



## The concept of domicile under French law

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Domicile is defined in article 102 of the French Civil Code as the place where a person "has his principal establishment". The article alone is by no means sufficient to comprehend the concept of domicile which is mainly clarified through case law and legal authors.

There is a classic distinction between domicile and residence. Residence is the place where a person lives in a stable fashion but this is not necessarily his domicile. Consequently we talk of "secondary residence" or of "marital residence". In practice, residence is often confused with domicile. The address of a person often corresponds to the place where he effectively resides. But the fact that this is often the case should not allow two completely different notions to be confused. Neither must there be confusion between "civil domicile", and "fiscal domicile" as defined in article 4 B of the French Tax Code (see our 11-2008 French Tax News on how French tests of tax residence work). Article 4 B refers to fiscal domicile but the notion of residence in fiscal terms covers the same concept. The distinction between fiscal domicile and civil domicile applies more to foreigners habitually living in France who are probably fiscally domiciled in France but not inevitably civilly so.

Nowadays, civil domicile principally serves to localise a person for the accomplishment of legal acts (in particular with regard to the authority of courts, opening of successions at the deceased's last domicile, celebrating marriages at the domicile of the spouses etc). For such purposes, in many cases the law also

refers to the residence of a person for the accomplishment of certain acts so as to overcome the difficulties related to the effective determination of the domicile of certain people. In ancient law, domicile played a much more important role because it made it possible to determine the custom applicable to an individual according to his domicile. This function of determination of an applicable law is to a certain extent found today in private international law for foreigners living in France, particularly in a succession context.

A foreigner who is fiscally domiciled or resident in France will be subject to income and capital gains tax on his worldwide income / capital gains and to wealth tax on his worldwide assets. He will also be subject to estate duty on his worldwide assets should he die fiscally domiciled in France (subject of course to any international tax treaties). On the other hand, the effective place of his domicile within the meaning of the Civil Code will have different consequences when considering which rules of devolution apply to a succession. Indeed, under French law, the devolution of movable estate is determined by reference to the law of the deceased's last domicile. In this case, the question is one of civil and not of fiscal domicile. Consequently, under French law, a person can be fiscally domiciled in France in respect of estate duty and not civilly domiciled in France when determining the rules applicable to the devolution of a succession. For many years civil domicile in theory applied only to French nationals. Since the law of 10 August 1927, case law consistently finds that foreigners having "an effective residence of a stable

and permanent nature which is also the location of the family home and professional activity" in France can be domiciled in France. However, the criteria are rigorously assessed by the judges. To retain the existence of such a domicile in France, the foreigner must clearly establish his intention to make France his permanent home and must give up any idea of returning to his country of origin. Consequently, it appears more difficult to acquire a civil domicile than a fiscal domicile. However, this intention still has to be corroborated by the facts. A priori, it will be assumed that a foreigner in France has maintained his domicile of origin unless he has demonstrated a desire to establish his domicile in France, which in most situations is the case. However, the question of a foreigner's civil domicile is not merely theoretical. In the event of conflict of succession, the application of the rules of devolution of French law can, in certain situations, have considerable implications. We can readily imagine the importance to disinherited or poorly provided for children on hearing a French judge establish the civil domicile of their deceased father or mother to be in France, whereby they will benefit from the French statutory reserved share ie forced heirship rights. (However, rules of conflict and renvoi are not the subject of this issue of French Tax News). The deceased's intentions might not suffice if, from the facts, the judges deem that he behaved as though he were domiciled in France.

## Components of the concept of domicile

Although somewhat obsolete nowadays, domicile traditionally consists of three elements: necessity, uniqueness and fixity.

### Necessity of domicile

Classic writers considered that, without domicile, one could not have human beings. Each individual must, of necessity, have a domicile. But in certain cases, domicile may be difficult to determine (eg people of no fixed abode) which is why, in any situation, there is a domicile of origin. If a person has not declared a new choice of domicile, he is assumed to still have his previous one (ie his first known domicile). Thus the residence of a minor, in theory, is that of his/her parents at the time of his/her birth until a personal residence is acquired. This rule can lead, in certain cases, to a person being localised in a place with which he has broken all ties. This is why

in some circumstances, particularly in procedural matters, the law refers to the residence of the person rather than to his domicile. Moreover, the law has had to intervene so as to regulate the situation of itinerant workers, by establishing the principle of a commune of attachment. The requirement of necessity has diminished in the face of practical reality.

### Uniqueness of domicile

Everyone in principle has only one domicile. From this principle stems the rule that the domicile of origin is lost when a new one is chosen. As a person cannot have two domiciles simultaneously, the loss of the preceding domicile is automatic. This rule of single domicile (uniqueness) undoubtedly was essential when the law of the past made domicile the criterion for attaching a person to a legal provision or local custom, but its importance today has considerably diminished. Nevertheless, we have seen that with regard to succession, it still has a role to play.

From practical necessity, legislators and case law have had to soften the rigours of the sole domicile principle. Indeed, as well as general domicile, the law recognises the existence of special or secondary domiciles. These places are given as domicile for the exercise of certain rights or in the dealings with certain people (eg place of business, matrimonial residence etc). The rule of uniqueness remains only in respect of general domicile. In addition, in litigation, the rule of sole domicile has the major disadvantage of offering the defendant the possibility of avoiding jurisdiction of the courts if papers were served on him somewhere other than at his principal domicile. To reduce this possibility, the judges thus referred to the concept of apparent domicile. A place is regarded as the apparent domicile if, in the eyes of third parties of good faith, it is wrongly seen as the principal establishment of the person.

### Fixity of domicile

The requirement of fixity is mainly used to distinguish domicile from residence characterised on the contrary by their mobility. This requirement for fixity would not be an obstacle to the possibility of changing domicile.

### Determining domicile

We have mentioned the situation of a deceased's domicile being disputed by heirs to an estate and, indeed, domicile

can be difficult to determine if an individual has, or has had, various homes in several locations. For example, he may live with his family in a city, own a property somewhere else and work in yet another location. In the event of litigation, the judge will have to choose where the sole domicile of the individual is to be located. Determination of domicile is the exclusive responsibility of the courts as it is an issue of fact to be assessed solely by the judges. Those who would dispute the domicile of a person (eg heirs) must provide proof that the latter's place of domicile is elsewhere. This proof can be in the form of testimonies or various indications which will be submitted to the judge for assessment. Where the proof is provided by the person concerned, this is treated with greater respect as his intention, in itself, will play an important part.

Indeed, the principle is that any individual should be free to fix his domicile wherever he chooses. However, in certain cases, domicile is imposed by law, as is the case with dependent minors (domiciled in theory with their father and mother), adults subject to a guardianship order (at guardian's domicile), certain civil servants (at the place where they exert their functions). It should be noted that prior to 1975 a married woman's official domicile was that of her husband. These cases of official domicile are not to be considered here. Only the rules determining voluntary domicile will be explored. The domicile of a person is the one freely designated by his acts and intentions. This voluntary domicile replaces, in theory, the domicile of origin. However, this does not mean that intention is sufficient to establish a domicile in a fictitious place, as the facts will also be taken into account. Besides the mere intention of an individual, a judge will be looking for other elements which make it possible to attach a person to a place. In the majority of cases, the intention of the interested party will be implicit and deduced from the circumstances.

One of the most important criteria selected in case law is the existence of an effective residence, provided the person has been there for some length of time. The residence can be regarded as a domicile only if it is of sufficient stability and fixity (eg occupied for the major part of the year). The judges also take into account family attachments and in particular the residence of the family. It should be noted that these first two criteria are also taken into account in order to determine the tax residence of a person pursuant to the test of foyer

(Article 4 B of the CGI). But we cannot deduce from this that a person whose tax foyer is in France necessarily has his civil domicile there.

When the place of residence of a person is distinct from the place where his material interests are concentrated, the courts generally favour the second of these criteria. This is logical as there is a strong chance that a person's principal establishment will be in the same place as his fortune and pecuniary interests, ie where he has acquired property or opened bank accounts; where he practises his profession, in particular when it consists of conducting a commercial or agricultural business. In this respect, there have been judgments that a person's intention to fix his domicile in France was demonstrated by the fact that he had lived and worked in France for several years.

Lastly, the exercising of certain rights or fulfilling of certain obligations at a given place can be taken by a judge as an additional demonstration of the person's intention to fix his domicile there. For example, the fact of being registered on the electoral register of a particular borough, holding a role in the local council or paying taxes in a given place are some of the elements a judge will take into account when determining the place of domicile, on condition however that there is evidence of an effective residence in the same place.

In addition to these criteria, we would specify that the person's acts could also be taken into account, such as agreeing to be called before a court which is not that of his domicile; obtaining a residence card; wishing to be buried in a certain place etc.

## Change of domicile

Since there is a principle of freedom to choose one's place of domicile, change of domicile is always possible (except when the domicile is imposed by law). However, as this change of domicile can become litigious the legislator has provided for certain precautions to be taken. Whilst a person's intention is, in principle, a determinant element of his change of domicile, a judge must nevertheless be convinced of its genuineness and will require the individual to be effectively living in the new place. The Civil Code regulates the conditions of change of domicile but also the proof of such change.

## Conditions of changing domicile

Article 103 of the Civil Code sets out two conditions regarding change of domicile: an objective condition which requires the person concerned to be effectively living in another place and a subjective condition which requires an intention to change domicile.

The first condition requires the person to be genuinely living in the new place. Indeed, transfer of domicile can take place only if the new residence answers the criteria of domicile. In addition, genuinely living in another place implies that the person has given up his former ties to establish himself elsewhere. Let us remember that as long as the person does not reside in a new place, he is considered to have retained his initial residence. Therefore the fact of intending to settle in a new place whilst effectively living in the previous place is of no legal consequence.

The intention to fix one's domicile at the place of one's new home constitutes the second condition essential to changing domicile. The judges must therefore note that this is the person's intention which, in most cases will be deduced from the facts.

When one of the two conditions is not filled, in particular if there is no clear indication of the person's intention to change domicile, the judge will refuse to validate the transfer. In these circumstances, the new home will be regarded merely as a residence.

## Proof of change of domicile

The rules in respect of proof of change of domicile are set out in Articles 104 and 105 of the French Civil Code.

When changing domicile, a specific declaration should be made both to the local authority of the place that has been left, and to the authority of the place to which domicile is being transferred.

However, these declarations will not prevent the courts from dealing with the substance of a case ultimately to assess the true intention of the person wishing to change domicile. Moreover, this requirement is rarely met (although it remains a requirement) and when complied with, only constitutes one element of proof of intention.

Generally, determination of a person's domicile is first and foremost an issue of fact, the circumstances and elements of which are ultimately evaluated by the courts dealing with the substance of a case. The courts will attempt to determine, from the various specific circumstances of each case, which place the person intended to choose as his domicile. We have seen that an individual's residence, family, place of work, fortune and behaviour are part of the many elements that a judge will take into account. However, none of these elements individually will make it possible for a judge to determine the domicile of a person and, in practice, he will look for a solution on a case by case basis, to avoid being locked into an inevitably rigid general rule.

The criteria to be taken into account will depend on the nature of the litigation involved. For example, if domicile is to determine where a succession shall be opened, it is more likely that the deceased's centre of pecuniary interests will be selected. The same person could be deemed domiciled at the place of his family residence for a private affair, whilst the domicile retained for his professional occupation will be the location of his company. Judges thus adopt a pragmatic approach when determining domicile, depending on the interests in question. Such an approach constitutes without doubt another attack on the principle of uniqueness of domicile which itself lends to uncertainty in the subject.

For further information, please contact:

William Easun  
E/ [william.easun@lg-legal.com](mailto:william.easun@lg-legal.com)

Irene A Luke  
E/ [irene.luke@lg-legal.com](mailto:irene.luke@lg-legal.com)

Frederic Mege  
E/ [frederic.mege@lg-legal.com](mailto:frederic.mege@lg-legal.com)

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