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Cross border incapacity: Will England and Wales find the tin opener? Schedule 3 to the Mental Capacity Act 2005

Alexander Ruck Keene's article 'An International Can of Worms?' ([2011] Eld LJ 77) on the case of *Re MN* [2010] EWHC 1926 (Fam) highlighted some, but by no means all of the issues involved in incapacity issues across borders.

Scotland, but not England and Wales, has ratified the Hague Convention XXXV of 13 January 2000 on the International Protection of Adults (Hague Convention 2000). EU Member States are being encouraged to ratify and more are doing so. The EU Commission Action Plan of April 2010 implementing the Stockholm Programme refers to the desirability of EU Member States acceding to Hague Convention 2000and that in 2014 the Commission is to report as to the need for additional proposals.

Many of the problems in the UK stem from the fact that Hague Convention 2000 has been ratified in Scotland, but not yet in England and Wales. Although not ratified, nevertheless, Hague Convention 2000 is in effect in force internally in the courts in England and Wales, but there are no mechanisms in place to assist at an administrative level with its implementation.

Legislative History and Background

It may be that the recent trend towards mass globalisation began as a result of the ending of the Bretton-Woods agreement in 1971 and the subsequent abolition of exchange controls, which in the UK occurred in 1979. The ability to purchase property in other states and the freedoms within the EU pioneered in the Maastricht treaty have increased the trend of ever larger numbers of citizens moving, studying, working or retiring abroad.

The private client consequences of older people living in a different state to that of their families, are that there are increasing numbers of estates, both during lifetime and on death, with cross border issues. The conflicts relating to incapacity issues are particularly complex.

The Hague Convention 2000 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.
Professor Eric Clive of Edinburgh University and of the Scottish Law Commission chaired the original 1997 Hague Commission, with members from France, USA, Canada, Denmark and Switzerland, which proposed the wording of the Convention. More detailed information, including the invaluable Report of Professor Lagarde (Paul Largarde, *Explanatory Report on the 2000 Hague Convention on the Protection of Adults*, HCCH (2003)), is available from the Hague Convention website: http://www.hcch.net.

Hague Convention 2000 has now been ratified by Finland, France, Germany, Scotland (by the Adults with Incapacity (Scotland) Act 2000 asp 4) and Switzerland. Estonia has ratified but with effect from 1 November 2011. The Convention came fully into effect on 1 January 2009. Although England and Wales has not yet ratified (and it is not clear when it will do so) Anglo-Welsh law by virtue of Sch 3 to the Mental Capacity Act (MCA) 2005 is virtually identical to Hague Convention 2000, but with a few differences. For those practitioners who are not used to dealing in private international law issues, Sch 3 may appear to be an odd beast bolted on to the MCA 2005 without thought.

All of the Hague Conventions deal with private international law. Accordingly, they must use generic terminology that can be understood in different jurisdictions. Hague Convention 2000 is no exception. However, the recitals to Hague Convention 2000 affirm that 'the interests of the adult and respect for his or her dignity and autonomy are to be primary considerations'.

Of necessity, therefore, Hague Convention 2000 does refer to generic terms, such as 'Adults', 'Protective Measures', 'Powers of Representation' and 'Central Authorities' each with their own definition under Hague Convention 2000.

Capacity and Incapacity

It is well understood that whether an individual has sufficient capacity is not a question with a binary yes/no answer. 'Capacity, to do what, precisely?' should be the response. A person may have capacity to marry, but not to manage complex financial affairs or make a valid Will.

Similarly, which applicable law may be the correct one to decide the question of capacity will depend on the action for which capacity is needed. The capacity to contract or to make a binding gift, for example, may be decided by the proper law of the contract governed by the Rome I Regulation as for example discussed in the case of Gorjat and Others v Gorjat [2010] EWHC 1537 (Ch).

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, whilst by contrast common law jurisdictions have looked to the individual's domicile.

Hague Convention 2000 and the Schemes of Sch 2 and Sch 3

The main restrictions on the application of Hague Convention 2000and Sch 3 to the MCA are the exclusions contained in Art 4 of Hague Convention 2000 referred to in Sch 3, para 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 may appear at 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.

There are two main differences between Hague Convention 2000 and Sch 3:

- The first is that Hague Convention 2000 applies to adults of 18 years whilst Sch 3 applies to persons of 16 years.

- Secondly, Hague Convention 2000 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, whilst Sch 3 also applies not only to 16 year olds who have such an impairment, but also to donors of Powers of Attorney of any age whether or not so impaired or insufficient.

Confusingly, internal Anglo-Welsh Lasting Powers of Attorney can, of course, only be created by persons of 18 years, in any event.

As Alexander Ruck Keene described, the main cross border effects of Hague Convention 2000 and Sch 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 (*Re MN* [2010] EWHC 1926 (Fam) – see [2011] ELD LJ 19 and 77).

However, since England and Wales has not yet actually ratified Hague Convention 2000, it must be remembered that although its private international law is virtually identical to Hague Convention 2000, the cross border co-operation provisions in Chapter V, Art 28 onwards cannot be used, whilst they can be in Scotland. Similarly, it is not currently possible to obtain a certificate under Art 38 in England and Wales, whilst it is in Scotland.

Prior to ratification, there are also doubts as to the availability of Art 7 and 8 requests under Sch 3, para 8. As Alexander Ruck Keene has highlighted, the Convention has come into existence without any consideration as to its administrative needs and consequences.

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 Hague Convention 2000 ((2009) 58 *International Comparative Law Quarterly* 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 which will promote increased certainty and uniformity within this area. Whilst these rules are not free from criticism, the concerns which 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.'*

Many of us think that it has long been high time for England and Wales to ratify Hague Convention 2000.

Powers of Representation and Lasting Powers

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.

Hague Convention 2000 refers to 'powers of representation' whereas Sch 3 to the MCA refers to 'Lasting Powers'. The only definition in Hague Convention 2000 is in Art 15 which refers to:

> *'powers of representation granted by an adult, either under an agreement or by a unilateral act, to be exercised when such adult is not in a position to protect his or her interests.'*

Schedule 3 para 13(6) defines Lasting Powers (for the purposes of Part 3 only) 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.

This provision does not contain any transitional provisions and will therefore apply to historic EPAs made at a time when thought was not given as to the habitual residence of the donor at the time of creation.

It is not at all clear as to what is required to specify a particular law in writing. It may well be arguable that the use of the form of Lasting Power of Attorney which includes the words under para 9 on p 8: 'I appoint and give my attorneys … and to the provisions of the Mental Capacity Act 2005' is impliedly specifying English law.

However, this is by no means clear, and if it is not absolutely certain that a donor is habitually resident in England and Wales at the time of the creation of an LPA, it is suggested that it would be good practice in para 5 on p 6 specifically to state that the Lasting Power is subject to the condition that the law of England and Wales is to apply as the specified law.

If England and Wales is a 'connected country' under Sch 3, para 13(3), the particular fact that makes it so connected, such as a former habitual residence, should also be stated.

There is, however, no requirement that such specification must be within the Lasting Power itself, or that the specification must be made at the same time as the making of the Lasting Power. The specification can therefore presumably be by a separate statement in writing, made at a later time. It is therefore not too late to arrange for clients who have created historic EPAs or LPAs to specify Anglo-Welsh law now, provided that such a connection under para 13(3) does actually exist – such as the fact that England and Wales had been a previous habitual residence or of UK citizenship with England and Wales being the part of the UK with which the Donor was most closely connected.

Many other jurisdictions have forms of powers of attorney that have a like effect to a LPA. 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 be remembered that in many jurisdictions, however, marriage or divorce can automatically revoke a power of attorney.

The MCA 2005 directs that England and Wales must now recognise such powers if valid under the applicable law as set out in Sch 3 para 13. In contrast to Hague Convention 2000, recognition under Sch 3 applies whether or not capacity may have been impaired.

Other Issues Dealt with by MCA Sch 2

Statutory Wills

The concept of a statutory will is unknown in many jurisdictions. Accordingly the cross border effect of an Anglo-Welsh statutory will is particularly complex. Those States that have ratified Hague Convention 2000 should recognise an Anglo-Welsh statutory will as being a protective measure, although some persuasion may be needed. However, the cross border effect of an Anglo-Welsh statutory Will is limited by MCA Sch 2 paras 1–4. In In the Matter of P [2010] EWHC 1928 (Fam), Mr Justice Lewison clearly indicated (at paras [31]–[34]) that the omission of words similar to 'other than immovable property in England or Wales' contained at the end of s 97(4)(a) Mental Health Act 1983 from para 4(4) was an oversight of Parliament and that para 4(4) is therefore to be regarded as correctly meaning:

> (4) But sub-paragraph (3) (whilst it shall always apply in so far as the will disposes of immovable property within England and Wales) does not have effect in relation to the will …

As a result, an Anglo-Welsh statutory will whilst effective over immovable property in England and Wales and although it can always be executed, is never effective over immovable property outside England and Wales. If P is domiciled outside England and Wales at the time of making the statutory will, it is only effective over movable property, whether within or outside England and Wales, if the law of P's domicile directs that Anglo-Welsh law is the applicable law to decide questions as to P's capacity.

This provision is particularly at odds with the thrust of Hague Convention 2000 that the

law of the state of habitual residence should be the applicable law for all questions and that the domicile of P should be irrelevant.

By contrast, the provisions of s 18 of the MCA and Sch 2 paras 5 and 6 relating to settlements created or later varied by the court are not subject to any such particular restriction based on domicile or the situs of property.

In any event, clearly any of the powers relating to statutory wills or settlements can only be exercised by the court if P is habitually resident in England and Wales or one of the other grounds for jurisdiction exists.

Ademption of Gifts

The saving para 8 of Sch 2 by virtue of which a gift is not to lapse in a will, if the relevant property is disposed of by virtue of s 18, causes similar cross border confusions.

It is uncertain as to whether the courts would classify this issue as one of construction of the provisions of a will or alternatively as one of the effects and implementation of a protective measure.

If it is a matter of construction of a will, then the applicable law would be that intended by the testator, which in the absence of any indication is presumed to be the law of the testator's domicile at the date of execution of the will. This presumption can be rebutted by any sufficient indication that the testator intended his will to be construed according to the law of another country. Such intention can be expressed in the Will, or may be implied from circumstances such as his use of a particular language or of expressions known only to a particular law. These matters were considered in the case of *Dellar v Zivy, Zivy, Lemarchand and Zivy* [2007] EWHC 2266 (Ch).

Thus, if the Court of Protection makes an order for the sale of property of a person who at the time of execution of his will was domiciled outside England and Wales, it is probable that the 'Preservation of interests in property disposed of on behalf of person lacking capacity' provisions of Sch 2, para 8 will not apply, since the construction of the will would be governed by the law of the other jurisdiction.

It can be very clear that an individual who is currently lacking capacity is now habitually resident in England and Wales. Sufficient thought may not be given, however, to the fact that either now or at the time of making the individual's will, they may not have been or be domiciled in England and Wales. It is understood that Scottish law, as an example, does not have such similar saving provisions as Sch 2 para 8.

Considerable care needs therefore to be exercised before necessarily relying on the Sch 2 para 8 in any circumstances in which cross border issues arise.

Vesting of Stock

The provisions of Sch 2 para 7 are a restatement of the law in the repealed Mental Health Act 1983. Before 2007, a foreign curator could sue and give good receipt for movables in England and Wales unless the Court of Protection had appointed a

receiver. However, a foreign curator had no power to execute a transfer of stock or shares, although the Court of Protection had power specifically to authorise such execution.
It will now only be in particularly unusual circumstances that para 7 powers will be exercised.

Conclusion

It ought now to 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, historic enduring and lasting powers may no longer be valid.
Before considering the internal law of England and Wales, thought should always be given as to whether a cross border connection exists that means that the first question should be as to 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.

If any cross border issues may be relevant in relation to capacity, very careful analysis and thought needs to be applied. It may not be possible to provide clients with a simple and straightforward overall solution.

If England and Wales were now to ratify Hague Convention 2000, the position would be somewhat more straightforward. However, further amendments to MCA, Sch 2 will be needed in the future to bring it into line with Sch 3.

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