Common ground

Issues of cross-border capacity would be made simpler if England and Wales were to ratify Convention XXXV, says *Richard Frimston*

The consequences of elderly people living in a different state to their families are that there are increasing numbers of estates with cross-border issues both during lifetime and on death. The conflicts of law for incapacity issues are particularly complex. In my current casebook are many examples:

- Mrs A left London to live with her nephew in Munich. She has now lost capacity. Will Germany recognise the registered LPA and can it still be used to deal with UK investments?
- Mrs B lives in Wales but has lost capacity. She is joint owner of a property in France with her children. What are the powers of the Court of Protection in relation to the property and will France recognise any order made? Is it possible for a gift of the French property to be sanctioned and would a statutory will from the Welsh court be effective in France?

Border control

The Hague Convention on the International Protection of Adults of 13 January 2000 (Convention XXXV) attempts to produce some solutions to the issues of jurisdiction, applicable law and recognition and enforcement, not only of court powers, but also of the forms and effectiveness of lasting powers of attorney across borders. More detailed information, including the invaluable report of Professor Lagarde, is available from the Hague Convention website: http://www.hcch.net

Convention XXXV has now been ratified by Finland, France, Germany, Scotland, Switzerland and Estonia and it is likely that the Czech Republic will also shortly follow suit. Although England and Wales has not yet ratified (and it is not clear when it will do so and who the Central Authority may be), Anglo-Welsh law, by virtue of schedule 3 to the Mental Capacity Act 2005, is virtually identical to Convention XXXV, but with a few differences. For those practitioners who are not used to dealing in private international law issues, schedule 3 may appear to be an odd beast bolted on to the MCA2005 without thought.

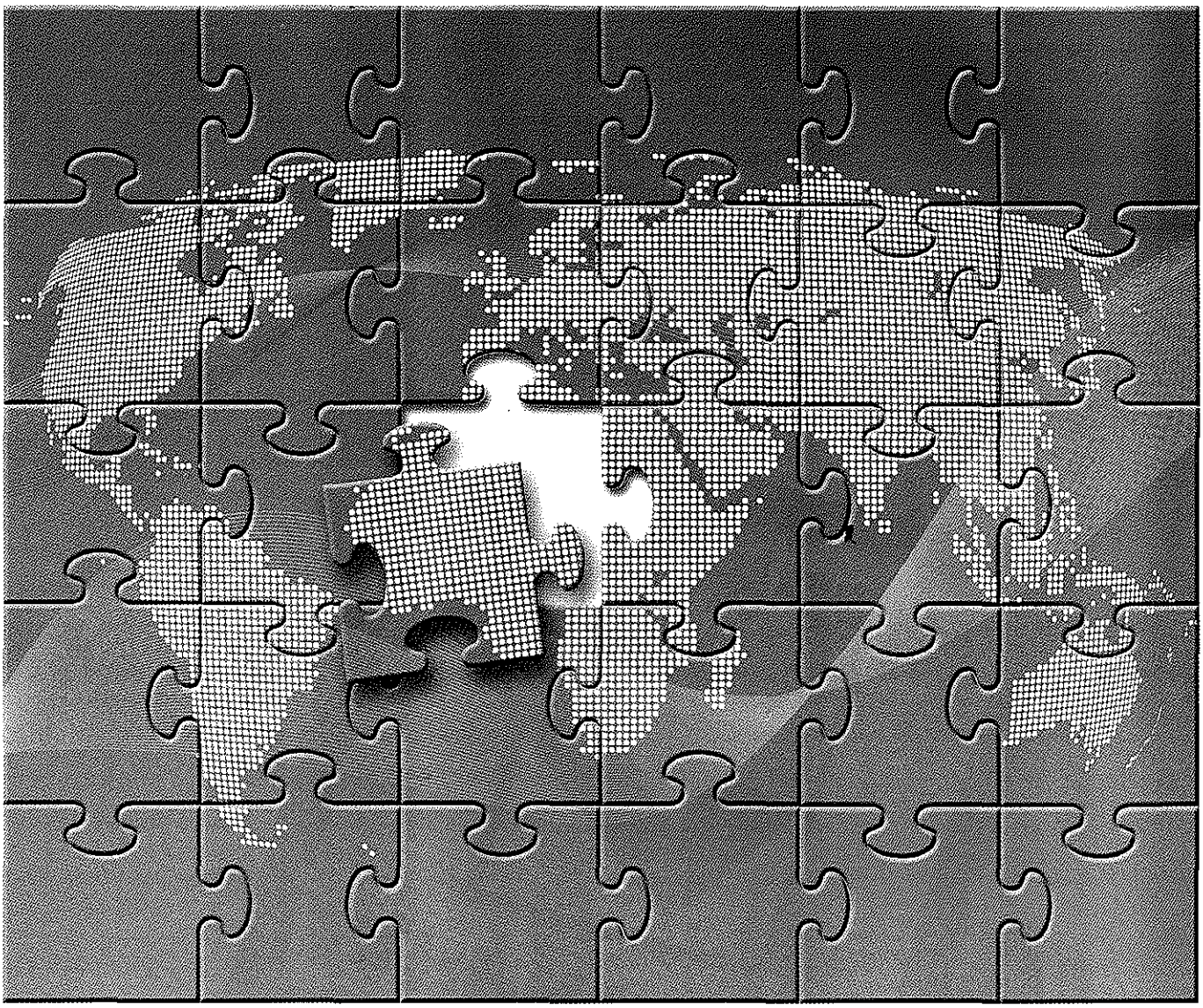
> **"Schedule 3 may appear to be an odd beast bolted on to the MCA 2005 without thought"**

It is well understood that whether an individual has sufficient capacity is not a question with a binary yes/no answer. As Senior Judge Denzil Lush has said in *Re Collis*, mental capacity is both issue-specific and time-specific. A person at a particular time may have capacity to marry, but not to manage complex financial affairs or make a valid will.

Most civil law states have historically regarded questions of capacity as a matter for the 'personal law' of the individual usually governed by the law of the nationality, while, by contrast, common law jurisdictions have looked to the individual's domicile.

The main restrictions on the application of Convention XXXV and schedule 3 are the exclusions contained in article 4 of Convention XXXV referred to in schedule 3, paragraph 33. The full extent and effect of these exclusions relating to maintenance obligations, marriage, dissolution and divorce, matrimonial property regimes, trusts and succession, social security, public health matters, crime, immigration and public safety are not actually quite as broad as it may appear on first sight. Study of the Lagarde report is crucial if a matter actually involves or turns on the precise boundaries of any of these exclusions.

The main cross-border effects of Convention XXXV and schedule 3 are to make habitual residence the main connecting factor for deciding questions of jurisdiction and applicable law and for purposes of recognition and enforcement.



Considered approach

Private international law always highlights the tensions between the desire for simplicity of rules to establish jurisdiction, applicable law and recognition and enforcement, together with comity between legal systems, versus the needs for local discretion and public policy issues in hard cases.

David Hill, in his excellent review of Convention XXXV in the *International Comparative Law Quarterly* (vol 58, April 2009 pp 469-476), concluded: "The need for legal systems to provide adequate protection for incapacitated adults will undoubtedly become more pressing in the coming years, domestically as well as internationally. The 2000 Hague Convention provides a valuable framework of rules that will promote increased certainty and uniformity within this area. While these rules are not free from criticism, the concerns that exist are of a minor nature and do not strike at the core of the instrument. Indeed the primary challenge is the necessity of extending the convention regime beyond France, Germany and Scotland."

"The primary challenge is the necessity of extending the convention regime"

Many of us think that it has long been high time for England and Wales to ratify Convention XXXV.

So far the only Anglo-Welsh case to look at the provisions of part 4 of schedule 3 is *Re MN* [2010] EWHC 1962 (Fam). Mr Justice Hedley considered whether to recognise and enforce an order of a Californian court requiring the return of P from England and Wales.

The main points of interest were first that: "Habitual residence is an undefined term and in English authorities it is regarded as a question of fact to be determined in the individual circumstances of the case ... in this case were the removal 'wrongful', I would hold that MN was habitually resident in California at the date of orders."

"Many of us think that it has long been high time for England and Wales to ratify Convention XXXV"

Second, that schedule 3 trumps the best interests tests of section 1: "A decision to recognise under paragraph 19(1) or to enforce under paragraph 22(2) is not a decision governed by the best interests of MN."

It was recognised that this "may lead both to hardship and artificiality... MN may survive the return journey. PLH may have the right to submit to the Californian court that it is in MN's best interests to live with her in England. It may, however, be that she could not survive another trip and so any welfare enquiry in California would be rendered nugatory." It is understood that MN has returned to California.

Pulling power

The problems in relation to enduring and lasting powers of attorney cross border show where theory and practice can diverge, until further administrative support becomes available.

Schedule 3 paragraph 13(6) defines lasting powers as LPAs, EPAs or any other power of like effect. The law applicable to such a power is either that of the country of the donor's habitual residence, or 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 and even though that applicable law does not itself recognise such powers. Paragraph 13 does not contain any transitional provisions and will therefore apply to historic powers made at a time when thought was not given as to the habitual residence of the donor at the time of creation.

Many other jurisdictions have forms of powers of attorney that have a similar effect to LPAs. These are often called enduring, continuing or durable powers. In some states, such as Germany, subsequent incapacity does not automatically revoke a general power of attorney. It should also be remembered that the effects of death, marriage or divorce on a lasting power can be very different in different states. Which law applies will have a big impact.

The MCA 2005 directs that England and Wales must now recognise such foreign lasting powers if valid under the applicable law as set out in schedule 3 paragraph 13. In contrast to Convention XXXV, recognition under schedule 3 applies whether or not capacity may have been impaired.

The Court of Protection is seeing a significant rise in applications for orders relating to the recognition and enforcement of lasting powers and other protective measures from other states.

Before considering the internal law of England and Wales, practitioners should always give thought to whether a cross-border connection exists. If so, the first question should always be whether the law of England and Wales applies at all or whether the law of another state may have jurisdiction or be the applicable law.

It ought to now be possible to avoid having to arrange execution of a local lasting power in each relevant jurisdiction, but nevertheless this option may still be the simplest practical solution. However, some historic enduring and lasting powers may no longer be valid.

It may not always be possible to provide clients with a simple overall solution, but Court of Protection orders may be enforceable in another state and vice versa.

If England and Wales were now to ratify Convention XXXV, the position would become somewhat more straightforward. ■

Richard Frimston is head of private client at Russell-Cooke