

# The International Protection of Adults after Brexit

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## ABSTRACT

The International Protection of Adults is the subject of the 2000 Hague Adults Convention. This Convention is in force in a part of the European Union (EU) (13 of 27 countries) and in a part of the UK (only Scotland). The UN Convention on the Rights of Persons with Disabilities seeks to guarantee human rights. The EU is in the process of legislating on the cross-border protection of adults. The article discusses forms of protection and their cross-border effect. This includes the appointment by adults of representatives for when they might need them later, *ex lege* representatives and court-ordered measures. The legal patchwork is at the moment not optimal, but if all EU Member States and the entire UK adopt the Hague Adults Convention, the cross-border continuation of protection will be enhanced.

**KEYWORDS:** Private international law, Autonomy and self-determination, Capacity, Lasting powers of attorney, Hague Adults Convention, European Union

## I. INTRODUCTION

This article came about as part of the research project *Protection of international families with links to the European Union post-Brexit: Collaborative Scotland-EU partnership*, coordinated by Katarina Trimmings of the University of Aberdeen and funded by the Royal Society of Edinburgh. Its focus is on the protection of adults, as ensured in cross-border situations.

After setting out the legal landscape, the article discusses powers of representation, *ex lege* representation of adults, measures ordered by courts, and the certificate to facilitate the cross-border effects of measures of protection. The article's aim is to point out the effects of Brexit for the protection of adults. The situation, as will become clear, is in flux. There are pending proposals in the European Union (EU)<sup>1</sup> and the ratifications of the Hague Adults

<sup>1</sup> See the two Proposals of 31 May 2023 discussed in Section 1.c) below.

Convention<sup>2</sup> are on the increase. The situation differs from that of divorce, child protection, or maintenance, where EU legislation was in place already before Brexit day, and the UK has thus lost common legislation. In the topic at hand, the question is not what the UK has lost, but rather where it stands and what it will not gain, although it is argued that harmonization within the EU would eventually simplify the landscape for the UK, as well.

## II. CONTEXT—LEGAL LANDSCAPE

The two most important legal instruments on the international plane are the Hague Adults Convention and the United National Convention on the Rights of Persons with Disabilities (UNCRPD).<sup>3</sup> The EU has up until now not adopted legislation on this matter, which does not mean that they have been inactive. Their initiatives are also relevant when considering relations with the United Kingdom.

### 1. The Hague Adults Convention

The Hague Adults Convention aims at protecting

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)).

A person who has reached the age of 18 years is considered an adult (Article 1(2) of the Hague Adults Convention). The Convention is not limited to persons who are in some respect ‘incapable’ according to any legal system, but focuses on persons factually in need of protection, due to some impairment or insufficiency,<sup>4</sup> which can be of a physical or mental nature.<sup>5</sup>

Being an instrument of private international law, the focus of the Hague Convention is on cross-border situations. Its provisions apply, for instance, when the adult concerned moves to another State or has property in another State, or when measures taken in one State need to be given effect or amended in another State for whatever reason.

In the style of a classical instrument of private international law, the Convention contains rules on international jurisdiction, applicable law, recognition, enforcement, and cooperation between Contracting States. The Convention places much weight on the habitual residence of the adult involved. This constitutes the main rule for jurisdiction (Article 5) as well as the main rule for applicable law (Articles 13 and 15).<sup>6</sup> Exceptions exist, for instance, to make provision for the transfer of proceedings to a court in another Contracting State if that court would be better suited to hear the case (Article 8). The Convention was to a large extent inspired by the Hague Child Protection Convention.<sup>7</sup> This approach ensured a logical (and to some extent known) structure, but it also led to some criticism regarding the tension between autonomy and protection.<sup>8</sup> However, the Convention is flexible and can be interpreted in line with the UNCRPD.<sup>9</sup>

<sup>2</sup> Hague Convention of 13 January 2000 on the International Protection of Adults.

<sup>3</sup> Concluded on 12 December 2006.

<sup>4</sup> See the Explanatory Report by Paul Lagarde, revised edition 2017 (Lagarde Report) <<https://assets.hcch.net/docs/1509ab33-c2fe-4532-981c-7aa4dad9ba45.pdf>> (accessed 11 September 2024) para 9.

<sup>5</sup> Ibid. See also Joëlle Long, ‘Rethinking Vulnerable Adults’ Protection in the light of the 2000 Hague Convention’ (2013) 27 *International Journal of Law, Policy and The Family* 51, 61–62.

<sup>6</sup> Art 13 for law applicable to court-issued measures, referring to the law of the court taking the measures, which will according to the general rule be the court of the Adult’s habitual residence; art 15 for the law applicable to powers of representation, which is the law of the Adult’s habitual residence in the absence of choice.

<sup>7</sup> Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children. Lagarde Report (n 4), para 4.

<sup>8</sup> This tension will surface again in the discussion below.

<sup>9</sup> See Sonia E. Rolland and Alex R. Keene, ‘Interpreting the 2000 Hague Convention on the International Protection of Adults Consistently with the 2007 UN Convention on the Rights of Persons with Disabilities’ (Study commissioned by the

The Hague Adults Convention refers to ‘guardianship’ and ‘curatorship’ as possible measures of protection (Article 3c). Truly enough, the two terms have traditionally been used in domestic legal systems to designate forms of substitute decision making, whereas the UNCPRD requires States to transition towards supported decision-making (Article 12 of the UNCPRD). However, in the tradition of a private international law instrument, the Convention does not aim to create types of protective measures or to promote some of them over others. It does not explicitly deal with the support that adults may be given to exercise their own decision-making capacity. Yet, this matter has increasingly found its way into national legislation and there is no doubt that measures of support, too, fall within the scope of the Convention.<sup>10</sup> The Convention also provides for powers of representation granted by an adult in contemplation of incapacity (see Section 2). The Convention is sufficiently flexible to keep up with evolutions in the law and should be interpreted taking such into account.<sup>11</sup>

There is an old Hague Convention, dating from 1905, on the deprivation of civil rights in connection with incapacity.<sup>12</sup> Most countries that were bound by the 1905 Convention have since denounced it, but Italy, Poland, Portugal, and Romania have not.<sup>13</sup> There is no evidence its rules are being applied in practice.<sup>14</sup> In any event, its scope is very limited: It only applies to nationals of Contracting States with their habitual residence in a Contracting State.<sup>15</sup> Moreover, in relations between Contracting States that have also joined the Hague Adults Convention, the latter Convention replaces the older one (Article 48 of the Hague Adults Convention).

The Hague Adults Convention had a slow start. After its conclusion, other signatures and ratifications were slow to come. The Convention needed three ratifications to enter into force (under its Article 57(1)). This happened only on 1 January 2009 (ie, 3 months after the deposit of the third instrument of ratification).<sup>16</sup> The first four Contracting States were France, Germany, Switzerland, and the UK. However, the UK’s ratification binds only Scotland.<sup>17</sup> The law in England and Wales largely follows the Convention, despite the fact

UN Special Rapporteur on the Rights of Persons with Disabilities, 2021) <[https://www.ohchr.org/sites/default/files/Documents/Issues/Disability/Hague-CRPD\\_Study.docx](https://www.ohchr.org/sites/default/files/Documents/Issues/Disability/Hague-CRPD_Study.docx)> (accessed 11 September 2024) 9.

<sup>10</sup> See for instance the Assisted Decision-making (Capacity) Act 2015 of Ireland; see also Geoffrey Shannon and Shauna Colgan, ‘The Protection and Empowerment of Vulnerable Adults: Ireland’ in *FL-EUR Study* <[https://www.familyandlaw.eu/pagina/country\\_reports](https://www.familyandlaw.eu/pagina/country_reports)> (accessed 5 July 2024).

<sup>11</sup> See Rolland and Keene (n 9) 7; Pietro Franzina, ‘The Protection of Adults’ in Paul Beaumont and Jayne Holliday (eds), *A Guide to Global Private International Law* (Bloomsbury Publishing, 2022) 553, 61ff; Richard Frimston, ‘The 2000 Adult Protection Convention—Sleeping Beauty or Too Complex to Implement?’ in Thomas John, Rishi Gulati and Ben Köhler (eds), *The Elgar Companion to the Hague Conference on Private International Law* (Edward Elgar, 2020) 226, 228ff; Joint Submission to the European Commission by the UN Special Rapporteur on the rights of persons with disabilities (Gerard Quinn) and the Independent Expert on the enjoyment of all human rights by older persons (Claudia Mahler), ‘Towards Greater Coherence of International Law. Reflections on the adequacy of the European Commission’s proposal for a Regulation and Council Decision governing the Hague Convention on the Protection of Adults’ (August 2023) <<https://www.ohchr.org/sites/default/files/documents/issues/disability/olderpersons/Annex-Joint-Submission-Towards-Greater-Coherence-International-Law.pdf>> (accessed 5 July 2024).

<sup>12</sup> See for the full text (in French) <<https://www.hcch.net/en/instruments/the-old-conventions/1905-deprivation-of-civil-rights-convention#status>> (accessed 5 July 2024).

<sup>13</sup> See <<https://www.hcch.net/en/instruments/the-old-conventions/1905-deprivation-of-civil-rights-convention#status>> (accessed 5 July 2024).

<sup>14</sup> Lagarde Report (n 4), para 159; Pietro Franzina and Joëlle Long, ‘The Protection of Vulnerable Adults in EU Member States. The Added Value of EU Action in Light of The Hague Adults Convention’ in Christian Salm (ed), *Protection of Vulnerable Adults—European Added Value Assessment* (European Parliamentary Research Service 2016) 106–77, 127.

<sup>15</sup> Hague Deprivation of Civil Rights Convention, art 14.

<sup>16</sup> See the status table of signatures and ratifications <<https://www.hcch.net/en/instruments/conventions/status-table/?cid=71>> (accessed 10 September 2024).

<sup>17</sup> See the Declaration of the United Kingdom made under art 55 <<https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=46&disp=resdn>> (accessed 11 September 2024). For implementation in Scotland, see the Adults with Incapacity (Scotland) Act 2000, in particular sch 3.

that these jurisdictions are not bound by it.<sup>18</sup> Not being a formal Contracting State, however, prejudices England and Wales: measures taken here will benefit neither from the Convention's recognition and enforcement mechanisms nor from the provisions on cooperation between authorities (see Section 4).<sup>19</sup>

Estonia and Finland joined in 2001, the Czech Republic in 2012, Austria in 2014, and Monaco in 2016. Thereafter, it was only in 2018 that ratifications started picking up, still only in Europe. The current Contracting States are, in addition to those already mentioned, Belgium, Cyprus, Greece, Ireland, Latvia, Malta, and Portugal.<sup>20</sup> Moreover, Italy, Luxembourg, the Netherlands, Poland, and Romania have signed but not yet ratified the Convention. This solicits the question whether it is a coincidence that only European States have become party to the Convention, which will be discussed in Section C.

## 2. The UN Convention on the Rights of Persons with Disabilities

The UNCRPD is an international human rights law instrument. It is based on the universality of human rights and on the idea of universal personhood. It applies to persons with disabilities. These include

those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

Accordingly, there is a large overlap in the scope of this Convention and that of the Hague Adults Convention, but they have different focuses. The UNCRPD aims to guarantee certain rights. Many of these guarantees have to be provided by the State in which the adult has their habitual residence or is present, even in the absence of any cross-border element. For instance, ensuring the accessibility of public facilities and transport (Article 9 of the UNCRPD) is a task of each State, irrespective of whether the persons with disabilities live in their State or are merely present temporarily.

The UNCRPD places much emphasis on autonomy, both physical and with respect to decision making. 'Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons' is the first principle that the UNCRPD mentions, in its Article 3(a). The UN Committee on the Rights of Persons with Disabilities monitors the application of the UNCRPD through State reports, responses on issues, and dialogues with States.<sup>21</sup> As the EU as well as all its Member States and the UK are parties to the Convention,<sup>22</sup> they are also bound by this obligation.<sup>23</sup> An Optional Protocol to the UNCRPD recognizes the competence of the UN Committee to receive and consider communications from or on behalf of individuals or groups of individuals subject to its jurisdiction who claim to

<sup>18</sup> Sch 3 on International Protection of Adults of the Mental Capacity Act 2005. See also Claire van Overdijk, "England and Wales" in Richard Frimston and others (eds), *The International Protection of Adults* (OUP 2015) 179, paras 11.99–11.111.

<sup>19</sup> The Netherlands is in a similar position: it adapted its legislation to the Convention and courts apply the Convention, but it cannot benefit from being considered a Contracting State by other Contracting States. See Richard Frimston, Chanien Engelbertink and Anneke Vrengoer, "The Netherlands" in Frimston and others (n 18), 43.28.

<sup>20</sup> See the status table (n 16).

<sup>21</sup> Art 35 of the UNCRPD obliges States Party to submit reports 2 years after ratification and thereafter at least every 4 years and whenever the Committee requests such report. Art 36 regulates the monitoring and publication of the reports.

<sup>22</sup> See the website of the UN Treaty Office for a full list of the more than 190 States Party <<https://indicators.ohchr.org>> (accessed 11 September 2024).

<sup>23</sup> See also the bi-annual reports by the Committee on the Rights of Persons with Disabilities, where they discuss among other things the situations in specific countries <[https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=27](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=27)> (accessed 11 September 2024). See for instance the EU's implementation report of 2016 <[https://www.europarl.europa.eu/RegData/etudes/IDAN/2016/536347/EPRS\\_IDA\(2016\)536347\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2016/536347/EPRS_IDA(2016)536347_EN.pdf)> (accessed 7 July 2024).

be victims of a violation by that State Party of the provisions of the Convention. The UK is a party to the Protocol, and so are several EU Member States. The EU, as such, is not a party.

In the same line of respecting personal autonomy, the European Court of Human Rights found that a State violates Article 8 of the European Convention on Human Rights if it deprives, even partially, a person with a disability of their legal capacity without carrying out a careful consideration of less restrictive alternatives that would serve the purpose.<sup>24</sup>

The UNCPRD's obligation upon States Party to adopt legislation that respects the en-listed rights has triggered legislative shifts in several countries.<sup>25</sup>

### 3. The EU's initiatives

It is not unusual for a Hague Convention to start off with mainly European States, although the recent conventions in the sphere of the recognition and enforcement of judgments have known a different pattern.<sup>26</sup> So, perhaps the efforts of the European Parliament have had an influence. The European Parliament has adopted two resolutions to push the European Commission to take legislative action in the field of the protection of adults: one in 2008<sup>27</sup> and another in 2017.<sup>28</sup> The European Parliament requested the Commission to monitor experience with the application of the Hague Adults Convention and submit a legislative proposal for closer cooperation between EU Member States and for easier recognition and enforcement of measures across borders. The 2017 Resolution asked the Commission to act by March 2018. The Commission's initial reaction was to indeed monitor the ratification and application of the Hague Convention. It only came with legislative proposals in 2023, following a political document by the Council of the EU, adopted in 2021, which called on Member States to ratify the Hague Adults Convention, if they had not done so already.<sup>29</sup> One of the proposals envisages a Council Decision authorizing Member States that have not already done so to become party to the Hague Adults Convention 'in the interest of the Union'.<sup>30</sup> The other proposal is for a Regulation that would supplement (and in some respects depart from) the Convention.<sup>31</sup> Neither the Decision nor the Regulation would be binding on Denmark. Ireland would likewise not be bound, but may choose to opt in.

<sup>24</sup> ECtHR App no 13006/13, *Ivinović v Croatia*, 18 September 2014, esp. s 44. See also Kees Blankman, 'Meerderjarigenbescherming en (on)bekwaamheid' (2019) *Nederlands Juristenblad* 2019/3, 193–97.

<sup>25</sup> See eg, Katja Karjalainen, 'Representation of Vulnerable Adults in Finland in the Light of the CRPD' *Family & Law* 2024 <<https://www.familyandlaw.eu/tijdschrift/fenr/2024/02/FENR-D-23-00003>> (accessed 5 July 2024); Salla Silvola and Anna Mäki-Petäjä-Leinonen, 'The Protection and Empowerment of Vulnerable Adults: Finland' in *FL-EUR Study* <[https://www.ohchr.org/sites/default/files/Documents/Issues/Disability/HagueCRPD\\_Study.docx](https://www.ohchr.org/sites/default/files/Documents/Issues/Disability/HagueCRPD_Study.docx)> (accessed 11 September 2024) 6; Jordi Ribot Igualade, 'The Reforms of Spanish Law on Legal Capacity and Supported Decision-making for Persons with Disabilities' (2023) *Family&Law*, 1 <10.5553/FenR/000060> Silvola and Mäki-Petäjä-Leinonen *Ibid* 7; Barbara Novak, 'The Protection and Empowerment of Vulnerable Adults: Slovenia' in *FL-EUR Study*, 3. See also van Overdijk (n 18) para 11.37 on the debate that the UNCPRD prompted in England and Wales.

<sup>26</sup> Mexico was the first State to accede to the Hague Convention of 30 June 2005 on Choice of Court Agreements. Although younger than the Hague Adults Convention, the Choice of Court Convention is currently in force not only in the EU, all its Member States and many of its neighbouring States—Albania, Moldova, Montenegro, and Ukraine—but also in Singapore and Uruguay. China, Israel, and the USA have also signed it. Similarly, the Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters have been ratified not only by the EU, its Member States, and other European countries but also by Uruguay. Costa Rica, Israel, and the USA have signed it but have not yet ratified it.

<sup>27</sup> Resolution of the European Parliament of 18 December 2008 with recommendations to the Commission on cross-border implications of the legal protection of adults (2008/2123(INI)), OJ CE, 45 (23 February 2010) 71.

<sup>28</sup> Resolution of the European Parliament of 1 June 2017 with recommendations to the Commission on the protection of vulnerable adults (2015/2085(INL)), OJ C 307 (30 August 2018) 154.

<sup>29</sup> Council Conclusions on the protection of vulnerable adults across the EU, OJ C 3301 (17 August 2021) 1.

<sup>30</sup> Proposal of 31 May 2023 for a Council decision authorising Member States to become or remain parties, in the interest of the EU, to the Convention of 13 January 2000 on the International Protection of Adults, COM/2023/281.

<sup>31</sup> Proposal of 31 May 2023 for a Regulation on jurisdiction, applicable law, recognition and enforcement of measures and cooperation in matters relating to the protection of adults, COM/2023/280.

From an EU-institutional point of view, there are several interesting points to note about these legislative initiatives. The first is that the Commission acknowledged that the protection of adults is not a matter of family law, but one falling in the category of other civil matters.<sup>32</sup> This means that the Commission used the general legal basis for judicial cooperation in civil matters. Measures under this legal basis may be taken through the ordinary legislative procedure under Article 81(2) of the Treaty on the Functioning of the European Union (TFEU). If this were a family law matter, a special legislative procedure would have applied according to Article 81(3) of the TFEU. This means that the Council would have had to act unanimously, with the European Parliament being left with no more than a consultative role. This would have made EU legislation in this area more challenging or lengthy.

The second institutional point is that due to the date of publication after Brexit (despite the calls by the European Parliament before Brexit), the UK could not take part in the negotiations. In procedures that were started up before Brexit, the UK could still be represented at the table until 31 January 2020, thus influencing the content of the legislation.<sup>33</sup>

Thirdly, the Commission proposed exercising the EU's internal and external competence simultaneously. Most often internal competence is exercised first, and this then triggers external competence.<sup>34</sup> Exclusive (or even shared) exclusive competence is the result that the EU Member States no longer have the capacity to conclude conventions with other States (whether bilateral or multilateral). Thus, the UK will only be able to contract with the entire EU. If it wants to contract with one or several Member States, these States can only act upon authorization by the EU. As noted above, Scotland is already bound by the Hague Adults Convention.<sup>35</sup> If the EU's proposals became law, Scotland would thus share a legal framework with all EU Member States. Individual EU Member States would no longer be able to enter into bilateral agreements with the UK to deal with cross-border measures for adults. Joining the Hague Adults Convention has thus become the only available option to facilitate the treatment of international cases in this field with the EU and its Member States.

This international and EU legal context merely provides a backbone of human rights and private international law. The largest part of adults' law is substantive in nature and is found on the domestic level. It is the interaction of all these different domestic laws that interests us from a private international law perspective.

### III. POWERS OF REPRESENTATION GRANTED BY THE ADULT IN ANTICIPATION OF INCAPACITY

The laws of several jurisdictions, including Scotland and some EU Member States, provide that adults with decision-making capacity may plan for future incapacity by granting a trusted person, either under an agreement or by a unilateral act, the power to make decisions concerning their property and/or personal welfare for the event that they are no longer able to protect their interests.<sup>36</sup> The availability of these powers is crucial to realizing the

<sup>32</sup> See the Explanatory memorandum preceding both proposals.

<sup>33</sup> As was the case for the negotiation of Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition, and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast) (Brussels IIb), OJ L 178 (2 July 2019) 1–115.

<sup>34</sup> CJEU Opinion 1/03 of 7 February 2006, ECLI:EU:C:2006:81; CJEU Opinion 1/13 of 14 October 2014, ECLI:EU:C:2014:2303.

<sup>35</sup> See n 17.

<sup>36</sup> See, generally, for a comparative overview, Frimston and others (n 18), under the relevant national reports. See also, as regards EU Member States, Lorenz Adriaenssens and others, *Study on the Cross-border Legal Protection of Vulnerable Adults in the EU* (European Commission 2021) 67ff.

fundamental rights of the adults concerned, as enshrined in the UNCRPD<sup>37</sup> and in the European Convention on Human Rights.<sup>38</sup>

The powers conferred by an adult in contemplation of incapacity differ from ordinary powers of attorney in two interrelated respects.

First, as regards their function, they are intended to protect the granter. Where powers have been granted by an adult to be exercised when they are no longer in a position to protect their interests, courts and other authorities are prevented, as a rule, from taking measures directed at the protection of the person or property of the adult, except where the powers in question prove insufficient or cannot be relied upon. In view of their purpose and implications, the establishment and implementation of protective powers warrant special safeguards, including supervision by courts or other dedicated bodies.

Secondly, concerning their operation, protective powers are obviously meant to survive incapacity. Depending on the applicable law and the preferences of the granter, they may either become effective when the granter loses their decision-making capacity or remain in force despite that occurrence. By contrast, ordinary powers of attorney normally cease to have effect, or are subject to annulment, as soon as the principal becomes incapacitated.<sup>39</sup>

Not all States make room in their legislation for powers of attorney granted in contemplation of incapacity and other voluntary anticipatory acts. In some countries, like Bulgaria, the law fails to address the matter entirely.<sup>40</sup> Other jurisdictions only permit some specified form of planning. Italian law, for example, merely regulates advance medical directives.<sup>41</sup> A similar situation exists in Croatia.<sup>42</sup>

For their part, the States whose legislations enable adults to plan for incapacity follow a variety of patterns. Rules differ greatly from one jurisdiction to another on several issues, including the formal requirements of the document in which the powers are expressed and the permitted scope of the powers, ie, the kind of transactions that the representative may enter into on behalf of the adult.

Where a cross-border element is present, the issue arises of the law governing the substance of the powers.<sup>43</sup> Additionally, since protective powers are normally subject to the supervision of State authorities, the issue arises of whether the courts or other competent authorities of a given State have jurisdiction to rule on such powers, notably to determine whether the interests of the adult require that they be withdrawn or modified. Where

<sup>37</sup> As stated by the UN Committee on the Rights of Persons with Disabilities, '[a]ll persons with disabilities have the right to engage in advance planning and should be given the opportunity to do so on an equal basis with others': *General Comment No 1 (2014) - Article 12: Equal recognition before the law*, CRPD/C/GC/1 <<https://documents.un.org>> (accessed 11 September 2024) para 17.

<sup>38</sup> The European Convention on Human Rights does not explicitly state that adults have a fundamental right to plan for their incapacity. The Committee of Ministers of the Council of Europe, however, has urged the Member States of the Council of Europe (all of which are, ipso facto, parties to the Convention) to 'promote self-determination for capable adults in the event of their future incapacity, by means of continuing powers of attorney and advance directives': Recommendation (2009) 11, on principles concerning continuing powers of attorney and advance directives for incapacity <<https://rm.coe.int/168070965f>> (accessed 11 September 2024), Principle 1. The Committee did so having regard to the European Convention on Human Rights and several international human rights law instruments.

<sup>39</sup> See generally, and for further references, Hein Kötz, *European Contract Law*, 2nd edn (OUP 2017) 305.

<sup>40</sup> See the country profile for Bulgaria in *The Vulnerable in Europe*, run by CNUE—Notaries of Europe <<https://www.the-vulnerable.eu>> (accessed 11 September 2024).

<sup>41</sup> Law No 219 of 22 December 2017.

<sup>42</sup> See more in the country profile for Croatia in *The Vulnerable in Europe* (n 40).

<sup>43</sup> Powers of representation granted in contemplation of incapacity are not 'measures' of protection. As such, their international circulation does not entail their 'recognition', let alone their 'enforcement'. Where an international element is present, and the issue arises of whether the powers granted by the adult may be relied upon in State A, one should resort to the conflict-of-laws rules in force in State A and determine on the basis the law governing the powers in question. If the law specified for this purpose is the law of State B, it is then for the rules of B to determine whether, and subject to which conditions, the said powers may be relied upon in A.

jurisdiction exists, the question also arises of the law according to which a decision to that effect may be taken.

The answer to the above questions varies from one State to the other, in particular depending on whether the State before whose authorities the issue is raised is a party to the Hague Adults Convention or not.

### 1. The situation in States parties to the Hague Adults Convention

In the States that are bound by the Hague Adults Convention, the law applicable to powers of representation is determined in accordance with Articles 15 and 16 of the Convention, as implemented at the domestic level (as regards Scotland, reference is made to Schedule 3 of the Adults with Incapacity Act).

#### *A. Scope of the conflict-of-laws rule in Article 15*

Article 15 applies to a broad range of voluntary anticipatory acts relating to the personal and/or property interests of an adult.<sup>44</sup>

Advance medical directives come within the purview of Article 15 provided they also entail the appointment of one or more persons to represent the adult. Doubts have been expressed as regards the applicability of Article 15 to acts by which the adult merely expresses their wishes or instructions, without entrusting anybody with the task of conveying or implementing such wishes or instructions. The latter acts, also known as isolated or self-standing advance directives, fall within the general scope of the Hague Adults Convention and are subject to the cooperation provisions therein.<sup>45</sup> However, according to a commonly held view, they do not come within the scope of Article 15. As a result, their effectiveness depends on the law specified under the domestic conflict-of-laws rules of the State where the issue is raised.

The appreciation of whether a particular voluntary anticipatory act constitutes a power of representation under Article 15 should be made on a case-by-case basis.<sup>46</sup>

#### *B. The law applicable to the existence and extent of powers according to Article 15(1) and (2)*

Pursuant to Article 15(1), protective powers are governed by the law of the State of the adult's habitual residence at the time of the agreement or act. The adult is permitted to subject the powers to the law of a different State, provided the chosen law is among those listed in Article 15(2), namely, the law of a State of which the adult is a national; the law of the State of a former habitual residence of the adult; the law of a State in which property of the adult is located, as far as that property is concerned. The choice must be made in writing.

The law specified under Article 15(1) and (2) governs the 'existence', 'extent', 'modification', and 'extinction' of the powers. It is for that law to establish, *inter alia*, the conditions subject to which the powers become effective; their permitted scope; the admissible number of grantees; and the personal qualifications, if any, they must comply with. The above law further decides whether the grantee must seek a judicial authorization as a prerequisite to entering into certain transactions on behalf of the adult (such as a gift), and determines the grounds on which the powers cease to exist.

<sup>44</sup> According to one reading, these include acts by which the adult concerned appoints one or more persons to assist them in their decision-making, no matter whether those acts also confer on those persons the power to represent them vis-à-vis third parties: Prel. Doc No 4 of February 2024 (third revised version)—Revised draft Practical Handbook on the Operation of the 2000 Protection of Adults Convention (hereinafter *Practical Handbook*) <<https://assets.hcch.net/docs/d98713c7-3aab-43a4-b246-be8ca120246d.pdf>> (accessed 11 September 2024) para 9.11.

<sup>45</sup> *Practical Handbook* *ibid* para 3.61.

<sup>46</sup> *Practical Handbook* *ibid* para 3.62.



The Convention fails to mention whether the formal validity of the act whereby the powers are granted should also be assessed against the law specified pursuant to Article 15(1) or (2). The question, it is argued, should be answered in the affirmative.<sup>47</sup> For these purposes, the concept of formal validity should be understood to extend to the production of medical certificates attesting of the decision-making capacity of the granter at the time of the act, as required by the law of some countries.<sup>48</sup>

The law determined pursuant to Article 15 of the Convention applies irrespective of whether it is the law of a Contracting State. This is due to the universal application of the conflict-of-law rules pursuant to Article 18 of the Convention.

Where the designated law is the law of a State in which two or more territorial systems of law coexist regarding protective powers or the protection of adults, the indications provided in Article 45 of the Convention apply. Specifically, any reference to habitual residence in that State must be construed as referring to habitual residence in a territorial unit, while any reference to the State in which the adult is a national must be construed as referring to the territorial unit designated by the law of that State or, in the absence of relevant rules, to the territorial unit with which the adult has the closest connection.

Nothing in the Convention prevents the application of the overriding mandatory provisions of the law of the State in which the adult is to be protected, pursuant to Article 20. These may include the rules that health professionals are instructed to apply under the law of the State in which they are established where the need arises for an urgent medical treatment and the circumstances are such that the patient's consent cannot be sought.

The Convention comes with a standard provision on *ordre public*. According to Article 21, the application of the law designated under Article 15 'can be refused only if this application would be manifestly contrary to public policy'. The provision calls for a narrow interpretation. It may not be invoked unless it is established that the application of the law specified under Article 15 would contravene the fundamental policies of the forum.

### C. The law applicable to the 'manner of exercise' of the powers under Article 15(3)

Article 15(3) of the Convention provides that the manner of exercise of protective powers of representation 'is governed by the law of the State in which they are exercised'.

The convention distinguishes between the 'existence' and 'extent' of the powers granted by an adult and their 'manner of exercise'. The 'existence' and 'extent' are governed by the law specified under Article 15(1) and (2), as discussed above. The 'manner of exercise' refers to 'points of detail, such as the verification of the existence and extent of the powers in accordance with domestic procedural law, the deposit of the act granting the powers, or the authorisation procedure (ie, registration requirements), where the law applicable to the powers of representation foresees such authorisation'.<sup>49</sup>

It may be difficult in some instances to assess whether a given requirement relates to the manner of exercise of the powers for the purposes of Article 15(3). Doubts may arise, in particular, with the requirement that the powers or any document relating thereto be registered or undergo similar procedures. Two scenarios should be distinguished in this regard depending on the intended purpose of the requirements concerned.

<sup>47</sup> Jan von Hein, 'Haager Erwachsenenschutzübereinkommen vom 13.1.2000 (ErwSÜ)' in Jan von Hein and Dieter Henrich (eds), *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen—Art 19.24 EGBG; ErwSÜ* (Sellier and de Gruyter 2019) 385, 473.

<sup>48</sup> Under s 15(3) of the Adults with Incapacity Act, for example, 'continuing powers of attorney' and 'welfare powers of attorney' must be made in writing and incorporate a certificate by an authorized professional, based on an interview made immediately prior to the act, that the granter understands the nature and extent of the powers, and that there are no reasons to believe that the granter is acting under undue influence or that any other factor vitiates the granting of the power.

<sup>49</sup> *Practical Handbook* (n 44) para 9.22.

First, the law of some States makes registration a condition for the establishment of the powers or their coming into effect. The law of Belgium, for example, fits into this pattern. It provides that protective powers of representation must be registered upon their establishment. If registration occurs after the grantor has lost decision-making capacity, the powers are invalid.<sup>50</sup> At stake here is the very existence of the powers, not their manner of exercise. This entails that registration, as prescribed by Belgian law, must be complied with only when it comes to powers governed by Belgian law pursuant to Article 15(1) or (2). Powers governed by a law that does not regard registration as compulsory cannot accordingly be subjected to registration in conformity with Belgian law, via Article 15(3), on the ground that they are to be exercised in Belgium. Similar remarks apply to registration as required under Scots law. The Adults with Incapacity Act stipulates that the appointed representative of the adult has no authority to act until the document whereby the powers were granted has been registered with the Office of the Public Guardian. Non-compliance with this requirement prevents the powers from coming into effect. Thus, the requirement is one concerning the substance of the powers, not their manner of exercise. The Code of Practice for Continuing and Welfare Attorneys prepared by the Scottish Government appears to support this reading.<sup>51</sup> Paragraph 7.3 of the Code states that attorneys appointed under the law of a country other than Scotland, including England and Wales, ‘will not be required to have [their] powers registered by the Public Guardian’.

The second scenario arises where registration or analogous requirements are contemplated for purposes of publicity, or to facilitate supervision by the authorities of the State where the powers are exercised (including for the purposes of Article 16 of the Convention, examined below). French law appears to follow this approach. The *code civil* provides that powers granted by an adult in anticipation of incapacity must be presented, by the grantee, to the clerk of the competent tribunal, together with a medical certificate attesting that the adult is not in a position to protect their interests.<sup>52</sup> The clerk stamps the documents received and returns them to the grantee. The powers may be relied upon by the grantee only after these formalities have been completed. The French *Cour de Cassation* characterized the latter requirement as one concerning the manner of exercise of the powers granted by an adult.<sup>53</sup> A different approach, the Court explained, must be followed concerning the requirement in Article 479 of the civil code. According to the latter provision, the document in which the powers are expressed must explicitly determine, among other things, the way in which the activity of the grantee is to be checked. In the absence of such a determination, the powers are null and void. The latter requirement is concerned with the validity, hence the existence, of the powers, and must accordingly be complied with only as regards powers governed by French law pursuant to Article 15(1) or (2) of the Convention. French authorities, the Court observed, cannot rely on Article 15(3) to prescribe compliance with the requirement in question on the ground that the powers are meant to be used in France.

<sup>50</sup> Art 490 of the (old) Belgian Civil Code (this code is called ‘the Old Civil Code’ because it is in the process of being gradually replaced, and the old version remains in force for those parts that have not yet been replaced). See also Frederik Swennen and Tim Wuyts, ‘The Protection and Empowerment of Vulnerable Adults: Belgium’ in *FL-EUR Study*, 39–43 <[https://www.familyandlaw.eu/pagina/country\\_reports](https://www.familyandlaw.eu/pagina/country_reports)> (accessed 5 July 2024).

<sup>51</sup> <<https://www.gov.scot/publications/code-practice-continuing-welfare-attorneys-second-edition-updated-february-2018/>> (accessed 11 September 2024)

<sup>52</sup> French civil code, art 481.

<sup>53</sup> Cassation, First Civil Chamber, ruling of 27 January 2021, case no 19-15.059 (2021) *Revue critique de droit international privé*, 693, with a comment by Mariel Revillard.

*D. Withdrawal or modification of powers by a competent authority under Article 16*

According to Article 16, a court with jurisdiction under the Convention may withdraw or modify the protective powers granted by the adult themselves ‘when they are not exercised in a manner sufficient to guarantee the protection of the person or property of the adult’. Such a situation may occur, for instance, where the grantee is prevented from acting on behalf of the grantor or where evidence exists that the attorney is contravening the instructions given or is not acting in the interest of the adult.

Jurisdiction may be based on any of the grounds in the Convention. Thus, for instance, powers granted under the law of Scotland by a national of Finland may be terminated or modified under measures taken by Finnish courts, provided the latter courts have jurisdiction over the adult in question based on the adult’s nationality in accordance either under Article 7 or under Article 8 of the Convention.<sup>54</sup> A measure to the same effect may be taken, say, by Czech courts based on Article 9 of the Convention insofar as the powers in question are relied upon for the purposes of managing property belonging to the adult situated in the Czech Republic.<sup>55</sup> The measures taken for this purpose enjoy recognition and enforcement in the other Contracting States in accordance with the Convention, provided they are meant to circulate outside the State of origin.<sup>56</sup>

In assessing whether the powers granted by the adult ought to be terminated or modified, courts will normally apply, as stipulated in Article 13(1), the *lex fori*. Article 16 provides, however, that ‘the law referred to in Article 15 should be taken into consideration to the extent possible’. The solution adopted seeks to reconcile two concerns. The first is the respect for the wishes of the adult, expressed when they were still able to protect their interests. The second is the concern for the efficient discharge of the supervisory functions of the authorities with jurisdiction over the adult.

Article 16 refers, generally, to the withdrawal and modification of the powers granted by the adult. The term ‘modification’, it is contended, should be understood to encompass any measure aimed to prevent the risk of infringement of the adult’s rights or to address the consequences of such an infringement if it has already occurred. In Scotland, for example, this would include the measures contemplated in section 20 of the Adults with Incapacity Act. The latter provision stipulates that the competent sheriff, if it considers that it is necessary to safeguard or promote the interests of the adult, may order, *inter alia*, that a power of attorney be subject to the supervision of the Public Guardian to such extent as may be specified in the order, that an attorney appointed to deal with the property of the adult submit accounts in respect of any period specified in the order for audit to the Public Guardian, or that a welfare attorney be subject to the supervision of the local authority to such extent as may be specified in the order. In Germany, courts may rely on Article 16 of the Convention

<sup>54</sup> According to art 7(1), the authorities of a Contracting State of which the adult is a national may take measures for the protection of the adult ‘if they consider that they are in a better position to assess the interests of the adult, and after advising the authorities having jurisdiction under Article 5 or Article 6, paragraph 2’. As clarified in art 7(2), jurisdiction under (1) may not be exercised ‘if the authorities having jurisdiction under Article 5, Article 6, paragraph 2, or Article 8 have informed the authorities of the State of which the adult is a national that they have taken the measures required by the situation or have decided that no measures should be taken or that proceedings are pending before them’. Art 7(3) clarifies that the measures taken in the State of the adult’s nationality ‘shall lapse as soon as the authorities having jurisdiction under arts 5 and 6, para 2, or art 8 have taken measures required by the situation or have decided that no measures are to be taken’. Art 8, for its part, provides that the authorities of a Contracting State having jurisdiction under arts 5 or 6, if they consider that such is in the interests of the adult, may request the authorities of another Contracting State to take measures for the protection of the person or property of the adult, provided the latter State is among those listed for this purpose, including the State of which the adult is a national.

<sup>55</sup> Art 9 provides that the authorities of a State where property of the adult is located ‘have jurisdiction to take measures of protection concerning that property, to the extent that such measures are compatible with those taken by the authorities having jurisdiction under Articles 5 to 8’.

<sup>56</sup> This is not the case of measures based on art 9 of the Convention, since jurisdiction under the latter provision is limited to the State where the property is situated.

to appoint a *Kontrolbetreuer*, ie a supervisor to the attorney. The supervisor may request, *inter alia*, that the attorney produces evidence of any activity carried out on behalf of the adult.<sup>57</sup>

## 2. The situation in the EU Member States that are not (yet) bound by the Convention

The Member States of the EU that are not parties to the Hague Adults Convention rely on their own domestic rules of private international law to deal with powers of representation granted in anticipation of incapacity.

Some of them, like the Netherlands,<sup>58</sup> have unilaterally incorporated into their legislation the rules laid down in Articles 15 and 16 of the Convention, despite not being bound by the Convention on the international plane.<sup>59</sup> Consequently, the remarks made above regarding the latter provisions also apply to these States, with one qualification. The measures taken in a State that is not a party to the Convention in situations of the kind contemplated in Article 16 of the Convention, do not benefit from the rules of recognition laid down in the Convention. In practice, this means that Dutch measures whereby the powers granted by an adult are terminated or modified do not enjoy recognition and enforcement in Scotland under the Convention. They will not be given effect in Scotland unless they comply with the (stricter) conditions laid down in section 7 of section 3 of the Adults with Incapacity Act.<sup>60</sup>

Other Member States, instead, deal with powers of representation under rules of private international that differ from those of the Convention. Italy is one such State. Continuing powers of attorney, as noted above, are not known as such under Italian law. The Italian Statute on Private International Law<sup>61</sup> lacks a provision on the law applicable to such powers. It is generally accepted that one must resort to the general rule on the law applicable to the protection of adults, found in Article 43 of the Statute. According to this provision, the protection of adults is governed by the law of their nationality. The practical implications of this rule, as applied to powers of representation granted in anticipation of incapacity, may be awkward. Suppose, for instance, that a Bulgarian national whose habitual residence is in Scotland grants a continuing power of attorney in conformity with Scots law. If the powers are relied upon in Italy, and the issue arises of their applicable law, Italian authorities will assess the existence and extent of those powers based on Bulgarian law, not the law of Scotland. And since Bulgarian law does not enable adults to plan for incapacity, they will likely conclude that the attorney cannot act on behalf of the adult. The outcome, it is argued, is hardly consistent with the obligations arising from the UNCPRD (to which Italy is a party), as it prevents the implementation of the self-determination of the adult concerned, without any reasonable justification.

## 3. Expected changes in the EU Member States under the proposed Regulation

The picture described above will change once all Member States of the EU become party to the Hague Adults Convention. Articles 15 and 16 of the Convention will apply in all EU Member States. The measures taken by their respective authorities will be entitled to recognition and enforcement in all Contracting States in accordance with the rules in Chapter IV of the Convention.

The adoption and entry into force of the proposed EU Regulation will not, as such, result in additional changes as regards powers of representation, since the new piece of legislation will

<sup>57</sup> German civil code, s 1896.

<sup>58</sup> See n 19.

<sup>59</sup> Romania followed a similar path: art 2578(3) of the Romanian civil code corresponds, in substance, to art 15 of the Hague Adults Convention.

<sup>60</sup> In particular, measures emanating from a non-Contracting State qualify for recognition in Scotland if the jurisdiction of the authorities that took them is based on the adult's habitual residence that State.

<sup>61</sup> Law No 218 of 31 May 1995.

merely refer, as regards conflicts of laws, to the rules of the Convention. As stipulated in Article 8 of the proposal, '[t]he law applicable to the cross-border protection of adults shall be determined in accordance with Chapter III of the HCCH 2000 Protection of Adults Convention'.

Rather, the future Regulation, if enacted as proposed by the Commission, will result in the introduction of a rule on choice of court, which will apply in the Member States alongside the jurisdictional rules of the Hague Convention. According to Article 6(1) of the proposal:

the authorities of a Member State other than the Member State in which the adult is habitually resident shall have jurisdiction where all of the following conditions are met: (a) the adult chose the authorities of that Member State, when he or she was still in a position to protect his or her interest; (b) the exercise of jurisdiction is in the interest of the adult; (c) the authorities of a Member State having jurisdiction under Articles 5 to 8 of the HCCH 2000 Protection of Adults Convention have not exercised their jurisdiction.

The provision would be relevant to the management of powers of representation in that the courts chosen by the adult may rely on the new ground of jurisdiction, *inter alia*, for the purposes of withdrawing or modifying the powers granted by the adult, where they consider that the interests of the adult so require.

However, measures issued in a Member State by a court whose jurisdiction rests solely on a choice by the adult under Article 6 may be refused recognition and enforcement under the Convention. As stated in Article 22(2)(a) of the Convention, a measure originating in one Contracting State may be denied recognition in another, in particular, 'if the measure was taken by an authority whose jurisdiction was not based on, or was not in accordance with, one of the grounds provided for by the provisions of Chapter II' of the Convention. The latter provisions do envisage, in Article 8(2)(d), a possible choice of court by the adult, but they only do so for the purposes of enabling a transfer of the case from the courts that possess jurisdiction under other jurisdictional basis in the Convention to the courts chosen by the adult, provided all conditions for such a transfer, as provided in Article 8(1), are met. In practice, Scottish authorities would not be required by the Convention to recognize and enforce the measures taken by a court in an EU Member State, chosen by the adult, if the jurisdiction of the latter court rests exclusively on the Regulation, and is not in accordance with the provisions in Chapter II of the Convention.

#### IV. *EX LEGE* POWERS OF REPRESENTATION

In some States, the law provides that an adult who is unable to protect their interests may be represented by another person merely by operation of law, that is, regardless of the will of the adult represented.<sup>62</sup>

Austria is among these States. Articles 268–270 of the civil code provide for statutory representation by a next of kin subject to several conditions. *Ex lege* representation is excluded, among other situations, where the adult has appointed a representative in contemplation of incapacity or has declared that they do not wish to benefit from statutory representation, and either the appointment or the declaration has been duly registered. Statutory powers cease to exist, in principle, as soon as measures are adopted to ensure the protection of the person and property of the adult have been taken.

Those eligible to act as statutory representatives of the adult include the adult's spouse, their parents, siblings, children, and grandchildren. The material scope of the powers

<sup>62</sup> See, in general, Adriaenssens (n 36) 79ff.

conferred on *ex lege* representatives is limited in various respects. The representative may enter into transactions relating to the care and assistance of the adult, and represent the adult in court in proceedings concerning such transactions. Restrictions are in place as regards other transactions, e.g., those regarding company shares owned by the adult.

The Hague Adults Convention does not deal specifically with *ex lege* representation. Statutory representation is not a measure of protection under Article 3, nor a power of representation under Article 15. Statutory representation falls, however, within the general scope of the Convention, as defined by Article 1, when it is aimed at the protection of adults who, by reason of an impairment or insufficiency of their personal faculties, are not in a position to protect their interests. As such, it may be the subject of cooperation between the authorities of Contracting Parties in accordance with the provisions in Chapter V.

The fact is, however, that no specific conflict-of-laws rules devoted to *ex lege* representation are found in the Convention. In the absence of such rules, Contracting States are free to rely on their own domestic rules to identify the law applicable to such powers.

Few countries have introduced in their legislation provisions that deal specifically with the law applicable to statutory powers of representation. Germany and Austria are among these.<sup>63</sup> Scotland is, too. Pursuant to Section 5(4) of Schedule 3 of the Adults with Incapacity Act, '[a]ny question whether a person has authority by virtue of any enactment or rule of law to represent an adult shall be governed – (a) where such representation is for the purposes of the immediate personal welfare of the adult and the adult is in Scotland, by the law of Scotland; and (b) in any other case, by the law of the country in which the adult is habitually resident.'

It is difficult to determine how the issue of the law applicable to *ex lege* powers of representations would be decided in the States whose legislation does not include a specific rule to that effect. Case law on the topic is almost non-existent.

The picture is likely to remain unchanged in the EU Member States since the proposed Regulation does not address the issue. It will be for Member States, acting individually, to fill the gap left by the Convention, if they consider this worth the effort.

## V. MEASURES ISSUED BY A COURT

Measures issued by a court can be of a very diverse nature. As already alluded to in the explanation of the legal context above,<sup>64</sup> the legal systems have been evolving quite a lot over the past years. Court measures can thus be as diverse as appointing a guardian to appoint a support person to declare acts that the adult can or cannot perform independently. The current section delves into the jurisdiction of the courts, the applicable law, and the cross-border effects of court-issued measures.

### 1. Jurisdiction of the courts to issue measures of protection

The Hague Adults Convention premises jurisdiction first and foremost on the habitual residence of the adult concerned,<sup>65</sup> with some exceptions and specifications.<sup>66</sup> Giving jurisdiction to these courts ensure proximity between the court and the person that will be subject

<sup>63</sup> Jan von Hein, 'Erwachsenenschutz im deutsch-österreichischen Verhältnis' in T Garber (ed), *Festschrift Matthias Neumayr* (Manz Verlag 2023) 793.

<sup>64</sup> Section 1B above.

<sup>65</sup> Hague Adults Convention, art 5.

<sup>66</sup> Such as in the case of refugees of persons of whom the habitual residence cannot be established: Hague Adults Convention, art 6.

to the measures imposed. An old English case shows the value of this approach.<sup>67</sup> A person of Norwegian nationality, while living in England, suffered a stroke. A dispute subsequently arose between his partner in England on the one hand and his estranged wife and son in Norway, on the other hand, on whether the person had to be brought back to Norway. Norwegian authorities had appointed a guardian for him, but he was hospitalized in England, where his partner visited him daily. The Family Court had to investigate the person's domicile, which is of course difficult if the person is not able to contribute to the discussion himself. The Court then took jurisdiction on the basis of his presence. Under the Hague Convention (if both States concerned were to follow it) it would be clear that it is up to the State of the habitual residence (clearly England in the instance) to take measures and if necessary appoint a representative.

These rules bind Contracting States for all situations and are applicable irrespective of whether the adult might have the nationality of a State that has not acceded to or ratified the Convention. As explained above, the law of England and Wales broadly follow these rules, according to Schedule 3 of the Mental Capacity Act.

Article 8 of the Convention allows for the transfer of the proceedings to a court in another State if this would be in the adult's interests. One of the considerations for such transfer, pursuant to Article 8(2)(d) is that the adult had chosen in writing the authorities of a particular State, for instance in a document where they grant powers of representation.

The Convention however does not provide for a direct choice of forum. This was a choice by the drafters to take account of the vulnerability adults might have to external influences.<sup>68</sup> The EU's Proposed Regulation departs from the Hague Adults Convention on this matter: Article 6 of the Proposed Regulation allows a choice of court, provided that the choice was made at a time when the adult was still in a position to protect their own interests, that the exercise of jurisdiction is in the interest of the adult, and that the court that has jurisdiction under the Hague Adults Convention has not yet exercised such jurisdiction. Article 7 of the Proposed Regulation clarifies that the choice is not exclusive and thus does not oust the jurisdiction of the court of the State where the adult is habitually resident. If the adult is habitually resident in a Hague Convention State outside the EU (such as Scotland), their choice of court cannot confer jurisdiction under the Proposed Regulation. For that situation, the Hague Adults Convention will take precedence according to Article 59. This means that the only way in which the choice will be relevant, is in case of a transfer, as explained above.

As a non-Contracting State, for instance, Italy's courts are permitted to assert their jurisdiction in this area in a very broad range of cases, including, in particular, where the adult in question is a national of Italy, irrespective of where the adult lives (or lived) and of the location of their assets. These bases of jurisdiction would thus apply to Italian nationals living in Scotland, while Scottish courts would also have jurisdiction over them under the Hague Adults Convention. Transfer outside the context of the Hague Convention is unlikely. The Scottish courts might consider *forum non conveniens*, but Italian procedural law does not know a similar mechanism to deny hearing the case. In the worst case, this might lead to conflicting judgments, with an inevitable effect on recognition and enforcement.

## 2. Applicable law

Under the Hague Adults Convention, courts issue measures according to their own law (according to Article 13). Only by way of exception, where the interests of the adults so

<sup>67</sup> S (Hospital Patient: Court's Jurisdiction), In re [1995] Fam. 26; [1995] and S (Hospital Patient: Court's Jurisdiction) (No. 2), Re, [1996] Fam. 23. See also the discussion by Dermot Feenan, 'Private International Law and Care of Mentally Incapable Persons Re S (Hospital Patient: Foreign Curator)' (1997) 4 *European Journal of Health Law* 81.

<sup>68</sup> Lagarde Report (n 4) para 71.

require, courts may apply, or take into consideration, the law of a different country with which the situation is connected. The Proposed Regulation does not amend this rule.<sup>69</sup> There are exceptions to the rule, but all Hague Convention States and EU Member States will be bound by the same rules. Therefore, Brexit will not have any impact on this part of private international law.

English law has been adapted to the Hague Adults Convention, and forum law will be applied, while the jurisdiction rules are similar to those of the Convention.<sup>70</sup> The old case of *S*, referred to in the previous section,<sup>71</sup> again shows the utility of this rule. Had the Hague Convention governed the situation, the judge would have taken jurisdiction on the basis of the habitual residence of the adult (which was in the case easier to establish than domicile, and probably often easier to establish). After that initial test, the judge would be able to apply forum law. It would not be necessary to consider the law of the State of nationality.

The old Convention on Deprivation of Civil Rights, in the tradition of many civil law legal systems, used nationality as the first connecting factor.<sup>72</sup> The problem with this approach is that a court having to decide what would be best for an adult of a foreign nationality might have to rely on foreign law, even if the adult would continue living in the State of the court. As national laws differ with respect to the powers that a court-appointed representative might have, as well as with respect to the control mechanisms, applying foreign law might be awkward and might not work well in practice.

### 3. Effects of Scottish measures in EU countries

In EU Member States that are party to the Hague Adults Convention, Scottish measures of protection will be easily recognized and enforced under this Convention. If the European Commission's proposals are followed and all EU Member States become bound by the Hague Adults Convention, the same will be true for recognition and enforcement in all these States.

The European Commission is proposing a regime of even easier recognition, in the sense that the recognizing authority must not (and may not) verify the jurisdiction of the court or origin,<sup>73</sup> while such verification is foreseen under the Hague Adults Convention's Article 22 (2)(a). For enforceability, the European Commission is also proposing an enhancement. According to the Proposed Regulation's Article 11, there is no need for an intermediary procedure or a declaration of enforceability. The EU legislator has been inserting this method incrementally in various regulations in the field of civil and commercial matters.<sup>74</sup> Scottish judicial measures will not be able to benefit from this abolition of *exequatur*. However, enforcement is not often invoked in these matters; it is more frequently issues of recognition that arise. An example is a court-appointed representative of an adult who would like to get access to bank accounts abroad.

<sup>69</sup> Art 8 of the Proposal for a Regulation refers to the entire Chapter II of the Hague Adults Convention, containing the rules on applicable law.

<sup>70</sup> S 7 of sch 3 of the Mental Capacity Act 2005, read in conjunction with ss 11 and 12 of sch 3, detailing the instances in which foreign law had to be applied.

<sup>71</sup> See n 66.

<sup>72</sup> Hague Convention on the Deprivation of Civil Rights, art 1. However, as explained in Section 1A above, this Convention is hardly ever used any more.

<sup>73</sup> Art 10 of the Proposal for a Regulation sets out the only available grounds for refusal, and the lack of jurisdiction of the court of origin is not in its list.

<sup>74</sup> For instance Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels Ia), OJ L 351 (20 December 2012) 1–32; Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition, and enforcement of decisions and cooperation in matters related to maintenance obligations, OJ L 7 (10 January 2009) 1–79; the Brussels IIb Regulation (n 33).



Measures issued by courts of Member States not party to the Hague Adults Convention might face more difficulties for recognition. For instance, due to the broad jurisdictional bases in Italy, as discussed above, the risk exists that foreign measures (even if issued by the court where the adult is habitually resident) are refused recognition on the grounds that Italian courts are either seized concerning the protection of the adult in question, or have already granted irreconcilable measures related to the protection of the same adult.

#### 4. Effects in Scotland of measures issued in EU countries

The effects in Scotland of measures issued in EU countries is not that different from the system explained in the previous section: intra-EU judgments will benefit from slightly easier recognition and from abolition of *exequatur*. The same cannot be said for the recognition and enforcement in Scotland of judgments emanating from EU countries. For EU Member States that have joined the Hague Adults Convention (ie, all of them, excluding Denmark, if the European Commission's proposal for a Council Decision is followed), the Convention will apply. For other EU Member States, Scottish private international law will apply. The benefit if the EU adopts the Proposal for a Regulation is that all EU judgments will be capable of recognition and enforcement in Scotland under the Hague Adults Convention.

Returning once again to the case of *S* discussed above: the judge considering what the best solution would be for the Norwegian person who had suffered a stroke in England, would only be obliged to recognize the Norwegian judgment appointing a guardian if that Norwegian court had jurisdiction on the basis of the Hague Adults Convention. This Convention clearly favours habitual residence over nationality as a basis for jurisdiction. Under Article 7 of the Hague Adults Convention, the Court of the adult's nationality would have to assess whether they are in a better position to assess the interest of the adult. Before taking jurisdiction, they have to inform the court of the habitual residence of the adult. If a court in another Contracting State took a measure at a time when the court in England had jurisdiction, the court in England would not be obliged to recognize the measure.<sup>75</sup>

## VI. THE CERTIFICATE UNDER THE HAGUE ADULTS CONVENTION AND UNDER THE EU REGULATION

The representative of an adult, whether appointed under a measure of protection taken by the authorities of a State or based on a power of attorney granted by the adult themselves, may need to show that they are entitled to act on behalf of the adult. They may need to do so in a country other than the country in which the measure was taken, or the power of attorney was granted and/or registered. The effectiveness of the protection ensured by the measure or the power of attorney in question may be undermined in those countries if those presented with the evidence of the measure or the power of attorney do not consider it to be appropriate.

To mitigate these problems, Article 38(1) of the Hague Adults Convention provides that the authorities of the Contracting State where a measure of protection has been taken or a power of representation has been confirmed 'may deliver to the person entrusted with protection of the adult's person or property, on request, a certificate indicating the capacity in which that person is entitled to act and the powers conferred'. According to Article 38(2), the capacity and powers stated in the certificate 'are presumed to be vested in that person as of the date of the certificate, in the absence of proof to the contrary'. It is for each State to designate the authorities with competence to draw up the certificate. A model certificate is

<sup>75</sup> See the refusal grounds in art 22(2) of the Hague Adults Convention, esp. art 22(2)a).

provided in a recommendation adopted by the Special Commission of the Hague Conference which resulted in the adoption on the Convention in 1999.<sup>76</sup>

So far, Article 38 of the Convention has been rarely used in practice.

In its proposal for a Regulation on the international protection of adults, the European Commission suggested the creation of a ‘European Certificate of Representation’. This certificate would be issued in a Member State to enable the representative to demonstrate, in another Member State, that they are authorized to represent the adult, in particular, as regards the control, management, and disposition of the adult’s property, the acquisition of such property, the carrying out of a contract entered into by the adult, the carrying on, on the adult’s behalf, of any trade or business, the conduct of legal proceedings in the adult’s name or on the adult’s behalf, and medical decisions, including giving and refusing consent to the carrying out of a medical treatment.

The intended purpose of the EU Certificate is basically the same as the certificate issued in accordance with Article 38 of the Convention. The same is true of its effects. As stated in Article 40(2) of the Proposal, the certificate would be presumed to accurately demonstrate elements which have been established under the law applicable to the source measure or the source confirmed powers of representation or under any other law applicable to their specific elements.

Unlike the Hague Adults Convention, the Commission’s proposal lays down a detailed and comprehensive set of rules addressing the practical questions that may arise with respect to the certificate, including as regards the application for a certificate, the issuance procedure, the modification or withdrawal of the certificate and the suspension of its effects. Before issuing a certificate, the issuing authority must verify that the applicant is entitled to the certificate, that the elements to be certified are in conformity with the source measure, and that the measures are valid and have not been replaced by other measures. In order to verify the information that is meant to appear in the certificate, the issuing authority will, as the case may be, consult the ‘protection registers’ that the proposal aims to establish in all Member States, and interconnect.

The provisions regarding the EU Certificate of Powers of Representation are inspired in several respects by those governing the EU Certificate of Succession created by the EU’s Succession Regulation.<sup>77</sup> There are, of course, some differences. One such difference concerns the temporal validity of the EU Certificate of Powers of Representation, which is limited. The circumstances of the adult may in fact evolve over time. This may result, in turn, in the modification or withdrawal of the existing protection measures, or the termination or modification of the powers conferred by the adult. ‘Certified’ powers may thus cease to exist, or suffer from limitations that did not exist previously. To avoid, or mitigate, the shortcomings of possible reliance on an outdated certificate, the proposed Regulation stipulates that EU certificates are valid, as a rule, for a period of 1 year, unless the issuing authority provides that the period be longer or shorter, where reasons exist that justify such deviation.

The EU Certificate has the potential to represent a key innovation in this area, as it is designed to meet a practical concern that is often voiced by those involved in the protection of adults in cross-border situations, namely the difficulties experienced when required to give evidence abroad as to the existence and scope of their powers (eg, when dealing with the bank where the adult has an account). It will include the information that a certificate

<sup>76</sup> Published as an Annex to the Convention; see <<https://www.hcch.net/en/publications-and-studies/details4/?pid=3618&dtid=28>> (accessed 8 July 2024).

<sup>77</sup> Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, OJ L 201 (27 July 2012) 107–34.

issued in accordance with the Convention would feature, but will contain additional details. It will come with a list of possible measures, that a judge or other authority could easily tick or click. The availability of such a list facilitates translation of the form into the language of the place where it is to be used. It is an approach that the EU has also used in other Regulations. In addition, the EU Certificate contains an open field. The Hague certificate, by comparison, contains only the open field. The EU Certificate is therefore completely in compliance with the Hague Convention. It might even be used as a model for other Hague Convention Contracting States.

The authorities of EU Member States might be faced with detailed EU certificates as well as shorter Hague Convention certificates. While some concerns have been raised about this duality, it is believed that the existence of the detailed EU certificate next to the more general certificate under the Hague Convention would in no way be detrimental to Hague Convention Contracting States outside the EU such as the UK. The authorities of EU Member States should be able to deal with different certificates having similar effects. Moreover, central authorities in this niche area of the law should be able to provide information and explanations to authorities if they had any doubts.

One issue raised by the proposed EU Certificate is whether the latter would travel as such outside the European Union, and produce in the Hague Convention Contracting States (other than the EU Member States) the effects attached by the Convention to certificates issued under Article 38. The question, it is contended, should be answered in the affirmative, as long as the EU certificate in question comes with the information required under the Hague Convention. Hopefully Scottish authorities, for instance, would be willing to accept certificates issued under the Proposed Regulation on the basis that they indeed contain the information required under the Hague Adults Convention. The fact that the format and content of the EU certificate differ from those of a certificate issued in accordance with the Convention should not represent an insurmountable obstacle. The Convention in any event does not oblige the use of the model elaborated in the framework of the Hague Conference. The latter model, as observed above, merely forms the object of a recommendation.

Still, the risk exists that EU Certificates could be seen by authorities and practitioners outside the EU as not being equivalent in substance to certificates issued under the Hague Convention. These risks, it is suggested, may be prevented or at least mitigated in two ways. First, by improving the proposed model for the EU Certificate so that it may clearly present itself as the EU version of the certificate contemplated in Article 38 of the Convention, thereby inviting those outside the EU to use it as such. Secondly, by ensuring that appropriate information is provided to authorities and stakeholders in Contracting States of the Hague Convention that are not EU Member States, regarding the characteristics of the EU Certificate. This would include drawing the attention of users of the EU Certificate on the fact that its temporal validity is limited, as explained above. Such a limitation, it is believed, would affect the use of the EU Certificate (via Article 38 of the Hague Convention) in all Contracting States. Although the Convention fails to make provision for a similar limitation, there are no reasons why the effects attached to a certificate in the receiving State should be broader (temporally) than those attached to that certificate under the rules in force in the State of origin.

## VII. CONCLUSION

This article has discussed the cross-border protection of adults, especially in light of Brexit. The protection of adults, all while respecting their rights as enshrined in the UNCRPD, is a legal field that is in rapid evolution. Two further peculiarities exist. The first is that the

ratification of the Hague Adults Convention by the UK binds only Scotland. However, England and Wales adapted its legislation to largely follow the Convention. While such unilateral alinement with a Convention works well in some respects (such as jurisdiction and applicable law), it bears no or very little advantage to the State that wishes to see its measures recognized and enforced abroad. The second peculiarity is that the European Commission in 2023 proposed that all EU Member States that have not already done so sign and ratify the Hague Adults Convention. The Commission also proposed some enhancements or even departures from the Convention. The European Commission is thus proposing a combination of internal and external action. The external action will affect the EU's neighbours such as the UK. It will slightly complicate the operation of the Hague Convention, but with some goodwill, the system will be able to work well. Cross-border protection of adults needs a diversity of measures—sometimes the respecting of what adults determined themselves (granting powers of representation), sometimes respecting the existence of *ex lege* powers of representation, and sometimes court-ordered measures. For the continuation of protection, the recognition in other States of all of these forms of protection is desirable. Such recognition is facilitated by a certificate under the Hague Adults Convention.

Hopefully, soon all EU Member States, as well as all constituent parts of the UK will be bound by the Hague Adults Convention, and States will find a way to apply the Convention flexibly and in full recognition of the rights of adults under the UNCRC. If so, Brexit's impact on the protection of adults will be limited. It will not be inexistant though, in light of the differences between the systems of the Hague Adults Convention and the EU's Proposed Regulations.

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