on which the proceedings in the English court were begun,

the English court must order the proceedings to be stayed. The object of this provision was to give jurisdictional priority to the country most closely connected with the marriage, that is to say to the country to which the marriage may be said to "belong".[75]

Discretionary stays

12–011 Paragraph 9 of Sch.1 to the Domicile and Matrimonial Proceedings Act 1973 makes provision for matrimonial proceedings in an English court to be stayed in favour of the court of another country in certain situations.[76]

Where before the beginning of the trial or first trial in any matrimonial proceedings, other than proceedings governed by the Brussels IIa Regulation, which are continuing in the court, it appears to the court:

(a) that any proceedings in respect of the marriage in question, or capable of affecting its validity or subsistence, are continuing in another jurisdiction; and

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[73] Schedule 1, para.3(2).

[74] It is unclear whether the Regulation allows the continued application of the rules as to obligatory stays in cases involving other proceedings in those countries, art.19 giving priority to the court first seised speaks of the "courts of different Member States" but the effect of art.66 may be that the courts in England and Scotland are to be treated as if they were courts in different Member States.

[75] Law Com. No.48 (1972), para.85.

[76] Similar provisions exist for civil partnerships: Family Proceedings (Civil Partnership: Staying of Proceedings) Rules 2005/2921.

(b) that the balance of fairness (including convenience) as between the parties to the marriage is such that it is appropriate for the proceedings in that other jurisdiction to be disposed of before further steps are taken in the proceedings in the court,

the English court may, if it thinks fit, order that the proceedings before it be stayed.[77]

Paragraph 9 now applies only to proceedings other than those governed by the Brussels IIa Regulation.[78] The meaning of this exclusion was not wholly clear, for cases in which jurisdiction is taken under national law can be regarded as governed by the provision as to "residual jurisdiction" under art.7 of the Regulation. However in *Mittal v Mittal*[79] the Court of Appeal interpreted the exclusion as limited to cases in which the Regulation "tells the court how to deal with the application"; in cases under art.7 national law governs. The intention appears to be that para.9 should continue to apply where that residual jurisdiction is invoked.[80]

The question of the application in this context of the decision in *Owusu v Jackson*[81] (which in the context of the Brussels I Regulation precluded the English courts from using the notion forum non conveniens to stay proceedings) was squarely faced for the first time in *JKN v JCN*.[82] The court held that *Owusu v Jackson* did not apply to cases governed by the Brussels IIa Regulation, for a number of reasons. *Owusu v Jackson* did not address the position that arises under the Domicile and Matrimonial Proceedings Act 1973 where by definition there are concurrent proceedings. *Owusu v Jackson* should be limited to cases under the Brussels I and Brussels I *bis* Regulations, essentially civil and commercial cases, and not extended so as to apply to the Brussels IIa Regulation dealing with family law. Article 2 of the Brussels I Regulation (art.4 of the Brussels I *bis* Regulation) had been described as "mandatory" by the European Court, but under art.3 of the Brussels IIa Regulation there was no corresponding obligation: art.3 envisaged a multiplicity of Member States having concurrent jurisdiction, art.2 of the Brussels I Regulation envisaged only one. This reasoning was endorsed by the Court of Appeal in *Mittal v Mittal*.[83]

The discretionary power in para.9 may be exercised on the court's own motion as well as on the application of a party to the marriage. In considering the balance of fairness and convenience, the court must have regard to all factors appearing to

[77] Domicile and Matrimonial Proceedings Act 1973 Sch.1, para.9 as amended by the European Communities (Matrimonial Jurisdiction and Judgments) Regulations 2001, SI 2001/310. See *Mytton v Mytton* (1977) 7 Fam. Law 244; *Shemshadfard v Shemshadfard* [1981] 1 All E.R. 726; *Thyssen-Bornemisza v Thyssen-Bornemisza* [1986] Fam. 1; *S v S (Matrimonial Proceedings: Appropriate Forum)* [1997] 1 W.L.R. 1200. For the discharge of stays, and the effect of a stay on powers to make orders as to financial and other ancillary matters, see Domicile and Matrimonial Proceedings Act 1973 Sch.1, paras 10 and 11.

[78] See SI 2001/310, reg.4.

[79] [2013] EWCA Civ 1255; [2014] 2 F.C.R. 208.

[80] *JKN v JCN* [2010] EWHC 843 (Fam.); [2011 1 F.L.R. 826.

[81] Case 281/02 [2005] E.C.R. I–1383; [2005] Q.B. 801.

[82] [2010] EWHC 843 (Fam.); [2011] 1 F.L.R. 826.

[83] [2013] EWCA Civ 1255; [2014] 2 F.C.R. 208, followed on this point in *Toy v Chan* [2014] EWCA Civ 251; [2015] 1 F.L.R. 492.

be relevant, including the convenience of witnesses and any delay or expense which may result from the proceedings being stayed, or not being stayed. The court will exercise its discretion on the same basis as in forum non conveniens cases, using the principles set out in *Spiliada Maritime Corp. v Cansulex Ltd.*[84] That this was the correct approach was established in the House of Lords in *De Dampierre v De Dampierre,*[85] a case which illustrates the operation of the rules on discretionary stays.

> H was a French aristocrat whose family estates produced cognac. He married W, also a French national, in France in 1977. They moved to England in 1979, where their only son was born in 1982. In 1985, W took the child to New York and the marriage broke down. H began divorce proceedings in France in May 1985; W petitioned for divorce in England in July 1985, and H sought a stay of the English proceedings. Although unsuccessful in the lower courts, H succeeded in the House of Lords.

The decision in the lower courts was based on the fact that a maintenance order would be made in favour of W in the English proceedings, but that under French law a finding that she was responsible for the failure of the marriage would lead to a denial of any such order. The House of Lords, following the *Spiliada* approach, held that the financial advantage W might gain from proceeding in England was only one factor. Given the tenuous nature of her links with England, it was logical and not unfair to allow the litigation between the parties, both of whom were French and who had married in France, to be conducted in the courts of that country.[86]

The English court has power, which will be very sparingly exercised, to grant an interim injunction restraining the continuance of foreign matrimonial proceedings.[87] The principles applicable are again those developed in non-matrimonial cases, i.e., those in *S.N.I. Aerospatiale v Lee Kui Jak.*[88]

CHOICE OF LAW

Divorce

12-012 The question of choice of law has never been prominent in the English rules of the conflict of laws relating to divorce, which has always been treated as primarily a jurisdictional question.[89] English courts when deciding whether to recognise foreign divorces have never examined the grounds on which the decree was granted in order to see whether they were sufficient by English domestic law.

[84] [1987] A.C. 460; see above, para.7–031.
[85] [1988] A.C. 92. Were the facts to recur, the outcome would now be different: the French proceedings, being in another Member State, would have priority under art.19.
[86] For other illustrations, see *R v R (Divorce: Stay of Proceedings)* [1994] 2 F.L.R. 1036 (stay refused); *T v T (Jurisdiction: Forum Conveniens)* [1995] 2 F.L.R. 660 (stay granted); *Otobo v Otobo* [2002] EWCA Civ 949; [2003] 1 F.L.R. 192 (stay refused); *Ella v Ella* [2007] EWCA Civ 99; [2007] 2 F.L.R. 35 (stay granted, relevance of pre-nuptial agreement).
[87] e.g., *Hemain v Hemain* [1988] 2 F.L.R. 388.
[88] [1987] A.C. 871; see above, para.7–036.
[89] For academic discussions, see Carruthers (2012) 61 I.C.L.Q. 881; Shakargy (2013) 9 J.Priv.Int.L. 499.

On the other hand, when English courts have themselves assumed jurisdiction, they have never applied any other law than that of England. In marked contrast, courts on the continent of Europe have, since the beginning of this century, often applied foreign law, usually the law of the parties' nationality. This has sometimes involved them in very complicated problems, especially when the parties are of different nationalities.

The civil law approach is well illustrated by Council Regulation 1259/2010 of 20 December 2010 implementing enhanced co-operation in the area of the law applicable to divorce and legal separation.[90] This sets out uniform applicable law rules for divorce and legal separation for the 14 participating Member States, not including the UK. The Regulation introduces an element of party autonomy, with the parties being able to designate the applicable law, subject to certain safeguards, from a list of options: (a) the law of the State of the spouses' habitual residence at the time of conclusion of the agreement; (b) the law of the State of the spouses' last habitual residence if one of them still resides there at the time of conclusion of the agreement; (c) the law of the State of nationality of one of the spouses at the time of conclusion of the agreement; and (d) the law of the forum.[91] In the absence of a choice by the parties, a "cascade" of possibly applicable laws is established. Divorce and legal separation would be subject to the law of the State: (a) where the spouses are habitually resident at the time the court is seised; or, failing that, (b) where the spouses were last habitually resident, provided that the period of residence did not end more than one year before the court was seised, in so far as one of the spouses still resides in that State at the time the court is seised; or, failing that, (c) of which both spouses are nationals at the time the court is seised; or, failing that, (d) where the court is seised.[92] Where the law applicable under these rules makes no provision for divorce or does not grant one of the spouses equal access to divorce or legal separation on grounds of their sex, the law of the forum is to apply.[93]

In English law, the only possible alternative to the *lex fori* would be the law of the domicile. No difference between them could exist before 1938, because English courts did not exercise jurisdiction unless the parties were domiciled in England. When this did become possible, the Court of Appeal assumed without discussion that nevertheless English law was still applicable,[94] and this was confirmed by a legislative provision last enacted as s.46(2) of the Matrimonial Causes Act 1973.[95] This provided that in any proceedings in which the court had jurisdiction by virtue of that section, the issues should be determined in accordance with the law which would be applicable thereto if both parties were domiciled in England at the time of the proceedings, i.e., English law. This

[90] [2010] O.J. L343, p. 10. For the discussions which led to the UK's decision not to participate the account given by Thorpe LJ in *Radmacher v Granatino* [2009] EWCA Civ 649; [2009] 2 F.C.R. 645 at [6] to [9].
[91] Article 5. For provisions as to the formal and essential validity of the agreement, see arts 6 and 7.
[92] Article 8.
[93] Article 10.
[94] *Zanelli v Zanelli* (1948) 64 T.L.R. 556.
[95] Re-enacting earlier legislation going back to the Law Reform (Miscellaneous Provisions) Act 1949.

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subsection was repealed in 1973, but this was not intended to alter the law.[96] Hence, if a spouse habitually resident in England but domiciled abroad wishes to obtain a divorce on a ground recognised by the law of his or her domicile but not by English law, the English court cannot assist. To require English courts to dissolve marriages on exotic foreign grounds would be distasteful to the judges and unacceptable to public opinion. Conversely, if the English court can grant a divorce under the terms of the 1973 Act, it is immaterial that the law of the domicile has no comparable ground of divorce. This approach can, of course, cause problems where the law of the parties' domicile does not recognise the divorce, but this has been held to be irrelevant.[97]

Separation

12–013 Unlike divorce *a vinculo matrimonii* (dissolving the marriage bond), judicial or legal separation was a remedy granted by the ecclesiastical courts before 1858. Its principal effect was (and is) to entitle the petitioner to live apart from the respondent, but not to dissolve their marriage nor enable either party to remarry. It is little used today; the remedy is sought chiefly by persons who have religious scruples about divorce. It has never been doubted that the English courts will apply English domestic law and no other, even if the parties are domiciled abroad.

Nullity of marriage

12–014 The question of what law governs the validity of a marriage was considered in the previous chapter. It was there pointed out that the formal validity of a marriage is governed (in general) by the law of the place of celebration, and capacity to marry (in general) by the law of each party's antenuptial domicile. There is more doubt about physical incapacity, which may be governed by the *lex fori* or possibly by the law of the petitioner's domicile, and consent of parties, which may be governed by the law of each party's antenuptial domicile or possibly by the *lex fori*. There is no need to repeat the former discussion of these matters in this chapter. But something should be said on the question of whether a marriage could be annulled in England on some ground unknown to English law.

The grounds on which a marriage is void or voidable in English law are clearly set out in ss.11 and 12 respectively of the Matrimonial Causes Act 1973 as amended, and the bars to relief in the case of voidable marriages in s.13. Section 14(1) provides that where, apart from the Act, any matter affecting the validity of a marriage would under the rules of private international law fall to be determined by reference to the law of a foreign country, nothing in ss.11, 12 or 13(1) shall preclude the determination of that matter by that foreign law, or require the application to the marriage of the grounds or bar to relief there mentioned. This subsection seems to leave open the question with which we are concerned.

[96] Law Com. No.48, para.103–108.
[97] *Kapur v Kapur* [1984] F.L.R. 920; *Otobo v Otobo* [2002] EWCA Civ 949; [2003] 1 F.L.R. 192.

Of course a marriage could be annulled for failure to comply with the formalities prescribed by the law of the place of celebration, however much those formalities might differ from those of English domestic law.[98] And a marriage could be annulled if the parties were within the prohibited degrees of the law of their antenuptial domicile, even though they might have capacity to marry by English domestic law.[99] But could a marriage be annulled in England on some ground quite unknown to English domestic law, e.g., lack of parental consent[100] or mistake as to the attributes of the other spouse?[101] In the former case, it is possible that the English court might fall back on tradition, characterise the impediment as a formality, and treat it as immaterial if the marriage was celebrated in England[102] or Scotland[103] but as invalidating the marriage if it was celebrated in the country by whose law the requirement of parental consent was imposed. But, as we have seen,[104] there are grave objections to this course. In the latter case, the impediment could not by any stretch of the imagination be characterised as a formality, and the court would be squarely faced with the question whether a marriage could be annulled on some ground unknown to English law. There is no English authority on this question. All that can be said is that there is no reported case in which a marriage has been annulled on any such ground.

In *Vervaeke v Smith*,[105] the House of Lords refused to recognise a foreign decree annulling a marriage celebrated in England on the ground (unknown to English law) that it was a mock marriage. The implication is that the English court would not annul a marriage on such a ground.

RECOGNITION OF DIVORCES, SEPARATIONS AND ANNULMENTS

12–015 The simple statement in *Le Mesurier v Le Mesurier*[106] that domicile was the true test of jurisdiction did not exhaust the issues surrounding divorce. Many other countries, notably those in the civil law tradition, proceeded on a quite different basis, for example that of nationality. A failure on the parts of the courts of one country to recognise the decrees granted in another country creates a "limping marriage" valid in some parts of the world but invalid or dissolved elsewhere, with inconvenient consequences for the parties. The liberalisation of the bases on which jurisdiction could be assumed, a feature not only of English law but of that of many other countries in recent decades, requires a corresponding liberalisation

[98] See, e.g. *Berthiaume v Dastous* [1930] A.C. 79 (marriage in church without civil ceremony); *Asaad v Kurter* [2013] EWHC 3852 (Fam.); [2014] 2 F.L.R. 833 (church marriage in Syria; failure to register the marriage with civil authorities and to obtain authorities' consent to marriage involving a foreign national).
[99] *Sottomayor v De Barros (No.1)* (1877) 3 P.D. 1 (first cousins).
[100] See *Ogden v Ogden* [1908] P. 46 (French law).
[101] See *Mitford v Mitford* [1923] P. 130 (German law).
[102] *Simonin v Mallac* (1860) 2 Sw. & Tr. 67; *Ogden v Ogden*, [1908] P. 46.
[103] *Lodge v Lodge* (1963) 107 S.J. 437.
[104] Above, para.11–018.
[105] [1983] 1 A.C. 145. See also *R. (on the application of Baiai) v Secretary of State for the Home Department* [2008] UKHL 53; [2009] 1 A.C. 287 re-affirming the rule of public policy that a "sham" marriage is still a valid marriage in English law.
[106] [1895] A.C. 517, 540.

of the rules governing the recognition of foreign decrees if the limping marriage syndrome is to be kept within bounds. Recognition cannot, however, be wholly automatic: the English courts need not accept every assertion of jurisdiction by a foreign court. Balancing these considerations makes for a certain necessary complexity in the law.

The law on the recognition and enforcement of decrees granted outside England and Wales depends in the first instance on where the decree was granted, and sometimes on the type of decree under consideration in the English court.

Decrees granted in other European Union Member States

12–016 Although the Brussels IIa Regulation[107] contains detailed rules as to jurisdiction in matrimonial causes, its most important role is ensuring the proper working of the internal market in the area of the free movement of persons by providing for the mutual recognition and enforcement of divorce, legal separation and marriage annulment throughout the EU.[108] The Regulation does not apply to same-sex marriages, but in England there is legislation dealing with such cases.[109]

Article 21(1) provides that a judgment given in a Member State must be recognised in the other Member States without any special procedure being required, a judgment being one for divorce, legal separation or marriage annulment whatever the judgment may be called, including a decree, order or decision.[110] However, this automatic recognition is subject to the fact that any interested party may apply for a decision that the judgment not be recognised.[111] The grounds for non-recognition are limited to those listed in art.22:

(a) that recognition is manifestly contrary to the public policy of the Member State in which recognition is sought;
(b) where the judgment was given in default of appearance, that the respondent was not served with the document which instituted the proceedings, or not so served in sufficient time to enable him or her to arrange a defence; unless the respondent accepted the judgment unequivocally;
(c) that the judgment is irreconcilable with a judgment in proceedings between the same parties in the Member State in which recognition is sought; or
(d) that the judgment is irreconcilable with an earlier judgment given between the same parties in another Member State,

or in a non-Member State where the judgment is entitled to recognition in the Member State in which recognition is sought.

In practice, the availability of the public policy ground is extremely limited: neither the jurisdiction of the Member State granting the decree which is the subject of recognition[112] nor the substance of that decision[113] may be reviewed,

[107] See generally McEleavy, (2004) 53 I.C.L.Q. 605, at p.633ff.
[108] With the exception of Denmark.
[109] See para.12–040, below.
[110] Article 2.
[111] Article 21(3).
[112] Article 24.

and recognition may not be refused because the decree was granted on a basis unknown to the law of the recognising State.[114] This means that the public policy ground will be available only in extreme situations as the European jurisprudence under the Brussels I Regulation[115] demonstrates:

> "Recourse to the public-policy clause . . . can be envisaged only where recognition or enforcement of the judgment delivered in another Contracting State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle . . . the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order".[116]

The second ground for refusal, relating to default of appearance of the respondent, is qualified by references to cases in which the respondent has accepted the judgment unequivocally. So, where the respondent has acted subsequently in such a way as to rely on that judgment, such as remarrying, the ground will not be available. This ground is mirrored in the non-recognition provisions of the Family Law Act 1986.[117]

The last two grounds deal with irreconcilable judgments. There is no requirement that the judgments contain the same cause of action so once the marriage has been ended in one particular way, e.g., by annulment, a court may not recognise an alternative termination, e.g., a divorce. The ground is extended to earlier decrees of non-Member States as long as they fulfil the conditions necessary for recognition in the recognising state. However, since there are no provisions for a stay of proceedings in the courts of a Member State when the courts of a non-Member State are already seised, it is possible that irreconcilable judgments will be pronounced in the courts of a Member State and a non-Member State. The Regulation provides no answer to the resulting problem, but the spirit of the Regulation suggests that the judgment of the Member State would be preferred.

Decrees granted in the British Isles

12–017 The automatic recognition throughout the UK of decrees of divorce granted under the law of any part of the British Isles was first provided for, on the recommendation of the English and Scottish Law Commissions,[118] in the Recognition of Divorces and Legal Separations Act 1971. The Family Law Act 1986 extended the earlier provisions to nullity decrees and s.44(2) now provides for the automatic recognition throughout the UK of divorces, annulments and

[113] Article 26.
[114] Article 25.
[115] See para.10–004, above.
[116] Case C–7/98 *Krombach v Bamberski* [2000] E.C.R. I-1935 at para.37.
[117] See below para.12–034.
[118] Law Com. No.34 (Scot. Law Com. No.16) (1970), para.51.

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judicial separations granted at any time by a court of civil jurisdiction in any part of the British Isles, including the Channel Islands and the Isle of Man.[119]

Such decrees cannot be questioned in England on any ground of lack of jurisdiction. Recognition may, however, be refused in the discretion of the court in limited circumstances examined below.[120]

The provisions in the Family Law Act 1986 as to the recognition or non-recognition of the validity of a decree granted elsewhere in the British Isles apply in relation to any time before the coming into effect of those provisions as well as in relation to any later time, but not so as to affect any property to which any person became entitled before that date,[121] or to affect the recognition of the validity of the decree if that matter had been decided by any competent court in the British Isles before that date.[122] In the latter case, the policy of the Act is not to disturb the position reached as a result of litigation.

Certain extra-judicial divorces granted in the British Isles before 1 January 1974 and recognised as valid under the common law rules applicable before that date remain entitled to recognition in England. The relevant pre-1974 recognition rule is that in *Armitage v Attorney General,*[123] under which divorces recognised as valid under the law of the spouses' common domicile were recognised in England,[124] subject to a residual discretion not to recognise if justice so required.[125]

Apart from those exceptional cases, s.44(1) of the Family Law Act 1986 provides that no divorce or annulment obtained in any part of the British Isles shall be regarded as effective in England unless granted by a court of civil jurisdiction. It is no longer possible for parties seeking a divorce to resort to the various ecclesiastical courts, such as that of the Greek Orthodox Church or the court of the Chief Rabbi.[126] So far as annulments are concerned, this provision was new but stated what had been the position at common law. A nullity decree pronounced by a Roman Catholic diocesan tribunal has never had any effect on the civil, as opposed to the ecclesiastical, status of the parties.[127]

Decrees granted elsewhere[128]

12–018 In the period before 1972, English judges developed a number of rules for the recognition of foreign divorces. Over time, the rules became more and more liberal; in all of them, the basis on which the foreign court assumed

[119] This seems to apply to same-sex marriages as in other cases; there has been no specific legislation dealing with the point.
[120] Below, para.12–031.
[121] 4 April 1988.
[122] Family Law Act 1986 s.52(2).
[123] [1906] P. 135.
[124] See *Har-Shefi v Har-Shefi (No.2)* [1953] P. 220; *Qureshi v Qureshi* [1972] Fam. 173.
[125] *Qureshi v Qureshi* [1972] Fam. 173, 201.
[126] See *Solovyev v Solovyeva* [2014] EWFC 1546; [2015] 1 F.L.R. 734 (divorce in Russian consulate in London "obtained in" England and so not entitled to recognition).
[127] cf. *Di Rollo v Di Rollo*, 1959 S.C. 75, 79.
[128] i.e., outside the EU with the exception of Denmark.

jurisdiction,[129] and the grounds on which it pronounced a divorce,[130] were both equally irrelevant. The rules became not only more liberal but also more technical and often unpredictable in effect. Fresh legislative intervention was plainly required, and a model came to hand in 1968, when the Hague Conference on Private International Law produced a Convention on the recognition of divorces and legal separations.[131] The provisions of this Convention were originally implemented by the Recognition of Divorces and Legal Separations Act 1971 now replaced by more liberal provisions in the Family Law Act 1986. The Family Law Act 1986 provides in s.45 that an overseas divorce or legal separation must be recognised in the UK if, and only if, it is entitled to recognition under the Act or some other statutory provisions.[132] The effect of this important provision is retrospectively to abolish for all purposes the common law recognition rules and also to preclude the courts from developing further judge-made rules of recognition.

Requirements for recognition

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12–019 The Family Law Act 1986, though in almost all respects a distinct improvement on the legislation it replaced, makes use of a troublesome distinction between divorces "obtained by means of judicial or other proceedings" and other divorces. The nature of this distinction between "proceedings" and "non-proceedings" divorces is more conveniently explored in a later context[133]; the rules now to be examined are those applicable to "proceedings" divorces, which are by far the most common. Such a divorce (or legal separation) obtained in a country outside the British Isles is entitled to recognition in England if (a) it is effective under the law of that country[134]; and (b) at the date of the commencement of the proceedings,[135] either party to the marriage was habitually resident or domiciled in, or was a national of that country.[136]

(i) Effective

12–020 The first requirement is that the divorce or separation must have been effective under the law of the foreign country in which it was obtained. A foreign divorce may of course be effective for some purposes but not for others: thus it may be effective to restore the spouses to the status of single persons, but ineffective to

[129] *Robinson-Scott v Robinson-Scott* [1958] P. 71, 88; *Indyka v Indyka* [1969] 1 A.C. 33, 66.
[130] *Bater v Bater* [1906] P. 209; *Wood v Wood* [1957] P. 254; *Indyka v Indyka* [1969] 1 A.C. 33.
[131] For the text of the Convention and comment thereon by Anton, see (1969) 18 I.C.L.Q. 620–643, 657–664. The text and a commentary also appear in Law Com. No.34 (Scot. Law Com. No.16) (1970).
[132] These other statutory provisions, such as the Indian and Colonial Divorce Jurisdiction Act 1926 are of very limited importance. An argument that the Foreign Judgments (Reciprocal Enforcement) Act 1933 was relevant in the context of the recognition of overseas divorces was rejected, it is submitted rightly, in *Maples v Maples* [1988] Fam. 14 (not following dicta to the contrary in *Vervaeke v Smith* [1981] Fam. 77 at 125–126).
[133] See below, para.12–025.
[134] Family Law Act 1986 ss.46(1)(a).
[135] Section 46(3)(a).
[136] Section 46(1)(b).

destroy the wife's right to maintenance from her husband. Presumably "effective" here means (in the case of a divorce) effective to dissolve the marriage. The divorce or separation would presumably not be effective if, e.g., the foreign court had no internal competence under its own law to grant it[137]; or if the foreign decree is not final until a specified period of time has elapsed, or until a decree absolute is pronounced, or while an appeal is pending. A divorce will be recognised as "effective" if the substantive rules of the foreign law have been followed; questions of proof which may arise, for example as to whether a letter of divorce had actually been delivered, are matters for English law.[138] "Effective" has been held to imply a less rigorous standard than "valid": it can mean a decree which, although invalid per se in the granting state, is none the less to be treated as valid by virtue of some supervening legal decision or equitable principle such as estoppel.[139] The requirement that the divorce or separation must have been effective under the law of the foreign country has important implications for the recognition in England of divorces granted in federal states where divorce is a matter for State as opposed to federal law, e.g., the US. This matter is considered below.[140]

(ii) Personal connecting factors

12–021 If the divorce or separation is in this sense effective, its recognition depends upon the existence at the date of the commencement of the proceedings of one of the specified links between one or both parties and the country in which it was obtained, i.e. habitual residence,[141] domicile, or nationality. For this purpose, "domicile" has two alternative meanings.[142] The first is that the party concerned was domiciled in the relevant foreign country under the normal rules as to domicile in English law. The second is domicile according to the law of the relevant foreign country "in family matters"; this last phrase ensures that if a country has differing concepts of domicile, as has England since the Civil Jurisdiction and Judgments Act 1982, it is that concept relevant to family law which will be used.

If there are cross-proceedings for divorce or separation, it is sufficient if the jurisdictional tests were satisfied at the date of commencement of either the original proceedings or the cross-proceedings, and it is immaterial which of them led to the decree. The decree must in other respects be entitled to recognition, e.g. it must be effective under the law of the country in which it is granted.[143]

In some countries, a legal separation can be converted into a divorce after a prescribed period, e.g., one year. The Act provides that in such a case if the original legal separation was entitled to recognition and is converted in the

[137] See *Adams v Adams* [1971] P. 188, where a Southern Rhodesian divorce was refused recognition in England because the judge who pronounced it had not taken the oath of allegiance or the judicial oath in the prescribed form.
[138] *Wicken v Wicken* [1999] Fam. 224; *K v R* [2007] EWHC 2945 (Fam).
[139] *Kellman v Kellman* [2000] 1 F.L.R. 785 ("mail order" decree in Guam).
[140] See para.12–028.
[141] As to the meaning of habitual residence, see above, para.3–004.
[142] Family Law Act 1986 s.46(5).
[143] Section 47(1).

country in which it was obtained into a divorce effective under the law of that country, it will be recognised in England. It is immaterial that the spouses had lost the habitual residence, domicile or nationality of that country between the date of the original decree and its conversion into a divorce.[144]

(iii) Findings of jurisdictional fact

12–022 If the foreign court makes a finding of fact, including a finding that either spouse was habitually resident or domiciled under the law of the foreign country, or a national of the foreign country, whether expressly or by implication, on the basis of which jurisdiction was assumed, that finding is conclusive evidence of that fact if both spouses took part in the proceedings, and in any other case is sufficient proof of that fact unless the contrary is shown.[145] If the proceedings are judicial in character, appearance in the proceedings is treated as taking part therein.[146]

(iv) Retrospective application

12–023 In its application to overseas divorces and legal separations the Family Law Act 1986, like its predecessor, is retrospective. It applies to the recognition of divorces and legal separations obtained before or after the date of commencement of Pt II of the Act; and in the case of a decree obtained before that date it requires recognition in relation to any time before that date as well as in relation to any subsequent time.[147] There are two exceptions to this: s.52(2) provides that the provisions of Pt II of the Act do not affect any property to which any person became entitled before the date of commencement of that Part, or affect the recognition of the validity of the decree if that matter had been decided by any competent court in the British Isles before that date. In the latter case, that court decision will be followed.

(v) Federal and other composite states

12–024 Special considerations arise where a divorce or legal separation is obtained in a federal or composite state in which the different territorial units have different systems of law in respect of matrimonial causes. The matter is complicated by the fact that while there is little difficulty in identifying the habitual residence or domicile of a party by reference to a particular territory or province, nationality is essentially a matter for the political state, the federation: one can speak of Australian citizenship but not of Tasmanian citizenship.

Accordingly, special provisions are contained in s.49 of the Family Law Act 1986. These provisions distinguish between cases in which recognition depends upon the habitual residence or domicile of a party and those in which the nationality criterion is used. Where the recognition of the decree depends upon

[144] Section 47(2).
[145] Section 47(1)(2). See *Torok v Torok* [1973] 1 W.L.R. 1066. But the Act does not require the recognition of any finding of fault made by the foreign court: s.51(5).
[146] Section 48(3).
[147] Section 52.

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