

England & Wales – France: Incapacity of Adults

The Cross Border and Private International Law Issues: Enduring Powers of Attorney, Lasting Powers of Attorney, Mandats de Protection Future and the Hague Conventions of 1978 and 2000. England & Wales and Scotland have now each ratified the Hague Convention on the International Protection of Adults. The private international law problems in a rapidly changing legal landscape are well illustrated by the detailed cross border issues with France.

English and French private international law (PIL) in the area of capacity of adults has in the past been very uncertain. Capacity is not really a separate legal characterisation or *qualification*, but a particular requirement for many separate legal classes, in each case, often having a different definition in relation to different legal classifications. The question as to whether a person has the capacity to enter into a contract, may be governed by the law of the contract; to enter into marriage or make a Will, under English law by the law of domicile, or the personal law or law of nationality under French law. The tests for different questions are certainly different under English internal law.

However, the direct private international law issues linked to the incapacity of adults are:

- Which Court has jurisdiction to make orders in relation to an incapacitated adult's property and affairs?
- Will jurisdiction B recognise:
 - An Order of the Courts of State A?
 - A form of Enduring, Lasting, Durable or other form of Power of Attorney intended to have effect after the onset of mental incapacity, if valid in State A?

England & Wales

Enduring Powers of Attorney Act 1985

Since 1985 it had been possible for a person (the Donor) to grant an Enduring Power of Attorney (an EPA) in favour of one or more persons (the Attorney) in order that the Attorney may sign documents in the Donor's name. The EPA can be limited or unlimited and if in favour of more than one Attorney, can be joint, in which case all Attorneys must

sign or joint and several, in which case only one Attorney needs to sign. It is not possible to grant an EPA (or any other power of attorney) under English law which permits sub-delegation.

The EPA can be used as an ordinary power of attorney, i.e. whilst the Donor has capacity and before the EPA is registered, if not subject to any limitations.

When the Attorney believes that the Donor is becoming mentally incapable he is then under a duty to register the power at the Court of Protection and serve notice of his intention to register on the Donor and members of the Donor's family. If the Court receives no objection, the EPA will be registered after 4 weeks. Pending registration, the Attorney is authorised to use the power for emergencies necessary for the Donor.

There is no requirement to obtain a medical certificate and it is possible that the EPA may be registered at a time when the Donor still has capacity for many acts.

Although, it is no longer possible to create a new EPA since October 1, 2007, existing EPAs continue to be valid.

English PIL relating to Adult Incapacity prior to 1 October 2007

Jurisdiction

The English Courts have probably had jurisdiction over a *person*:

- if he is present in England, whatever his domicile or nationality and whether he has any assets in England or not.¹

The English Courts have probably had jurisdiction over a person's *property*:

- if he is present in England, whatever his domicile or nationality and whether he has any assets in England or not.²
- if he has property in England, whatever his residence, domicile or nationality.³

The English Courts have *not* had jurisdiction over a *person* or his *property* by virtue solely of:

- British nationality or
- English domicile

Equally, although the Court may have technical jurisdiction, it will not make an order directly affecting property in another jurisdiction,

- if such order would not be recognised in that jurisdiction or
- if it would infringe another court's jurisdiction

¹ *Re S (Hospital Patient: Foreign Curator)* [1996] Fam 23

² *Re Burbidge* [1902] 1 Ch 426

³ *Re Scott* (1874) 22 WR 748

Applicable Law

When making a statutory Will under the Mental Health Act, its effect is limited to matters governed by English law.⁴ However, the English Courts have applied English law without limit in exercising their jurisdiction.

Recognition

The questions of recognition in state A in relation to a foreign attorney or curator from state B are:

- whether his appointment in state B is recognised in state A and
- what powers may he exercise in state A

In England, the court had to be satisfied that:

- the curator was authorised by state B to take proceedings outside state B to recover property in England or manage the affairs of the patient⁵ and that
- the patient was sufficiently closely connected with state B.

England would not recognise the powers of a curator over the *person* of the patient, but this could be specifically authorised by the English court.

The foreign curator had no power over English immovables⁶ or in relation to movables if a receiver had been appointed under English law⁷. Otherwise the foreign curator could sue and give good receipt for movables. The foreign curator had no power to execute a transfer of stock or shares, although the Court of Protection could specifically authorise this.

Mental Capacity Act 2005 (MCA2005)

Since 1 October 2007 the only option has been to create the new form of Lasting Power of Attorney (LPA) either in relation to property and affairs and / or in relation to personal welfare. The LPA can be limited or unlimited and if in favour of more than one Attorney, can be joint (together), in which case all Attorneys must sign, or joint and several (together & independently), in which case only one Attorney needs to sign. It is still not possible to grant a LPA (or any other power of attorney) under English law which permits sub-delegation. The LPA must include a certificate from someone who has known the Donor for 2 years or from a professional person.

The LPA can be registered on the application of the Donor or the Attorney at any time, whether or not the Donor has capacity. Notice of the registration must be sent to the Donor and the persons specified by the Donor in the LPA. If the Court receives no objection, the LPA will be registered after 5 weeks. Pending registration, the Attorney is not authorised to use the LPA at all.

⁴ Mental Health Act 1983 s.97(4)

⁵ *Didisheim v London and Westminster Bank* [1900] 2 Ch 15 and *Re Piper* [1927] 4 DLR 924

⁶ *Grimwood v Bartels* (1877) 46 LJ Ch 788

⁷ *Re RSA* [1901] 2 KB 32

Before registration the LPA cannot be used as an ordinary power of attorney. However, a LPA can be and is very likely to be registered whilst the Donor still has full mental capacity.

Hague Convention of 14 March 1978 on the Law Applicable to Agency (Convention XXVII)

This Convention has been ratified by Argentina, France, the Netherlands and Portugal and is therefore in force. An explanatory report was published in 1978.⁸ Generally the applicable law is the internal law at the place of business or habitual residence of the agent, unless the place where the agent is to act is also that of the place of business or the habitual residence of the principal.⁹ The parties may expressly choose any applicable internal law.¹⁰ *Renvoi* is not applied. The proposed Rome I Regulation does not include these rules.

Hague Convention of 13 January 2000 on the International Protection of Adults (Convention XXXV)

Convention XXXV has been ratified by Germany, Scotland and from 1 October 2007, England & Wales. France, the Netherlands and Switzerland have signed and Switzerland may ratify in 2008. Until a third member of the Hague Conference does sign *and* ratify, Convention XXXV will not enter into force. The explanatory report published in 2003 is well worth reading.¹¹

English PIL relating to Adult Incapacity post 30 September 2007

Jurisdiction

The new English Court of Protection now has jurisdiction over a *person* (if 16 or older) or his *property*:

- if he is habitually resident in England, whatever his domicile or nationality and whether he has any assets in England or not.
- if he is present in England, if the matter is urgent, whatever his domicile or nationality and whether he has any assets in England or not.

The new English Court of Protection now has jurisdiction over a *person's property*:

- in England, whatever his residence, domicile or nationality.¹²

⁸ http://www.hcch.net/index_en.php?act=publications.details&pid=2947

⁹ Article 6

¹⁰ Article 5

¹¹ http://www.hcch.net/index_en.php?act=publications.details&pid=2951

¹² MCA2005 Sch.3, para 7

Once Convention XXXV enters into force, the English Courts will have jurisdiction over a *person or his property*:

- if he is British citizen with a closer connection to England and Wales than to Scotland or Northern Ireland and where Article 7 of the Convention has been complied with or
- in relation to a person where an Article 8 request has been made and the Minister of Justice agrees¹³

Applicable Law

The English Court will apply English law unless it considers that there is a substantial connection with another country, in which case it will apply the law of that country.¹⁴ *Renvoi* is excluded and the internal law of that country will be applied.¹⁵

In relation to Lasting Powers defined as LPAs, EPAs and other powers having a like effect, the law applicable is:

- that of the country of the Donor's habitual residence
- that of a country of which he is a national, or in which he has formerly been habitually resident or in which he has property, if the Donor specifies that law in writing,¹⁶ (even if that applicable law does not itself recognise such powers).

There are provisions to protect third parties.¹⁷

Recognition

England will now recognise protective measures¹⁸ taken in another country provided that the incapable adult is habitually resident in that jurisdiction.¹⁹ There are circumstances in which recognition can be refused if the Court of Protection thinks that:

- the case in which the measure was taken was not urgent and the adult was not given an opportunity to be heard and the omission was in breach of the rules of natural justice or
- recognition would be contrary to public policy or
- the measure would be inconsistent with an English mandatory provision or
- the measure is inconsistent with an English protective measure.²⁰

¹³ MCA2005 Sch.3, para 8

¹⁴ MCA2005 Sch.3, para 11

¹⁵ MCA2005 Sch.3, para 2(4) importing Article 19

¹⁶ MCA2005 Sch.3, para 13

¹⁷ MCA2005 Sch.3, para 16

¹⁸ Defined by MCA2005 Sch.3, para 5

¹⁹ MCA2005 Sch.3, para 19(1)

²⁰ MCA2005 Sch.3, para 19(3) & (4)

Any finding of fact in relation to the protective measure is conclusive.²¹

Parts of the MCA2005 not yet in force

Of the Convention XXXV set out in the 3rd Schedule to the MCA2005, paragraphs 8 [jurisdiction in relation to non residents], 9 [jurisdiction in relation to convention countries], 19(2) and 19(5) [protective measures made by convention countries], Part 5 [co-operation with convention countries], and paragraph 30 [Article 38 certificates given by convention countries] only come into force, when Convention XXXV itself enters into force under Article 57.²²

France

Lois n° 2007-308 of 5 March 2007²³

In the past the main options in relation to mentally incapable adults were applications to the court for protection measures; *la sauvegarde de justice* (judicial supervision), *la curatelle* (curatorship) or *la tutelle* (guardianship).

French law recognised that a form of *mandat* could continue under the general rules of agency during a period of judicial supervision and that it could be expressed to be for the period of supervision.²⁴

The majority of the reforms to French law enacted by lois n° 2007-308 in relation to the protection of adults will take effect from 1 January 2009. From that date the *mandat de protection future* (“*mpf*”) [future protection mandate] will become effective. Of course, there are significant jurisprudential differences between a common law power of attorney and a civil law mandate, and the two cannot be regarded as identical.

The form of the *mpf* can be made in a notarial authentic form which would be required for the sale of property or a simple form under hand which could be used for day to day management issues.²⁵

It is possible for a *mpf* to be signed now, but it cannot be used until 1 January 2009.

²¹ MCA2005 Sch.3, para 21

²² MCA2005 Sch.3, para 35

²³ <http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=JUSX0600126L>

²⁴ Existing Article 491-3 code civile

²⁵ All set out in the new Section 5 of Chapter II of the existing Title XI of Book I of the Civil Code – new Articles 477 - 494 code civile

French PIL relating to Adult Incapacity prior to ratification of Convention XXXV

Jurisdiction

The French courts have jurisdiction in relation to:

- persons with a French *domicile*, i.e. those who are habitually resident in France and
- property situated in France.²⁶

Applicable Law

Under the Civil Code, the statutes relating to the status and capacity of persons, govern French persons, even those residing in foreign countries.²⁷ The relevant connecting factor is therefore that of nationality; it is presumed that *renvoi* would be accepted and that the personal law would therefore not be merely the internal law but would include the individual private international law rules.

In the case of urgency or if the adult's personal law does not give sufficient protection, the courts can apply French law.

Recognition

In France as in England, the court must be satisfied that:

- the curator is authorised by state B to take proceedings outside state B to recover property in France or manage the affairs of the patient and that
- the patient was sufficiently closely connected, was a national of state B.

It is not clear whether a foreign curator has any power over French immovables.

French recognition of English EPAs and LPAs (a "Lasting Power")

Under French private international law, whether an individual has mental capacity or not will be a question for their personal law, i.e. the law of their nationality, including its rules of private international law.

A British citizen most closely connected to England & Wales will be subject to the provisions of the 3rd Schedule to MCA2005, as set out above. This will include questions as to the existence, extent, modification and extinction of Lasting Powers and these are governed by the law of the state of the Donor's habitual residence at the time of the creation of the Lasting Power, unless a different law has been specified in writing; that of a country of which he is a national, or in which he has formerly been habitually resident or in which he has property, (even if that applicable law does not itself recognise such Lasting Powers). This should therefore also include questions of determination of incapacity. *Renvoi* is no longer accepted and the internal law of the habitual residence (or other specified state) will be applicable.

²⁶ Article 3, paragraph 3 code civile

²⁷ Articles 1232 – 1263 nouveau code de procedure civile

The manner of exercise, however, is governed by the law of the state in which the Lasting Power is exercised.

The effect of these rules is that *provided it is clear that the Donor is not mentally capable at the time the Lasting Power is exercised* and unless some other law is specified in writing, a Lasting Power of:

- a British citizen habitually resident in
 - England & Wales at the time of the *grant* of the Lasting Power will be subject to English internal law unless some other relevant law is specified
 - France at the time of the *grant* of the Lasting Power will be subject to French internal law unless some other relevant law is specified
- a French citizen habitually resident in England & Wales at the time of the *grant* of the Lasting Power will be subject to
 - English internal law in England unless some other relevant law is specified
 - French internal law in France

Lasting Powers made by British citizens will only be valid in France if the Donor is habitually resident in England & Wales at the time of creation. Lasting Powers made by French citizens will only be valid if the Donor is habitually resident in England & Wales at the time of creation and even then they will *only* be valid in England & Wales.

It should be born in mind that the same issues apply in relation to Lasting Powers made when the donor was habitually resident in another state such as one of the United States or of the states of Australia or if the Donor has chosen to make a Lasting Power in the form recognised by one of those states by virtue of a connecting factor of nationality or of former habitual residence under paragraph 13 of the 3rd Schedule to the MCA2005.

The major problems occur however *if the donor may still be mentally capable*.

- From a French perspective, if the donor still has capacity, Convention XXVII applies and the relevant law is in effect, that of the habitual residence of the *attorney* at the time of the creation, unless some other law is specified; the choice is not limited.
- From an English perspective, whether or not the donor still has mental capacity, the provisions of paragraph 13 of the 3rd Schedule to the MCA2005 still apply (even though Article 15 of Convention XXXV might not apply) and the relevant law is in effect, that of the habitual residence of the *donor* at the time of the creation, unless some other relevant law is specified; the choice is of course limited.

Professor Lagarde drew attention to this problem at paragraph 97 on page 54 of his report²⁸. Thus there will be very different results in France depending on whether at the time of exercise, the Donor has mental capacity, whilst the results in England will be identical whether there is mental capacity or not.

The need for certainty in France as to whether mental incapacity exists at the time of exercise of the Lasting Power may cause difficulties and confusion in England & Wales.

²⁸ http://www.hcch.net/index_en.php?act=publications.details&pid=2951

The French courts clearly have jurisdiction in relation to property, whether movable or immovable, defined by the applicable (rather than French) law as being situated in France²⁹. It is a matter for the French courts as to recognition under the above rules of a Lasting Power created in England.

Unless a law other than English law is correctly specified, (presumably at box 6 on the LPA Form), it is not possible for an English Power to give the power to sub-delegate and thus an Attorney under an English Power could not validly execute a *procurator* to enable property in France to be sold, but would require the authority of a specific order of the Court of Protection.

The issues involved in conflicts of laws between France and England remain extremely complex. They will not be resolved on 1 January 2009 with the coming into force of the *mpf*, but will only be partially simplified once France ratifies Convention XXXV. Questions as to whether the Donor has lost mental capacity at the time of exercise of the Lasting Power will still remain.

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²⁹ Article 3, paragraph 3 code civile