

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT **C**
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS



Constitutional Affairs

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Petitions

**CROSS-BORDER
IMPLICATIONS OF THE
LEGAL PROTECTION OF
ADULTS**

NOTE



DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT C: CITIZENS' RIGHTS AND
CONSTITUTIONAL AFFAIRS

LEGAL AFFAIRS

CROSS-BORDER IMPLICATIONS OF THE LEGAL
PROTECTION OF ADULTS

NOTE

Abstract

Convention XXXV is of significant assistance in relation to cross-border capacity issues. However, it does have some weaknesses. Accordingly, Member States should be encouraged to ratify Convention XXXV. In addition the creation of a form of European Power of Representation would be extremely useful.

This document was requested by the European Parliament's Committee on Legal Affairs.

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LIST OF ABBREVIATIONS

- Convention XXXV** Hague Convention XXXV for the International Protection of Adults of 13 January 2000
- EPA** Enduring Power of Attorney of England & Wales
- EPR** European Power of Representation
- Lagarde Report** The explanatory report to Convention XXXV of Professor Paul Lagarde
- LPA** Lasting Power of Attorney of England & Wales
- MCA 2005** Mental Capacity Act 2005 of United Kingdom
- OPG** Office of Public Guardian of England & Wales
- PIL** Private International Law
- Rome I Regulation** Regulation No 593/2008 of 17 June 2008 on the law applicable to contractual obligations
- Succession Regulation** Regulation No 650/2012 of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession

EXECUTIVE SUMMARY

Background

Private international law (PIL) in the area of capacity of adults has in the past been very uncertain. Capacity is not a separate legal classification or qualification, but a particular requirement for one of many separate legal acts. Under many internal laws, the precise test of capacity differs between each act. As regards PIL, the governing rules may also differ between each legal act. For example, 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 the law of England & Wales is probably governed by the law of domicile (as the person's personal law) at the time of making the Will for movables and the law of situs for immovables.

Under the Succession Regulation (EU) No 650/2012, these questions will be governed by the law which would have been applicable to the succession, if death had occurred on the day the disposition was made.

Under the PIL of many Member States, many capacity questions are governed by the law of the state of nationality as the relevant personal law.

It should also be borne in mind that the approach to capacity in each jurisdiction, can be very different.

In most of the UK, there is now a presumption that a person has capacity. Questions of capacity are to be act specific, and lack of capacity in relation to one act, does not imply a lack of capacity for other acts. All decisions made for a person must be made in that person's best interests. In some jurisdictions, if it is found that a person lacks capacity, then they are regarded as lacking capacity for all relevant actions.

The Alzheimer Europe website provides an excellent summary of some of these issues and the differences of their treatment in various Member States and other European jurisdictions. (<http://www.alzheimer-europe.org/Alzheimer-Europe>)

The various comparative national reports for Member States and other European jurisdictions are also a very useful resource.

As the number of older people in the EU continues to rise, the number of such older people resident in a Member State other than the Member State of their nationality also increases. Advisers are seeing more and more problems associated with dealing across national borders with the assets of persons who have lost capacity and the problems of moving such persons from one Member State to another, so that they may be cared for nearer to their relatives in another Member State.

Even between Member States that have ratified Convention XXXV the recognition of a Power of Representation in another Member State, can be complex and difficult in practice.

Aim

Hague Convention XXXV of January 13, 2000 on the International Protection of Adults (Convention XXXV) and its strengths

Other experts will describe the detailed mechanics of Convention XXXV and its effects on private international law; the usual PIL issues of jurisdiction, applicable law and recognition and enforcement.

Convention XXXV is in force in six Member States (and Switzerland). The UK has, unusually, only ratified Convention XXXV in relation to Scotland by virtue of the Adults with Incapacity (Scotland) Act 2000 asp 4. Notwithstanding this, the law in England & Wales as

set out in the Mental Capacity Act 2005 (MCA2005) and in particular its Schedule 3 (Sch.3 MCA2005), is now virtually identical to Convention XXXV.

The cases of Re MN [2010] EWHC 1926 (Fam) and Re M EWHC 3590 (COP) are examples of the courts of England & Wales considering the effects of Sch.3 MCA2005 and the changed PIL in England & Wales.

The clear rules as to jurisdiction, applicable law and recognition and enforcement are a huge advance compared to the confused rules of many non Convention XXXV Member States.

The Differences between Convention XXXV and Sch.3 MCA2005

Convention XXXV applies to Adults defined as persons of 18 years who as a result of an impairment or insufficiency of his personal faculties cannot protect his interests, whereas Sch.3 MCA2005 applies to such persons of 16 years (save when Brussels IIbis or Hague Convention XXXIV apply).

Sch.3 MCA2005 also applies not only to such persons of 16 years, but also to Donors of Powers of Representation (Lasting Powers of Attorney) whether or not so impaired or insufficient. This means that although the whole of Convention XXXV only applies to Adults whose capacity is impaired, Sch.3 applies also to Lasting Powers of Attorney, whether or not the donor has impaired capacity.

In practice, this extension is very helpful and practical. The same PIL rules apply whether or not the Donor has completely lost capacity under all relevant laws. The dignity of the Donor can often be retained as a result.

Convention XXXV and its weaknesses

In a European context, a Hague convention can be unsatisfactory. The definitions of "Habitual residence", "impairment or insufficiency of faculties" or "protective measures" are not necessarily the same in each Member State.

The fact that Convention XXXV only applies to Powers of Representation once the donor cannot protect his interests as a result of an impairment or insufficiency of his personal faculties, is an inherent weakness. Third parties find it impossible to establish easily whether under the applicable law, circumstances have arisen so that Convention XXXV actually applies to the Power of Representation. Even if it is clear that such circumstances have arisen, it can be difficult for third parties to understand and accept a Power of Representation created in a foreign language under the law of another Member State.

Future Actions

Convention XXXV

The EU Parliament Resolution P6 TA(2008)0638 of December 18, 2008 at para. 4 calls on the EU Commission to assess the option of the accession of the Community as a whole to the Convention XXXV and suggests that this could be an area of enhanced cooperation between Member States. The EU Commission Action Plan of April 2010 implementing the Stockholm Programme COM(2010) 171 refers to the desirability of EU Member states acceding to Convention XXXV and that in 2014 the Commission is to report as to the need for additional proposals.

STEP would support the Parliament Resolution and has been pressing Member States to ratify Convention XXXV. The failure of the UK to ratify Convention XXXV in relation to England & Wales appears particularly parsimonious.

Regulation

STEP would also support moves to convert Convention XXXV into an EU Regulation so as to harmonise the individual definitions and place it under the jurisdiction of the European Court of Justice.

A European Power of Representation

A most useful practical measure would be the creation under such a Regulation of a form of European Power of Representation (EPR). The creation of a form of EPR which could be easily understood and recognised throughout the European Union would reduce many existing practical problems. It would be most helpful if the EPR could be used both before and after a person as a result of an impairment or insufficiency of his personal faculties can no longer protect his interests.

Information

STEP would also propose that information should be more readily available on the internet as to the internal law relating to incapacity in individual Member States, in order to provide assistance to individual citizens.

As the number of older EU citizens increases, these issues will become ever more relevant. The EU Year of Citizens, would be a good year to begin to make progress on these issues.

INTRODUCTION

KEY FINDING

PIL on the subject of mental capacity is diverse, complex and difficult.

Private international law (PIL) in the area of capacity of adults has in the past been very uncertain. Capacity is not a separate legal classification or qualification, but a particular requirement for one of many separate legal acts. Under many internal laws, the precise test of capacity differs between each act. As regards PIL, the governing rules may also differ between each legal act. For example, the question as to whether a person has the capacity to enter into a contract, may be governed by the law of the contract¹; to enter into marriage or make a Will, under the law of England & Wales is probably governed by the law of domicile at the time of making the Will for movables and the law of situs for immovables.

The Scottish Law Commission Report on Succession² of April 2009 indicates that under current Scottish PIL capacity to make a Will for movables is governed by the law of domicile, whilst for immovables is governed by the law of situs. It recommends that instead the law of domicile should govern both questions.

Under the Succession Regulation (EU) No 650/2012, these questions will be governed by the law which would have been applicable to the succession, if death had occurred on the day the disposition was made.

It should also be borne in mind that the approach to capacity in each jurisdiction, can be very different.

In most of the United Kingdom, there is now a presumption that a person has capacity. Questions of capacity are to be act specific, and lack of capacity in relation to one act, does not imply a lack of capacity for other acts. All decisions made for a person must be made in that person's best interests.

The Alzheimer Europe website provides an excellent summary of some of these issues and the differences of their treatment in various European states.³ The various comparative national reports for 18 European jurisdictions are also a very useful resource.⁴

The United Nations Convention on the Rights of Persons with Disabilities⁵ and Optional Protocol, were adopted in 2006 and entered into force on May 3, 2008. The Convention attempts to change attitudes and approaches to persons with disabilities so that they are seen not as "objects" of charity, medical treatment and social protection but as "subjects" with rights, who are capable of claiming those rights and making decisions for their lives based on their free and informed consent as well as being active members of society.

The Convention has been ratified by over 100 states.⁶ The United Kingdom ratified on June 8, 2009 and the European Union on December 23, 2010.

¹ See for example the case of *Gorjat and others v Gorjat* [2010] EWHC 1537 (Ch) and the applicability of the Rome Convention and the Rome I Regulation to gifts.

² (SCOT LAW COM No 215) at para.5.11

³ <http://www.alzheimer-europe.org/Alzheimer-Europe>

⁴ <http://www.alzheimer-europe.org/EN/Policy-in-Practice2/Country-comparisons>

⁵ <http://www.un.org/disabilities/default.asp?id=150>

⁶ <http://www.un.org/disabilities/countries.asp?id=166>

As the number of older people in the EU continues to rise, the number of such older people resident in a Member State other than the Member State of their nationality also increases. Advisers are seeing more and more problems associated with dealing across national borders with the assets of persons who have lost capacity and the problems of moving such persons from one Member State to another, so that they may be cared for nearer to their relatives in another Member State.

Even between Member States that have ratified Convention XXXV the recognition of a Power of Representation in another Member State, can be complex and difficult in practice.

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 personal welfare and/or property and affairs?
- Which state's law will that Court apply?
- Will jurisdiction B recognise and enforce:
 - An Order of the Courts of State A and if so will it apply local conditions of implementation?
 - A form of Power of Representation or Attorney intended to have effect after the onset of mental incapacity, if valid in State A?

1. HAGUE CONVENTION XXXV OF JANUARY 13, 2000 ON THE INTERNATIONAL PROTECTION OF ADULTS (CONVENTION XXXV) AND PIL IN ENGLAND & WALES

KEY FINDINGS

- Although the UK has only ratified Convention XXXV with effect for Scotland, the PIL in England & Wales is very similar but with some subtle differences.
- The cases of Re MN and Re M illustrate some of the complexities.

Other experts will describe the detailed mechanics of Convention XXXV and its effects on private international law; the usual PIL issues of jurisdiction, applicable law and recognition and enforcement.

However, the particular effects of Convention XXXV in the United Kingdom are of interest. Convention XXXV has been ratified by the United Kingdom in relation to Scotland only by virtue of the Adults with Incapacity (Scotland) Act 2000 asp 47. The United Kingdom has under art.55 declared that its ratification of Convention XXXV only extends to Scotland.

Notwithstanding this, s.63 of the Mental Capacity Act 2005 (MCA 2005) specifically states that Sch.3 of the MCA 2005 gives effect in England and Wales to Convention XXXV (in so far as the Act does not otherwise do so), and makes related provision as to the private international law of England and Wales. Both s.63 and Sch.3 MCA 2005 have been effective from October 1, 2007.

However, by para.35 of Sch.3, para.8 [jurisdiction in relation to non residents], para.9 [jurisdiction in relation to convention countries], para.19(2) and 19(5) [protective measures made by convention countries], Part 5 [co-operation with convention countries], and para.30 [Article 38 certificates given by convention countries] are only to come into force, when Convention XXXV itself enters into force.

Although Convention XXXV is effective in England & Wales, England & Wales has not yet actually ratified. It is understood that England & Wales is still committed to ratifying as soon as practicable and is actively working towards this.

Thus, although England & Wales has not ratified, its law (subject to a few minor differences) is now fundamentally the same as the Convention by virtue of Sch.3 to the MCA 2005.

The main differences between Convention XXXV and Sch.3 are:

- Convention XXXV applies to adults defined as persons of 18 years⁸;
- Sch.3 applies to persons of 16 years.⁹

However, since the Hague Convention XXXIV on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in respect of Parental Responsibility and Measures for the

⁸ Art.2.1

⁹ Para.4(b)

Protection of Children came into force in the United Kingdom on November 1, 2012 the definition of adult for purposes of Schedule 3 to the MCA 2005 is now:

“4(1)“Adult” means [subject to sub-paragraph (2)] a person who—

(a) as a result of an impairment or insufficiency of his personal faculties, cannot protect his interests, and

(b) has reached 16.

[(2) But “adult” does not include a child to whom either of the following applies—

(a) the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in respect of Parental Responsibility and Measures for the Protection of Children that was signed at The Hague on 19 October 1996;

(b) Council Regulation [\(EC\) No. 2201/2003](#) concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility.]¹⁰

- Convention XXXV applies only to adults who, by reason of an impairment or insufficiency of their personal faculties, are not in a position to protect their interests.¹¹
- Although Sch.3 defines “Adult” in the same terms,¹² Sch.3 also applies not only to “Adults”, but also to Donors of Powers of Attorney whether or not so impaired or insufficient. This means that although the whole of Convention XXXV only applies to Adults whose capacity is impaired, Sch.3 applies also to certain Powers of Attorney, whether or not the donor has impaired capacity.

Sch.3 also applies Convention XXXV to conflicts within the United Kingdom between England & Wales on the one hand and Scotland or Northern Ireland on the other, since para.3(1) defines “Country” to include a territory which has its own system of law.

1.1. Private International Law in England & Wales relating to Adult Incapacity under Schedule 3 post 30 September 2007

The clear rules as to jurisdiction, applicable law and recognition and enforcement are a huge advance compared to the confused rules of many non Convention XXXV Member States.

There have been two reported cases in England & Wales looking at the application of the Private International Law rules set out in Sch.3 MCA 2005.

¹⁰ Regulations 1(2) and 17 of The Parental Responsibility and Measures for the Protection of Children (International Obligations) (England and Wales and Northern Ireland) Regulations 2010

¹¹ Art.1.1

¹² Para.4(a)

1.2. Re MN [2010] EWHC 1926 (Fam)

The judgment of Hon. Mr. Justice Hedley in the case of Re MN¹³ of July 30, 2010 was the first reported Anglo-Welsh decision relating to cross border capacity issues, since the advent of Sch. 3.

The case involved the removal of MN from California to England under a Californian Advance Health Care Directive. After the removal, the Californian court made various orders including directing the return of MN to California.

The judgement in Re MN reached two conclusions:

1. The removal of a child from one jurisdiction to another by one parent without the consent of the other is wrongful and is not effective to change habitual residence.¹⁴ The wrongful removal of an incapacitated adult should have the same consequence and leave the courts of the country from which the adult was taken free to take protective measures.

2. If habitual residence had not been changed and the Californian court had jurisdiction, the question was raised as to whether s.1(5) MCA2005 requiring an act to be done in the person's best interests, was a mandatory provision for the purposes of Sch.3, para 19(4)(b). If it was and if the recognition and enforcement of an order would not be in the best interests of the adult, then para.19(4)(b) would give the court the discretion not to recognise and enforce. The question was whether a decision to recognise and /or enforce an order is a decision made for or on behalf of the adult?¹⁵ The court decided¹⁶ this difficult question in the negative for three reasons:

- that a decision to recognise or enforce could not properly be described as a decision "for and on behalf" of the adult. It is a decision in respect of an order not a person.
- This technical reason is justified as reflecting the policy of Sch.3 and of Part 4 namely ensuring that persons who lack capacity have their best interests and their affairs dealt with in the country of their habitual residence; to decide otherwise would be to defeat that purpose.
- Best interests in the implementation of an order are relevant and are dealt with by para.12 which would otherwise not really be necessary

However, the court was concerned that such an approach might lead both to hardship and artificiality.¹⁷

The Lagarde Report considered the questions of mandatory provisions also known as "*loi de police*" in the context of both Arts. 20 and 22 and considered that the majority of these questions would relate to medical matters.

¹³ [2010] EWHC 1926 (Fam)

¹⁴ [2010] EWHC 1928 (Fam) at para.22 and see e.g. *Re PJ* [2009] 2 FLR 1051 (CA)

¹⁵ [2010] EWHC 1928 (Fam) at para.30.

¹⁶ [2010] EWHC 1928 (Fam) at para.31

¹⁷ [2010] EWHC 1928 (Fam) at para.32

1.3. Re M EWHC 3590 (COP)

The Hon. Mr. Justice Mostyn in the case of Re M¹⁸ of December 21, 2011 held that an order of the Irish High Court should be recognised under Para.19, Sch. 3 MCA2005, notwithstanding the fact that it involved the deprivation of liberty, and if M had been habitually resident in England & Wales, could not have been made in a welfare order under s.16 MCA2005. The court considered that the ability to disapply under Para.19(4) were not relevant on the particular facts, but could be in other circumstances.

¹⁸ [2011] EWHC 3590 (COP)

2. POWERS OF REPRESENTATION – POWERS OF ATTORNEY

KEY FINDINGS

- PIL on the subject of Powers of Representation is also complex but also incomplete.
- Generally, only issues of applicable law are dealt with.

In relation to Powers of Representation, defined in England & Wales as “Lasting Powers” and including all powers having a like effect, by virtue of para.13 of Sch.3 MCA 2005, 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 (but only in respect of that property), if the Donor specifies that law in writing,¹⁹ (even if that applicable law does not itself recognise such powers).

Many jurisdictions have forms of powers of attorney that have a like effect to a Lasting Power of Attorney. These can be called Enduring, Continuing or Durable Powers, mandats de protection future, Vorsorgevollmächte or Vorsorgeaufträge. It should be remembered that in many jurisdictions, marriage or divorce automatically revokes a power of attorney. The precise classification of this act of revocation will vary between states.

The International Guardianship Network (IGN) is a useful resource in this area²⁰. The IGN is a project from the non-profit and non-government organisation Betreuungsverein Treptow-Köpenick e.V. in Berlin and its international partners.

The Council of Europe has also considered the question of continuing powers of attorney and advance directives. The Council of Europe recommendation R(99)4E²¹ of 23 February 1999 concerning the protection of incapable adults has now been supplemented by recommendation CM/Rec(2009)11²² on principles concerning continuing powers of attorney and advance directives for incapacity which was adopted on 9 December 2009. There is a related fact sheet from the CoE Legal Committee on Legal Co-operation (CDCJ).²³

Lasting Powers as a form of power of attorney, may however be classified or characterised by some jurisdictions as forms of contractual delegation, mandate or of agency. This does cause some conflicts issues.

2.1. Hague Convention XXVII of March 14, 1978 on the Law Applicable to Agency

The Hague Agency Convention has been ratified by Argentina, France, the Netherlands and Portugal and is in force. An explanatory report was published in 1978.²⁴ Generally the applicable law for agency is the internal law at the place of business or the habitual residence of the agent, unless the place where the agent is to act is also that of the place

¹⁹ MCA 2005 Sch.3, para.13

²⁰ <http://www.international-guardianship.com/>

²¹ <http://www.coe.int/document-library/default.asp?urlwcd=https://wcd.coe.int/ViewDoc.jsp?id=407333>

²² <http://www.coe.int/document-library/default.asp?urlwcd=https://wcd.coe.int/ViewDoc.jsp?id=1563397>

²³ <http://www.coe.int/t/dghl/standardsetting/family/Fact%20Sheet%20on%20continuing%20powers%20of%20attorney.pdf>

²⁴ http://www.hcch.net/index_en.php?act=publications.details&pid=2947

of business or the habitual residence of the principal.²⁵ The parties may expressly choose any applicable internal law.²⁶ Renvoi is not applied. The Rome I Regulation (EC) No 593/2008 of June 17, 2008 on the law applicable to contractual obligations does not include these rules.

This is an example of the existing private international law that may apply to Lasting Powers in other jurisdictions even those that are parties to Convention XXXV, but at times when the Donor's capacity is not impaired.

2.2. Applicable Law for Powers of Representation

However, under the law of England & Wales, by virtue of para.13 of Sch.3 MCA 2005, a British citizen most closely connected to England & Wales will be subject to the provisions of Sch.3. 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). These rules apply under the law of England & Wales whether or not the Donor's capacity has been impaired.

If the Donor is an "Adult", i.e. capacity has been impaired, then the remainder of Sch.3 will also apply. This should therefore also include questions of determination of incapacity. Since Renvoi no longer applies, it is the internal law of the habitual residence (or other specified state) that will be applicable.

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

It should also be noted that the protection granted to third parties by para.16 of Sch.3 does only apply to lasting powers granted by "Adults" so that no such protection under para.16 is available if the donor is not as a result of an impairment or insufficiency of his personal faculties, unable to protect his interests

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.
- For example, 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

It should be born in mind that the same issues apply in relation to Lasting Powers made when the donor was habitually resident in a state not a party to Convention XXXV 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 para.13.

Sch.3 does, of course, now set out the private international law in England & Wales and therefore in addition to setting out the rules for jurisdiction and recognition in England & Wales it also sets out the applicable law and therefore the rules as to which lasting powers are or are not valid. A lasting power (i.e. such as a South Australian Enduring Power of

²⁵ Art.6

²⁶ Art.5

Attorney) validly made in South Australia by a person habitually resident in South Australia at the time of creation, is now valid whenever the power was made. An old form Anglo-Welsh Enduring Power of Attorney made by a person habitually resident at the time of creation in a state where such powers are not valid, will now be invalid, even if made at an earlier time when Sch.3 did not apply (unless validated by England & Wales being correctly specified as a connected country).

However, since Convention XXXV has not yet been ratified, it is currently not possible to obtain an Art.38 certificate from the UK Office of the Public Guardian. Proving the existence of a valid Anglo-Welsh power of representation in another jurisdiction, may be difficult.

The position in Northern Ireland is that The Enduring Powers of Attorney (Northern Ireland) Order 1987 [SI 1987 No. 1627 (N.I. 16)] still subsists, so that Northern Ireland Enduring Powers of Attorney (NIEPA) remain valid and can still be made.

Since there are as yet no new private international law rules in Northern Ireland (Northern Ireland not yet having any provisions similar to Sch.3), a Northern Irish EPA will be valid under the law of Northern Ireland, but not under the law of England & Wales if the donor was not habitually resident in Northern Ireland at the time of the making of the NIEPA. If Northern Irish law is clearly specified in the NIEPA (which one can argue is the case in relation to the statutory form) then the NIEPA is valid but only in relation to property situated in Northern Ireland and not to any other property.

Northern Ireland will not currently recognise any form of Lasting Power other than a Northern Irish EPA. However, a new Mental Capacity (Health, Welfare and Finance) Bill is proposed which may be enacted during 2013.

In practice, the extension in England & Wales of Convention XXXV to Lasting Powers of Attorney, whether or not the Donor's capacity has been impaired to is very helpful and practical. The same PIL rules apply whether or not the Donor has completely lost capacity under all relevant laws. The dignity of the Donor can often be retained as a result.

2.3. Revocation of Lasting Powers of Attorney

In accordance with Sch.3 MCA 2005, the law applicable to the extinction of a lasting power of attorney or power of representation is also governed, as described above, by para. 13.

It should be remembered therefore that the revocation of a lasting power on the death of the donor or revocation under section 13 on the donor's bankruptcy or termination on the death, bankruptcy, or lack of capacity of the donee or the divorce or dissolution of a marriage or civil partnership between the donor and donee will only apply if the law of England & Wales is the law applicable.

Other applicable laws will have very different provisions. In many European jurisdictions, the death of the donor does not terminate a power of attorney. In some jurisdictions such as New South Wales the marriage of the donor other than to the donee, automatically revokes a power of attorney, but divorce does not.

Careful consideration therefore always needs to be given to all the events that might or might not affect the validity of the power.

3. THE EUROPEAN UNION AND THE ROME I REGULATION

KEY FINDING

Art.13 of Rome I Regulation should not be overlooked.

Regulation No 593/2008 of 17 June 2008 on the law applicable to contractual obligations has been in force since 17 December 2009 and is similar to the Rome Convention. Although Art. 1 para. 2(a) of Rome I specifically excludes its application to questions involving the status or legal capacity of natural persons, Article 13 sets out a provision in relation to incapacity.

In a contract concluded between persons who are in the same country, a natural person who would have capacity under the law of that country may invoke his incapacity resulting from the law of another country, only if the other party to the contract was aware of that incapacity at the time of the conclusion of the contract or was not aware thereof as a result of negligence.

It should be recalled that the Rome I Regulation applies more broadly than solely to commercial contracts but also to enforceable gifts. The relevance of the Article 13 defence is therefore likely to increase.

The Rome I Regulation does not contain any private international law rules relating to agency or powers of attorney. Art. 7 of the EU Commission's original proposal for a Rome I Regulation was intended at least partly to harmonise some of the various private international law rules and was based on the Hague Convention XXVII. However, it was not adopted in the final Rome I Regulation.

4. THE EUROPEAN UNION AND THE SUCCESSION REGULATION

KEY FINDING

The Succession Regulation also deals with various PIL matters regarding capacity in particular for dispositions of property upon death.

When the EU Succession Regulation becomes fully effective on August 17, 2015, its effects on Private International Law for succession in the relevant parts of the EU (i.e. excluding Denmark, Ireland and the UK) will have a further impact on this fast changing area of the law.

Art. 1.2(b) of the Succession Regulation specifically excludes its application to questions involving the status or legal capacity of natural persons. However, this is without prejudice to Art.23(2)(c) which deals with the capacity to inherit and to Art.26 which deals with the question of the capacity of the person making a disposition of property upon death [a Will or Agreement as to Succession] to make such a disposition, being treated as one of substantial validity.

Generally and by virtue of Art.23.2(c) questions as to the capacity to inherit will be governed solely by the law applicable to the succession.

Questions as to the capacity of a person making a Will, will be governed under Art.24.1 by the law which, under the Regulation, would have been applicable to the succession of the testator if he had died on the day on which the Will was made. A valid choice of law can also be made under Art.22.

Questions as to the capacity of a person making an Agreement as to Succession will be governed under Art.25 by the law which, under the Regulation, would have been applicable to the succession of the testator if he had died on the day on which the Agreement was concluded. A valid choice of law can also be made under Art.22. If the Agreement relates to the estate of more than one person, then under Art.25.2 the relevant law will be that with which the Agreement is most closely connected.

5. TAKING OF EVIDENCE

KEY FINDING

Apostilles are often still required.

In relation to any cross border matter involving incapacity, it is likely that evidence will be required to be taken from outside the relevant jurisdiction.

The Taking of Evidence Regulation, Council Regulation (EC) No 1206/2001 of May 28, 2001 applies to a Member State of the European Union (other than Denmark). The European Judicial Atlas in Civil Matters²⁷ and Europa²⁸ websites are useful resources if this Regulation is to be used.

For Denmark and many other non EU jurisdictions the Hague Convention XX²⁹ of March 18, 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters will apply.

Whilst Art. 41 of Convention XXXV, makes it clear that all documents forwarded or delivered under the Convention are exempt from legalisation or any analogous formality, the Lagarde Report concludes³⁰ that this means all written information furnished, all judicial and administrative decisions, as well as certificates delivered in accordance with Art. 38.

However, Art. 41 may not exempt individual powers of representation from the need for legalisation prior to recognition in another jurisdiction.

²⁷ http://ec.europa.eu/justice_home/judicialatlascivil/html/te_information_en.htm?countrySession=4&

²⁸ http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_civil_matters/l33130_en.htm

²⁹ http://www.hcch.net/index_en.php?act=conventions.text&cid=82

³⁰ At 150 on p 70.

6. CONVENTION XXXV AND ITS WEAKNESSES

KEY FINDINGS

- Convention XXXV does have a number of weaknesses.
- In particular, a Power of Representation is not a Protective Measure

In a European context, a Hague convention can be unsatisfactory. The definitions of "Habitual residence", "impairment or insufficiency of faculties" or "protective measures" are not necessarily the same in each Member State.

The fact that Convention XXXV only applies to Powers of Representation once the donor cannot protect his interests as a result of an impairment or insufficiency of his personal faculties, is an inherent weakness. Third parties find it impossible to establish easily whether under the applicable law, circumstances have arisen so that Convention XXXV actually applies to the Power of Representation.

Even if it is clear that such circumstances have arisen, it can be difficult for third parties to understand and accept a Power of Representation created in a foreign language under the law of another Member State.

As para.19 of the Lagarde Report states: "Finally, it should be pointed out that the text only concerns the protection of adults when this gives rise or has given rise to measures of protection. The validity of instruments executed by a person whose personal faculties are impaired but who has not been made the object of a measure of protection remains outside the scope of the Convention. Such validity is in fact on the borderline between capacity and consent, and therefore, in accordance with juridical categories, between personal status and juridical acts, which the future Convention is not intended to regulate."

Thus since a Power of Representation is not a Protective Measure, it is not possible to obtain a court order under Chap.IV of Convention XXXV to authenticate the Power and ensure its acceptance and enforcement across borders.

The fact that Convention XXXV does not cross over the borderline into personal status, is a severe weakness and limit on the usefulness of Convention XXXV. The lack of any mechanism to authenticate Powers of Representation and persuade relevant third parties as to the validity of such a Power is a huge practical disadvantage.

7. OTHER PRACTICAL PROBLEMS

KEY FINDING

The law of England & Wales generally prohibits sub-delegation, and in a cross-border context, this can create practical problems.

No Sub-delegation

United Kingdom Powers of Representation are created against the backdrop of the laws of Scotland, England & Wales and of Northern Ireland. Under these laws, deeds and other authentic acts can be signed "in escrow" or in readiness some time before they are to be dated, used and become effective.

Accordingly, it is never necessary for Representatives to be able to sub-delegate their power, and this is generally prohibited under the relevant laws in the United Kingdom. This causes severe difficulties cross-border, since in relation to the sale of any land it is often most convenient to be able to grant a specific power of representation to enable the sale to occur. Under UK Powers of Representation, since this is not possible, either the Representative must personally travel to the completion meeting to sign the deed on behalf of the incapax or a separate application to the court must be made.

8. FUTURE ACTIONS

KEY FINDINGS

- Member States should be encouraged to ratify Convention XXXV.
- An EU Regulation in this area would be valuable, if legal competence exists.
- A form of European Power of Representation would be extremely useful.
- More Information also needs to be made easily available to the Citizen.

8.1. Convention XXXV

The EU Parliament Resolution P6 TA(2008)0638 of December 18, 2008 at para. 4 calls on the EU Commission to assess the option of the accession of the Community as a whole to the Hague Convention and suggests that this could be an area of enhanced cooperation between Member States. The EU Commission Action Plan of April 2010 implementing the Stockholm Programme COM(2010) 171 refers to the desirability of EU Member states acceding to Convention XXXV and that in 2014 the Commission is to report as to the need for additional proposals.

STEP would support the Parliament Resolution and has been pressing Member States to ratify Convention XXXV. The failure of the United Kingdom to ratify Convention XXXV in relation to England & Wales appears particularly parsimonious.

8.2. Regulation

STEP would also support moves to convert Convention XXXV into an EU Regulation so as to harmonise the individual definitions and place it under the jurisdiction of the European Court of Justice and extend its scope into the sphere of personal status and acceptance and enforcement of Powers of Representation.

8.3. A European Power of Representation

Questions as to the circumstances in which and how the Convention applies at the edges of classifications of wills and succession remain. The practical problems for citizens in using Convention XXXV are not inconsiderable.

A most useful practical measure would be the creation under such an EU Regulation of a form of European Power of Representation (EPR). The creation of a form of EPR which could be easily understood and recognised throughout the European Union would reduce many existing practical problems. It would be most helpful if the EPR could be used both before and after a person as a result of an impairment or insufficiency of his personal faculties can no longer protect his interests. It would also be helpful if the EPR permitted sub-delegation across the EU.

8.4. Information

STEP would also propose that information should be more readily available on the internet as to the internal law relating to incapacity in individual Member States, in order to provide assistance to individual citizens.

As the number of older EU citizens increases, these issues will become ever more relevant. The EU Year of Citizens, would be a good year to make progress on these issues.

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS **C**

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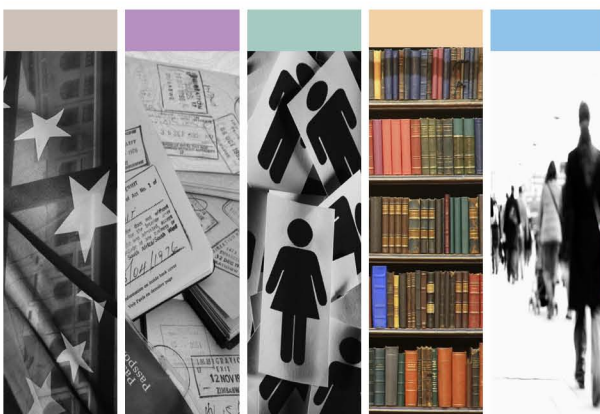
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