

2. The underlying principle of the Convention is to improve the protection in international situations of adults who, by reason of an impairment or insufficiency in their personal faculties, are not able to safeguard their own interests.

3. The need for the Convention has arisen from the lengthening of the human life span and the corresponding rise in the incidence of illnesses related to old age, such as Alzheimer's disease. These concerns were considered to be heightened at the international level as a result of the increasing ease of international travel, something which has led to many people of retirement age deciding to spend the latter part of their lives abroad, primarily in milder climates.

4. These natural movements in population have made practitioners and in particular notaries more concerned to have at their disposal private international law rules which are well defined.

5. Part of the background to the Convention was the fact that a number of jurisdictions had, or were in the course of, reforming their domestic law in this area. This enabled guidance to be proffered in relation to international problems faced by jurisdictions that have recently legislated (such as England and Wales with the Mental Capacity Act 2005) and those states that yet to legislate.

6. The Convention is primarily intended to address situations where questions may arise over which court has jurisdiction to make decisions in relation to an adult, present in one jurisdiction, but habitually resident in another.

7. The Convention applies to “the protection in international situations of
adults who, by reason of an impairment or insufficiency of their personal faculties, are not in a position to protect their interests.” (Article 1(1)). An adult is defined as a person who has reached the age of 18 years; however, the Convention also applies to measures of protection taken in respect of an adult who had not reached the age of 18 years at the time the measures were taken (Article 2).

8. The objectives of the Convention are set out in Article 1(2):

“a) to determine the State whose authorities have jurisdiction to take measures directed to the protection of the person or property of the adult;

b) to determine which law is to be applied by such authorities in exercising their jurisdiction;

c) to determine the law applicable to representation of the adult;

d) to provide for the recognition and enforcement of such measures of protection in all Contracting States;

e) to establish such co-operation between the authorities of the Contracting States as may be necessary in order to achieve the purposes of this Convention.”

9. The Convention recognises the difficulties posed in a situation where an individual has made advance arrangements with regard to how he wishes his affairs to be dealt with in the event that he loses capacity and the importance of being able to ascertain whether these arrangements will be recognised in other jurisdictions and, if so, to what extent.

10. It also contains provisions concerning co-operation between Contracting States designed to enhance the protection of incapacitated adults. The system of co-operation, which is flexible and enables use of existing channels, encompasses, among other things, information exchange, the facilitation of agreed solutions in contested cases, and the location of missing adults. Contracting States must designate a Central Authority to discharge the duties which are imposed by the Convention, which primarily relate to facilitating effective communication between Contracting States and mutual assistance.

11. Some examples of the type of situation the Convention is intended to address are set out in the outline of the convention prepared by the Hague Conference on Private International Law

http://www.hcch.net/upload/outline35e.pdf:

“1. A Scotsman has been living in Argentina since his retirement 10 years ago. He owns property in Scotland and Argentina. He now suffers from age-related dementia and is not capable of managing his affairs. The property
needs to be sold to provide funds for the care of the man living in Argentina. He has a son living in Scotland. Some years ago, the man granted his son extensive powers of attorney to be exercised in the event of any incapacitating illness certified by a Scottish medical practitioner. If the Convention were in force between the countries, the powers of attorney would be recognised in Argentina and the son could act on the man’s behalf to make the necessary arrangements to manage his father’s affairs. The powers of representation would be exercised in accordance with the law in Argentina.

2. A man with Japanese nationality dies in Japan. He is survived by a 40 year old daughter who is living in Canada, and who has both Canadian and Japanese nationality. She suffers from schizophrenia and has been placed under a protective regime in Canada. If the Convention were in force in between the countries, the jurisdiction lies with the Canadian courts to make decisions related to the protection of her interests, as she is habitually resident in Canada. The Convention would ensure that the powers of her guardian in Canada would also be recognised in Japan and other Convention States. The guardian in Canada would be issued with a certificate outlining his or her powers of representation and would be able to act in Japan on the daughter’s behalf in relation to the succession of her father’s estate."

12. The Convention entered into force on 1 January 2009. It has been signed by thirteen states (Cyprus, Czech Republic, France, Finland, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Poland, Switzerland and the UK) but has thus far only been ratified by four States: France, UK (extended to Scotland but not England & Wales), Germany and Switzerland.

13. The UK made use of the federal states clause in the Convention in order to ratify it for only one part of its territory. As the Convention allows the distinction between territories with separate systems of law within the State, the UK was able to ratify in respect of Scotland only.

14. Although the UK has yet to ratify the Convention for England & Wales the Convention became of full effect in England and Wales from 1 January 2009 when it entered into force. This is by virtue of Schedule 3 to the Mental Capacity Act 2005, which gives effect to the Convention in England and Wales in so far as the MCA does not otherwise do so and makes related provision as to the private international law of England and Wales.
The amendments to the private international law of England and Wales made by schedule 3 MCA 2005 mean that, despite non ratification of the Convention, English law is now fundamentally the same as the Convention. However, as a matter of public international law the UK (in so far as England and Wales are concerned) is not recognised as a Contracting State of the Convention until full ratification takes place. This means that for international purposes the Convention will have no effect between the UK (in relation to England and Wales) and Contracting States until the UK fully ratifies it. The Public Guardian holds the policy for extending ratification of the 2000 Convention in relation to England and Wales and it began a scoping exercise during 2009. However, it is presently not known when the UK will ratify the Convention in full. The present situation creates some difficulties with regard to the system of co-operation envisaged by the Convention amongst other factors. These are considered in further detail below.

B. Applicable English Law- Schedule 3 MCA 2005

i. Protective Measures:

Schedule 3 of MCA 2005 adopts the Convention definition of adults with incapacity and applies it to any person who has reached the age of 16. Section 5(1) of Schedule 3 sets out the 'protective measures' within the scope of its provisions as follows:

- a) the determination of incapacity and the institution of a protective regime;
- b) placing the adult under the protection of an appropriate authority;
- c) guardianship, curatorship or any corresponding system;
- d) the designation and functions of a person having charge of the adult's person or property, or representing or otherwise helping him;
- e) placing the adult in a place where protection can be provided;
- f) administering, conserving or disposing of the adult's property; or
- g) authorising a specific intervention for the protection of the person or property of the adult.

These protective measures cover the range of different possible interventions adopted in the laws of the various countries participating in the Hague Conference on Private International Law.

ii. Jurisdiction:

The applicable law prior to Schedule 3 of MCA 2005:
Prior to the enactment of Schedule 3 of MCA 2005 and the coming into force of the Convention on 1 January 2009, the courts of England and Wales would normally have 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.

The courts of England and Wales would also normally have jurisdiction over a person’s property:

- If he is present in England, whatever his habitual residence or nationality and whether he has any assets in England or not.
- If he has property in England, whatever his habitual residence or nationality.

Conversely, the courts of England and Wales would not have jurisdiction over a person’s property by virtue solely of British nationality or English residence. Equally, the court would not have made 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.

The applicable law since Schedule 3 of MCA 2005 came into force:

The Convention prescribes uniform rules determining which country’s authorities are competent to take the necessary measures of protection:

i. It attributes primary jurisdiction to the authorities of the adult’s habitual residence. This is reflected in Section 7(1) of Schedule 3.

ii. However, it also recognises the concurrent, albeit subsidiary, jurisdiction of the authorities of the State of which the adult is a national. This is reflected in Section 8 of Schedule 3.

iii. The Convention allows a State to exercise jurisdiction where property of the adult is situated in that State in order to take measures of protection concerning that property. This is reflected in Section 7(1)(b) of Schedule 3.

iv. The Convention allows a State to exercise jurisdiction to take emergency measures where the adult or property belonging to the adult is present in that State. This is reflected in Section 7(1)(c) of Schedule 3.

v. Finally, the Convention allows a State to exercise jurisdiction in relation to an adult present in that State for a measure which is temporary with limited territorial effect for the protection of the person. This is reflected in Section 7(1)(d) of Schedule 3.
22. Further, the state of habitual residence can, with the agreement of the receiving state, transfer jurisdiction to another state connected with the adult (Section 8 of Schedule 3). According to the Convention, this provision is only available to Contracting States (Article 8). Until England and Wales ratify the Convention it is unlikely that the states that have ratified the Convention will cooperate with England and Wales with respect to such a jurisdiction transfer request.

**iii. Applicable Law to be applied within Schedule 3**

23. The state with jurisdiction will apply its own law but may instead choose to apply the law of another state with which the adult has a connection (Section 11, Schedule 3).

24. Special rules apply to incapacity planning tools such as enduring or lasting powers of attorney: the maker may designate the law of the state of which he or she is a national, in which he or she was formerly habitually resident or in which the property of his or hers is located. However, under Section 14 of Schedule 3 where such powers of representation are not exercised in a manner sufficient to guarantee the protection of the person or property of the donor, the court may disapply or modify the power. Where it does so it should take into consideration as far as it is possible the law chosen by the donor of the relevant power.

25. When a protective measure is taken in State A but implemented in State B the conditions of implementation are governed by the law of State B (Section 12, Schedule 3). As such, when the courts of England and Wales have jurisdiction in this regard, mandatory provisions of English law will be applied irrespective of any system of law which would otherwise apply (Section 17, Schedule 3). Furthermore, Section 18 of Schedule 3 provides that the court would not be required to apply any provision of another country’s law if that would be manifestly contrary to public policy.

**iv. Recognition**

26. A protective measure is to be recognised in England and Wales if taken under the law of the state of habitual residence, and, in relation to a measure taken under the law of any country in which the Convention is in force, if that state had jurisdiction under the Convention.
27. The courts of England and Wales are entitled to disregard the protective measure if it can be established under Section 19 of Schedule 3 that:

i. In a non-urgent case the adult was not given an opportunity to be heard and that omission amounted to a breach of natural justice;

ii. recognition of the measure would be manifestly contrary to public policy,

iii. the measure would be inconsistent with a mandatory provision of the law of England and Wales, or

iv. the measure is inconsistent with one subsequently taken, or recognised, in England and Wales in relation to the adult.

28. An interested person can require a ruling on whether a particular measure taken in another state is recognised (Section 20 of Schedule 3).

v. **Enforcement:**

29. An interested person may apply to the court for a declaration as to whether a protective measure taken under the law of a country other than England and Wales is to be recognised in England and Wales (Section 22(1), Schedule 3).

30. If the State making the protective measure had jurisdiction to do so under the Convention and none of the factors excluding recognition (set out in paragraph 25 i-iv above) apply, the court must make a declaration (Section 22(2), Schedule 3).

vi. **Cooperation:**

31. Part 5 of Schedule 3 relates to Co-operation between Contracting States regarding cross-border placements or adults in danger (Article 28 of the Convention).

32. Under these provisions a public authority proposing to place an adult in an establishment in a Convention county outside England and Wales must consult an appropriate authority in that other country (Article 26).

33. Further, where a public authority is aware that an adult who is in serious danger and in relation to whom protective measures are in
existence or could be taken has become resident in another Convention country, it must notify the appropriate authority in that country of the danger and the measures taken or under consideration (Article 28).

34. In order to facilitate the implementation of these provisions, each Contracting State is required to designate a Central Authority to cooperate with each other to achieve the purposes of the Convention (Article 28 of the Convention).

35. Although Schedule 3 of MCA 2005 has implemented the co-operation provisions of the Convention into domestic law, the UK is only obliged to declare a Central Authority in England and Wales once it has fully ratified the Convention. Thus far the UK has chosen not to declare a Central Authority in England and Wales. The fact that the UK is not a currently a Contracting State and is presently without a designated Central Authority presents means that the co-operation provisions under Part 5 of Schedule 3 are at present ineffective.

36. Similar problems occur in relation to the transfer of jurisdiction possible under Section 8(3) of Schedule 3 (giving effect to Article 8 of the Convention) (paragraph 21 above) which provides that the courts of England and Wales will have jurisdiction following the acceptance of such a transfer request. This provision will also be ineffective until England and Wales ratify the Convention.

37. It is understood that England and Wales is still committed to ratifying the Convention as soon as practicable although the reasons for distinguishing between Scotland and England & Wales for the purposes of ratification have not been explained by the Ministry of Justice or the Foreign Office.

38. The codification of English Private International Law through Schedule 3 of the MCA is a welcome clarification of what was a previously uncertain area of law. However, this development is regrettably limited by the currently ineffective provisions in Schedule 3 concerning cross border cooperation.

39. The EU Commission has been called upon to assess the option of the accession of the EU as a whole to the Convention with the aim of enhanced cooperation between Contracting States. This would be a welcome step in the development of uniform body of law concerning international adult protection.