

confidence also embodies a duty to respect the Convention rights of an employee. This may be regarded as horizontal enforcement of the Convention by the backdoor, but it seems to me altogether legitimate and strongly arguable.

**CONCLUSION**

My conclusion is that the domestication of the ECHR will give workers an opportunity to win some new rights in areas in which Parliament has failed to legislate, such as the right to private life and freedom of expression, and that the exclusion of rights to collective bargaining and to strike is, at worst, neutral in effect, leaving employers and unions free to pursue their aims by social and political means. Statutory interpretation and the common law will benefit by being redrawn in categories which reflect fundamental social values. The judges will have an opportunity to import into the private employment relationship the public law aims of protecting the dignity and liberty of the individual against the arbitrary or unfair exercise of managerial prerogatives. Looked at this way, the Human Rights Bill could be not simply a fashion but a turning point.

Whatever one's views about this, one

point is beyond question. Kahn-Freund said 21 years ago, that:

*'to enact a Bill of Rights may involve a shifting of the function of law reform from Parliament, the Government and the Law Commission to the Bench and the Bar.'*  
 ([1970] CLJ 240, 270)

The judges will have to take into account decisions of the European Court and European Commission on Human Rights, but will not be bound by them. This means that judges will have the power to develop European standards to the realities of our own labour relations. Ironically, it is only by developing a unique UK case law that the judges can adapt the ECHR in a way which enhances rather than restricts the rights of workers and their unions in unequal employment relationships. Most of the cases dealing with collective issues have come from countries where extensive rights to bargain and to strike already existed. The applicants were complaining of specific restrictions. The UK, in which convention rights now have to be applied, is a country in which there is no statutory system of workers' participation, most employees are not protected by collective bargaining, fewer than 30% are unionised, and at least one-third of the workforce is outside the scope of

employment protection legislation. The courts will need a deep understanding of this social reality and of comparative labour law if they are to 'bring rights home'. This involves a recognition that civil rights, such as freedom of association, are, in the words of Dickson CJ's dissent in *Re Public Service Employee Relations Act* (1987) 38 DLR (4th) 161, SCC, at p. 197:

*'most essential in those circumstances when the individual is liable to be prejudiced by the action of some larger and more powerful entity, like the government or an employer.'*

The task of the courts and tribunals will be to harmonise collective interests and individual rights, so as to support the rights of workers rather than to undermine them. 

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# Private International Law

## Incapacity and contracts - the European dimension

by Dr Volker Lipp



English law as to mental incapacity and the protection of incapable adults in respect of their person and their property has been under review by the Law Commission for England and Wales since 1989, as has the Scottish law by the Scottish Law Commission since 1990,

with broad public participation. However, the international and, in particular, the European dimension of these issues is largely unknown.

**DOMESTIC LAWS**

Today there is no common European law of persons, nor are there common rules in the conflict of laws regarding the law of persons. The rules governing capacity, mental disorder and the protection and legal representation of incapable adults and of minors are quite different in Europe, both in the respective domestic laws and in private international law. Law reforms in various European countries have widened the differences in the respective domestic

laws. So may the application of the proper law doctrine to the question of capacity to contract in English law within the field of private international law.

**LAW REFORM IN EUROPE**

Reform of laws relating to the protection of incapable adults has been seen in:

- France (1968)
- Austria (1983)
- UK (1983)
- Belgium (1991)
- Germany (1992)

The English and Scottish Law Commissions put forward further proposals for reform in 1995

In conflict of laws all over Europe, the personal law of an individual – either his national law or the law of his domicile – is unanimously applied with respect to his capacity to contract; but the position is not so clear in English conflict of laws. If the English courts are to apply the proper law of the contract to the question of capacity according to the prevalent opinion among contemporary legal writers, instead of the law of domicile, a real difference will be created within European conflict of laws. Moreover, English courts have long been reluctant to accept the powers of a foreign legal representative and to recognise the jurisdiction of a foreign court and its consequent orders, for English law has traditionally been taking care of the affairs of a minor or an incapable person by other means than the appointment of a legal representative, except for his representation in legal proceedings via his next friend or guardian ad litem.

### PROBLEMS IN THE EU

On the other hand, great efforts are made to achieve a European law of contract (e.g. by the Commission on European Contract Law, a non-official multi-national group of distinguished experts, or other working groups at various European research institutes and universities); some scholars even propose the creation of a European Civil Code, thus taking sides with the European Parliament. Although it seems doubtful whether such a codification could, or above all, should be realised, European private law is constantly being created by the European Union within specified fields of the law, such as consumer law, where a uniform European law for consumer contracts is already in the pipeline. Within a growing body of uniform European private law, the differences between the national legal orders relating to capacity, legal representation and protection of minors and incapable adults, both in the respective domestic laws as well as in private international law, will steadily gain importance both in jurisprudence and in practice. They may even be regarded as obstacles to the free movement of persons or goods in the European Union.

Different rules in the conflict of laws have another effect too; it is beyond the autonomy of the parties to choose the law governing their capacity to contract, and each court will apply its own national rules of conflict of laws. The pure chance of where (i.e. in which member state of the European Union) a case is brought to court, will decide the applicable law. It is therefore impossible for the parties to know and to adjust to this law when entering into the contract.

### SOLUTIONS UNDER WAY?

Whereas certain European and international institutions have already begun to work on it, the European Union and its member states have yet to realise this challenge. In 1996 the Council of Europe set up a group of specialists on incapable and other vulnerable adults, which has already prepared a draft recommendation on principles concerning the legal protection of incapable adults. Along with earlier work of the Council of Europe concerning the legal protection of minors, which started in the 1970s, the object of the Council is to harmonise the domestic laws of the European countries on these issues. The European Convention on Human Rights, and the case law of the European Court and Commission of Human Rights in particular, have also brought about major changes to the legal position of minors and incapable adults in domestic laws, as well as laying the foundation for a European standard of basic rights for these persons.

#### PRIVATE LAW CREATED

European private law is constantly being created by the European Union within specified fields of law, such as consumer law, where a uniform European law for consumer contracts is already in the pipeline.

In the field of conflict of laws, the Hague Conference on Private International Law, at its 18th session (1996), adopted the revised Convention on the Protection of Children, and established a special commission on the protection of adults to prepare a draft convention, both directed to harmonise

the different rules in private international law. While these conventions do not include rules on a person's capacity to contract, but are concerned with protective measures and their effects, they may indirectly lead to a partial harmonisation of the respective rules, in so far as a protective measure has effect on a person's capacity.

### A PERSPECTIVE FOR THE FUTURE

Even if the recommendations of the Council of Europe that have been, or will be, proposed are implemented, there will still exist considerable differences with respect to the domestic law on minors and incapable adults between the various European countries, including their capacity to contract. As long as these differences remain, there is a need for common rules in private international law. Within the European Union and in the light of the principle of subsidiarity, this may even be the preferable way to enhance legal certainty and to remove obstacles to the free movement of persons within the European Union.

However, the Rome Convention on the Choice of Law for Contracts (1980) which, for exactly these reasons, was worked out within the framework of the then European Economic Community, does not address the issue of capacity to contract, with the exception of its art. 11, whose sense and scope of application are not quite clear. Being the core of a common European private international law, the Rome Convention is nevertheless the starting point for any legal discussion of these problems, which is now overdue. 

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