

The 2000 Hague Convention on the International Protection of Adults Five Years On

Introduction¹

1. The 2000 Hague Convention on the International Protection of Adults ('the 2000 Convention') represents the first modern attempt by States to create a coherent mechanism to enable the cross-border protection of adults and their property when they are not in a position to protect their interests. It is now five years since it came into force on 1 January 2009, following ratification by three States: the United Kingdom (in respect of Scotland alone) in 2003, Germany in 2007, and France in 2007. There are now eight contracting States,² with a further seven states having signed it.³ All of the States are European.
2. Despite the small number of States which have signed the 2000 Convention, and the even small number of States that have ratified, the Convention is already having an impact: the prospect of signature, for instance, being one driver in the moves by the Republic of Ireland to reform its antiquated mental capacity legislation.
3. Despite the fact that the United Kingdom has yet to ratify the 2000 Convention in respect of England and Wales, it has already had a dramatic (if, as yet, little noticed) impact because of the curious way in which the Government sought to take upon itself almost all the obligations of the Convention by enacting s.63 and Schedule 3 to the Mental Capacity Act 2005 ('MCA 2005') including – importantly – the obligation to interpret Schedule 3 consistently with the 2000 Convention.⁴ In other words, the material provisions of the 2000 Hague Convention are, in effect, in force in England and Wales and apply to any case with a cross-border element falling within the scope of the Convention, regardless of whether or not the foreign country involved is a Contracting State to the Convention.
4. Now that five years passed, we have a small but important body of case-law from England and Wales upon the 2000 Convention, together with glancing light shone from decisions in Scotland. We can therefore, perhaps, usefully take stock of matters as well as to highlight specific reasons why ratification on behalf of England and Wales would be so useful.
5. This paper is divided as follows:
 - (1) The background to the 2000 Convention;
 - (2) An overview of the 2000 Convention;
 - (3) Schedule 3: the key features;
 - (4) Particular topics of importance: (1) habitual residence
 - (5) Particular topics of importance: (2) powers of attorney
 - (6) Particular topics of importance: (3) recognition and enforcement
 - (7) The future – why ratify?

¹ Parts of this paper draw on material that will be included in the forthcoming work by Richard Frimston, Adrian Ward, Alex Ruck Keene and Claire van Overdijk entitled 'The International Protection of Adults,' to be published by Oxford University Press in 2014.

² In alphabetical order: Austria, the Czech Republic, Estonia, Finland, France, Germany, Switzerland and the United Kingdom (in respect of Scotland).

³ In alphabetical order: Cyprus, Greece, Ireland, Italy, Luxembourg, Netherlands and Poland.

⁴ Paragraph 2(4) of Schedule 3.

The 2000 Convention: background

6. The 2000 Convention can be placed in line of international instruments going back to 1905 and the Convention *concernant l'interdiction et les mesures de protection analogue* ('the Convention Relating to Deprivation of Civil Rights and Similar Measures of Protection').⁵ This Convention formed one of five international conventions in the family law arena adopted at the Third and Fourth Sessions of the Hague Conference on Private International Law ('the Hague Conference') in 1900 and 1904,⁶ all of which based questions of applicable law and jurisdiction over personal status primarily on the national law of the persons in question.
7. The 1905 Convention was ratified by a number of European states, but the United Kingdom and the United States declined to participate. Growing difficulties in the operation of the nationality principle became apparent at an early stage and despite efforts made by the Hague Conference to revive the treaties in the 1920s, over the years most of the parties both to this Convention and to the others concluded at the same time denounced them.
8. A lengthy hiatus then ensued before the preparation of further treaties in the area, the focus switching to matters concerning children. Conventions concluded in this area under the auspices of the Hague Convention included, most importantly, (1) the Convention of 5 October 1961 Concerning the Powers of Authorities and the Law Applicable in respect of the Protection of Infants ('the 1961 Convention')⁷ and (2) the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction ('the 1980 Convention');⁸ and (3) the Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption ('the 1993 Convention').⁹ The 1961 Convention was widely recognised as having been less than entirely successful, and in 1993, the States represented at the Seventeenth Session of the Hague Conference therefore decided to undertake at the Eighteenth Session both a revision to the 1961 Convention and the possible extension of the new Convention's scope to the protection of incapacitated adults. As described by the deputy Secretary-General of the Hague Conference, Adair Dyer, that decision in fact:

ha[d] three panels, forming a sort of a triptych. The central panel deals with the protection of the person of the minor and must be painted against the background of the United Nations Convention on the Rights of the Child (CRC) adopted by the General Assembly on 20 November 1989. One side panel would be a landscape dealing with the protection of the minor's property, moveable and immovable, but clearly secondary in importance to the central panel, since care of the minor's person is an acute problem common to all younger children, but ownership of substantial property is a problem restricted to a relatively small percentage of the children in the population. Thus the landscape may be a countryside relatively unencumbered with manmade structures or objects. On the other hand, the matching side panel which might

⁵ *Convention concernant l'interdiction et les mesures de protection analogue* (done in French alone) (The Hague, 17 July 1905).

⁶ See Adair Dyer, 'The Internationalization of Family Law', *UC Davis Law Review* 30 (1996-7): pp. 625-645 and in particular pp.627-8. The *Convention pour Régler la Tutelle des Mineurs* (done in French alone) (The Hague, 12 June 1902)—usually translated as the 'Convention relating to the settlement of guardianship of minors'—was the first to use the concept of 'habitual residence.'

⁷ Convention Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Infants (The Hague, 5 October 1961, 331 UNTS 145). Note, this was published in the official French version together with an English translation. That translation differs in some important respects from the official revised version of the Convention completed and signed on October 19 1996, English in the interim having been adopted as a second official working language of the Hague Conference.

⁸ Convention on the Civil Aspects of International Child Abduction (The Hague, 25 October 1980, 1343 UNTS 89).

⁹ Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (The Hague, 29 May 1993, 1870 UNTS 167).

deal with the protection of incapacitated adults could be a landscape bristling with factories and garnished with a wall papered with share certificates issued by companies or corporations. With incapacitated adults, except for the minority who suffer from severe disabling mental illness, management of their property may play a predominant role. Indeed, a protective management of their property may play a major role in determining what options are available from a financial point of view for the care of the person. In any case, neither of the side panels has for a backdrop, a comprehensive international instrument broadly in force, such as the CRC.¹⁰

9. The first half of the programme decided upon at the Seventeenth Session was carried out in the Eighteenth Session, culminating in the 1996 Convention. There was insufficient time for that Session to examine the position of adults. A Special Commission was therefore formed which produced a draft convention (and accompanying report) for consideration by a Special Diplomatic Commission which met at The Hague in the autumn of 1999 and unanimously adopted the text of what became the 2000 Convention on 2 October 1999. The 2000 Convention was formally concluded and opened for signature on 13 January 2000.
10. It can be seen from the legislative history summarised above that the 2000 Convention was seen as a counterpart to the 1996 Convention. Further, the experts involved in drafting the 2000 Convention were in very substantial part the same as those who had been involved in drafting the 1996 Convention, and their ‘specific task... was to consider whether the solutions adopted by the 1996 Convention could be extended to the protection of adults.’¹¹ In the circumstances, it is a pertinent question whenever one has cause to examine the 2000 Convention – and by extension – Schedule 3 to the MCA 2005 whether the drafters of the Convention entirely succeeded in distinguishing adults in need of protection from ‘big children.’

The 2000 Convention: overview

11. The core provisions of the Convention address two matters that are, conceptually, very distinct:
 - (1) the resolution of questions relating to the taking of protective measures by State authorities (both judicial and administrative), and in particular (1) the identification of which authorities have jurisdiction to take such measures; and (2) the establishment of a framework for the effective recognition and enforcement of such measures in other Contracting States; and
 - (2) the resolution of questions relating to powers of representation granted in advance by adults prior to the onset of incapacity and designed either to survive such incapacity or to take effect upon their incapacity (a convenient shorthand for such powers being ‘private mandates’).
12. The substance of the solutions adopted are addressed in the section below by reference to their incorporation into English law in Schedule 3, but it is important to note at this stage that, as with many international treaties, especially those framed under the auspices of the Hague Conference on Private International Law, there are a number of terms that are left deliberately undefined. Of these, the most important by some way is ‘habitual residence,’¹² which is the touchstone for the

¹⁰ Dyer, ‘Report’, p.13.

¹¹ Paul Lagarde, ‘Convention of 13 January 2000 on the International Protection of Adults: Explanatory Report’, in *Proceedings of the Special Commission with a Diplomatic Nature 20 September to 2 October 1999*, edited by The Permanent Bureau of the Hague Conference (The Hague: SDU, 2003), pp. 389-415 (‘the Lagarde Report’), paragraph 3. The report is also available online at http://www.hcch.net/index_en.php?act=publications.details&pid=2951&dtid=3; references in this paper are given in paragraph numbers.

¹² The then-Deputy Secretary General of the Permanent Bureau, Adair Dyer had, in a document prepared for purposes of the earlier Special Commission drafting the 1996 Convention, noted that ‘[t]he application of the principles of the preliminary draft Convention on the protection of children to situations [relating to habitual residence] involving the protection of adults... on the face of it does not seem feasible without some

determination of which State authorities have jurisdiction over the person and property of the adult in question. Although in the very early stages of the preparatory work questions were raised as to precisely how the concept should apply in relation to adults (as opposed to children), the term is expressly not defined, being a term ‘which despite the important legal consequences attaching to it, should remain a factual concept.’¹³ I return to this concept as it has been examined in the courts of England and Wales in section 4 below.

13. Other terms which either were not defined or were not defined with precision include:

- (1) ‘Adults.’ The temporal definition is clear: the 2000 Convention applies to those who have reached the age of 18,¹⁴ albeit that it can also apply in respect of measures taken in anticipation of a person’s majority where the person in question was not 18 at the point that they were taken.¹⁵ The rest of the definition is rather vaguer, an adult for purposes of the 2000 Convention being a person over the age of 18 “who, by reason of an impairment or insufficiency of their personal faculties, are not in a position to protect their interests.”¹⁶ The Lagarde Report¹⁷ makes clear that the decision not to use a term such as ‘incapacity’ in this context was quite deliberate. Moreover, whilst the Explanatory Report identifies as a particular example of those who will fall within the Convention’s scope those suffering from Alzheimer’s disease, it is important to note that the Convention is intended to cover impairments that are physical as well as mental. This is clear both from the Explanatory Report and from the rejection of the proposal from the United Kingdom which sought to introduce a requirement that the impairment relate to the adult’s mental faculties (or ability to communicate).¹⁸ The result is that the 2000 Convention would appear to encompass a very wide class of individuals, including those who would not – in England and Wales – be considered to fall within the scope of the Mental Capacity Act 2005 or – in Scotland – to fall within the scope of the Adults with Incapacity (Scotland) 2000; and
- (2) ‘Measure of protection.’ Whilst a non-exhaustive definition is given in Article 3, it is only by careful examination of the Convention as a whole and of the supporting materials that it

adjustment.’ He continued: ‘[f]or example, a child who is normally aware of his or her surroundings will always impart some ‘habitual’ element to the place of residence. On the other hand, it is difficult to speak of the ‘habitual’ residence of an adult who has lost all awareness of his or her surroundings, for example because of being in a coma. It seems that any Special Commission or group of experts which undertakes to adapt the rules of the preliminary draft on the protection of children will have to consider whether an adult who loses all awareness of his or her surroundings still retains the latest ‘habitual’ residence and, if so, whether the authorities of that State have the power to order or authorize a change in the ‘habitual’ residence to another State. The case of the person in a coma raises the issue of whether the *habitual residence* is subjective or objective in nature, *i.e.* whether the ‘habit’ in habitual implies some awareness by the person of his or her surroundings, or whether the ‘habit’ may be on the part of other persons who regularly see him or her lying in one place.’ Dyer, ‘Note on the Protection of Incapacitated Adults,’ reproduced in the Proceedings at pp.37–45, at p. 45.

¹³ Lagarde Report, paragraph 49.

¹⁴ 2000 Convention, Art 2(1).

¹⁵ 2000 Convention, Art 2(2).

¹⁶ Article 1(1).

¹⁷ Lagarde Report, paragraphs 9-10.

¹⁸ Lagarde Report, paragraph 9. See also the discussion recorded in Minutes 1 in the Proceedings at pp.223 ff. It should, though, be noted that the Chair of the Commission subsequently expressed the view that Art 1(1) should probably be interpreted such that the Convention only covered ‘those who lack decision- making capacity’, since ‘on human rights grounds, compulsory measures of protection would not be justified in relation to persons who have full decision-making capacity’ Eric Clive, ‘The New Hague Convention on the Protection of Adults’, 2000 Yearbook Private of International Law 2, no. 1 at p.5. See, for an extended discussion on this point, predicated on the basis that the Convention does cover a wider category of individuals, Long, ‘Rethinking Vulnerable Adults’ Protection’ at pp. 61–65.

becomes clear that a measure of protection only extends to a measure taken by an administrative or judicial authority, such that it does not extend to cover:

- a. decisions made by medical practitioners, medical practitioners not ordinarily counting as ‘authorities’ for purposes of the 2000 Convention;¹⁹
- b. (importantly) private mandates. This can be seen from the body of the Convention itself,²⁰ from passages in the Lagarde Report,²¹ in academic commentary,²² and by analogy with the provisions of the 1996 Convention relating to protective measures.²³ Nor – where such is necessary – does the fact that a private mandate has to be registered or otherwise subject to confirmation by State authorities before it can be effective cloak such a private mandate with the mantle of a protective measure.²⁴

Schedule 3: an overview

14. Schedule 3 was enacted with a minimum of legislative consideration, and it is perhaps indicative of its rather undercooked nature that there was for a number of years a live debate as to the extent to which all of its provisions were in force²⁵ (the answer – that they are not – finally being given by Sir James Munby P in December 2013 in *Re PO*²⁶).
15. In any event, Schedule 3 (tracking the 2000 Hague Convention) serves two broad legislative purposes:
 - 15.1. providing the framework for recognition and enforcement of ‘protective measures’ taken in the place of the person’s habitual residence;
 - 15.2. establishing principles to resolve conflicts of laws issues arising in respect of private mandates or – in the language of Schedule 3 – ‘lasting powers’;²⁷
16. As a necessary component of both, it also sets out the basis upon which the Court of Protection has jurisdiction over those physically present in England and Wales (and/or who have property present here).

¹⁹ The Lagarde Report is – curiously – silent on this matter, but see in this regard the summaries of the position given by the Chair of the Special Diplomatic Commission during the course of the meetings of the Commission recorded in the Proceedings at pp. 303 and 311.

²⁰ Article 38 is concerned with the situation where certificates of status and powers are provided by the authorities of Contracting States ‘where a measure of protection has been taken or a power of representation confirmed.’ If a power of representation that was granted by an adult with capacity always constituted a ‘measure of protection,’ this wording would have been otiose. Further, Article 50 applies different rules to the temporal application of the 2000 Convention to ‘measures taken’ (Article 50(2)) on the one hand and ‘powers of representation... granted under conditions corresponding to those set out in Article 15’ (Article 50(3)).

²¹ Lagarde Report, paragraphs 93, 94, 96, 106, 109, 124, 134, and 146.

²² Eric Clive, ‘The New Hague Convention on the Protection of Adults’ *2000 Yearbook Private of International Law (II)* 1 at 15.

²³ See in this regard Nigel Lowe and Michael Nicholls QC, *The 1996 Hague Convention on the Protection of Children* (Bristol: Jordans, 2012), paragraphs 2.6–2.7 and Eric Clive, ‘The New Hague Convention on Children’, *Juridical Review* 3 (1998): pp. 169–188 at 171, footnote 8.

²⁴ This is quite clear from paragraph 146 of the Lagarde Report, where Professor Lagarde – discussing Article 38 – notes that a confirmation of powers by a State authority (judicial or administrative) ‘is not a measure of protection within the meaning of the Convention.’

²⁵ Paragraph 35 of Schedule 3 providing that paragraphs 8, 9, 19(2) and (5), and 30, along with the entirety of Part 5 (Cooperation) come into force only if the Convention is in force in accordance with Article 57.

²⁶ [2013] EWHC 3932 (COP); [2013] WLR (D) 495 (CP). Permission to appeal this decision has been sought by the applicant; the outcome of this application is not yet known.

²⁷ Schedule 3, paragraph 6.

17. As noted at the outset, perhaps the most curious feature of Schedule 3 is that (save in certain limited circumstances) all the obligations imposed upon the Court of Protection are imposed without reference to whether the third country in question is a signatory to the 2000 Convention. In other words, Schedule 3 and the provisions therein will be of relevance *whenever* a cross-border incapacity issue arises.

Jurisdiction

18. By operation of paragraph 7(1) of Schedule 3, the Court of Protection can exercise its ‘full original jurisdiction’²⁸ in relation to:

18.1. an adult²⁹ habitually resident in England and Wales;

18.2. an adult’s property in England and Wales;

18.3. an adult present in England and Wales or who has property there, if the matter is urgent; or

18.4. an adult present in England and Wales, if a protective measure which is temporary and limited in its effect to England and Wales is proposed in relation to him.

19. Certain deeming provisions operate in paragraph 7(2) to set out when an adult is to be treated as habitually resident in England and Wales.

20. I return to the question of habitual residence in section 5 below.

Protective measures

21. Protective measures are provided for in Part 4 of Schedule 3, which must be read with the definitions in Part 1. Tracking the Convention, paragraph 5 defines a “protective measure” as “a measure directed to the protection of the person or property” (specific, non-exhaustive examples are included which, again, track the Convention).

22. Part 4 of Schedule 3 governs the recognition and enforcement of protective measures upon application to the Court of Protection. It mirrors the mechanisms in place for measures taken in respect of children,³⁰ in particular, the way in which the court is prevented from investigating in any detail the merits of the measure. The court’s role is confined, in essence, to scrutinising whether core procedural and substantive rights have been complied with. What perhaps does not emerge entirely clearly from Part 4³¹ – but is very clear from the 2000 Convention itself³² – is that foreign protective measures are to be recognised by operation of law without any formal application for recognition.³³

²⁸ The phrase used in *Re MN* [2010] EWHC 1926 (Fam); [2010] COPLR Con Vol 893 by Hedley J to contrast with the very limited jurisdiction of the Court of Protection when it comes to the recognition and enforcement of protective measures.

²⁹ By virtue of paragraph 4, an “adult” for the purposes of Schedule 3, is a person who “as a result of impairment or insufficiency of his personal faculties, cannot protect his interests,” and who has reached 16. Where the person is under 18, they must not be subject either to the 1996 Convention or ‘Brussels II’, i.e. Council Regulation (EC) No. 2201/2003).

³⁰ Under, in particular, the provisions of Brussels IIR and the 1996 Hague Convention.

³¹ But, in fact, can be seen from a proper reading of paragraph 19(1) of Schedule 3.

³² Article 22(1): ‘The measures taken by the authorities of a Contracting State shall be recognised by operation of law in all other Contracting States.’

³³ Until the 2000 Convention is ratified in respect of England and Wales, a foreign protective measure will only be recognised if it was taken on the ground that the adult was habitually resident in the other country in question

23. I address the topic of recognition and enforcement in more detail in section 6 below.

Foreign powers of attorney

24. As foreign powers of attorney are not protective measures, they are not capable of being made the subject of applications for recognition and enforcement under the provisions of Part 4. This does not mean, however, that ‘foreign’ powers are not effective within England and Wales.³⁴ Rather, questions of their validity and exercise fall for consideration by reference to the rather more complicated provisions of Part 3 of Schedule 3. These are discussed in detail at section 7 below.

Supporting legislation

25. It should perhaps be noted that it was envisaged in Schedule 3 that regulations would be made to flesh out the provisions of the Schedule.³⁵ No such regulations exist, nor do the Court of Protection Rules 2007 contain any provisions relating to (for instance) applications for recognition and enforcement of foreign protective measures.³⁶

Particular topics of importance: (1) habitual residence

26. As noted above, the 2000 Convention deliberately does not define ‘habitual residence,’ nor is substantial guidance to be found in the Lagarde Report. Greater assistance can perhaps be derived from decisions of Hedley J in *Re MN (Recognition and Enforcement of Foreign Protective Measures)*³⁷ and Sir James Munby P in *Re PO*.³⁸ These will be discussed in turn.

27. The proceedings in *Re MN* related to an elderly woman habitually resident in California, who had been removed from there to Canada and thence to this country in circumstances which, it was said, involved a breach of the terms of Part 3 of an advance directive signed by her. In considering whether her habitual residence had now changed to England and Wales Hedley J held that:

[22] ... the question of authority to remove is the key in this case to the question of habitual residence. 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. It is well recognised in English law that 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 – see e.g. *Re P-J (Abduction: Habitual Residence: Consent)* [2009] EWCA Civ 588, [2010] 1 WLR 1237, [2009] 2 FLR 1051. It seems to me that the wrongful removal (in this case without authority under the directive whether because Part 3 is not engaged or the decision was not made in good faith) of an incapacitated adult should have the same consequence and should leave the courts of the country from which she was taken free to take protective measures. Thus in this case were the removal ‘wrongful’, I would hold that MN was habitually resident in California at the date of Judge Cain’s orders.

(whether or not that country is a Convention State): see paragraphs 19(1) and (2) of Schedule 3, paragraph 19(2) only coming into force upon ratification in respect of England and Wales (paragraph 35(c)).

³⁴ Assuming, which I do for the balance of this section, that the wording of the power is capable of giving authority to the attorney to take decisions regarding the donor’s assets or person outside the country in which the instrument was drafted. This is a question which can only be answered by reference to the wording of any individual instrument.

³⁵ Paragraph 32.

³⁶ In notable contrast to the position in the Family Procedure Rules 2010, which contain (in part 31) detailed provisions for applications under Brussels IIR and the 1996 Convention.

³⁷ [2010] COPLR Con Vol 893 (CP).

³⁸ [2013] EWHC 3932 (COP); [2013] WLR (D) 495 (CP).

[23] If, however, the removal were a proper and lawful exercise of authority under the directive, different considerations arise. The position in April 2010 was that MN had been living with her niece in England and Wales on the basis that the niece was providing her with a permanent home. There is no evidence other than that MN is content and well cared for there and indeed may lose or even have lost any clear recollection of living on her own in California. In those circumstances it seems to me most probable that MN will have become habitually resident in England and Wales and this court will be required to accept and exercise a full welfare jurisdiction under the Act pursuant to para 7(1)(a) of Sch 3.39 Hence my view that authority to remove is the key consideration.

28. *Re MN* was followed in Scotland in a 2011 case, *F v S*.⁴⁰ It has very recently been followed by the President of the Court of Protection, Sir James Munby, in *Re PO*. This case concerned the move of a woman from England to Scotland, the move having taken place at the instigation of three of her children, and being strongly contested by the fourth. For present purposes, the key question for the court was whether PO was still habitually resident in England and Wales, or whether her habitual residence had changed to Scotland. In his judgment, having quoted with approval the passages from the judgment from *Re MN* set out above, Sir James Munby P further held that:

28.1. Habitual residence can in principle be lost and another habitual residence acquired on the same day;⁴¹

28.2. In the case of an adult who lacks the capacity to decide where to live, habitual residence can in principle be lost and another habitual residence acquired without the need for any court order or other formal process, such as the appointment of an attorney or deputy;⁴²

28.3. Habitual residence will not change if the removal has been wrongful. Sir James Munby P gave as an example the circumstances of *Re MN*, as well as the example of the breach of a court order;⁴³

28.4. Unlike the position in relation to children under European law,⁴⁴ the principle of *perpetuatio fori* has no application in this context. Determination of an incapacitated adult's habitual residence is to be assessed by reference to all the circumstances as they are at the time of assessment. Where the assessment arises as a result of an application before a court, therefore, the relevant date for determining habitual residence is the date of the hearing, and not the date when the relevant application was made.⁴⁵

29. In reaching his conclusion that PO was at the time of the hearing habitually resident in Scotland, Sir James Munby P also placed weight upon the fact that: (1) PO was settled in her care home in Scotland and, seemingly, expressing her contentment at being there; and (2) PO was by the time

³⁹ Giving effect to Article 5(1), and providing that the Court of Protection may exercise its jurisdiction (insofar as it otherwise unable to do so) over an adult habitually resident in England and Wales.

⁴⁰ (2012) SLT (Sh Ct) 189. This was a Convention case, involving as it did France and Scotland.

⁴¹ *Re PO* at paragraph 17. In reaching this conclusion, Sir James Munby P relied both on paragraph 50 of the Lagarde Report and also, by analogy, with the decision of the Supreme Court in *Re A* [2013] 3 WLR 761 (HL) (a case concerning the proper approach to the determination of habitual residence of children).

⁴² *Re PO* at paragraph 18.

⁴³ As in *Re HM (Vulnerable Adult: Abduction)* [2010] 2 FLR 1057, concerning the removal of an adult from England and Wales to Israel. No questions arose in that case as to whether their habitual residence had changed, the court proceeding upon the basis that it had not.

⁴⁴ Council Regulation (EC) 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, Art 8 (and see also *HA v MB (Brussels II Revised: Article (11)7 Application)* [2008] 1 FLR 289 at paragraph 89).

⁴⁵ *Re PO* at paragraph 21.

of the hearing (and in contrast to the position that had prevailed at the outset) not currently expressing a desire to return either to her own home or to the English county in which it was located.⁴⁶

30. In light of these decisions, therefore, and mindful of the repeated dicta from the superior courts as to the extent to which legal glosses should not be put upon the phrase ‘habitual residence’,⁴⁷ it is suggested that a number of principles can nonetheless be discerned which will assist in the individual factual assessment required in each case:

30.1. by contrast to the position that can pertain in other situations,⁴⁸ an adult can only have (at most) one habitual residence for purposes of the 2000 Convention,⁴⁹ and may in some circumstances have none;

30.2. in the case of an adult who had, but has subsequently lost, the capacity to decide where they wished to live, their habitual residence will remain that of the country in which they were habitually resident as at the point at which they lost capacity, although it is possible for this to change if they are moved to another country in circumstances which do not give rise to any inference of wrongdoing on the part of a third party responsible (whether through formally or informally) for their care and wellbeing;⁵⁰

30.3. if a change of habitual residence is asserted in such a case, the authorities will scrutinise with care both the circumstances of the move itself, and the circumstances under which the adult in question is now residing, the latter with a view to examining whether it is a permanent arrangement. In this examination, it is appropriate to take into account the degree to which the adult appears to be settled and their state of mind, even if they lack the capacity to make a capacitous decision as to residence;⁵¹

30.4. where an adult is wrongfully removed from their ‘home’ jurisdiction, then it is suggested that their habitual residence could change if there is subsequent endorsement of that move

⁴⁶ *Re PO* at paragraph 23.

⁴⁷ *Re A (Children)* [2013] UKSC 60; [2013] 3 WLR 761 per Baroness Hale at paragraph 54(vi), discussing the concept in relation to children.

⁴⁸ See, for an instance under English law, *Ikimi v Ikimi* [2002] Fam 72 (for purposes of s.5(2) of the Domicile and Matrimonial Proceedings Act 1973). A person will also need to have one ordinary residence for purposes of community care legislation: see *R (Cornwall Council) v SoS for Health & Ors* [2014] EWCA Civ 12 (in which the Court of Appeal also firmly overruled the approach previously adopted in English law to the determination of the ordinary residence of incapacitated adults, in favour of a test directed to an examination directed to all the circumstances of the case, including, in an appropriate case, the state of mind of the adult in question).

⁴⁹ This flows from the use of the determinate Article in Article 5(1) giving jurisdiction to the judicial or administrative authorities of the Contracting State of ‘the habitual residence of the adult.’ For purposes of the law of England and Wales, children cannot have more than one habitual residence for purposes of the 1980 Convention: *In Re V (Abduction: Habitual Residence)* [1995] 2 FLR 992 (where it was held that, for purposes of that earlier Convention, a child who lived in two countries for different parts of the year had consecutive habitual residences rather than being concurrently habitually resident in both).

⁵⁰ Note in this regard, that the 2000 Convention recognises in Article 8(2)(e) the special status of a person who is close to the adult and prepared to undertake their protection.

⁵¹ Another term that could be used here would be ‘wishes and feelings’ (and the term was used in submissions to the President in *Re PO*). However, upon reflection, it may be that, as the analysis of habitual residence is an exercise that takes place within the confines of Schedule 3 MCA 2005, which is – in many ways – a statutory provision divorced from the balance of the Act, using ‘wishes and feelings’ here might potentially risk blurring a distinction that should be maintained. I note that, in *Re LC (Children)* [2014] UKSC 1, the Supreme Court held that the ‘state of mind’ of an adolescent child (or a child with the maturity of an adolescent) could properly be taken into account for purposes of determining whether that child had a habitual resident distinct from that of the parent with which the child lawfully resides (see paragraph 37). In so doing, Lord Wilson (speaking for the majority) considered that none of the words ‘wishes,’ ‘views,’ ‘intentions,’ or ‘decisions’ of the child were apt in the context in which he was considering the question.

by the responsible administrative or judicial authorities of the country of habitual residence and/or all those family members and carers properly interested in the adult's care;

- 30.5. at least for purposes of the English courts, the passage of a sufficiently long period of time could, in and of itself, effect a change in habitual residence even were the original removal to have been wrongful.⁵² The courts have not given any guidance as to the necessary length of time, but it is suggested that, by analogy with the position in relation to the 1996 Convention in relation to children,⁵³ one year might be an appropriate rule of thumb;
- 30.6. in the case of an adult who has never had the capacity to decide where they wish to live, then their habitual residence at the point of majority will be that which they had immediately prior to turning 18. Their habitual residence can, however, change thereafter in the same circumstances as those described above;
- 30.7. the assessment of habitual residence will always be by reference to the facts as they exist as at the time of the assessment by the relevant authorities, such the fact that proceedings are on foot in the courts of the country of the original habitual residence will not prevent a change of habitual residence prior to the resolution of those proceedings;
- 30.8. the burden will always lie upon the person asserting the change of residence.⁵⁴

Particular topics of importance: (3) powers of attorney

31. As noted above, the second main purpose of Schedule 3 (mirroring that of the Convention) is to provide the tools for resolving conflicts of laws questions arising in the context of 'foreign' powers of attorney.
32. Importantly, such powers are not protective measures, so they are not capable of being made the subject of applications for recognition and enforcement under the provisions of Part 4. This does not mean, however, that 'foreign' powers are not effective within England and Wales.⁵⁵ Rather, questions of their validity and exercise fall for consideration by reference to the rather more complicated provisions of Part 3 of Schedule 3.
33. The starting point⁵⁶ is the principle that the law applicable to the existence, extent, modification or extinction of the power of representation will be that of the country of the habitual residence of the donor as at the point of granting the power.
34. However, and so as to give effect to the principle that adults should have the maximum autonomy to make choices as to their own futures, a donor has a limited ability to designate in writing that a law of a different country should apply to these matters.
35. Importantly, perhaps, whilst Part 3 would appear on its face largely to be concerned with the position whereby questions relating to 'foreign' powers fall for determination by the Court of

⁵² *Re MN* paragraph 21.

⁵³ 1996 Convention, Art 7(1)(b).

⁵⁴ By analogy with the position pertaining in relation to children: see *Re R (Wardship: Child Abduction)* [1992] 2 FLR 481 at 487. None of the judges in the cases cited above expressly considered the evidential burden, but it would appear that all proceeded on the basis that the burden would lie with the person contending that there had been a change.

⁵⁵ Assuming, which I do for the balance of this section, that the wording of the power is capable of giving authority to the attorney to take decisions regarding the donor's assets or person outside the country in which the instrument was drafted. This is a question which can only be answered by reference to the wording of any individual instrument.

⁵⁶ Which stems from Article 15 of the Hague Convention.

Protection, on a proper analysis Part 3 is not so limited (and nor are the Articles of the Convention upon which Part 3 draws). Part 3 therefore sets out a position which should apply in respect of 'foreign' powers regardless of whether or not they come before the Court of Protection.

36. Part 3 envisages two factual scenarios:

36.1. the donor was habitually resident in England and Wales at the time of making the power. In that case (and in line with the principle set out immediately above), the donor can choose to designate the law of a connected country to apply to the existence, extent, modification or extinction of the power of representation (paragraph 13(1)). For these purposes, a connected country is defined as a country: (1) of which the donor is a national; (2) in which he had previously been resident; or (3) where he has property (paragraph 13(3)). In the last of these cases, the donor can only specify that the law of that connected country apply in relation to that property (paragraph 13(4));

36.2. the donor was habitually resident other than in England and Wales at the time of making the power, but England and Wales is a connected country. In that case, the donor can specify that the law of England and Wales is to apply in mirror fashion to that set out above (paragraph 13(2)(b)).⁵⁷ If the donor does not so specify, then the applicable law will be that of the foreign country (paragraph 13(2)(a)).

37. Paragraph 13 does not address two other scenarios:

37.1. the donor was habitually resident other than in England and Wales, has no connection with England and Wales and made no specification at all as to the law he wished to apply;

37.2. the donor was habitually resident other than in England and Wales and specified that the applicable law should be that of a third country.

38. Logic, and fidelity to the principles of the Convention, would suggest that in the first case the applicable law will be that of the habitual residence of the donor at the time of the grant of the power and that in the second, the applicable law should be that of the third country if it is a connected country (to use the language of paragraph 13). However, until and unless ratification of the Convention is extended to England and Wales (or a judicial pronouncement in a suitable case) this is a question which does not afford of a definitive answer.

39. In all cases, however, the following rules apply:

39.1. the law applicable to the *exercise* of the power will be England and Wales (paragraph 13(5));

39.2. the Court can disapply or modify the lasting power if it is not exercised in a manner sufficient to guarantee the protection of the person or property of the donor (paragraph 14(1));

39.3. the Court is required in exercise of its jurisdiction in this regard to take into account mandatory provisions of the law of England and Wales (paragraph 17); and

39.4. the Court cannot be required to apply the law of a country other than England and Wales if its application would be manifestly contrary to England and Wales (paragraph 18).

⁵⁷ The OPG guidance suggests that this should be in the conditions box on page 6 of the Property and Affairs LPA form, and page 7 of the Health and Welfare LPA form.

40. It is perhaps worth noting that Schedule 3 envisages that regulations may be made (under paragraph 15) to provide, in essence, that a ‘foreign’ power must meet the formalities required under Schedule 1 in respect of a domestic power. Until such point as regulations are made, the precise form of the ‘foreign’ power is not of determinative effect as regards questions of whether and how it is to be exercised in England and Wales.
41. Paragraph 16 provides a measure of protection for transactions involving donees of foreign powers that would otherwise be void because the donee did not have authorisation under the law of England and Wales, where the third party to the transaction neither knew nor ought to have known of the position. By virtue of paragraph 16, the validity of a transaction entered into between the donee of a ‘foreign’ power purporting to act under that power and a third party, where both are in England and Wales, cannot be questioned in proceedings, nor can the third party be held liable merely because the law applicable to the ‘foreign’ power was, in fact, not the law of England and Wales, and the representative was not authorised under that law to enter into the transaction, so long as the third party neither knew nor ought to have known that the applicable law was the law of the other country (paragraph 16(2)(a), (3) and (5)).
42. It should be noted that the OPG in England and Wales does not maintain a register of ‘foreign’ powers alongside its registers of LPAs and EPAs (and CoP orders appointing Deputies).⁵⁸ An attorney under a ‘foreign’ power can should – in theory – be able to point to the provisions of Schedule 3 when dealing with an institution, but what happens where that institution declines to accept the authority of the attorney?
- 42.1. as noted above, a foreign power of attorney is not a protective measure and cannot therefore be made the subject of an application for recognition and enforcement before the Court of Protection;
- 42.2. however, it would seem to me entirely arguable that if an attorney encountered resistance on the part of a particular institution to act upon the instrument in respect of the adult’s property, it would be possible for the attorney to seek a specific declaration from the Court of Protection under s.15 MCA 2005 or – in an appropriate case – a decision under s.16 MCA 2005⁵⁹ so as to obtain relief;
- 42.3. if the attorney encountered resistance in respect of the discharge of their powers in respect of the adult’s health and welfare, then the position is perhaps more complicated, albeit that it would seem to me that in many cases it would be possible to contend that the Court of Protection would have jurisdiction on the basis of the presence of the adult, because the matter would be urgent for purposes of paragraph 7(1)(c) of Schedule 3.⁶⁰
- 42.4. in either case, applying the principles set out in *Re MN*, it might also be the case that the adult has become habitually resident in England subsequent to the making of the power of attorney, in which case the Court of Protection would have jurisdiction by virtue of paragraph 7(1)(a);

⁵⁸ There is nothing in the scheme of Schedule 3 (or in the provisions of the Convention) which would prevent the English OPG from registering a foreign power; it would appear unlikely at present, however, that the English OPG would have the vires to do so: s.58(1) MCA 2005. The Lord Chancellor could by regulations under s.58(3)(b) MCA 2005 confer other functions upon the OPG (and/or an Order in Council could be made under paragraph 31 of Schedule 3 a function for purposes of enabling the Convention to be given effect), and by either legislative route imbue the English OPG with authority to register ‘foreign’ powers.

⁵⁹ The Court of Protection would have jurisdiction over P’s property by virtue of paragraph 7(2) of Schedule 3.

⁶⁰ If the adult is not present in England and Wales, it is difficult to see in what circumstances the attorney would be encountering difficulties.

- 42.5. moreover, in either case, it seems to me that it would be necessary, inter alia, for the ‘offending’ institution to be made a party to the application; it also seems to me that there would be a proper case to advance that the institution should be required to pay the costs incurred by the attorney in making the application (at least if the institution had had the provisions of Schedule 3 properly brought to their attention and was still declining to give effect to the instrument).
43. A truly ‘belt and braces’ approach for a capacitous foreign client who is determined to ensure as little future debate as possible about the authority with which they have imbued their attorney(s) is to make a specifically English LPA. It should be noted, though, that they can only specify that the law of England and Wales is to apply to all aspects of the LPA (other than its exercise) if they have a connection with England and Wales as defined in Schedule 3. Conversely, an Anglo-Welsh client with substantial assets and/or who spends substantial amounts of time abroad who wishes to ensure the equivalent lack of dispute in respect of the powers with which they have imbued their attorney(s) would be well-advised to draw up appropriate instruments in respect of the individual country or countries⁶¹ where they are likely to be most necessary. In such cases, there can be no substitute for obtaining advice from a suitably qualified lawyer in the relevant jurisdiction, although a very quick, and useful, ‘heads-up’ as to the type of matters that are likely to arise in the major jurisdictions can be found in Part X of the Jordans *Court of Protection Practice* work (and a substantially more detailed analysis will in due course appear in the book referred to in footnote 1 above).
44. Two final points arise in relation to Scotland:⁶²
- 44.1. In an *Application by C re R*, Airdrie Sh. Ct., April 02, 2013 (unreported), the relevant provisions of the Adults with Incapacity (Scotland) Act 2000 were interpreted so as give automatic effect to a properly registered English enduring power of attorney, which was, further, held to have like effect—in Scotland—to a continuing power of attorney granted under the provisions of Scottish law.⁶³ The sheriff, further, directed⁶⁴ the attorney that she was entitled to rely upon the general powers contained in the enduring power, including, specifically the power to claim and administer social care payments due to the adult under the relevant Scottish legislation;
- 44.2. It is possible to register a Scottish power of attorney in the Books of Council and Session held by the Registers of Scotland. By virtue of s.4 Evidence and Powers of Attorney Act 1940, an extract from the Books of Council and Session “shall, in any part of the United Kingdom, without further proof be sufficient evidence of the contents of the instrument and of the fact that it has been so deposited or registered.” Whilst – for the reasons set out above – a valid Scottish power should be effective in England by operation of law, this step provides a potential further ‘belt and braces’ step that can be taken to secure such effectiveness.

Particular topics of importance (3) recognition and enforcement

45. In *Re MN*, Hedley J clarified that a decision as to whether to recognise (and, by extension, to enforce) a protective measure is not one taken for or on behalf of the person in question for purposes of s.1(5) of the MCA 2005; in other words, it is not necessary for the Court to go through a full-blown best interests analysis before granting an application for recognition and

⁶¹ And sometimes even state within a federal country, to take the examples of America, Australia and Spain as countries in which issues such as those discussed within this paper are likely to arise.

⁶² See further, in this regard, the note on Scots incapacity law by Adrian Ward circulated with the February issue of the 39 Essex Street Mental Capacity Law Newsletter, available at www.39essex.com/newsletters.

⁶³ I.e. s15(1) Adults with Incapacity (Scotland) Act.

⁶⁴ Under the provisions of s3(3) Adults with Incapacity (Scotland) Act 2000.

enforcement.⁶⁵ However, and importantly, it is still necessary (by virtue of paragraph 12, which makes it clear that implementation is governed by the law of the implementing country) to conduct an analysis of whether the *measures* taken in England and Wales to enforce the protective measure are in the person's best interests. To take the concrete example of MN, the parties ultimately agreed terms in California (where she was agreed to remain habitually resident), and a consent order was entered into there that was recognised and declared capable of enforcement as a protective measure under Schedule 3. However, in order so to do, Hedley J was still required to satisfy himself (by a report from an appropriately qualified expert) that the mechanics of the return by air ambulance were not contrary to her best interests. I think it is not beyond the bounds of possibility that a case will arise where, although, in principle, a foreign protective measure falls to be enforced, it will never actually take effect, because of impact on the adult of its implementation.

46. The wording of Schedule 3, and in particular the unilateral obligation that we have taken upon ourselves to recognise foreign protective measures wherever they have been taken means that our Courts may well be asked to recognise and enforce protective measures taken in circumstances which may cause a degree of unease, because they will have been taken in countries with legal systems very different to our own.
47. However, this is perhaps necessary as a *quid pro quo*, so as to secure the cooperation of courts in foreign jurisdictions to bring about the return of incapacitated adults abstracted from England and Wales. It is perhaps worth considering the circumstances that prevail in such a case. In an unreported case in which I was involved in 2009 on behalf of P's property and affairs deputy, Black J (as she then was) proceeded on the basis that, given the circumstances under which P was removed from the country by her son, P's habitual residence could not have changed. She therefore considered that, as P continued to be habitually resident in England and Wales, the Court of Protection retained jurisdiction (under paragraph 7 of Schedule 3) over her person, so as to secure her welfare. Declarations and orders were therefore made in an attempt to compel her return. An injunction was also made freezing the assets worldwide of her son, in an attempt to compel him to return her together with the proceeds of the sale of her house, which had been transferred to him in highly questionable circumstances. While this decision was reached on an *ex parte* basis (albeit with the Official Solicitor present), the approach to habitual residence is entirely consistent with that subsequently taken, after full argument, by Hedley J in *Re MN*. The approach taken by the Court to its own powers is also consistent with the approach taken, again after full argument, by Lord Justice Munby in *Re HM (Vulnerable Adult: Abduction)* [2010] 2 FLR 1057, in which he confirmed that the High Court (under the inherent jurisdiction) had the same powers in respect of a missing adult without capacity as it does in relation to a missing child.⁶⁶

⁶⁵ This also means that a person can be deprived of their liberty by virtue of a 'foreign' order even if they would be ineligible if they were habitually resident in England: see *Re M* [2011] EWHC 3590 (COP) [2012] COPLR 430, concerning the placement of a young Irish adult in a English psychiatric facility.

⁶⁶ By virtue of s.47(1) MCA 2005, which imbues the Court of Protection with the same powers in connection with its jurisdiction as the High Court, it seems to me that it would be entirely proper for the Court of Protection to deploy the entire panoply of remedies that were deployed in *Re HM*, which included: (1) injunctive orders directed to a respondent (PM) with custody of an incapacitated adult (HM), including a collection order; (2) orders inviting the assistance of both domestic and foreign public (including judicial) authorities; (3) orders seeking information from various individuals, friends or associates of a respondent (including summonses to Court to give evidence), from various banks, insurers and travel agents, from an airline, various telephone and email service providers and the DVLA, and from others thought to be holding monies for PM; (4) freezing orders, some directed to specific individuals in relation to specific assets held by them, the other a general freezing order in respect of all of a respondent's assets which has been renewed from time to time; (5) various orders permitting frozen funds to be used to fund living expenses and to fund not merely PM's legal costs in this country and in Israel but also the living costs of HM and her mother (KH) costs both here and there and the costs of HM's guardian in Israel, together with directing a third party to transfer monies from an account in his name to an account in the name of the Official Solicitor's solicitors, directing the relevant bank to honour those

The future – why ratify?

48. The European Parliament has strongly encouraged the ratification of the 2000 Convention by Member States of the European Union, one reason being that the recognition abroad of ‘protection regimes’ is essential to ensure the free movement of persons and that therefore “the legal protection regimes must . . . have continued legal effect, not least to ensure the continuity of decisions taken at a judicial or administrative level, or by the person him/herself. Such is the case with incapacity mandates or future protection mandates, which it must be possible to apply throughout the European Union.”⁶⁷
49. If and when the United Kingdom extends the application of the Convention to England and Wales, two particularly important parts of Schedule 3 will take effect:
- 49.1. Part 5, providing a framework for consultation as regards the proposed cross-border placement of adults between Contracting States;
- 49.2. Paragraph 30, giving effect to Article 38 of the Convention, which provides for certificates to be issued by appropriate authorities in Contracting States where a measure of protection has been taken or a power of representation confirmed. By virtue of paragraph 30, such a certificate will stand (unless the contrary is shown) as proof of the matters contained within it. In due course, such certificates will serve an extremely useful function in giving a measure of security to those holding powers of representation that their powers will be accepted in other Contracting States. The provisions of the Convention allow for more than one authority to be designated for purposes of issuing certificates in states (such as the United Kingdom) which have more than one system of law in its component parts; once paragraph 30 of Schedule 3 is in force, a certificate issued by the Scottish OPG *qua* Article 38 authority would therefore serve as proof within England and Wales of the matters contained therein, unless the contrary is shown.

ALEXANDER RUCK KEENE

39 Essex Street

February 2014

alex.ruckkeene@39essex.com

www.39essex.com

www.copcasesonline.com

instructions whatever contrary instructions they might have from PM, and subsequently directing the solicitors as to the utilisation of funds in that account and (6) various orders designed to prevent PM knowing what was going on, though at the same time permitting appropriate disclosure to others.

⁶⁷ Report with Recommendations to the Commission on cross-border implications of the legal protection of adults, 24 November 2008 (2008/2123(INI) (European Parliament). The European Parliament recommended that the creation of a single form for ‘incapacity mandates’ as a harmonised Community vehicle for the circulation, recognition and enforcement of those mandates. ‘This would mean that individuals who had granted powers of representation to a third party through an agreement or unilateral deed could live or reside in a Member State other than their Member State of origin, without foregoing the benefits of that mandate.’