

Protection of Adults Convention

Explanatory Report

Paul Lagarde

New and Revised Edition

Explanatory Report

on the

Hague Convention of 13 January 2000 on the International Protection of Adults

by

Paul Lagarde

Text adopted by the Special Commission with a diplomatic character

New and Revised Edition

Published by
The Hague Conference on Private International Law
Permanent Bureau
Churchillplein 6b
2517 JW The Hague
The Netherlands

Telephone: +31 70 363 3303
Fax: +31 70 360 4867
E-mail: secretariat@hcch.net
Website: www.hcch.net

© Hague Conference on Private International Law 2017

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any way or by any means, including photocopying or recording, without the written permission of the copyright holder.

Thanks to the generous assistance of the European Commission/DG Justice, the Explanatory Report on the 2000 *Hague Protection of Adults Convention*, prepared by Professor Paul Lagarde and revised in 2016, was translated into all official languages of the European Union, with the exception of English, French, Spanish and German. The French and English versions were revised by Paul Lagarde and the Permanent Bureau while the Spanish and German translations will be revised in the near future. The original Spanish translation of the unrevised Explanatory Report was kindly provided by the Ministry of Foreign Affairs of Spain and the German translation was kindly provided by the Federal Ministry of Justice and the Federal Foreign Office of the Federal Republic of Germany. Please note that the German translation has not been coordinated between the Austrian, German and Swiss authorities. The translations of this publication in other languages (with the exception of Spanish) have not been reviewed by the Permanent Bureau of the Hague Conference on Private International Law.

The official versions of this publication, in English and French, are available on the website of the Hague Conference on Private International Law (www.hcch.net).

Printed in The Hague, the Netherlands

Preface

1 The contents of this pamphlet have been drawn from the *Proceedings of the Special Commission with a diplomatic character of September – October 1999, Protection of Adults*.

This latter publication contains, in addition to the pages hereinafter reproduced, the preliminary documents, reports and summaries of discussions relating to the work of the Special Commission with a diplomatic character of 1999. The full volume can be ordered either through booksellers or directly from the Permanent Bureau of the Hague Conference on private international law, Churchillplein, 6b, 2517 JW The Hague, The Netherlands (e-mail: secretariat@hcch.net, fax: +31 70 360 4867).

2 The Explanatory Report by Professor Paul Lagarde serves as a commentary on the Convention adopted by the Special Commission with a diplomatic character which is set out in the Final Act of 2 October 1999.

3 The Convention was first signed on 13 January 2000 by the Netherlands and therefore bears that date.

4 This revised edition of the Explanatory Report includes additional information within paragraph 146 with regard to confirmation of powers of representation.

5 The Hague Conference on private international law has its own website (www.hcch.net) providing information concerning the Hague Conference and the Hague Conventions.

The Hague, April 2017

Outline

CONVENTION	7
Recommendation adopted by the Special Commission of a Diplomatic Character on the Protection of Adults	23
<i>CERTIFICAT / CERTIFICATE</i>	<i>25</i>
<i>MESURES DE PROTECTION CONCERNANT UN ADULTE / MEASURES OF PROTECTION CONCERNING AN ADULT</i>	<i>28</i>
<i>INFORMATION RELATIVE AUX MESURES DE PROTECTION CONCERNANT UN ADULTE / INFORMATION RELATING TO MEASURES OF PROTECTION CONCERNING AN ADULT</i>	<i>30</i>
REPORT	33

Convention

Extract from the Final Act of the Special Commission of a diplomatic character on the protection of adults signed on the 2nd of October 1999*

CONVENTION ON THE INTERNATIONAL PROTECTION OF ADULTS

The States signatory to the present Convention,
Considering the need to provide for the protection in international situations of adults who, by reason of an impairment or insufficiency of their personal faculties, are not in a position to protect their interests,
Wishing to avoid conflicts between their legal systems in respect of jurisdiction, applicable law, recognition and enforcement of measures for the protection of adults,
Recalling the importance of international co-operation for the protection of adults,
Affirming that the interests of the adult and respect for his or her dignity and autonomy are to be primary considerations,
Have agreed on the following provisions –

CHAPTER I – SCOPE OF THE CONVENTION

Article 1

1. This Convention applies to the protection in international situations of adults who, by reason of an impairment or insufficiency of their personal faculties, are not in a position to protect their interests.
2. Its objects are –
 - a) to determine the State whose authorities have jurisdiction to take measures directed to the protection of the person or property of the adult;
 - b) to determine which law is to be applied by such authorities in exercising their jurisdiction;
 - c) to determine the law applicable to representation of the adult;
 - d) to provide for the recognition and enforcement of such measures of protection in all Contracting States;
 - e) to establish such co-operation between the authorities of the Contracting States as may be necessary in order to achieve the purposes of this Convention.

Article 2

1. For the purposes of this Convention, an adult is a person who has reached the age of 18 years.
2. The Convention applies also to measures in respect of an adult who had not reached the age of 18 years at the time the measures were taken.

* For the complete text of the Final Act, see *Proceedings of the Special Commission with a diplomatic character of September – October 1999*.

Article 3

The measures referred to in Article 1 may deal in particular with –

- a) the determination of incapacity and the institution of a protective regime;
- b) the placing of the adult under the protection of a judicial or administrative authority;
- c) guardianship, curatorship and analogous institutions;
- d) the designation and functions of any person or body having charge of the adult's person or property, representing or assisting the adult;
- e) the placement of the adult in an establishment or other place where protection can be provided;
- f) the administration, conservation or disposal of the adult's property;
- g) the authorisation of a specific intervention for the protection of the person or property of the adult.

Article 4

(1) The Convention does not apply to –

- a) maintenance obligations;
- b) the formation, annulment and dissolution of marriage or any similar relationship, as well as legal separation;
- c) property regimes in respect of marriage or any similar relationship;
- d) trusts or succession;
- e) social security;
- f) public measures of a general nature in matters of health;
- g) measures taken in respect of a person as a result of penal offences committed by that person;
- h) decisions on the right of asylum and on immigration;
- i) measures directed solely to public safety.

(2) Paragraph 1 does not affect, in respect of the matters referred to therein, the entitlement of a person to act as the representative of the adult.

CHAPTER II – JURISDICTION

Article 5

(1) The judicial or administrative authorities of the Contracting State of the habitual residence of the adult have jurisdiction to take measures directed to the protection of the adult's person or property.

(2) In case of a change of the adult's habitual residence to another Contracting State, the authorities of the State of the new habitual residence have jurisdiction.

Article 6

(1) For adults who are refugees and those who, due to disturbances occurring in their country, are internationally displaced, the authorities of the Contracting State on the territory of which these adults are present as a result of their displacement have the jurisdiction provided for in Article 5, paragraph 1.

(2) The provisions of the preceding paragraph also apply to adults whose habitual residence cannot be established.

Article 7

(1) Except for adults who are refugees or who, due to disturbances occurring in their State of nationality, are internationally displaced, the authorities of a Contracting State of which the adult is a national have jurisdiction to take measures for the protection of the person or property 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.

(2) This jurisdiction shall 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.

(3) The measures taken under paragraph 1 shall lapse as soon as the authorities having jurisdiction under Article 5, Article 6, paragraph 2, or Article 8 have taken measures required by the situation or have decided that no measures are to be taken. These authorities shall inform accordingly the authorities which have taken measures in accordance with paragraph 1.

Article 8

(1) The authorities of a Contracting State having jurisdiction under Article 5 or Article 6, if they consider that such is in the interests of the adult, may, on their own motion or on an application by the authority of another Contracting State, request the authorities of one of the States mentioned in paragraph 2 to take measures for the protection of the person or property of the adult. The request may relate to all or some aspects of such protection.

(2) The Contracting States whose authorities may be addressed as provided in the preceding paragraph are –

- a)* a State of which the adult is a national;
- b)* the State of the preceding habitual residence of the adult;
- c)* a State in which property of the adult is located;
- d)* the State whose authorities have been chosen in writing by the adult to take measures directed to his or her protection;
- e)* the State of the habitual residence of a person close to the adult prepared to undertake his or her protection;
- f)* the State in whose territory the adult is present, with regard to the protection of the person of the adult.

(3) In case the authority designated pursuant to the preceding paragraphs does not accept its jurisdiction, the authorities of the Contracting State having jurisdiction under Article 5 or Article 6 retain jurisdiction.

Article 9

The authorities of a Contracting State where property of the adult is situated 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.

Article 10

- (1) In all cases of urgency, the authorities of any Contracting State in whose territory the adult or property belonging to the adult is present have jurisdiction to take any necessary measures of protection.
- (2) The measures taken under the preceding paragraph with regard to an adult habitually resident in a Contracting State shall lapse as soon as the authorities which have jurisdiction under Articles 5 to 9 have taken the measures required by the situation.
- (3) The measures taken under paragraph 1 with regard to an adult who is habitually resident in a non-Contracting State shall lapse in each Contracting State as soon as measures required by the situation and taken by the authorities of another State are recognised in the Contracting State in question.
- (4) The authorities which have taken measures under paragraph 1 shall, if possible, inform the authorities of the Contracting State of the habitual residence of the adult of the measures taken.

Article 11

- (1) By way of exception, the authorities of a Contracting State in whose territory the adult is present have jurisdiction to take measures of a temporary character for the protection of the person of the adult which have a territorial effect limited to the State in question, in so far as such measures are compatible with those already taken by the authorities which have jurisdiction under Articles 5 to 8, and after advising the authorities having jurisdiction under Article 5.
- (2) The measures taken under the preceding paragraph with regard to an adult habitually resident in a Contracting State shall lapse as soon as the authorities which have jurisdiction under Articles 5 to 8 have taken a decision in respect of the measures of protection which may be required by the situation.

Article 12

Subject to Article 7, paragraph 3, the measures taken in application of Articles 5 to 9 remain in force according to their terms, even if a change of circumstances has eliminated the basis upon which jurisdiction was founded, so long as the authorities which have jurisdiction under the Convention have not modified, replaced or terminated such measures.

CHAPTER III – APPLICABLE LAW

Article 13

- (1) In exercising their jurisdiction under the provisions of Chapter II, the authorities of the Contracting States shall apply their own law.
- (2) However, in so far as the protection of the person or the property of the adult requires, they may exceptionally apply or take into consideration the law of another State with which the situation has a substantial connection.

Article 14

Where a measure taken in one Contracting State is implemented in another Contracting State, the conditions of its implementation are governed by the law of that other State.

Article 15

(1) The existence, extent, modification and extinction of powers of representation granted by an adult, either under an agreement or by a unilateral act, to be exercised when such adult is not in a position to protect his or her interests, are governed by the law of the State of the adult's habitual residence at the time of the agreement or act, unless one of the laws mentioned in paragraph 2 has been designated expressly in writing.

(2) The States whose laws may be designated are –

- a) a State of which the adult is a national;
- b) the State of a former habitual residence of the adult;
- c) a State in which property of the adult is located, with respect to that property.

(3) The manner of exercise of such powers of representation is governed by the law of the State in which they are exercised.

Article 16

Where powers of representation referred to in Article 15 are not exercised in a manner sufficient to guarantee the protection of the person or property of the adult, they may be withdrawn or modified by measures taken by an authority having jurisdiction under the Convention. Where such powers of representation are withdrawn or modified, the law referred to in Article 15 should be taken into consideration to the extent possible.

Article 17

(1) The validity of a transaction entered into between a third party and another person who would be entitled to act as the adult's representative under the law of the State where the transaction was concluded cannot be contested, and the third party cannot be held liable, on the sole ground that the other person was not entitled to act as the adult's representative under the law designated by the provisions of this Chapter, unless the third party knew or should have known that such capacity was governed by the latter law.

(2) The preceding paragraph applies only if the transaction was entered into between persons present on the territory of the same State.

Article 18

The provisions of this Chapter apply even if the law designated by them is the law of a non-Contracting State.

Article 19

In this Chapter the term ‘law’ means the law in force in a State other than its choice of law rules.

Article 20

This Chapter does not prevent the application of those provisions of the law of the State in which the adult is to be protected where the application of such provisions is mandatory whatever law would otherwise be applicable.

Article 21

The application of the law designated by the provisions of this Chapter can be refused only if this application would be manifestly contrary to public policy.

CHAPTER IV – RECOGNITION AND ENFORCEMENT

Article 22

(1) The measures taken by the authorities of a Contracting State shall be recognised by operation of law in all other Contracting States.

(2) Recognition may however be refused –

- a) 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;
- b) if the measure was taken, except in a case of urgency, in the context of a judicial or administrative proceeding, without the adult having been provided the opportunity to be heard, in violation of fundamental principles of procedure of the requested State;
- c) if such recognition is manifestly contrary to public policy of the requested State, or conflicts with a provision of the law of that State which is mandatory whatever law would otherwise be applicable;
- d) if the measure is incompatible with a later measure taken in a non-Contracting State which would have had jurisdiction under Articles 5 to 9, where this later measure fulfils the requirements for recognition in the requested State;
- e) if the procedure provided in Article 33 has not been complied with.

Article 23

Without prejudice to Article 22, paragraph 1, any interested person may request from the competent authorities of a Contracting State that they decide on the recognition or non-recognition of a measure taken in another Contracting State. The procedure is governed by the law of the requested State.

Article 24

The authority of the requested State is bound by the findings of fact on which the authority of the State where the measure was taken based its jurisdiction.

Article 25

- (1) If measures taken in one Contracting State and enforceable there require enforcement in another Contracting State, they shall, upon request by an interested party, be declared enforceable or registered for the purpose of enforcement in that other State according to the procedure provided in the law of the latter State.
- (2) Each Contracting State shall apply to the declaration of enforceability or registration a simple and rapid procedure.
- (3) The declaration of enforceability or registration may be refused only for one of the reasons set out in Article 22, paragraph 2.

Article 26

Without prejudice to such review as is necessary in the application of the preceding Articles, there shall be no review of the merits of the measure taken.

Article 27

Measures taken in one Contracting State and declared enforceable, or registered for the purpose of enforcement, in another Contracting State shall be enforced in the latter State as if they had been taken by the authorities of that State. Enforcement takes place in accordance with the law of the requested State to the extent provided by such law.

CHAPTER V – CO-OPERATION

Article 28

- (1) A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention on such authorities.
- (2) Federal States, States with more than one system of law or States having autonomous territorial units shall be free to appoint more than one Central Authority and to specify the territorial or personal extent of their functions. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which any communication may be addressed for transmission to the appropriate Central Authority within that State.

Article 29

- (1) Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their States to achieve the purposes of the Convention.
- (2) They shall, in connection with the application of the Convention, take appropriate steps to provide information as to the laws of, and services available in, their States relating to the protection of adults.

Article 30

The Central Authority of a Contracting State, either directly or through public authorities or other bodies, shall take all appropriate steps to –

- a) facilitate communications, by every means, between the competent authorities in situations to which the Convention applies;
- b) provide, on the request of a competent authority of another Contracting State, assistance in discovering the whereabouts of an adult where it appears that the adult may be present and in need of protection within the territory of the requested State.

Article 31

The competent authorities of a Contracting State may encourage, either directly or through other bodies, the use of mediation, conciliation or similar means to achieve agreed solutions for the protection of the person or property of the adult in situations to which the Convention applies.

Article 32

- (1) Where a measure of protection is contemplated, the competent authorities under the Convention, if the situation of the adult so requires, may request any authority of another Contracting State which has information relevant to the protection of the adult to communicate such information.
- (2) A Contracting State may declare that requests under paragraph 1 shall be communicated to its authorities only through its Central Authority.
- (3) The competent authorities of a Contracting State may request the authorities of another Contracting State to assist in the implementation of measures of protection taken under this Convention.

Article 33

- (1) If an authority having jurisdiction under Articles 5 to 8 contemplates the placement of the adult in an establishment or other place where protection can be provided, and if such placement is to take place in another Contracting State, it shall first consult with the Central Authority or other competent authority of the latter State. To that effect it shall transmit a report on the adult together with the reasons for the proposed placement.
- (2) The decision on the placement may not be made in the requesting State if the Central Authority or other competent authority of the requested State indicates its opposition within a reasonable time.

Article 34

In any case where the adult is exposed to a serious danger, the competent authorities of the Contracting State where measures for the protection of the adult have been taken or are under consideration, if they are informed that the adult's residence has changed to, or that the adult is present in, another State, shall inform the authorities of that other State about the danger involved and the measures taken or under consideration.

Article 35

An authority shall not request or transmit any information under this Chapter if to do so would, in its opinion, be likely to place the adult's person or property in danger, or constitute a serious threat to the liberty or life of a member of the adult's family.

Article 36

(1) Without prejudice to the possibility of imposing reasonable charges for the provision of services, Central Authorities and other public authorities of Contracting States shall bear their own costs in applying the provisions of this Chapter.

(2) Any Contracting State may enter into agreements with one or more other Contracting States concerning the allocation of charges.

Article 37

Any Contracting State may enter into agreements with one or more other Contracting States with a view to improving the application of this Chapter in their mutual relations. The States which have concluded such an agreement shall transmit a copy to the depositary of the Convention.

CHAPTER VI – GENERAL PROVISIONS

Article 38

(1) The authorities of the Contracting State where a measure of protection has been taken or a power of representation 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.

(2) The capacity and powers indicated 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.

(3) Each Contracting State shall designate the authorities competent to draw up the certificate.

Article 39

Personal data gathered or transmitted under the Convention shall be used only for the purposes for which they were gathered or transmitted.

Article 40

The authorities to whom information is transmitted shall ensure its confidentiality, in accordance with the law of their State.

Article 41

All documents forwarded or delivered under this Convention shall be exempt from legalisation or any analogous formality.

Article 42

Each Contracting State may designate the authorities to which requests under Article 8 and Article 33 are to be addressed.

Article 43

(1) The designations referred to in Article 28 and Article 42 shall be communicated to the Permanent Bureau of the Hague Conference on Private International Law not later than the date of the deposit of the instrument of ratification, acceptance or approval of the Convention or of accession thereto. Any modifications thereof shall also be communicated to the Permanent Bureau.

(2) The declaration referred to in Article 32, paragraph 2, shall be made to the depositary of the Convention.

Article 44

A Contracting State in which different systems of law or sets of rules of law apply to the protection of the person or property of the adult shall not be bound to apply the rules of the Convention to conflicts solely between such different systems or sets of rules of law.

Article 45

In relation to a State in which two or more systems of law or sets of rules of law with regard to any matter dealt with in this Convention apply in different territorial units –

- a) any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit;
- b) any reference to the presence of the adult in that State shall be construed as referring to presence in a territorial unit;
- c) any reference to the location of property of the adult in that State shall be construed as referring to location of property of the adult in a territorial unit;
- d) any reference to the State of which the adult is a national shall 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;
- e) any reference to the State whose authorities have been chosen by the adult shall be construed
 - as referring to the territorial unit if the adult has chosen the authorities of this territorial unit;
 - as referring to the territorial unit with which the adult has the closest connection if the adult has chosen the authorities of the State without specifying a particular territorial unit within the State;
- f) any reference to the law of a State with which the situation has a substantial connection shall be construed as referring to the law of a territorial unit with which the situation has a substantial connection;

- g) any reference to the law or procedure or authority of the State in which a measure has been taken shall be construed as referring to the law or procedure in force in such territorial unit or authority of the territorial unit in which such measure was taken;
- h) any reference to the law or procedure or authority of the requested State shall be construed as referring to the law or procedure in force in such territorial unit or authority of the territorial unit in which recognition or enforcement is sought;
- i) any reference to the State where a measure of protection is to be implemented shall be construed as referring to the territorial unit where the measure is to be implemented;
- j) any reference to bodies or authorities of that State, other than Central Authorities, shall be construed as referring to those authorised to act in the relevant territorial unit.

Article 46

For the purpose of identifying the applicable law under Chapter III, in relation to a State which comprises two or more territorial units each of which has its own system of law or set of rules of law in respect of matters covered by this Convention, the following rules apply –

- a) if there are rules in force in such a State identifying which territorial unit's law is applicable, the law of that unit applies;
- b) in the absence of such rules, the law of the relevant territorial unit as defined in Article 45 applies.

Article 47

For the purpose of identifying the applicable law under Chapter III, in relation to a State which has two or more systems of law or sets of rules of law applicable to different categories of persons in respect of matters covered by this Convention, the following rules apply –

- a) if there are rules in force in such a State identifying which among such laws applies, that law applies;
- b) in the absence of such rules, the law of the system or the set of rules of law with which the adult has the closest connection applies.

Article 48

In relations between the Contracting States this Convention replaces the *Convention concernant l'interdiction et les mesures de protection analogues*, signed at The Hague 17 July 1905.

Article 49

- (1) The Convention does not affect any other international instrument to which Contracting States are Parties and which contains provisions on matters governed by this Convention, unless a contrary declaration is made by the States Parties to such instrument.
- (2) This Convention does not affect the possibility for one or more Contracting States to conclude agreements which contain, in respect of adults habitually resident in any of the States Parties to such agreements, provisions on matters governed by this Convention.
- (3) Agreements to be concluded by one or more Contracting States on matters within the scope of this Convention do not affect, in the relationship of such States with other Contracting States, the application of the provisions of this Convention.

(4) The preceding paragraphs also apply to uniform laws based on special ties of a regional or other nature between the States concerned.

Article 50

(1) The Convention shall apply to measures only if they are taken in a State after the Convention has entered into force for that State.

(2) The Convention shall apply to the recognition and enforcement of measures taken after its entry into force as between the State where the measures have been taken and the requested State.

(3) The Convention shall apply from the time of its entry into force in a Contracting State to powers of representation previously granted under conditions corresponding to those set out in Article 15.

Article 51

(1) Any communication sent to the Central Authority or to another authority of a Contracting State shall be in the original language, and shall be accompanied by a translation into the official language or one of the official languages of the other State or, where that is not feasible, a translation into French or English.

(2) However, a Contracting State may, by making a reservation in accordance with Article 56, object to the use of either French or English, but not both.

Article 52

The Secretary General of the Hague Conference on Private International Law shall at regular intervals convoke a Special Commission in order to review the practical operation of the Convention.

CHAPTER VII – FINAL CLAUSES

Article 53

(1) The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law on 2 October 1999.

(2) It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention.

Article 54

(1) Any other State may accede to the Convention after it has entered into force in accordance with Article 57, paragraph 1.

(2) The instrument of accession shall be deposited with the depositary.

(3) Such accession shall have effect only as regards the relations between the acceding State and those Contracting States which have not raised an objection to its accession in the six months after the receipt of the notification referred to in sub-paragraph *b*) of Article 59. Such an objection may also be raised by States at the time when they ratify, accept or approve the Convention after an accession. Any such objection shall be notified to the depositary.

Article 55

(1) If a State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that the Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.

(2) Any such declaration shall be notified to the depositary and shall state expressly the territorial units to which the Convention applies.

(3) If a State makes no declaration under this Article, the Convention is to extend to all territorial units of that State.

Article 56

(1) Any State may, not later than the time of ratification, acceptance, approval or accession, or at the time of making a declaration in terms of Article 55, make the reservation provided for in Article 51, paragraph 2. No other reservation shall be permitted.

(2) Any State may at any time withdraw the reservation it has made. The withdrawal shall be notified to the depositary.

(3) The reservation shall cease to have effect on the first day of the third calendar month after the notification referred to in the preceding paragraph.

Article 57

(1) The Convention shall enter into force on the first day of the month following the expiration of three months after the deposit of the third instrument of ratification, acceptance or approval referred to in Article 53.

(2) Thereafter the Convention shall enter into force –

- a) for each State ratifying, accepting or approving it subsequently, on the first day of the month following the expiration of three months after the deposit of its instrument of ratification, acceptance, approval or accession;
- b) for each State acceding, on the first day of the month following the expiration of three months after the expiration of the period of six months provided in Article 54, paragraph 3;
- c) for a territorial unit to which the Convention has been extended in conformity with Article 55, on the first day of the month following the expiration of three months after the notification referred to in that Article.

Article 58

(1) A State Party to the Convention may denounce it by a notification in writing addressed to the depositary. The denunciation may be limited to certain territorial units to which the Convention applies.

(2) The denunciation takes effect on the first day of the month following the expiration of twelve months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation takes effect upon the expiration of such longer period.

Article 59

The depositary shall notify the States Members of the Hague Conference on Private International Law and the States which have acceded in accordance with Article 54 of the following –

- a) the signatures, ratifications, acceptances and approvals referred to in Article 53;
- b) the accessions and objections raised to accessions referred to in Article 54;
- c) the date on which the Convention enters into force in accordance with Article 57;
- d) the declarations referred to in Article 32, paragraph 2, and Article 55;
- e) the agreements referred to in Article 37;
- f) the reservation referred to in Article 51, paragraph 2, and the withdrawal referred to in Article 56, paragraph 2;
- g) the denunciations referred to in Article 58.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at The Hague, on [.....],* in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the States Members of the Hague Conference on Private International Law.

* The Convention was signed on the 13th January 2000 and thus bears that date.

**Recommendation adopted by the Special Commission
of a Diplomatic Character on the Protection of Adults**

The Special Commission recommends to the States Parties to the Convention on the International Protection of Adults that the following model forms be used in applying the Convention.

CERTIFICAT/ CERTIFICATE

Article 38 de la Convention sur la protection internationale des adultes
signée à La Haye le [...]

Article 38 of the Convention on the International Protection of Adults
signed at The Hague on [...]

A. - L'autorité soussignée / *The undersigned authority* :

Pays / *Country* :

Etat - province (le cas échéant) / *State - province (if appropriate)* :

Nom de l'autorité émettrice / *Name of the issuing authority* :

.....

Adresse / *Address* :

.....

.....

Tél./*Tel.* : Télécopie/*Fax* : Courr. élec./*E-mail* :

certifie que / *certifies that* :

☐ une mesure de protection a été prise / *a measure of protection has been taken*

☐ la validité d'un pouvoir de représentation a été confirmée / *the validity of a power of representation has been confirmed*

par / *by* :

.....

le / *on* :

B. - Adulte intéressé / *Adult concerned* :

Nom / *Surname* : Prénom(s) / *First name(s)* :

Date et lieu de naissance / *Date and place of birth* :

Pays de résidence habituelle / *Country of habitual residence* :

Adresse / *Address* :

.....

.....

C. - Titulaire du certificat / *Holder of the certificate* :

Nom / *Surname* : Prénom(s) / *First name(s)* :

Date et lieu de naissance / *Date and place of birth* :

Adresse / *Address* :

.....

.....

Tél./*Tel.* : Télécopie/*Fax* : Courr. élec./*E-mail* :

D. - Pouvoirs du titulaire du certificat / Powers of the holder of the certificate :

1. - Le titulaire du certificat agit en qualité de / The holder of the certificate acts in the capacity of:

.....
 en application de la loi / *under the following law* :

2. - Les pouvoirs conférés au titulaire du certificat / The powers conferred on the holder of the certificate :

a) ☐ concernent la personne de l'adulte et sont / *concern the person of the adult and are* :

☐ complets / *unrestricted*

☐ limités aux catégories d'actes suivantes / *restricted to the following categories of acts*:

.....

☐ limités aux actes suivants / *restricted to the following acts* :

.....

☐ soumis à l'autorisation de / *subject to the authorisation of* :

b) ☐ concernent les biens de l'adulte et sont / *concern the property of the adult and are* :

☐ complets / *unrestricted*

☐ limités aux catégories d'actes suivantes / *restricted to the following categories of acts* :

.....

☐ limités à / *restricted to* :

☐ biens meubles / *movable property*

☐ biens immeubles / *immovable property*

☐ biens suivants / *the following property* :

.....

☐ soumis à l'autorisation de / *subject to authorisation of* :

.....

Les pouvoirs conférés au titulaire du certificat / The powers conferred on the holder of the certificate :

☐ expirent le / *expire on* :

☐ conservent leurs effets sauf modification ou révocation ultérieure / *are valid until amended or revoked*.

E. - Pouvoirs conservés par l'adulte / Powers retained by the adult :a) en ce qui concerne sa personne / *concerning the adult's person* :

.....

.....

.....

b) en ce qui concerne ses biens / *concerning the adult's property* :

.....

.....

.....

Sont joints au présent certificat / *Attached to the present certificate are* :

- ☐ une copie de la décision ou des pouvoirs de représentation / *a copy of the applicable order or power of representation*
- ☐ une liste complète des pouvoirs du titulaire du certificat et des pouvoirs conservés par l'adulte / *a full list of the powers entrusted to the holder of the certificate and of the powers retained by the adult* :

en / in :

☐ français / *French*☐ anglais / *English*

La qualité et les pouvoirs indiqués par le présent certificat sont tenus pour établis, à sa date, sauf preuve contraire / *The capacity and powers indicated in the certificate are presumed to be vested in that person, as of its date, in the absence of proof to the contrary.*

Pour toute information complémentaire, veuillez prendre contact avec l'autorité émettrice / *For more information, please contact the issuing authority.*

Fait le / *Dated this* à / *at*Signature / *Signature*Cachet / *Seal*

MESURES DE PROTECTION CONCERNANT UN ADULTE
MEASURES OF PROTECTION CONCERNING AN ADULT

Convention sur la protection internationale des adultes
 signée à La Haye le [...]

*Convention on the International Protection of Adults
 signed at the Hague on [...]*

1 - Article 8, paragraphe 1, de la Convention / Article 8, paragraph 1, of the Convention :

L'autorité soussignée / The undersigned authority :

.....

a l'honneur d'informer l'autorité suivante / has the honour to inform the following authority :

.....

☐ que de sa propre initiative / that on its own motion

☐ qu'à la demande de l'autorité suivante / that on a request from the following authority :

.....

elle requiert que soient prises des mesures de protection / it requests that measures of protection be taken :

☐ à l'égard de la personne de l'adulte / relating to the adult's person of :

Nom / Surname : Prénom(s) / First name(s) :

Date et lieu de naissance / Date and place of birth :

Adresse / Address :

☐ concernant ses biens / relating to the adult's property

☐ concernant le bien suivant / relating to the following property :

.....

en application de l'article 8, paragraphe 2, / under Article 8, paragraph 2,

lettre / letter ☐ a, ☐ b, ☐ c, ☐ d, ☐ e, ☐ f, de la Convention / of the Convention.

Fait à / Done at

Signature / Signature

le / on

Cachet / Stamp

2. - Article 8, paragraphe 3, de la Convention / Article 8, paragraph 3, of the Convention :

L'autorité soussignée / *The undersigned authority* :

.....
.....

a l'honneur d'apporter la réponse suivante à la demande ci-dessus / *has the honour to reply to the above request as follows* :

- ☐ elle accepte sa compétence / *it accepts jurisdiction.*
☐ elle n'accepte pas sa compétence / *it does not accept jurisdiction.*

Fait à / *Done at*

le / *on*.....

Signature / *Signature*

Cachet / *Stamp*

INFORMATION RELATIVE AUX MESURES DE PROTECTION CONCERNANT UN ADULTE
INFORMATION RELATING TO MEASURES OF PROTECTION CONCERNING AN ADULT

Convention sur la protection internationale des adultes,
signée à La Haye le [...]

*Convention on the International Protection of Adults,
signed at The Hague on [...]*

L'autorité soussignée / *The undersigned authority* :

.....

a l'honneur d'informer / *has the honour to inform* :

.....

que l'autorité suivante / *that the following authority* :

.....

1. - en application de l'article 7 de la Convention / *under Article 7 of the Convention*

- ☐ envisage des mesures de protection / *contemplates measures of protection*
 - ☐ concernant la personne de l'adulte / *concerning the person of the adult* (art. 7-1)
 - ☐ concernant les biens de l'adulte / *concerning property of the adult* (art. 7-1)
- ☐ a pris des mesures de protection / *has taken measures of protection* (art. 7-2, 7-3)
- ☐ a décidé qu'il n'y a pas lieu de prendre des mesures / *has decided that no measures are to be taken* (art. 7-2, 7-3)
- ☐ est saisie d'une procédure concernant la protection de l'adulte / *has proceedings pending concerning the protection of the adult* (art. 7-2) ;

2. - en application de l'article 10 de la Convention / *under Article 10 of the Convention*

- ☐ a pris des mesures d'urgence / *has taken urgency measures* (art. 10-1)
- ☐ a pris des mesures de protection / *has taken measures of protection* (art. 10-2) ;

3. - en application de l'article 11 de la Convention / *under Article 11 of the Convention*

- ☐ envisage des mesures de protection de la personne de l'adulte / *contemplates measures of protection of the person of the adult* (art. 11-1)
- ☐ s'est prononcée sur les mesures exigées par la situation / *has taken a decision in respect of the measures of protection required by the situation* (art. 11-2) ;

en ce qui concerne l'adulte suivant / *concerning the following adult* :

Nom / *Surname* :Prénom(s) / *First name(s)* :

Date et lieu de naissance / *Date and place of birth* :

Adresse / *Address* :

Une copie des décisions correspondantes est jointe / *Copies of the relevant decisions are attached* :

☐ Oui / *Yes*

☐ Non / *No*

Pour toute information complémentaire, veuillez prendre contact avec / *For further information, please contact* :

☐ l'autorité soussignée / *the undersigned authority*

☐ l'autorité qui a pris la décision / *the authority which has taken the decision*

Fait à / *Done at*

le / *on*

Signature / *Signature*

Cachet / *Stamp*

Report

Explanatory Report by Paul Lagarde

Table of contents

GENERAL FRAMEWORK, PRINCIPAL ORIENTATIONS AND STRUCTURE OF THE CONVENTION	40
<i>History.....</i>	<i>40</i>
<i>Principal orientations of the Convention.....</i>	<i>41</i>
ARTICLE BY ARTICLE COMMENTARY ON THE CONVENTION	43
<i>Title of the Convention and Preamble.....</i>	<i>43</i>
CHAPTER I – SCOPE OF THE CONVENTION	43
Article 1 (objects of the Convention)	43
Paragraph 1	43
Paragraph 2	45
Sub-paragraph a)	45
Sub-paragraphs b) and c)	45
Sub-paragraphs d) and e)	45
Article 2 (definition of the term “adult”).....	45
Article 3 (enumeration of the measures of protection)	46
Sub-paragraph a)	47
Sub-paragraph b)	47
Sub-paragraph c).....	47
Sub-paragraph d)	48
Sub-paragraph e).....	48
Sub-paragraph f)	48
Sub-paragraph g).....	48
Article 4 (matters excluded from the scope of the Convention)	49
Paragraph 1	49
Sub-paragraph a) (maintenance obligations)	49
Sub-paragraph b) (marriage)	49
Sub-paragraph c) (matrimonial property regimes)	50
Sub-paragraph d) (trusts or succession)	51
Sub-paragraph e) (social security)	51
Sub-paragraph f) (health)	52
Sub-paragraph g) (measures connected with penal offences).....	53
Sub-paragraph h) (asylum and immigration)	53
Sub-paragraph i) (public safety)	54
Paragraph 2	54
CHAPTER II – JURISDICTION	55
Article 5 (jurisdiction of the authorities of the adult's habitual residence).....	56
Paragraph 1	56
Paragraph 2	56

Article 6 (adults who are refugees, displaced or without habitual residence)	57
Paragraph 1	57
Paragraph 2	57
Article 7 (concurrent subsidiary jurisdiction of the authorities of the State of nationality of the adult)	58
Paragraph 1	58
Paragraph 2	59
Paragraph 3	60
Article 8 (transfer of jurisdiction to an appropriate forum)	60
Paragraph 1	61
Paragraph 2	61
Paragraph 3	63
Article 9 (jurisdiction of the authorities of the State where property of the adult is situated)	63
Article 10 (jurisdiction in case of urgency)	64
Paragraph 1	64
Paragraph 2	65
Paragraph 3	65
Paragraph 4	65
Article 11 (measures for the protection of the person which are temporary in nature and of limited territorial effect)	66
Paragraph 1	66
Paragraph 2	67
Article 12 (maintenance in force of the measures in case of a change of circumstances)	68
Final remarks	69
CHAPTER III – APPLICABLE LAW	69
Article 13 (law applicable to measures of protection)	70
Paragraph 1	70
Paragraph 2	70
Article 14 (conditions of implementation of the measure)	70
Article 15 (mandate in case of incapacity)	71
Paragraph 1	71
Paragraph 2	73
Paragraph 3	75
Article 16 (termination or modification of powers)	75
Article 17 (protection of third parties)	76
Article 18 (universal character of the conflicts rules)	77
Article 19 (exclusion of renvoi)	77
Article 20 (mandatory laws)	77
Article 21 (public policy)	78
CHAPTER IV – RECOGNITION AND ENFORCEMENT	78
Article 22 (recognition and grounds for refusal of recognition)	78
Paragraph 1	78

Paragraph 2	79
<i>Sub-paragraph a)</i>	79
<i>Sub-paragraph b)</i>	79
<i>Sub-paragraph c)</i>	80
<i>Sub-paragraph d)</i>	80
<i>Sub-paragraph e)</i>	80
Article 23 (preventive action for recognition or non-recognition)	80
Article 24 (findings of jurisdictional facts)	81
Article 25 (declaration of enforceability)	81
Article 26 (prohibition of review on the merits)	82
Article 27 (enforcement)	82
CHAPTER V – CO-OPERATION	83
Article 28 (creation of a Central Authority)	83
Article 29 (general obligation of co-operation)	83
Article 30 (communications, localisation)	83
Article 31 (mediation)	84
Article 32 (requests for concrete information and assistance with regard to a specific adult)	84
Paragraph 1	84
Paragraph 2	85
Paragraph 3	85
Article 33 (transborder placements)	85
Article 34 (adult in serious danger)	86
Article 35 (information creating a risk for the adult)	86
Article 36 (costs)	86
Article 37 (agreements between Contracting States)	87
CHAPTER VI – GENERAL PROVISIONS	87
Article 38 (international certificate)	87
Article 39 (protection of personal data)	89
Article 40 (confidentiality of information)	89
Article 41 (dispensation from legalisation)	89
Article 42 (designation of authorities)	89
Article 43 (communication of designations and declarations)	89
Articles 44–47 (federal clauses)	90
Article 44 (non application of the Convention to internal conflicts)	90
Article 45 (inter-territorial conflicts, general rules)	90
Article 46 (inter-territorial conflicts, special rules on the applicable law)	91
Article 47 (inter-personal conflicts, applicable law)	92
Article 48 (replacement of the Convention of 17 July 1905)	92
Article 49 (conflicts with other conventions)	93
Paragraph 1	93
Paragraph 2	93
Paragraph 3	94
Paragraph 4	94

Article 50 (temporal application of the Convention).....	94
Article 51 (language of communications)	95
Article 52 (monitoring of the Convention)	95
CHAPTER VII – FINAL CLAUSES	95
Articles 53-55 (final clauses)	95

- 1 The origin of the Convention on the International Protection of Adults goes back to the Decision taken on 29 May 1993 by the States represented at the Seventeenth Session of the Hague Conference on Private International Law

“to include in the Agenda of the Eighteenth Session the revision of the Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors, and a possible extension of the new Convention's scope to the protection of incapacitated adults.”¹

The Eighteenth Session of the Conference carried out half of this programme by drawing up the *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*, but it lacked the time to examine closely the case of adults. Also, having noted that the work on a convention on the protection of adults should be pursued following the adoption of what has become the Convention of 19 October 1996, and having considered “that one or more subsequent meetings of a Special Commission would be likely to lead to the adoption of a convention on the protection of adults”, it instituted for that purpose a Special Commission and decided “that the draft Convention to be drawn up by a Special Commission of a diplomatic character shall be embodied in a Final Act to be submitted for signature by the Delegates participating in such Commission”.²

- 2 Pursuant to that Decision, the Permanent Bureau of the Conference set up a Special Commission whose work was prepared by a Working Group which met in The Hague from 14 to 16 April 1997 under the chairmanship of Professor Struycken, Chairman of the Netherlands Standing Government Committee for the codification of private international law. This Group had accepted in advance that a small drafting committee, which met in The Hague on 13 and 14 June 1997, would draft a first outline text to provide a basis for the work of the Special Commission. The Special Commission met in The Hague from 3 to 12 September 1997. This Commission drew up a draft convention which, together with the accompanying Report,³ served as a basis for discussion in the proceedings of the Special Diplomatic Commission which met in The Hague from 20 September to 2 October 1999. In addition to the delegates from 30 Member States of the Conference, observers from 6 other States, from two intergovernmental organisations and 3 non-governmental organisations participated in the negotiations.

At the start of its first meeting, the Diplomatic Commission appointed as Chairman Mr Eric Clive, delegate of the United Kingdom, and as Vice-Chairs Mr Andreas Bucher, delegate of Switzerland, Ms Gloria F. DeHart, delegate of the United States of America, and Mr Kurt Siehr, delegate of Germany, who had already held these posts in the Special Commission, as well as H.E. Mr Antonio Boggiano, delegate of Argentina, and H.E. Mr Hua, delegate of the People's Republic of China. It also confirmed Mr P. Lagarde, delegate of France, as Rapporteur. During the session a Drafting Committee was set up under the chairmanship of Mr Kurt Siehr, delegate of Germany,⁴ a Group to examine the

¹ Final Act of the Seventeenth Session, Part B, 1.

² Final Act of the Eighteenth Session, Part B, 2.

³ The preliminary draft and the Report by Paul Lagarde form Preliminary Document No 2 of June 1998 for the attention of the Special Diplomatic Commission.

⁴ Besides its Chairman, the Rapporteur and the Members of the Permanent Bureau, this Committee consisted of Ms G.F. DeHart (United States), as well as Messrs A. Bucher (Switzerland), S. Danielsen (Denmark) and P. Lortie (Canada), the last replacing Mme Louise Lussier who had represented Canada at the Special Commission.

federal clauses, under the chairmanship of Mrs Alegría Borrás, delegate of Spain,⁵ and a Group to prepare model forms, under the chairmanship of Mme Marie-Odile Baur, delegate of France. The work of the Diplomatic Commission was greatly facilitated by the substantial preliminary documents already made available to the experts of the Special Commission of 1997 by the Conference Secretariat.⁶

This report relates to the *Convention on the International Protection of Adults*, unanimously adopted by the Member States present at the Plenary Session on 2 October 1999.

GENERAL FRAMEWORK, PRINCIPAL ORIENTATIONS AND STRUCTURE OF THE CONVENTION

History

- 3 While the work of the Hague Conference on Private International Law in respect of the protection of adults is not of the same order as its achievements with regard to the protection of children at risk, it is nevertheless not negligible and the matter has been a recurrent object of concern. Before the First World War, the Fourth Session adopted the Convention, signed on 17 July 1905, *concernant l'interdiction et les mesures de protection analogues*, still in force as between Italy, Poland, Portugal and Romania. Between the two wars, the Sixth Session, in 1928, formulated certain proposals with a view to supplementing it.⁷ The remarkable study of Bernard Dutoit, then Secretary at the Permanent Bureau, in 1967 (note 7 above), gave rise to a renewed sense of interest by the Conference in the subject, which in fact became the object, in 1979, between the Thirteenth and Fourteenth Sessions, of a questionnaire sent out to Member States. The replies⁸ did not at the time suggest any great frequency in the occurrence of practical problems concerning the protection of adults in the international order, and the Special Commission meeting in February 1980 to examine the future programme of the Conference did not retain the subject.

Since then, the human life span in the developed States has continued to lengthen, accompanied by a corresponding increase in the illnesses attaching to old age. The Secretary General of the Conference noted forecasts made by the Economic and Social Council, according to which the number of persons over sixty years would rise from 600 million in 2001 to 1.2 billion in 2025, and the number of persons aged eighty or above, now at 50 million, would increase to 137 million by 2025. Awareness of these problems has already led in certain States to a complete recasting of internal systems for the protection of adults who are suffering from an impairment or an insufficiency in their

⁵ The delegations of the United States, Canada, Australia, Mexico and Germany were also represented on this Committee.

⁶ Note on the protection of incapacitated adults, prepared by Mr Adair Dyer in September 1996 (Prel. Doc. No 14 for the Eighteenth Session); *Les majeurs protégés en droit international privé et la pratique notariale*, étude de Mme Mariel Revillard for the Working Group; Report of the Council of Europe's Group of Specialists on Incapable and Other Vulnerable Adults, prepared by Mr Eric Clive at the request of the Council of Europe, 21 January 1997; proposal by the Swiss delegation, submitted at the close of the Eighteenth Session, transposing the provisions of the Convention of 19 October 1996 almost literally to the case of adults.

⁷ *Actes*, 1928, p. 421, cited by DUTOIT, *La protection des incapables majeurs en droit international privé*, *Revue critique de droit international privé*, 1967.465, at 500-501.

⁸ *Acts and Documents of the Fourteenth Session (1980)*, Tome I, *Miscellaneous matters*, pp. 114-147.

personal faculties.⁹ Natural movements in population in modern times, and especially the rather high number of people coming to the age of retirement and deciding to spend the last part of their lives in a milder climate, have made practitioners and in particular notaries more concerned to have at their disposal private international law rules which are certain. In particular, as the people in question often have certain property at their disposal, notarial practice has been confronted with problems of private international law concerning the management or the sale of goods belonging to these persons or the handling of inheritances coming to them.

The appearance in certain recent codifications of private international law of specific rules¹⁰ has made it possible to envisage, out of concern for international harmony, the negotiation of an international convention on private international law on this question. The opportunity to take up this idea again and to start work was provided by the Decision taken at the Seventeenth Session, in 1993, to revise the *Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors*. As the problems are related, at least on the technical level, it was reasonable to ask governmental experts to examine whether the solutions which they would have accepted for the protection of children could not be applied, with the necessary adaptations, to the protection of adults.

Principal orientations of the Convention

- 4 The Convention follows the general structure of the Convention of 19 October 1996 and adopts on many points the same solutions. This is not surprising, as both Conventions were essentially negotiated by the same governmental experts, whose specific task, as already indicated, was to consider whether the solutions adopted by the 1996 Convention could be extended to the protection of adults.

Basically, the most important discussions were between, on the one hand, experts insisting on the specificity of the problem of the international protection of adults and wishing not to be bound by the model of the Convention on the Protection of Children, and on the other hand, those who, convinced of the complementarity of the two Conventions, considered that only exceptionally was it necessary to depart from the 1996 Convention. It was in the area of the jurisdiction of authorities that the debate between these two approaches was most lively. The compromise reached by the Special Commission on this point was not re-examined by the Diplomatic Commission.

- 5 Like the 1996 Convention, the Convention comprises the seven following chapters: Scope of the Convention; Jurisdiction; Applicable law; Recognition and enforcement; Co-operation; General provisions; Final clauses.

⁹ See, in particular, in Germany the *Betreuungsgesetz* of 12 September 1990, entry into force 1 January 1992. The delegate of Greece mentioned a Greek law of 1996. See also the Recommendation No R(99)4 of the Council of Europe of 26 February 1999 on Principles concerning the legal protection of incapable adults.

¹⁰ For example, the Swiss law of 18 December 1987, Article 85, paragraph 2 of which extends the Hague Convention of 5 October 1961 to adults by analogy. See also the Quebec Civil Code of 18 December 1991, Art. 3085, in principle making the legal regime of majors subject to the law of their domicile, and the Tunisian Law of 27 November 1998, Art. 41, making the guardianship of the person under judicial disability subject to its national law.

Chapter I (Arts 1-4) defines the objects of the Convention and the persons to whom it applies, gives an illustrative but rather complete enumeration of measures of protection falling within the scope of the Convention and indicates, in an exhaustive way, the matters excluded from the scope of the Convention.

Chapter II on jurisdiction (Arts 5-12) departs a little from the model of 1996. This model was characterised by a wish to avoid in principle all competition between the authorities of different States in taking measures of protection for the person or the property of the child and to concentrate jurisdiction to the advantage of the authorities of the State of the child's habitual residence. Some delegates would have liked to extend this system to adults. However, this concern was less of a constraint here. While it is undoubtedly desirable that the protection of the adult should be ensured by the authorities of the State of the habitual residence, it should also be borne in mind that the adult, in contrast to the child who is the object of a dispute between parents, is not, in most cases, the stake in a contest between persons seeking to exercise protection. It is also advisable not to hinder too much the good will of anyone who would be prepared to undertake this obligation. If such person does not reside in the same State as the adult to be protected, it would appear appropriate to allow him or her to refer to the authorities as close as possible to his or her residence and not to limit him or her to taking action in the State, perhaps far away, of the adult's habitual residence. It was also emphasised that exclusive jurisdiction in the authorities of the State of the adult's habitual residence could threaten his or her personal liberty, especially in a case where he has not chosen this habitual residence. This consideration militates in favour of the admission of a concurrent jurisdiction, at least for the authorities of the adult's State of nationality.

Chapter II reflects the compromise reached in the Special Commission. While Article 5 maintains the principal jurisdiction in the authorities of the State of the adult's habitual residence, Article 7 gives a concurrent though subordinate jurisdiction to the authorities of which the adult is a national. Also Article 8 allows the authorities of the State of the adult's habitual residence to request, in the interests of the adult, the authorities of other States to take measures of protection. Article 9 gives a concurrent subsidiary jurisdiction to the authorities of the State in which property of the adult is situated. Articles 10 and 11 repeat Articles 11 and 12 of the Convention on the Protection of Children for cases of urgency and for a number of provisional measures with limited territorial effect.

Chapter III on applicable law (Arts 13-21) takes up the principle of the 1996 Convention according to which each authority taking a measure of protection applies its own internal law (Art. 13). It likewise determines the law applicable to powers of representation conferred by an adult which are to be exercised when such adult is not in a position to protect his or her own interests (Art. 15).

Chapter IV (Arts 22-27) follows very closely the model of the 1996 Convention and regulates in detail the recognition and enforcement in one Contracting State of measures of protection taken in another Contracting State. It distinguishes clearly between recognition, the declaration of enforceability or registration for purposes of enforcement, and the actual enforcement.

Chapter V (Arts 28-37) establishes a mechanism for co-operation between Contracting States, which likewise follows very closely the corresponding chapter of the 1996 Convention. This mechanism is based, following the example of numerous other Hague Conventions, on the creation in each Contracting State of a Central Authority (Art. 28), the obligations and powers of which are set out by the subsequent articles.

Chapter VI (Arts 38-52) comprises the general provisions intended to facilitate the implementation and the monitoring of the Convention, as well as to protect the confidentiality of data and information assembled in accordance with it. It also specifies its application in time (Art. 50), seeks to prevent conflicts between conventions (Arts 48 and 49) and transposes Articles 46 to 49 of the Convention on the Protection of Children which deal with its application in respect of States with non-unified legal systems (so-called federal clauses, Arts 44-47).

Chapter VII (Arts 53-59) contains the customary clauses on the protocol surrounding signature, entry into force, accession to and denunciation of the Convention.

ARTICLE BY ARTICLE COMMENTARY ON THE CONVENTION

Title of the Convention and Preamble

- 6 The title “*Convention on the International Protection of Adults*” was found preferable to the much longer one of the Convention on the Protection of Children. Since there was no danger for adults of confusing this Convention and a previous one, there was everything to gain by giving the Convention a short, expressive title which was easy to quote.
- 7 The rather short Preamble stresses the importance of international co-operation for the protection of adults and of prioritising the interests of the adult and respect for his or her dignity and autonomy. The Commission did not conceal the fact that the interests of the adult could sometimes be at odds with his or her autonomy, but by mentioning both of them, it suggests an attempt to strike a balance between these two concerns.

The Commission rejected the suggestion by some delegations that reference should be made in the Preamble to other international instruments, in particular the United Nations Covenants on Civil and Political Rights and on Economic, Cultural and Social Rights. This position does not imply any underestimation of the importance of these instruments. Indeed, the Fundamental rights of adults in need of protection were at all times a central concern of the Commission, but specific provisions of the instruments mentioned above did not feature in the debates.

CHAPTER I – SCOPE OF THE CONVENTION

Article 1 (objects of the Convention)¹¹

Paragraph 1

- 8 This paragraph, which has no equivalent in the 1996 Convention, indicates at the outset that the object of the Convention is the *protection* of certain adults. This idea of protection serves as guide and yardstick for defining the scope of application of the Convention. As we will see in connection with Article 4, this means that a measure taken by the authority

¹¹ The titles appearing in italics after each Article mentioned have been added by the Rapporteur to increase the readability of his Report, but they do not appear in the text of the Convention.

of a State falls or does not fall within the scope of the Convention depending on whether it is or is not aimed at the protection of adults.

- 9 Paragraph 1 defines the adults to whom the Convention applies. These are naturally those who need protection, but to make this need quite clear, the Commission purposely avoided in this paragraph using juridical terms, such as “incapable party”, which have different meanings depending on the law being considered. It was therefore judged preferable to keep to a factual description of the adult in need of protection.

The text contains two factual elements. The first is that of an “impairment or insufficiency of [the] personal faculties” of the adult. The Convention does not therefore apply to the protection of adult victims of external violence, for example battered wives. The protection of these victims in fact comes under police measures, in the common non-technical sense of the term, and not under juridical measures of protection. The adults whom the Convention is meant to protect are the physically or mentally incapacitated, who are suffering from an “insufficiency” of their personal faculties, as well as persons usually elderly, suffering from an impairment of the same faculties, in particular persons suffering from Alzheimer's disease. Although the Commission did not wish to spell this out in the text, to avoid making it pointlessly cumbersome, it accepted that this impairment or this insufficiency could be permanent or temporary, since it necessitates a measure of protection.

The question was raised as to whether the case of prodigality, which within certain laws may be a cause of legal incapacity, was covered by these terms. The Commission considered that prodigality as such did not fall within the scope of the Convention. It could, nevertheless, when combined with other factors, be indicative of an impairment in the adult's personal faculties, calling for a measure of protection within the meaning of the Convention.

- 10 The insufficiency or impairment of the personal faculties of the adult must be such that he or she is not “in a position to protect [his or her] interests”. The second element in the definition must be understood broadly. The text takes into consideration, not only the property interests of the adult, which his or her physical or mental state may prevent him or her from managing properly, but more generally his or her personal and health interests. The fact that the adult seriously neglects the personal or property interests of his or her relatives, for whom he or she has responsibility, may also disclose an impairment in his or her personal faculties.

The Commission rejected a proposal by the United Kingdom for making it clear that the adult's incapacity could affect his or her mental faculties or ability to communicate.¹² The court should not be bound by the nature of the incapacity, the first criterion necessarily continuing to be the need for protection resulting from that incapacity.

Following a proposal by the delegations of China, Italy and the United Kingdom (Work. Doc. No 95), the Commission sought to stipulate in the text of Article 1, as it had in the Preamble, that the Convention applies “in international situations”. This will be the case when the situation involves more than one State. The requirement that the situation be international should not prevent a State with a plurilegislative system from applying the rules of the Convention to its purely internal conflicts, as it is permitted to do under Article 44 (see below No 154).

¹² Work. Doc. No 1, Minutes No 1, No 23 [see *Proceedings of the Special Commission with a diplomatic character* (1999), p. 224 (hereinafter, “*Proceedings of the SC with a diplomatic character* (1999)”).]

Paragraph 2

- 11 This paragraph describes the objects of the Convention and constitutes a sort of table of contents for it. It is practically identical to the corresponding Article in the 1996 Convention and calls for the same comments.

Sub-paragraph a)

- 12 The Convention determines the State whose authorities have jurisdiction but not the competent authorities themselves, which may be judicial or administrative and may sit at one place or another in the territory of the said State. In terms of conflicts of jurisdiction, it could be said that the Convention sets international jurisdiction, but not internal jurisdiction.

The Convention makes it clear from the first paragraph that it is concerned with the protection of the person *and the property* of the adult. This clarification is even more essential for the adult than for the child, since the adult's frail condition generally continues to an age at which he or she has at his or her disposal property which cannot be left unmanaged.

Sub-paragraphs b) and c)

- 13 These two sub-paragraphs give notice of the provisions of Chapter III on applicable law. By mentioning in the first Article the determination of the law applicable to representation of the adult, the Convention shows that the relevant rule (Art. 13) will be a conflict of laws rule and not a simple rule of recognition.

Sub-paragraphs d) and e)

- 14 These two sub-paragraphs are clear and self-sufficient. They give notice of Chapters IV (Recognition and enforcement) and V (Co-operation) of the Convention.

Article 2 (definition of the term “adult”)

- 15 An adult is defined by Article 2, paragraph 1, as “a person who has reached the age of 18 years”.

This lower limit very naturally coincides with the upper limit on the application of the Convention on the Protection of Children. Thus problems of the borderline between the scope of application of the two Conventions as to persons should be avoided. For example, while in a Contracting State specific measures for the protection of adults may be taken from the age of 16 years, as has been stated is the case in Scotland, it is the 1996 Convention and not the “Protection of Adults” Convention which should apply if such measures are contemplated with respect to an 18-year-old minor.¹³

Paragraph 2 treats the slightly different case where the competent authorities, applying the 1996 Convention, have taken measures for the protection of an incapacitated child, envisaging that these measures would continue to remain effective beyond the child's

¹³ The Commission rejected an amendment proposed by the United Kingdom (Work. Doc. No 2) in favour of considering the minor in this case as a major within the meaning of the Convention.

majority¹⁴ or that they would take effect starting from his or her majority.¹⁵ The thrust of paragraph 2 is to make the “Protection of Adults” Convention responsible for these measures as soon as the minor has reached 18 years of age. This provision is important. It makes it possible to avoid a break in continuity between the two Conventions. Had it not been adopted, it would no longer have been possible in the other Contracting States to recognise the measures taken during the child’s minority under the 1996 Convention pursuant to that Convention, which is not applicable to persons over 18 years of age, nor could they have been recognised under the “Adults” Convention, having been taken before the age of 18 years. Thanks to Article 2, paragraph 2, when the child attains 18 years of age, it is the new Convention which will apply to the recognition in the other Contracting States of these previous measures¹⁶ and also to their implementation, and it is also it which, naturally, will determine which the competent authorities are for abolishing or modifying these measures if need be.

- 16** At the other extremity of life, one may ask if the new Convention may still be applied after the death of the protected adult. The reply is in principle in the negative. Therefore, the Convention may not be used to ensure, for example, the recognition of post-mortem powers of representation of the adult. However, the application after death of some provisions of the Convention may be possible in so far as it relates to acts or measures taken during the adult’s life, such as the organisation of the funeral or the cancellation of ongoing contracts, such as a housing lease.
- 17** Following the model of the Convention on the Protection of Children, the new Convention does not contain a disposition limiting geographically the persons to whom it will apply. The result is that its geographical scope varies with each of its provisions. When one of its rules confers jurisdiction on the authorities of the habitual residence of an adult, it applies to all adults having their habitual residence in a Contracting State.¹⁷ When a Convention rule confers jurisdiction on the authorities of the residence of an adult, it applies to all adults having their residence in a Contracting State. When a Convention rule sets out a rule of conflicts of law dealing with the representation of the adult, this rule is, except as otherwise provided, a universal conflicts rule, as in all recent Hague Conventions on choice of law, applicable to all adults, whatever their nationality and whatever their residence. (cf. below Nos 46, 53 and 82).

Article 3 (enumeration of the measures of protection)

- 18** Like Article 3 of the Convention on the Protection of Children, this Article enumerates the issues on which the measures of protection of adults may bear. The Commission adapted this list, as far as was necessary, to the case of adults, while following as closely as possible the previous draft, to avoid giving rise to arguments *a contrario*. Since measures of protection vary with each legal system, the enumeration given in this Article can only be illustrative. Nonetheless, it tries to cover a very broad scope and certain of these elements may overlap, which makes little difference since the set of rules to which they are all subject is the same. It is somewhat futile, for example, to ask if a specific institution, such as the German *Betreuung*, is a “protective regime” within the meaning of sub-

¹⁴ For example, the “*minorité prolongée*” of Art. 487 *bis* of the Belgian Civil Code.

¹⁵ For example, the “*tutelle anticipée*” provided for by Art. 494, para. 2, of the French Civil Code.

¹⁶ The fact that the authorities’ rules of jurisdiction are not identical in the two Conventions might mean that a measure taken by the competent authority under the 1996 Convention (e.g. the divorce forum) and intended to extend beyond the child’s majority, cannot be recognised under the “Adults” Convention (see below, No 119, *ad* Art. 22, para. 2 *a*)).

¹⁷ Subject to habitual residence in a Contracting State in the case where the Convention gives jurisdiction to the authorities of the national State of the adult; see below, as to Art. 7, para. 1, No 59.

paragraph a), an “analogous institution” within the meaning of sub-paragraph c) or a “specific intervention” within the meaning of sub-paragraph g), since it constitutes in any case a measure of protection within the meaning of the Convention.

It is possible also that certain of the measures enumerated may be unknown in one or another legal system. This does not imply that they are available to every authority having jurisdiction under the Convention, but simply that they may be taken by such an authority if they are provided for by the law applicable under the Convention and that, in that case, they will fall within the scope of the Convention.

- 19 Finally, it should be pointed out that the text only concerns the protection of adults when this gives rise or has given rise to measures of protection. The validity of instruments executed by a person whose personal faculties are impaired but who has not been made the object of a measure of protection remains outside the scope of the Convention. Such validity is in fact on the borderline between capacity and consent, and therefore, in accordance with juridical categories, between personal status and juridical acts, which the future Convention is not intended to regulate.

Sub-paragraph a)

- 20 In certain legal systems, still quite numerous, the level of insufficiency or impairment of the adult's personal faculties determines the degree of juridical incapacity and, therefore, the type of protective regime under which he or she will be placed (interdiction, guardianship, curatorship, etc). The decision placing the adult in one of these categories constitutes a measure of protection within the terms of the Convention.

The “protective regime” to which this paragraph refers may be a general one or relate only to certain acts of the adult, or to just one area of his or her activity, and the incapacity from which he or she suffers may be partial only. The text does not expressly mention the revocation of the incapacity, but the clear intention of the Commission was to include this within the Convention and so also to oblige Contracting States to recognise such a revocation.

Sub-paragraph b)

- 21 The protection of the adult does not necessarily involve a declaration of his or her incapacity. The adult may remain in control of his or her affairs, continue to manage them without the assistance of a third party, but be placed “under the protection of a judicial or administrative authority” which may where necessary, for example, annul or bring about the annulment of certain past acts of the adult. This is, in particular, the object of the French institution of “*placement sous sauvegarde de justice*”.¹⁸

Sub-paragraph c)

- 22 The measures of protection may bear on guardianship, curatorship or other analogous institutions. Involved here are protective regimes which are established when the adult, in accordance with his or her condition, needs to be represented on a continuous basis, or simply assisted, supervised or advised in relation to the acts of civil life.

¹⁸ Art. 491 *et seq.* of the French Civil Code.

Sub-paragraph d)

- 23 The terms used are very broad. The “person or body having charge of the adult's person or property, representing or assisting the adult” may be a guardian, a curator or a *Betreuer*, but may also be simply a managing guardian in those cases where it has not seemed necessary to set up full guardianship,¹⁹ or a guardian *ad litem* assigned to represent the adult in litigation involving a conflict of interest with the legal representative, or even a nursing or retirement home called upon to take medical decisions in the absence of the legal representative, etc.

Sub-paragraph e)

- 24 The expression “placement of the adult in an establishment or other place where protection can be provided” is very broad and may cover the case where this measure is ordered without the consent of the person concerned and even against his or her will, as well as voluntary placement without restrictions on the liberty of the person concerned. Some delegations wanted this paragraph deleted, on the grounds that placement is often determined by social, medical or even public policy considerations, which should remain outside the scope of the Convention. A large majority²⁰ decided in favour of keeping the paragraph, both because it is difficult, in the field of protection, to distinguish between public law and private law and for the sake of symmetry with the Convention on the Protection of Children. However, safeguards exist to ensure that placement does not go ahead against the wishes of the authorities of the State of placement (Art. 33, see below, No 138).

Sub-paragraph f)

- 25 This sub-paragraph assumes great practical importance for adults. The measures of protection may bear on “the administration, conservation or disposal of the adult's property”. This very broad formulation encompasses all operations concerning property, in particular sale of immovables, management of securities, investments, regulation, and the handling of successions devolving to the adult.

Sub-paragraph g)

- 26 This sub-paragraph envisages a situation in which protection is limited to “the authorisation of a specific intervention”, for example for a surgical operation or for the sale of an asset.
- 27 From the list of the protection measures the Commission deleted the one included in Article 3 f) of the 1996 Convention (supervision by a public authority of the care of the person to be protected by any person having charge of that person), as no convincing concrete example could be provided of its usefulness for adults.
- 28 It was asked whether the list of protection measures ought not to be supplemented by a provision stating that the decision not to take the measure of protection ought also to be regarded as a measure within the meaning of the Convention.²¹ The Commission did not consider it served any purpose to introduce such a provision into the text of the Convention, but did accept its consequence, namely, the duty for Contracting States to

¹⁹ See, for example, Art. 499 of the French Civil Code.

²⁰ By 11 votes to 2, with 8 abstentions, see Minutes No 1, No 66 [see Proceedings of the SC with a diplomatic character (1999), p. 227].

²¹ See along these lines Work. Doc. No 84 of the Japanese delegation.

recognise such a negative decision taken by the competent authority of one of their number.²²

Article 4 (matters excluded from the scope of the Convention)

- 29 This Article enumerates certain matters or questions which are excluded from the scope of the Convention. Unlike that of Article 3, which includes the adverb “in particular”, this enumeration is exhaustive. Any measure directed to the protection of the person or the property of an adult, which is not excluded by Article 4, comes within the scope of the Convention.
- 30 Again, it should be stressed that the measure relates specifically to the protection of the adult, otherwise it would come, needless to say, outside the scope of the Convention. Thus, for example, naturally falling outside the Convention is any matter relating to the nationality of the adult or, equally, the award of damages to the adult arising from the application of rules of civil liability, except as regards the determination of the person having capacity to collect the sums awarded and, where necessary, to use them. At the same time, it would appear that what is sometimes called “*capacité délictuelle*” of the incapacitated adult, that is to say his or her capacity to be held civilly liable for acts resulting in damage caused by him or her, should be excluded from the scope of the Convention and should come under the heading of liability. It is not concerned with measures for the protection of an adult who commits a tortious act.
- 31 The exclusions set out in Article 4 have justifications which are different, one from the other. Some have to do with the fact that the matter excluded is already regulated by other conventions or that the rules of the Convention, in particular the failure to distinguish in principle between the *forum* and the *right*, would not be suitable. As for other exclusions, which touch on public law, it did not seem possible to impose on the Contracting States, in matters which touch on essential interests (criminal law, immigration), a treaty restraint on their jurisdiction.

Paragraph I

Sub-paragraph a) (maintenance obligations)

- 32 The two Hague Conventions of 2 October 1973 govern the law applicable to maintenance (support) obligations as well as the recognition and enforcement of decisions in respect of them. In addition, the Brussels and Lugano Conventions govern, among States of the European Union and the European Free Trade Association, the assumption of jurisdiction in respect of maintenance obligations, and also recognition and enforcement. On these matters the new Convention would therefore have been either pointless or a source of conflict of conventions. The exclusion of maintenance obligations was therefore necessary.

Sub-paragraph b) (marriage)

- 33 The exclusion of marriage is justified by the wish to avoid a conflict with the *Convention of 14 March 1978 on Celebration and Recognition of the Validity of Marriages*. Article II, No 4, of this Convention allows a Contracting State not to recognise the validity of a marriage if, under its law, one of the spouses did not have the mental capacity to consent. The inclusion of marriage within the new Convention would oblige this State to recognise the

²² See for example Art. 7, para. 3.

validity of such a marriage if it had been concluded pursuant to a protective measure conforming with it, which would contradict the 1978 Convention.

The Convention treats “similar relationships” on a par with marriage in order to exclude them from its scope. Although not naming them, it intended this expression to mean the officially recognised forms of union, whether heterosexual or homosexual, such as registered partnership in the legislation of Nordic States and the Netherlands or the solidarity civil covenant (“*pacte civil de solidarité*” - “PACS”) which has since been introduced into French law.²³

- 34 The exclusion covers the formation, annulment or dissolution of the union and also, in the case of marriage alone, legal separation. The Convention will therefore not apply to whether a mentally incapacitated person may or may not contract a marriage, or to whether an incapacity arising or belatedly revealed in one of the spouses can be a ground for the annulment or dissolution of the marriage.
- 35 On the other hand, the Convention does apply to the effects of marriage and similar relationships. The Commission rejected all proposals seeking to exclude them. Indeed, it appeared that all the rules governing relations between partners and particularly the representation between partners independently of the applicable matrimonial property regime, ought to be included in the Convention *insofar as they are aimed at the protection of the ailing partner*. In the contrary case, the exclusion results from Article 1, paragraph 1. Hence, the authorisation a partner may request of a court to represent his or her partner not in a position to indicate his or her wishes (Art. 219 of French Civil Code) is a protective measure within the meaning of the Convention, as it is directed towards the ailing partner. On the other hand, the authorisation which the healthy partner requests of a court for the purpose of alone entering into a transaction for which the assistance of his or her partner would be necessary (Art. 217, French Civil Code) serves the interests of the healthy partner or of the family, but not those of the ailing one. It thus lies outside the scope of the Convention as defined by Article 1, paragraph 1. Similarly, the rules on the attribution of family accommodation are not aimed at the protection of the incapacitated partner and are thus in principle excluded from the scope of the Convention. But the decision by which a court would use these rules with a view, in a specific case, to the protection of that partner, should be considered as a measure of protection within the meaning of the Convention.

Sub-paragraph c) (matrimonial property regimes)

- 36 The exclusion of matrimonial property regimes seemed natural because of the existence of the *Convention of 14 March 1978 on the law applicable to Matrimonial Property Regimes*.²⁴ For the sake of consistency, it is extended to “any similar relationship”.

The inclusion in the Convention of the effects of marriage and the exclusion of matrimonial property regimes will give rise to a characterisation problem familiar from legal systems in which these two categories are subject to different connecting factors. Here this problem of characterisation appears to be very limited however as the rules of representation between partners falling under the matrimonial property regime are, in theory, aimed at the functioning of the regime, while it may be presumed that those concerned with the protection of the ailing partner fall under the effects of marriage.

²³ Law No 99-944 of 15 November 1999.

²⁴ Notwithstanding the fact that this Convention excludes from its scope the legal capacity of spouses (Art. 1, para. 2, No 3).

Sub-paragraph d) (trusts or succession)

- 37 The exclusion of trusts is understandable in view of the concern that the Convention should not encroach on systems of ownership and, more generally on the categories of property rights. Moreover, the questions of private international law concerning trusts have already been dealt with in a specific Convention.²⁵

The exclusion should be understood restrictively and be limited to rules relating to the functioning of the trust. To take a concrete example, the exclusion of trusts will have as a consequence, that in the case where a trustee has died and the trust instrument has not provided for a replacement, the nomination by a judicial authority of another trustee could not be considered as being a measure of protection falling within the scope of the Convention.²⁶ By contrast, the designation of the representative of the adult who is authorised to receive the trust revenues from the trustee or to receive, in the adult's name, the trust property on its dissolution does fall within the scope of the Convention, because that is a measure of protection of the adult. Besides, the Trusts Convention contains an exception for mandatory provisions of the law designated by the conflicts rules of the forum in relation to the protection of minors and incapable parties.²⁷

- 38 The complete exclusion of successions is also taken from the Convention on the Protection of Children, to avoid in particular any conflict with the *Hague Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons*.

This means, for example, that if the law governing the succession lays down that an adult heir may only accept or renounce a succession, or conclude a succession agreement, by means of certain measures of protection, the Convention will not apply to these measures of protection. At the very most, it might be admitted that if the law governing the succession provides for the intervention of the legal representative of the adult heir, this representative would be determined through application of the Convention rules.

Sub-paragraph e) (social security)

- 39 The exclusion of social security is explained by the fact that the benefits are paid by bodies whose determination depends on precise connecting factors, taking into account the place of work or the habitual residence of the persons having social insurance and not necessarily corresponding with the Convention rules. On the other hand, coming within the scope of the Convention is the designation of the adult's representative who is qualified to receive the social security benefits, except insofar as the social security regulations might provide specific rules.

The Commission did not take up a proposal by the delegations of Denmark, Finland, Norway and Sweden in favour of adding the exclusion of social services to that of social security,²⁸ but its clearly expressed intention was that the notion of social security within the meaning of this sub-paragraph should be understood in a broad sense, going beyond what, in the law of each Contracting State, falls within social security *stricto sensu*.

²⁵ *Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition*.

²⁶ Article 8 a) of the Trusts Convention includes within the scope of the law applicable to the trust “the appointment, resignation and removal of trustees, the capacity to act as a trustee, and the devolution of the office of trustee”.

²⁷ Art. 15 a).

²⁸ Work. Doc. No 11, Minutes No 2, Nos 40-49 [see Proceedings of the SC with a diplomatic character (1999), p. 230].

It might be accepted that cash benefits designed to compensate for lack of resources or even that certain social welfare benefits in kind should also be excluded from the scope of the Convention. This would mean that any State could decide to grant them, in its own territory, according to its own rules, to any incapacitated adult present in that territory, without being bound by the rules of jurisdiction of the Convention and without the other Contracting States being bound to recognise those decisions and, where appropriate, assume responsibility for implementing them.

Sub-paragraph f) (health)

40 It is not the entirety constituted by education and health which is excluded from the Convention, but only, within this entirety, the public measures of a general nature, such as those which make vaccination obligatory. The placement of a specific adult in a particular care institution or the decision to have him or her undergo a surgical operation, for example, are decisions falling within the scope of the Convention.

41 The Commission only reached this solution, already adopted by the Special Commission, after very protracted discussions on the expediency of excluding *medical and health matters* in their entirety from the scope of the Convention. A special Working Group, chaired by Mr Nygh, delegate of Australia, was even set up in an effort to reach a solution acceptable to the greatest number of delegations.

The arguments put forward by those in favour of excluding medical matters were as follows. If those matters were included, some were afraid of being obliged to recognise, or even implement, individual decisions of a medical nature against their beliefs, such as measures ordering the abortion or sterilisation of incapacitated adults. Others were afraid that the medical system might grind to a halt if, before prescribing a course of treatment or carrying out an operation, medical practitioners were obliged, even in non-urgent cases, to obtain the necessary authorisation from the competent authorities of another Contracting State at the risk of becoming liable. On the other hand, the opponents of exclusion argued that if medical matters were to be excised from the Convention, it would essentially fail in its aim to protect the sick and elderly and would be reduced to a convention on the property of the adult.

During these protracted discussions, the Commission considered alternatives to exclusion, such as the adoption of rules of jurisdiction specific to medical matters, the most radical of which would have entailed submitting issues of consent and authorisation in this field to the authorities and the legal system of the State in which the medical practitioner works.

42 On the last day of its deliberations, the Commission finally found a solution acceptable to all delegations.²⁹ It discarded all proposals either for the total or partial exclusion of medical and health matters or for their submission to a special jurisdiction regime. It considered that, while medical acts in themselves, which fall within the domain of medical science and are the province of medical practitioners who are not authorities within the meaning of the Convention, fall outside the scope of the Convention, without there being any need to spell this out in the text, on the other hand legal questions concerning the representation of the adult connected with those medical acts (authorisations or designation of the legal or *ad hoc* representative) are included in the Convention and have to be subject to its general rules, without forming the object of rules of exception. This is why, apart from Article 4, paragraph 1 f), there is no reference in the Convention to medical or health matters. The rules of jurisdiction which will most often be applied in

²⁹ Work. Doc. No 114, presented by twenty delegations.

the medical domain (Arts. 10 and 11) without bringing the medical system to a standstill will be indicated below. Further, the provisions of Article 20 on mandatory laws and of Article 22 providing for the non-recognition of a measure contrary to public policy or a mandatory law of the State addressed, meet the concerns of States originally wishing to exclude medical matters from the scope of the Convention.

Sub-paragraph g) (measures connected with penal offences)

- 43 The Convention should deal with the protection of adults and not with criminal sanctions. The dividing line is however difficult to draw. The Commission abandoned the idea of establishing a distinction between measures of a repressive nature and measures of an educational nature. Such a distinction would have given rise to difficult problems of characterisation. Besides, in the case of conduct punishable at the criminal level (for example, murder, rape, assault with a deadly weapon), it would have been undesirable for the State of the place where the violation occurred to be able to exercise its power of repression, under its general rules, but not to be able, if it thought it more appropriate, to take a measure involving placement in a specialised institution, or to prescribe a medico-social outcome,³⁰ because it lacked jurisdiction under the Convention to take measures of protection for the adult. The exclusion from the scope of the Convention of measures taken as a result of penal offences committed by the person in need of protection expresses the wish of the Commission not to place any limit on the competence of Contracting States to respond with the measures which they deem appropriate, whether they be punitive or educational, to such penal offences.

The expression “measures taken in respect of a person as a result of penal offences committed by that person” indicates that only measures resulting from offences committed by the person requiring protection and relating to that person, and not offences committed by third parties and possibly justifying particular measures of protection of adults to whom the Convention applies.

By using the word “person” instead of the word “adult”, sub-paragraph g) sought to establish a link of continuity with the Convention on the Protection of Children. Sub-paragraph g) will apply in cases where the offence has been committed by the person requiring protection when still a minor, that is, if the measure is taken after the author of the offence has attained 18 years of age.

For the exclusion of the measures mentioned under sub-paragraph g) to apply, it is necessary and sufficient that the act committed by the person in need of protection be an act which is criminal under penal law when it is committed by any person whatever. The text does not require, in the particular case, that the person who committed the act be legally subject to criminal prosecution. His or her state of dementia may shelter him or her from such prosecution.

Sub-paragraph h) (asylum and immigration)

- 44 This sub-paragraph of Article 4 excludes from the Convention “decisions on the right of asylum and on immigration”, since these are decisions which derive from the sovereign power of States. Only decisions on these matters are excluded, in other words the granting of asylum or of a residence permit. On the other hand, the protection and representation of adults applying for asylum or for a residence permit do fall within the scope of the Convention. A proposal by the United States Delegation (Work. Doc. No 12) expressly to exclude from the scope of the Convention decisions pertaining to nationality was

³⁰ Provided for by some recent legislation to prevent recidivism in case of acts of paedophilia.

withdrawn following the observation that such exclusion was a foregone conclusion since such decisions are not measures of protection.

Sub-paragraph i) (public safety)

- 45 This exclusion, which is a new one in relation to both the 1996 Convention and the Special Commission's Preliminary draft Convention, primarily concerns the confinement of adults who are a danger to third parties by reason of the mental disorders from which they suffer.

Some delegations would have liked to exclude from the scope of the Convention all measures of enforced placement on psychiatric grounds, in order to avoid problems at the recognition and enforcement stage.³¹ Yet it was difficult to reconcile such exclusion with the reference to placement in the list in Article 3, sub-paragraph *e*), of the measures within the meaning of the Convention (see above, No 24). For this reason, those delegations amended their proposals in favour of only excluding enforced placement measures in relation to dangerous adults.³² The idea was that the placement to be excluded was the sort ordered in the interests of public safety, extraneous to the purpose of the Convention, and not the sort prescribed to protect the adult. But as an adult suffering from psychiatric disorder can also be a danger to him or herself and need protective internment, it appeared wiser not to refer at this point to placement, only to public safety.³³ The text ultimately adopted appreciably limits the scope of the exclusion. It is only "measures directed solely to public safety"³⁴ which are excluded. Hence, an enforced placement measure ordered in the interests of both public safety and the adult is still included within the scope of the Convention.

Paragraph 2

- 46 The purpose of this paragraph is to limit exclusions to what is strictly necessary, in other words what falls directly within the regulations applicable to the matters excluded, but not to the measures of protection of a general kind which have to be taken, even when they concern those matters. Thus the exclusion in paragraph 1, sub-paragraph *a*), means that the adult's claim to maintenance does not fall within the Convention, but it is clear from paragraph 2 that the Convention will apply to determining the person who will appear in the proceedings on behalf of the adult. Similarly, the question as to whether an incapacitated adult must be authorised by his legal representative to contract a marriage is excluded from the scope of the Convention by paragraph 1 *b*), but determining the legal representative called upon where appropriate, among other functions, to authorise the marriage does fall within the Convention. Or again, although nationality is in itself foreign to the scope of the Convention, without there being any need for an express exclusion,³⁵ and, therefore, the Convention does not apply to the question of whether the incapacitated adult needs to be assisted or represented in filing an application for naturalisation, the designation of the person empowered to assist or represent him or her is a measure falling within the scope of the Convention. In general, the effect of Article 4 is to exclude from the scope of the Convention questions which, according to the private international law of the authority addressed, fall within the category excluded, such as matrimonial property

³¹ See Work. Doc. Nos 4, 11 and 13, and the very close vote on Work. Doc. No 13 (Minutes No 2, No 103 [see Proceedings of the SC with a diplomatic character (1999), p. 234]).

³² Work. Doc. No 60.

³³ Work. Doc. No 52 and its adoption, Minutes No 8, No 58 [see Proceedings of the SC with a diplomatic character (1999), p. 278].

³⁴ Work. Doc. No 86 and its adoption, Minutes No 15, No 50 [see Proceedings of the SC with a diplomatic character (1999), p. 325].

³⁵ See above, No 44 [see Proceedings of the SC with a diplomatic character (1999), p. 325].

regimes or successions, but if, in this context, a problem of representation arises, for example with a view to the conclusion of a marriage contract or agreement as to succession, the Convention must apply.

As worded, paragraph 2 only safeguards the application of the Convention, in the matters excluded, as regards “the entitlement of a person to act as the representative of the adult”. And the powers of that representative as a rule fall within the law governing the matter excluded. For instance, if the law applicable to the succession which has fallen to the adult prohibits his or her representative from purely and simply accepting the succession which has fallen to him or her,³⁶ it is this law which must apply to this limitation of the powers of the representative and not the one which, according to the Convention, was applicable to the designation of that representative.

CHAPTER II – JURISDICTION

- 47 This chapter is the result of the fusion of the two approaches which, during the Special Commission, had divided the delegations.

According to the first approach, it was desirable in the interest of the adult's protection, and to afford an accessible forum to the few people prepared to concern themselves with him or her, to provide for a system of concurrent jurisdiction, supplemented by provisions on *lis pendens* in order to eliminate conflicts of jurisdiction which might result. The authorities of the State of the adult's habitual residence would therefore have been placed on an equal footing with those of his or her State of nationality, strengthened if need be by a supplementary link (the presence of property, the existence of a previous residence of the adult, the residence of persons prepared to take care of him or her), and perhaps the authorities of the previous habitual residence of the adult, reinforced by the same elements. In addition jurisdiction would have been given to the authorities of the State in which property of the adult is located to take measures of protection in relation to such property.

The second approach was to favour retaining as the main principle, as in the 1996 Convention, the jurisdiction of the authorities of the State of the adult's habitual residence and to make the jurisdiction of any other authority subject to their consent, whether these authorities be of a former habitual residence, or of the State of nationality of the adult, or of the location of property, or of the habitual residence of relatives. It was also proposed to give priority to the jurisdiction expressly designated by the adult himself or herself and, in the absence of designation, to the jurisdiction of the habitual residence or to a jurisdiction authorised by it.

- 48 The Special Commission managed to overcome this opposition and the general structure of the text which it arrived at was maintained by the Diplomatic Commission. Principal jurisdiction is attributed to the authorities of the State of the adult's habitual residence (Art. 5), but also recognised are the concurrent, albeit subsidiary, jurisdiction of the authorities of the State of which the adult is a national (Art. 7) and a number of complementary jurisdictions which are nevertheless still subordinate to the consent of the authorities of the State of habitual residence (Art. 8). Also accepted are the jurisdiction of the authorities of the State where property of the adult is situated to take measures of protection concerning that property (Art. 9) and the jurisdiction of the State in whose territory the adult (Arts 10 and 11) or property belonging to the adult (Art. 10) are present

³⁶ See for example Art. 461, with 495, French Civil Code.

to take emergency measures (Art. 10) or temporary measures with limited territorial effect for the protection of the person (Art. 11).

Article 5 (jurisdiction of the authorities of the adult's habitual residence)

Paragraph 1

- 49 This paragraph repeats word for word paragraph 1 of Article 5 of the Convention on the Protection of Children. The principal jurisdiction of the authorities of the Contracting State of the habitual residence of the adult did not give rise to any difficulty and was accepted unanimously. No definition was given of habitual residence, which despite the important legal consequences attaching to it, should remain a factual concept. The drawback of providing any quantitative or qualitative definition of habitual residence in one convention, would be to cast doubt on the interpretation of this expression in numerous other conventions in which it is used.

Paragraph 2

- 50 True still to the Convention on the Protection of Children, the Commission with equal unanimity accepted that, in the event of a change in the habitual residence of the adult to another Contracting State, jurisdiction passes to the authorities of the State of the new habitual residence. The question of the continuance in force of measures taken in the first State is governed by Article 12 (see below).

The change of habitual residence implies both the loss of the former habitual residence and the acquisition of a new habitual residence. It may be that a certain lapse of time exists between these two elements, but the acquisition of this new habitual residence may also be instantaneous on the simple hypothesis of a move of the adult concerned when this has occurred on a long-term if not final basis. This is then a question of fact, which it is for the authorities called upon to make a decision to assess.

- 51 The Commission did not discuss again certain questions connected with the change of habitual residence which were debated in detail during negotiations on the Convention on the Protection of Children. It thus implicitly accepted the solutions which had been arrived at there. Therefore, where the change of habitual residence of the adult from one State to another occurs at a time when the authorities of the first habitual residence are seised of a request for a measure of protection, the *perpetuatio fori* ought to be rejected, in the sense that the change of habitual residence *ipso facto* deprives the authorities of the former habitual residence of their jurisdiction and obliges them to decline its exercise.³⁷
- 52 Article 5 presupposes that the adult has his or her habitual residence in a Contracting State. In the case of a change of habitual residence from a Contracting State to a non-Contracting State, Article 5 ceases to be applicable from the time of the change of residence and there is nothing to prevent retention of jurisdiction, under the national law of procedure, by the authority of the Contracting State of the first habitual residence which has been seised of the matter, although the other Contracting States are not bound by the Convention to recognise the measures which may be taken by this authority.³⁸

³⁷ See the Explanatory Report on the Convention on the Protection of Children, No 42.

³⁸ The solution accepted for the Convention on the Protection of Children. See the references, above Report, note 30.

Article 6 (adults who are refugees, displaced or without habitual residence)

- 53 This Article is an exact reproduction of Article 6 of the Convention on the Protection of Children and it calls therefore for the same comments.

Paragraph 1

- 54 The adults contemplated by this paragraph often need, apart from situations of urgency, their protection to be organised on a long-term basis. They may indeed, for example, be led to apply for asylum or to sell property which they possess in the State where they are present. It is therefore necessary to organise their protection and the normal jurisdiction given by the Convention to the authorities of the State of their habitual residence is inoperative here, since these adults have *ex hypothesi* broken all links with the State of their previous habitual residence, and the precariousness of their stay in the State where they have provisionally found refuge does not allow it to be considered that they have acquired a habitual residence there. The simplest solution therefore was, as in the case of children, to attribute in these situations to the authorities of the State on the territory of which these adults are present, the general jurisdiction normally attributed to the authorities of the State of their habitual residence.

Paragraph 2

- 55 This paragraph extends the solution of paragraph 1 “to adults whose habitual residence cannot be established”. The court of the place where the adult is present here plays the role of a jurisdiction of necessity. This jurisdiction will have to cease whenever it has been established that the adult has a habitual residence somewhere. If this habitual residence is in the territory of a Contracting State, the authorities of this State will henceforth have jurisdiction. If it is situated in a non-Contracting State, the authorities of the State on the territory of which this adult is present will no longer have any more than the limited jurisdiction given to them by Articles 10 and 11 (see below and see also No 89).

The situation to which this text applies should be carefully distinguished from that of the change of habitual residence provided for by Article 5, paragraph 2. In the case of a change of habitual residence from one State to another, the authorities of the former habitual residence retain their jurisdiction as long as the adult has not acquired a habitual residence in the State to which he or she has moved. Article 6, paragraph 2, should not be used to give immediately a general competence to the authorities of this latter State, on the basis that the adult would have lost his or her former habitual residence without having yet acquired a new one. This mistaken interpretation would be particularly dangerous in the case where the transfer of the adult has been decided without his or her consent. It would in effect deprive the authorities of the adult's habitual residence prior to his or her move of any possibility of bringing about the return of the adult, by reason of the primacy recognised by paragraphs 2 and 3 of Article 7 as attaching to the jurisdiction and to the measures taken by the authorities of the State to which the adult has been moved. A reasonable waiting time is therefore necessary before invoking Article 6, paragraph 2, in order to ensure that the previous habitual residence, itself well-established, has definitively been abandoned.

Article 7 (concurrent subsidiary jurisdiction of the authorities of the State of nationality of the adult)

- 56 This Article is the first and principal element of the compromise described above between supporters of concurrent non-hierarchical jurisdictions and supporters of jurisdictions subordinate entirely to the authorities of the State of the adult's habitual residence.³⁹ Paragraph 1 lays down the principle of the concurrent jurisdiction of the authorities of the State of the adult's nationality and fixes its conditions. Paragraphs 2 and 3 define its subsidiary character.

Paragraph 1

- 57 The authorities to whom this paragraph gives jurisdiction are those “of a Contracting State of which the adult is a national”. The use of the indefinite Article shows that if the adult were to possess several nationalities, jurisdiction would be attributed concurrently to the authorities of each of the States of which he or she was a national.

The jurisdiction of the national State (or of a national State) is set out without the need for any supplementary connecting factor such as the previous residence of the adult, the residence of relatives, or the presence of property, and without any authorisation having been requested from the authorities of the State of the adult's habitual residence. It is clearly a case of concurrent jurisdiction.

This jurisdiction is general, like that of the authorities of the State of the habitual residence, and may bear on measures of protection of the person or of the property of the adult.

- 58 This jurisdiction is nevertheless excluded “for adults who are refugees or who, due to disturbances occurring in their State of nationality, are internationally displaced”. The authorities of the national State of the adult would in fact be ill placed to exercise their protection over an adult who has been forced to leave that State, whether by reason of having been the victim of, or having been threatened by, persecution (the refugee situation), or by reason of disturbances which prevail there. In the case of multiple nationalities, the text must be interpreted as meaning that the authorities of a national State of the adult other than that which he or she has had to leave may exercise the jurisdiction provided for by Article 7.
- 59 While it is not expressly so stated, the text is based on a supposition that the adult has his or her habitual residence in a Contracting State. If such is not the case, nothing prevents the Contracting State of which the adult is a national, from taking, under its national law, measures for the protection of the adult. But, since Article 7 requires the authorities of the national State to advise those of the State of habitual residence, necessarily a Contracting State,⁴⁰ or those which take its place, it leaves outside its contemplation the case where an adult has his or her habitual residence or is present (in the Art. 6, para. 1, situation) in a non-Contracting State. Other Contracting States would not be bound in this case to recognise measures taken by the authorities of the national State of the adult.

³⁹ See above, Introduction to Chapter II.

⁴⁰ Article 7, paragraph 1, refers to the authorities having jurisdiction under Article 5 or Article 6, paragraph 2, which are thus the authorities of Contracting States.

- 60 In addition to the requirement of advising in advance the authorities having jurisdiction under Article 5 or 6, paragraph 2,⁴¹ the authorities of the national State may only retain their jurisdiction “if they consider that they are in a better position to assess the interests of the adult”. In this assessment, they could take into account the existence of other connecting factors such as those set out above, at No 57. This positive condition for the exercise of jurisdiction by the authorities of the adult's nationality is at the same time a flexible element, allowing these authorities to decline jurisdiction if they consider that the authorities of the State of habitual residence, or those of any other State which the authorities of the habitual residence have, by virtue of Article 8 (see below), requested to exercise protective jurisdiction, are in a better position to assess these interests.

Paragraph 2

- 61 This paragraph, like the following one, indicates the subsidiary character of the jurisdiction of the authorities of the adult's national State.

Three circumstances may prevent the exercise of this jurisdiction: when, pursuant to Article 5, Article 6, paragraph 2 or Article 8,⁴² the competent authorities have taken all the measures required by the situation, when they have decided that no measure should be taken, or lastly when proceedings are pending before them. When this is the case, the national authorities must decline their jurisdiction and, if they were seised first, must even close the case, if they learn that proceedings have started before one of the authorities mentioned.

With regard to this last circumstance in particular, the text does not mention that proceedings before authorities having jurisdiction by virtue of Article 5 or Article 6, paragraph 2, must “have the same purpose” as those brought before the authorities of the adult's national State. This clarification would have allowed the national authorities seised with a request for a measure of protection concerning property of the adult to keep their jurisdiction if the authorities of the habitual residence were seised of a request concerning his or her person. However, this clarification was rejected because the two aspects almost always seemed to be intermingled and authorisation to sell property for example could be requested to provide the adult with a minimum of resources, this being thus in the interest of his or her person.

- 62 The jurisdiction of the authorities of the adult's national State only ceases to apply if those authorities have been informed of one of the three circumstances mentioned in the text by the authority competent under Article 5, Article 6, paragraph 2 or Article 8, which has exercised or is exercising its jurisdiction. It would not be enough for them to have had knowledge of it, even on the basis of the documents in the case file. This obligation on the national authority to inform, after giving notice of its intention to exercise its jurisdiction, is important, as it gives the assurance that it is at the moment when the national authority is getting ready to intervene that the authority normally competent is going to evaluate the circumstances warranting the exercise by the national authority of its jurisdiction. The existence of decisions previously taken by the authorities of the State of habitual residence, for example, and of which the national authorities have allegedly not been officially

⁴¹ A condition already imposed by Article 4, paragraph 1, of the *Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors*, but which was scarcely respected in the absence of a co-operation mechanism.

⁴² The fact that Article 7, paragraph 2, does not mention the competent authorities pursuant to Article 6, paragraph 1, is self-evident, since the national authorities do not have jurisdiction in the case covered by Article 6, paragraph 1 (refugees or displaced persons). In the borderline case mentioned above No 58 of a dual national obliged to leave one of his or her national States, the jurisdiction of the authorities of the State in which he or she is present would continue to have priority.

informed, would therefore not prevent them from exercising their jurisdiction in conformity with Article 7, paragraph 1, as the situation may have changed since those decisions.

- 63 In giving the competent authority the power, pursuant to Article 8,⁴³ to block the jurisdiction of the national authorities, the Commission wished to eliminate a risk of concurrent jurisdiction which might have been exercised in parallel and contradictorily. In cases where this delegated jurisdiction pursuant to Article 8 is limited to a specific aspect of protection (see below No 66), it is reasonable to suppose that the delegating authority should refrain from blocking the national authority's jurisdiction as regards the other aspects of protection.

In any case, to enable the competent authority pursuant to Article 8 to inform the national authority not to exercise its jurisdiction, it must itself have been informed of the latter's intentions. The text shows that it can only have been given this information by the competent authority pursuant to Articles 5 or Article 6, paragraph 2, itself advised by the national authorities pursuant to Article 7, paragraph 1.

Paragraph 3

- 64 The subsidiary nature of the jurisdiction of the authorities of the adult's national State affects the measures that they have taken, in the sense that these measures “lapse as soon as the authorities having jurisdiction under Article 5 or Article 6, paragraph 2 or Article 8, have taken measures required by the situation or have decided that no measures are to be taken”.

The parallelism with paragraph 2 is intentional. As just explained, these two circumstances prevent the national authority from exercising its jurisdiction (para. 2). When they arise after the national authority has exercised its jurisdiction and taken measures of protection, they have the effect of extinguishing these measures (para. 3). It would not be tolerable if the concurrence of jurisdictions were to result in measures of protection taken in a disorderly or contradictory manner. That is why the text gives primacy to the decisions which are ultimately taken by the authorities normally having jurisdiction under Article 5 or Article 6, paragraph 2 or Article 8, of the State of the habitual residence – whether these decisions are positive and comprise a measure of protection, or negative in the sense that they decide that there is no need to take a measure of protection.

The parallelism with paragraph 2 continues, in that the competent authorities under Articles 5, Article 6, paragraph 2 or Article 8, must inform the national authorities of the measures they have taken or of their decision not to take any. However, the wording on the text does not indicate that, although mandatory, this information is a condition of the extinguishing effect of the measures taken by the national authority.

Article 8 (transfer of jurisdiction to an appropriate forum)

- 65 This Article, whose inspiration is akin to that of Articles 8 and 9 of the Convention on the Protection of Children, is the second element of the compromise pointed out above between the two approaches to the problem of jurisdiction. It places the emphasis on the primacy of the authorities of the Contracting State of the adult's habitual residence, by

⁴³ In other words, to an authority to which the authority of habitual residence (or of presence in the case of Art. 6) has in some way delegated its jurisdiction, see below, Nos 65 *et seq.*

allowing them, if the interests of the adult so require, to have him or her protected by the authorities of another Contracting State.

Paragraph 1

- 66 It may be that the authorities of the adult's habitual residence, on whom principal jurisdiction is conferred (Art. 5), or even more so the authorities of the State where the adult is simply present in the case of Article 6, are not the best placed to assess in a particular case the interests of the adult. If, for example, the adult were living in a State other than that of his or her nationality, where he or she was under the protection of a person who had just died, and the only relative in a position to provide for his or her protection in the future had his or her habitual residence in another State, the authorities of this State are undoubtedly best placed to assess the fitness of this relative and to arrange the conditions under which protection is to be exercised.

Article 8, paragraph 1, combining the two procedures provided for by Articles 8 and 9 of the Convention on the Protection of Children, provides that the authorities of the Contracting State having jurisdiction under Article 5 (habitual residence) or Article 6 (presence, for refugees, displaced persons or persons without established habitual residence) are able, either on their own motion or at the request of the authorities of another Contracting State, to make a request to the authorities of the Contracting State which seems to them best placed to take measures for the protection of the adult.⁴⁴

This option to request a transfer of jurisdiction is reserved to the authorities of the Contracting State of the adult's habitual residence or, in the cases envisaged in Article 6, to the authorities of the State of the territory in which the adult is present. This wording excludes the authorities of the adult's national State. These may exercise their jurisdiction directly “if they consider that they are in a better position to assess the interests of the adult” (Art. 7), but may only abstain if such is not the case.

The object of the request addressed to the authorities of another Contracting State is to “take measures for the protection of the person or property of the adult”. The text adds that this request may relate to “all or some aspects of such protection”. An element of flexibility is thus introduced into this machinery for the delegation of jurisdiction. The request addressed to the State where the property is situated, for example, may thus be limited to the protection of the property situated there.

Paragraph 2

- 67 This paragraph lists the States whose authorities may be addressed under the conditions provided for in the preceding paragraph, that is to say on the request of the authorities of the State of the adult's habitual residence.
- 68 The text mentions in the first place “a State of which the adult is a national”. There is here no overlap with the primary jurisdiction of the authorities of the national State of the adult provided for by Article 7. In the case of Article 7, this concurrent jurisdiction is subsidiary and ceases to have effect if the authorities of the State of the adult's habitual residence decide to exercise their jurisdiction. In the case of Article 8, the national authorities have free scope, within the limits of the delegated authority which they have been asked to accept, since the authorities of the State of the habitual residence have withdrawn in

⁴⁴ A Working Group, chaired by Mrs Baur, delegate of France, prepared a model form which could be used by the requesting authority and by the authority addressed on the application of Article 8 (Work. Doc. No 91). This model, approved by the Commission, has not been incorporated into the Convention, but the Permanent Bureau will recommend that the Contracting States use it.

favour of their jurisdiction. In the case of a refugee or person involuntarily displaced from a State of which he or she has the nationality, it must be supposed, even though the Commission did not wish to introduce any clarification to this effect,⁴⁵ that the authorities of the State where the adult is present, which are competent under Article 6, paragraph 1, will refrain, failing a change in circumstances, from any delegation of jurisdiction to the authorities of the adult's national State.

- 69 The text mentions next “the State of the preceding habitual residence of the adult”. By these terms should be understood the State of the last habitual residence and not that of any previous habitual residence.⁴⁶ The authorities of the present habitual residence will take into account in particular whether this last habitual residence was more or less recent and whether there are present there persons who have known the adult.
- 70 The text mentions in third place “a State in which property of the adult is located”. It is necessary here to make an observation similar to that made above in relation to the national State of the adult. The jurisdiction of the authorities of the State where property is situated is set out as a primary heading by Article 9, but it is there circumscribed, as will be seen, by measures taken by the authorities of the adult's habitual residence, and limited to measures relating to property, while in the case of Article 8 the jurisdiction of the State where property is situated is in a way delegated and is not limited to measures concerning such property.
- 71 The text mentions in fourth place “the State whose authorities have been chosen in writing by the adult to take measures directed to his or her protection”. This resort to autonomy of will is a response to the desire to recognise and promote the need for autonomy of the incapacitated person. However, as the vulnerability of such persons to the external influences to which they may be subject also has to be taken into account, it was decided to circumscribe this autonomy by making it subject to the control of the authorities of the adult's habitual residence.⁴⁷
- 72 Fifthly, sub-paragraph e) mentions “the State of the habitual residence of a person close to the adult prepared to undertake his or her protection”. The jurisdiction of the authorities of this State is all the more understandable in that it is this State's protection that will be exercised and it is perhaps in this State that the adult will have to reside. This jurisdiction is also placed under the supervision of the authorities of the adult's habitual residence, who will make a *prima facie* evaluation of whether the person in question has reliable credentials – which will be determined by the authorities of the State of habitual residence – to undertake the protection of the adult.

The Commission retained the expression “person close to the adult” in preference to the apparently more precise “*relatives of the adult*” in order also to include persons such as friends or companions who are devoted to the adult though have no family connection.

45 See the discussion on this point, Minutes No 4, Nos 20 to 36 [see Proceedings of the SC with a diplomatic character (1999), pp. 244-245].

46 Article 8, paragraph 2, sub-paragraph b), differs on this point from Article 15, paragraph 2, sub-paragraph b), which allows the adult to designate the law of “the State of a former habitual residence of the adult” to regulate the mandate in case of incapacity, see below No 102.

47 The Commission rejected a proposal by the delegation of the United States in favour of permitting a delegation of jurisdiction to the State whose law governs the mandate in case of incapacity laid down in Article 15. See Working Document No 26 and the discussion, Minutes No 4, Nos 58-65 [see Proceedings of the SC with a diplomatic character (1999), pp. 246-247].

- 73 Lastly, sub-paragraph *f*) mentions the State in whose territory the adult is present, with regard to the protection of the person. The jurisdiction of the place where the adult is present is already laid down as a principle by Article 6, in the situations which it describes, and also by Articles 10 in cases of urgency and Article 11 as regards temporary and limited measures. In Article 8, the authorities of the State where the adult is present may receive delegation from the authorities of the State of habitual residence⁴⁸ to ensure the protection of the person, with no other limitation than those included in the request by those authorities. This new case of delegation was first considered during the discussion as applying only in the medical field. The decision set out above (No 42) not to lay down any special rules for this field entailed extending this possibility of delegation to the protection of the person of the adult in general.

Paragraph 3

- 74 The delegating authorities do not have power to compel the authorities whom they address to accept the jurisdiction which they ask them to exercise. To avoid a gap in protection, paragraph 3 provides that if the authorities requested do not accept jurisdiction, the authorities having jurisdiction under Articles 5 or 6 retain jurisdiction.

The text does not indicate the mode of non-acceptance of jurisdiction. This could obviously be a formal refusal of jurisdiction, but also, it seems, a prolonged failure to reply.⁴⁹

Article 9 (jurisdiction of the authorities of the State where property of the adult is situated)

- 75 The need to include a jurisdiction in the authorities of the State in which property of the adult is situated to take measures of protection relating to that property is explained by the fact that adults in need of protection are generally, in contrast to children, owners of property. When property is situated in a Contracting State other than that in which the adult has his or her habitual residence, the jurisdiction of the authorities of the State in which property is situated will allow the taking of a measure of protection adapted to the requirements of the law of this State and easy to implement. For example, if the law of the situs of property requires a judicial authorisation for the sale of property or, conversely, for the acceptance of an inheritance on which it depends, or to proceed to an official notice concerning land, and the law of the habitual residence does not know of this type of authorisation, it is more expedient to place the matter directly before the authorities of the State in which the property is situated.
- 76 The jurisdiction of the authorities of the State of the situs to take measures of protection concerning the property in question is accepted only “to the extent that such measures are compatible with those already taken by the authorities having jurisdiction under Articles 5 to 8”.

This limitation is self-explanatory and aims to avoid any inconsistency between measures for the protection of property which may be taken by the local authorities and those taken by the authorities which have a general jurisdiction to arrange protection. It should be noted that the measures taken by the authorities with general jurisdiction may have been

⁴⁸ In this precise case, the delegation of jurisdiction can theoretically only come from the authorities competent pursuant to Article 5.

⁴⁹ The use of the form indicated above, note 44, should make it possible to avoid the uncertainty of an implicit refusal.

taken before or after those taken by the authorities of the State of the situs.⁵⁰ If they have been taken afterwards, they will terminate the measures taken by the authorities of the situs to the extent of the incompatibility.

Article 10 (jurisdiction in case of urgency)

- 77 This text repeats literally that of Article 11 of the Convention on the Protection of Children and it was adopted without discussion, except for the addition of a fourth paragraph.

Paragraph 1

- 78 This text attributes to the authorities of each Contracting State on the territory of which the adult or property belonging to him or her is present, jurisdiction to take the necessary measures of protection in cases of urgency.

A situation of urgency arises where the situation, if remedial action were only sought through the normal channels of Articles 5 to 9, might bring about irreparable harm to the adult or his or her property. The situation of urgency therefore justifies a derogation from the normal rule and ought for this reason to be construed rather strictly. In medical matters particularly, Article 10 must not be used as general justification for the jurisdiction of the authorities of the State where the adult is present. An example which has been given is termination of the pregnancy of a young incapacitated woman. Although such an operation necessarily has to be performed within a certain time-limit, this is not normally a case of urgency of the kind covered by Article 10. In this field, some delegations would have liked to see jurisdiction of the place where the adult is present, but the rejection of the proposals to that effect⁵¹ cannot justify abuse of jurisdiction in case of urgency.

The jurisdiction provided for in Article 10 is concurrent with that of the authorities of the State of the adult's habitual residence. Its justification is precisely the existence of a case of urgency. If this jurisdiction had not been provided for, the delays which would be caused by the obligation to bring a request before the authorities of the State of the adult's habitual residence might jeopardise the protection or the interests of the adult. This concurrent jurisdiction will be exercised, for example, if it is necessary to ensure the representation of an adult who is away from his or her habitual residence and who must undergo an urgent surgical operation, or if perishable goods belonging to the adult have to be sold quickly.

- 79 The States whose authorities may be addressed on the basis of urgency are the States on the territory of which the adult or property belonging to him or her is present. As concerns the authority of the State where the adult is present, this extends *ex hypothesi* to adults other than refugees or displaced adults within the meaning of Article 6, paragraph 1, or adults without a habitual residence within the meaning of Article 6, paragraph 2. For these adults, indeed, in the absence of a State of habitual residence which is established or accessible, the authorities where the adult is present have general jurisdiction. Here, by contrast, the jurisdiction based on presence has a scope limited to situations of urgency.

⁵⁰ This solution stems from the adoption of a proposal by the United States in favour of deleting the adverb "already" (the measures already taken) in the Special Commission's Preliminary draft, see Work. Doc. No 101 and Minutes No 15, Nos 76-77 [see Proceedings of the SC with a diplomatic character (1999), p. 326].

⁵¹ See the proposal by three Nordic States (Work. Doc. No 19, and the discussion, Minutes No 4, Nos 66-100 [see Proceedings of the SC with a diplomatic character (1999), pp. 247-249]).

The authorities of the State on the territory of which property of the adult is present have, in cases of urgency, jurisdiction which is not limited to the protection of this property. It is possible, in fact, to conceive that the urgency requires the sale in one country of property of the adult, in order to furnish him or her, in the country where he or she is present, with the resources which are immediately necessary (see above, No 61).

Paragraph 2

- 80 The jurisdiction based on urgency, even though it is concurrent with the jurisdictions of authorities normally having jurisdiction under the Convention, must remain subordinate to them. Thus paragraph 2 of Article 10 provides, but only in the case where the adult concerned has his or her habitual residence in a Contracting State, that the measures taken in application of paragraph 1 “shall lapse as soon as the authorities which have jurisdiction under Articles 5 to 9 have taken the measures required by the situation” (compare Art. 7, para. 2). At that moment, the situation is under the control of the authorities which normally have jurisdiction, and there is no longer any reason to maintain the jurisdiction of the authorities of the State of the adult's presence nor the measures that they have taken in urgent circumstances and which, up to that moment, had to be recognised in all Contracting States (*cf.* Art. 22).

Paragraph 3

- 81 This paragraph governs the question of the survival of measures taken by the court acting under urgency jurisdiction, but on the hypothesis that the adult concerned does not have his or her habitual residence in a Contracting State. If the authorities of the non-Contracting State of the habitual residence of the adult, or as the case may be of another State whose jurisdiction may be recognised, have taken the measures required by situation, there is no reason to maintain the measures taken by the court acting under urgency jurisdiction.

The reason for this conclusion is the same as in the situation envisaged in paragraph 2, with the difficulty specific to this situation that the authority which would normally have jurisdiction is that of a non-Contracting State, to which *ex hypothesi* the Convention has not been able to attribute jurisdiction, and whose decisions are not necessarily recognised in the Contracting States. The recognition in the Contracting States of the measures taken by a non-Contracting State may only depend on the national law of each of the Contracting States concerned, with the result that the cessation of the effects of measures taken by the court acting under the urgency jurisdiction will not occur in a uniform and simultaneous manner in the different Contracting States. It will come about in a separate fashion in each of these States “as soon as [they] are recognised in the Contracting State in question”, that is to say, as soon as the decisions taken by a non-Contracting State are recognised in each of the Contracting States (and not only in the State whose authority has taken the urgency measure).

Article 10, paragraph 3, may appear to state the obvious. At least it has the merit of pointing out that the taking of an urgency measure in a Contracting State does not constitute an obstacle to the recognition in the other Contracting States of measures taken in a non-Contracting State.

Paragraph 4

- 82 This paragraph lays down the obligation, for the competent authorities under paragraph 1, to inform the authorities of the State of the adult's habitual residence of the measures taken. This provision once again expresses the primacy of the State of the adult's habitual residence and may be compared with the obligation to inform placed upon the authorities

of the adult's national State by Article 7, paragraph 1. However, the obligation to inform is much weaker here. It is laid down only "if possible" and only once the measures have been taken. Since, *ex hypothesi*, these are urgency measures, an obligation to inform beforehand, of the kind laid down in Article 7, paragraph 1, would have been hard to understand. Informing the authorities of the habitual residence is therefore not a condition of the jurisdiction laid down in Article 10 and failure to inform could not therefore be a ground for non-recognition of the urgency measures.

Another difference from Article 7, paragraph 1, is that the authorities having taken the urgency measures only have to inform the authorities of the adult's State of habitual residence of them, and not the authorities which might have had jurisdiction under Article 6. This limitation is understandable. If the authority having taken the urgency measures is that of the State where the adult is present, it may be confused with that laid down in Article 6. If it is the authority of the State where the property is situated which has taken an urgent measure of protection of property, there is no reason to impose upon it an obligation to inform the authorities of the State of the situs, which is not imposed upon it by Article 9 when ruling on non-urgency cases.⁵² In reality, Article 9 does not impose any obligation to inform the State of habitual residence either, and in this respect the obligation to inform in case of urgency is heavier than in the normal situation.

Article 11 (measures for the protection of the person which are temporary in nature and of limited territorial effect)

Paragraph 1

- 83 Independently of the cases of urgency, Article 11 also attributes to the authorities of each Contracting State, on the territory of which the adult is present, exceptional concurrent jurisdiction to take measures concerning the protection of his or her person which are temporary in nature and whose territorial effect is limited to the State in question.

The origins of this text, drawing inspiration from Article 12 of the Convention on the Protection of Children, go back to the Diplomatic Commission's long discussion on medical matters (see above Nos 41 *et seq.* concerning Art. 4, para. 1 *f*). The delegations of the United States of America, Finland and Switzerland⁵³ had proposed simply transposing that Article 12 to adults, believing that they could thus resolve medical matters among others. This proposal was rejected,⁵⁴ *inter alia* because the notion of limited territorial effect scarcely had any meaning in medical matters. The proposal was later taken up again and approved by the Commission at its second reading in a text limited to the measures concerning medical treatment and no longer mentioning the limited territorial effect.⁵⁵

⁵² It is only when the authorities of the State where the property is situated have been exceptionally called upon to take an urgent measure of protection of the person of the adult that one might have imagined an obligation to inform the authority of the State where the adult is present in the situations laid down in Article 6. The Commission did not wish to make their task any harder.

⁵³ Work. Doc. No 15.

⁵⁴ By 8 votes to 6, with 7 abstentions, Minutes No 4, No 103 [see Proceedings of the SC with a diplomatic character (1999), p. 249].

⁵⁵ See Work. Doc. No 82, the discussion Minutes No 13, Nos 1-18 [see Proceedings of the SC with a diplomatic character (1999), pp. 310-311] and the text presented after this discussion by the drafting committee, Work. Doc. No 88, Art. 10 *bis*, and the further discussion, Minutes No 15, Nos 78-100 [see Proceedings of the SC with a diplomatic character (1999), pp. 326-328].

It was in the final stage of the negotiations that, in a spirit of compromise, the definitive text was adopted without discussion,⁵⁶ including no further reference to medical treatment and reintroducing the notions of limited territorial effect.

- 84 Only in exceptional cases is this jurisdiction conferred upon the authorities of the State where the adult is present. The measures which may be taken concern only the person of the adult, unlike Article 12 of the Convention on the Protection of Children, which also mentions the protection of the property of the child. Bearing in mind the discussions referred to above, it may naturally be thought that these measures may have a medical purpose. However, these measures can only be temporary in nature and with a territorial validity limited to that State. A situation may be imagined where the State on whose territory a young incapacitated adult is temporarily present decides, with a view to protection, to isolate him or her from certain persons in his or her immediate environment during his or her stay in that State or takes a measure of placement or temporary hospitalisation, even in a non-urgent case. But this text does not confer jurisdiction on the State where the adult is present to authorise serious, definitive medical measures, such as an abortion, sterilisation or surgical operation entailing the removal of an organ or the amputation of a limb.

The jurisdiction stemming from this Article is still limited in that the measures taken on this basis by the authorities of the State where the adult is present must not be incompatible with the measures taken by the authorities of the State of his or her habitual residence. There is thus no reason to fear that the authorities having jurisdiction under Article 11 may organise a sort of separate protection of the adult on the territory of their State, since they must comply with all the measures already taken by the authorities normally having jurisdiction. This limitation differentiates Article 11 from Article 10. Only in situations of urgency can the jurisdiction of the State where the adult is present set aside the measures previously taken by the authorities normally having jurisdiction.

Moreover, the jurisdiction stemming from Article 11 is dependent, just like that conferred upon the authorities of the adult's national State by Article 7, on the authorities of the habitual residence being informed in advance.

Paragraph 2

- 85 In terms very close but different from those of the second paragraph of Article 10, and for the same case of an adult having his or her habitual residence in a Contracting State, this paragraph provides that the temporary measures thus taken shall lapse as soon as the authorities which have jurisdiction under Articles 5 to 8⁵⁷ “have taken a decision in respect of the measures of protection which may be required by the situation”. This last part of the sentence differs from that utilised in Article 10. It may be that, after having examined the situation, the authorities which normally have jurisdiction may consider that no measure need be taken. In such a case, the temporary measures taken in application of Article 11 no longer have any reason to continue.

Article 11 did not reiterate Article 12, paragraph 3, of the Convention on the Protection of Children. For it is self-evident that, where the adult has his or her habitual residence in a non-Contracting State, the recognition (not governed by the Convention), by the Contracting State having taken measures on the basis of Article 11, of the measures taken by the State of habitual residence will thus deprive the measures it has taken on the basis of Article 11 of their effect in the Contracting State concerned.

⁵⁶ Work. Doc. No 114.

⁵⁷ The reference to Article 6 is pointless here, since Article 6, like Article 11, confers jurisdiction on the State where the adult is present.

Article 12 (maintenance in force of the measures in case of a change of circumstances)

- 86 This Article, identical to Article 14 of the Convention on the Protection of Children, ensures the maintenance in force of measures taken by the competent authority, even when the bases for the jurisdiction of this authority have subsequently disappeared as a result of a change of circumstances, so long as the authorities which have jurisdiction following this change have not modified, replaced or terminated them.

This maintenance in force is necessary to ensure a certain continuity in the protection of the adult. If, for example, a guardian has been designated by the authorities of the adult's first habitual residence, it is necessary that this guardian may continue to exercise his or her functions in the event that the adult comes to reside habitually in another State. Certainly, in accordance with Article 5, paragraph 2, the authorities of this new State have jurisdiction henceforth to take measures for the protection of the adult, possibly to revoke those previously taken (see above, No 20), but, so long as they have not acted, the measures taken before the change of residence should remain in force to ensure continuity in the protection.

The principle, set out in Article 22, paragraph 1 (see below, No 116), of recognition by operation of law in all the Contracting States of measures taken by the authorities of one of them, would not be enough to achieve this result. Article 22 does indeed ensure recognition for measures which are in force, but the problem resolved by Article 12, which is commented on here, is precisely that of knowing whether the measures remain in force after the change of circumstances.

- 87 Article 12 applies to measures taken in application of Articles 5 to 9. It leaves outside its scope both measures taken under the urgency jurisdiction on the basis of Article 10, the fate of which is regulated by paragraph 3 of the Article concerned, and temporary measures of protection of the person of the adult, taken pursuant to Article 11. On the other hand, it does apply to measures taken by the national authorities of the adult (Art. 7), yet with the exception of Article 7, paragraph 3, which determines the ways in which these measures cease to have effect (see above, No 64).

- 88 The “change of circumstances” contemplated will be, in the case of Article 5 and 6, respectively, the change of the State of the adult's habitual residence, or only of the adult's presence. The measures taken will remain in force in accordance with Article 12, but their conditions of application will be governed, from the time of the change, by the law of the State of the new habitual residence, in accordance with Article 14 (see below). In the case of Articles 7 to 9, the “change of circumstances” will be respectively the change of nationality of the adult or of the location of the property. The text will have less frequent application in the case of Article 8, by reason of the fact that certain heads of jurisdiction envisaged by it (sub-paras. *b*) and *d*)) are fixed in time. It could however operate in the case of a change of nationality of the adult, of the location of property, of the presence of the adult or of the habitual residence of relatives of the adult.

The maintenance in force of the measures taken is ensured only “according to their terms”. This specification takes into account the fact that the competent authority of the State of habitual residence may have taken measures applicable only as long as the adult resided in that State. For example, it may have provided that any change of residence would have to be the subject of a declaration to the public authorities of the new residence.

Such an obligation cannot have extraterritorial effect and will not survive the change of habitual residence to another State. Likewise, if an adult has been placed by the same authority under the surveillance of a public social service, it is clear that this measure cannot survive a change in the adult's habitual residence to another State, since the service in question can exercise its powers only on the territory of the State to which it belongs.

Final remarks

- 89 The rules of jurisdiction contained in Chapter II, which have been analysed above, form a complete and closed system which applies as an integral whole to Contracting States when the adult has his or her habitual residence on the territory of one of them. In this case, a Contracting State is not authorised to exercise jurisdiction over an adult if such jurisdiction is not provided for in the Convention. The same solution prevails in the situations described in Article 6 where the adult is present in a Contracting State.

In the other situations, the mere presence of the adult gives rise to the application of Articles 10 and 11, but these Articles do not exclude the broader bases of jurisdiction which Contracting States might attribute to their authorities in application of their national law; save that, in this case, the other Contracting States are not at all bound to recognise these broadened bases for jurisdiction which fall outside the scope of the Convention. The same thing is true, but even more so, for the adults who do not have their habitual residence in a Contracting State, and who are not even present in one.

CHAPTER III – APPLICABLE LAW

- 90 While this chapter follows as a whole the corresponding chapter in the Convention on the Protection of Children, and particularly the principle that the authority which has taken jurisdiction applies its own law, it departs from it nevertheless on two important points.

The first is that any restriction on the capacity of an adult or even on the free disposal of his or her rights can only be the result of a measure of protection. One will not find, therefore, in the Convention a provision equivalent to those which, in the 1996 Convention, determine the law applicable to the attribution or to the extinction of parental responsibility by operation of law. The Commission rejected a proposal by the Finnish and Swedish delegations to apply to the *ex lege* representation of the adult the law of his or her habitual residence.⁵⁸ The practical example was that of the representation by operation of law of one spouse by the other in order to take medical decisions after an accident plunging the former into a coma. So this question is not regulated by the Convention, even though it falls within its scope as a consequence of the marriage (see above, No 35, *ad Art. 4*, para. 1 b)).

The second difference has to do with the case where the adult has been able to organise in advance the protective regime in the event of being no longer in a position to protect his or her interests. The development in certain legal systems, for example Canada, of these “*mandats d'inaptitude*” justified the inclusion in the Convention of a provision on the law applicable to them (see below, No 96, *ad Art. 15*).

⁵⁸ Work. Doc. No 29, rejected by 10 votes to 3 with 9 abstentions, see Minutes No 6, No 61 [see Proceedings of the SC with a diplomatic character (1999), p. 264].

Article 13 (law applicable to measures of protection)

Paragraph 1

- 91 The Commission adopted without discussion the principle laid down by the 1996 Convention, which already figured in that of 5 October 1961 on the protection of minors, according to which “in exercising their jurisdiction under the provisions of Chapter II, the authorities of the Contracting States shall apply their own law”.

Thus the task of the authority which has taken jurisdiction, which will apply the law it knows best, will be facilitated. Moreover, as the measures will be carried out most often in the State of the authority which has taken them, their execution will be smoother since they will be in conformity with the law of this State. Nevertheless, to avoid any risk of rigidity, the Convention, like that of 1996, gives a certain flexibility to the determination of the law applicable to the measure of protection. This appears in paragraph 2.

Paragraph 2

- 92 This paragraph constitutes an exception clause based not on the principle of proximity (the closest connection), but on the best interests of the adult. For example, if an authorisation is requested from the authorities of the habitual residence (and not those of the State of location as would be permitted by Article 9) to sell property of the adult situated abroad, it is preferable that the authority exercising jurisdiction should be able to apply or take into consideration the law of the situs of the property and grant the authorisation provided for under this law, even if the law of the authority exercising jurisdiction requires no authorisation in such a case.

Article 14 (conditions of implementation of the measure)

- 93 Article 14 is the product of a merger of Article 12, paragraph 3 and Article 14 of the Special Commission’s Preliminary draft, which sought to resolve two different situations on the basis of the same principles.

One situation is that of a change of law, the clearest example of which is a change of the adult’s habitual residence between the taking of the measure of protection and its implementation. It is this situation that was regulated by Article 12, paragraph 3, of the Preliminary draft, though inadequately expressed.⁵⁹ The idea was that the conditions of the implementation of the measure in the State of new habitual residence were to be governed by the law of that State.

The other situation is more generally that of the exercise of the powers of representation - whether they stem from a measure of protection or from a mandate in case of incapacity conferred by the adult in person - in a State other than that by whose law they have been conferred. This is the situation that was regulated, with such reticence,⁶⁰ by Article 14 of the Preliminary draft, in that the procedure for the exercise of those powers is subordinate to the law of the State in which they are exercised.

⁵⁹ See Explanatory Report on the Preliminary draft, Nos 86-89.

⁶⁰ See the Explanatory Report on the Preliminary draft, Nos 100-102.

In both situations, the idea was to make room for the law of the place of implementation of the measures or the exercise of the powers, but it was hard to discern what came under the conditions of implementation of the measures (in the event of a change of law) and what under the procedure for the exercise of the powers.

- 94 The purpose of the text of Article 14 decided on by the Diplomatic Commission is the implementation of the protective measures in a State other than the one where they have been taken, regardless of whether or not this situation stems from a change of law. It does not apply to the implementation of the powers of representation conferred by the adult in person, governed by Article 15, paragraph 3 (see below).

According to Article 14, the conditions of implementation of the measure are governed by the law of the Contracting State in which the measure is implemented. The expression “conditions of implementation” is to be understood in quite a broad sense. Take the example of a guardian appointed for the adult in the country of his former habitual residence and who must exercise his or her powers, in other words implement the protective measure by which he has been appointed, in another State, whether it is that of the new habitual residence or that in which the adult possesses a property to be sold. If the law of that other State makes the act to be performed by the guardian, such as the sale of the property, subject to authorisation by a guardianship judge, that is a “condition of implementation” which will therefore have to be complied with. Conversely, it may be that the law of the State under which the guardian has been appointed, requires this authorisation, while the law of the place of implementation of the measure does not. The parallelism between the situations would mean in this case too that the law of the place of implementation had to be applied. However, the requirement of authorisation by the law of origin might be seen as part and parcel of the very existence of the powers and it is suggested to the guardian that such authorisation is required. This should particularly be the case when the guardian holds the certificate referred to in Article 38 indicating that certain powers are subject to authorisation.

Article 15 (mandate in case of incapacity)

Paragraph 1

- 95 This Article envisages the situation in which the adult himself or herself organises in advance his or her protection for the time when he or she will not be in a position to protect his or her own interests. He or she does this by conferring on a person of his or her choice, by a voluntary act which may be an agreement concluded with this person or a unilateral act, powers of representation. By comparison, the Convention on the Protection of Children (Art. 16, para. 2) deals with parental responsibility attributed by an agreement or a unilateral act, but the grantor or the grantors under the agreement or the act are the parents or a parent of the child, while in this Convention the grantor is the adult who is to be protected.
- 96 The situation envisaged here is characterised by the fact that, on the one hand the powers of representation cannot in general begin to be exercised until after the adult who has conferred them is no longer able to protect his or her own interests, and that on the other hand their taking effect requires, at least in certain legal systems such as Quebec,⁶¹ the intervention of the judicial authority to establish incapacity. The powers thus conferred may be very varied. They have to do with the management of the adult's property as well

⁶¹ During the Special Commission, the Canadian delegation produced on this subject an important information document on the status of the law in this respect in Quebec and British Columbia.

as his or her personal care. One often finds in them the instruction given to the person mandated to refuse any persistent course of treatment in the event of incurable illness. This type of mandate, which seems to be quite common in certain States, and particularly in North America, is unknown in a number of European States, including France, where the mandate necessarily comes to an end in the event of the onset of incapacity;⁶² hence the interest in having a conflict of laws rule on the subject.

- 97 This mandate in case of incapacity is altogether different from the ordinary mandate which a fully capable adult confers on a person to take care of his or her interests. Such a mandate, which takes effect immediately, and ends, in most legal systems, with the onset of the adult's incapacity or on the determination of his or her incapacity to protect his or her interests, is the concern in private international law of the *Hague Convention of 14 March 1978 on the Law Applicable to Agency* and, by virtue of this Convention, it is in principle governed, in the absence of choice, by the law of the business establishment or the habitual residence of the agent (Art. 6) and it is this law which applies in particular to the termination of the powers of the agent (Art. 8 a)).

The case of an ordinary mandate conferred by the adult to take immediate effect, but distinguished by the fact that it has also been given, expressly, so it could continue to be exercised after the onset of incapacity, cannot be excluded. It might be accepted that such a mandate is divisible, in that it falls under the 1978 Convention, until the date of the onset of the incapacity and of the Convention on the Protection of Adults after that date.

- 98 The mandate in case of incapacity, by contrast, is governed, by virtue of Article 15 of the Convention, by the law of the State of the adult's habitual residence at the time of the agreement or the unilateral act. When conferred, even in France, by a French person having his or her habitual residence in New York, it is valid and remains so if this person later comes to reside habitually in France. Conversely, when conferred by an American having his or her habitual residence in Paris, it is ineffective and remains so if this American transfers his or her habitual residence to New York. Here the text does not make provision in favour of validity, but it does allow the grantor to choose the applicable law (see para. 2).

- 99 The scope of the applicable law covers “the existence, extent, modification and extinction of powers of representation”. The novel feature, when compared with the 1996 Convention, is the mention here of “the extent” of the powers. The 1996 Convention distinguishes between, on the one hand, “the attribution”⁶³ and “the extinction” of parental responsibility, which are subject to the law of the State of the child's habitual residence at the time of the events giving rise to this attribution or extinction, and, on the other hand, “the exercise” of this responsibility, which is subject as may be necessary to the law of the State of the child's new habitual residence (Art. 16, para. 1, and Art. 17). The result is that the extent of the parental responsibility, that is to say the acts which its holder may carry out alone or with an authorisation, or which he or she may not carry out, come under the heading of the exercise of parental responsibility. As for the Article examined here, it makes the existence, the extent and the extinction of powers conferred by the adult as a whole subject to the law of the State of the adult's habitual

⁶² Save, in French law at least, in the particular case of a mandate conferred in the case of placement, or with a view to placement, “*sous la sauvegarde de justice*” (Art. 491-3 of the French Civil Code).

⁶³ Which corresponds in the present Convention to the ‘existence’ of the powers, the difference in terminology arising from the fact that the 1996 Convention concerns *ex lege* parental responsibility, while the Preliminary draft refers to powers which can only derive their existence from the will of the adult himself or herself.

residence at the time of the agreement or of the unilateral act; this is a simplification, but paragraph 3 uses the concept of “the manner of ... exercise” of the powers, more restrictive than that of “the extent” of the powers, and requires in relation to them the application of the law of the State where they are exercised (see below under para. 3).

- 100 The link between the law of the State of the adult's habitual residence and the existence, the extent and the extinction of powers conferred by him or her, is retained only if the adult has not himself or herself designated another law to govern them. As regards the powers conferred by a voluntary act, the acceptance of the principle of a right to choose the applicable law could not be contested. The debate concentrated on the appropriateness of giving to the adult complete freedom in the choice of the applicable law or, on the other hand, placing limits on this freedom of choice by fixing in advance the laws that might be chosen. This latter solution was accepted by the Commission by a large majority⁶⁴ (15 votes to 6 and 2 abstentions).
- 101 Paragraph 1 requires, finally, that the law chosen has been “designated expressly in writing”. This wording noticeably avoids that used in the Conventions on the law applicable to contracts, namely the Rome Convention of 19 June 1980, concluded between the Member States of the European Union, the Hague Conventions of 15 June 1955 and 22 December 1986 on sales and of 14 March 1978 on the law applicable to agency. With differing forms of words, these different Conventions allow to a greater or lesser extent an implicit although in principle definite choice of the applicable law. Very widespread agreement became apparent in favour of completely forbidding implicit choice here, from a desire to avoid all uncertainty in the law applicable to the powers which, *ex hypothesi*, will be exercised at a time when the adult who conferred them is no longer in a position to protect his or her interests.

Paragraph 2

- 102 This paragraph restricts itself to listing the laws which may be chosen by the adult. The Commission confirmed the position of the Preliminary draft in favour of a closed list, leaving no room for an appraisal by the court.⁶⁵ The laws which may be chosen are the law of a State of which the adult is a national,⁶⁶ that of the State of a former habitual residence of the adult⁶⁷ and that of a State in which property of the adult is located, but only as regards that property.⁶⁸ The Commission set aside proposals seeking to add to the list of laws eligible that of the State on whose territory the adult intends to take up habitual residence⁶⁹ and that of the State of habitual residence of a relative of the adult prepared to ensure his or her protection.⁷⁰

⁶⁴ It rejected a proposal by the delegation of the Netherlands making provision for unlimited freedom of choice by 13 votes to 5 with 3 abstentions (Work. Doc. No 35 and Minutes No 6, No 22 [see Proceedings of the SC with a diplomatic character (1999), p. 261]).

⁶⁵ The Special Commission rejected by a small majority any open choice formula, such as the possibility of choosing the law of a State with which the adult has a close tie, and no proposal to this effect was submitted during the Diplomatic Commission.

⁶⁶ Therefore, in the event of several nationalities, one or other of the national laws.

⁶⁷ And not only of the last habitual residence, contrary to what is laid down, for delegations of jurisdiction, in Article 8, paragraph 2 *b)* (above, No 69). The Commission rejected by 11 votes to 7 with 5 abstentions a proposal to this effect by the delegations of the Nordic States (Work. Doc. No 28 and Minutes No 6, No 22 [see Proceedings of the SC with a diplomatic character (1999), p. 261]).

⁶⁸ See Work. Doc. No 28, adopted on this point by 20 votes to 1 with 2 abstentions, Minutes No 6, No 36 [see Proceedings of the SC with a diplomatic character (1999), p. 262].

⁶⁹ Work. Doc. No 41, withdrawn by its author.

⁷⁰ Work. Doc. No 44, withdrawn by its author.

- 103 The text should be interpreted as implicitly allowing the adult to choose several laws to govern the mandate in case of incapacity, by splitting up its elements so as to make each of them subject to the different laws. The Special Commission expressly accepted this power of “*dépeçage*”, which seemed particularly justified in the situation where the adult possesses property in different States. It considered, however, that it was not necessary to draft an express provision to this effect. This solution was not discussed again by the Diplomatic Commission. It should therefore be considered as accepted.

The possibility of the adult making the mandate as a whole subject to several laws, whether in the alternative (in favour of validity) or cumulatively (validity subject to compliance with all of the laws designated), was not discussed, but there appears to be nothing to prevent it.

- 104 The power given to the adult to choose the law applicable to the mandate in case of incapacity poses some problems because a number of laws do not recognise this type of mandate, or prohibit it. The Commission rejected a proposal from the delegations of the Nordic States which would have limited the application of paragraph 2, in other words, of the power to choose the applicable law, to cases in which the law of the State of the adult’s habitual residence recognised the mandate in case of incapacity.⁷¹ These delegations wished not to oblige States not recognising this institution to introduce it thereby into their law by the back door. However, the discussion showed that this limitation would have excessively restricted the autonomy of will and the way in which the adult wished to arrange for his or her incapacity. In particular, it seemed that the State of the adult’s habitual residence had no legitimate interest in preventing the exercise abroad, in the State where property is located for example, of powers of representation deriving from the mandate in case of incapacity.
- 105 The Commission also discussed, but without reaching any decision, the case where it is the law chosen by the adult (and not the law of his or her habitual residence) which does not recognise (or prohibits) the mandate in case of incapacity.

The Special Commission rejected a proposal inspired by Article 5 of the *Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition*,⁷² and which declared paragraph 2 (in other words, the power to choose) non-applicable when the law designated does not provide for this category of mandate. This proposal would have entailed reverting in this case to the law of the State of the adult’s habitual residence in accordance with paragraph 1. No further proposal was submitted to the Diplomatic Commission. The conclusion drawn by the Report on the Preliminary draft (No 99) remains valid, namely of regarding the powers conferred by the adult as void and of eliciting from the competent authority a measure of protection.

⁷¹ Work. Doc. No 28, rejected by 13 votes to 5 with 4 abstentions, see Minutes No 6, No 54 [see Proceedings of the SC with a diplomatic character (1999), p. 263].

⁷² Article 5 of the *Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition*: “The Convention does not apply to the extent that the law specified by Chapter II does not provide for trusts or the category of trusts involve”. In the Trusts Convention, this provision is explained by an underlying principle in favour of the validity of the trust, which appears clear in Article 6, paragraph 2. Paragraph 1 allows the settlor to choose the law applicable to the trust and paragraph 2 adds: “Where the law chosen under the previous paragraph does not provide for trusts or the category of trust involved, the choice shall not be effective and the law specified in Article 7 shall apply”. Article 6 thus doubles the chance that the trust will be valid (the law chosen, or in its absence the law objectively applicable) and Article 5 adds a third, which is that of the law designated outside the Convention by the law of the authority seised. The transposition of these provisions to the Convention on the protection of adults would have required a deeper debate on whether preference should be given to the mandate in case of incapacity.

Paragraph 3

- 106 This paragraph makes the manner of exercise of the powers conferred by the mandate in case of incapacity subject to the law of the State in which they are exercised. It should be compared with Article 14, which makes the conditions of implementation of the measures of protection taken by a competent authority of one Contracting State subject to the law of the State in which it is implemented (see above, No 94). The scope of application of the law of the place where the powers are exercised is thus more restricted when it is a matter of powers conferred by the adult himself or herself than when they derive from a measure of protection. Some delegations expressed a fear that more or less scrupulous foreign mandatories might invoke their powers, against local law, to authorise blood transfusions or organ transplants for the adult. Setting aside that fear, which will be resolved by recourse to the public policy of the place where the powers are exercised, the Commission decided, by a formal vote,⁷³ to limit the application of the law of the place of the exercise of the powers conferred by the adult to the “manner of exercise” and, by the same vote, refused to extend it to cover the “exercise” of these powers. On the other hand, it decided that that law should be “applied”, not just taken note of, as the Preliminary draft laid down.
- 107 The idea of the manner of exercise is, as pointed out above, No 99 (at Art. 15, para. 1), more restrictive than that of “the extent” of the powers. It should only comprise points of detail (*Art und Weise*, in German). These were not made explicit during the course of debate, but one might instance here verification of the existence and the extent of the powers according to a local procedure, deposit of the act conferring them, or the authorisation procedure when the mandate in case of incapacity prescribes an authorisation.

Article 16 (termination or modification of powers)

- 108 This Article, which corresponds somewhat to Article 18 of the Convention on the Protection of Children, provides for the possibility, for the authorities having jurisdiction under the Convention, of terminating or of modifying⁷⁴ the powers conferred by the adult in accordance with Article 15.

The wording decided upon, more elaborate than in the Preliminary draft, seeks to reconcile respect for the wishes of the adult, expressed when he or she was still able to protect his or her own interests, and the need to protect the adult when his or her condition has deteriorated and when these powers have to be exercised.

The desire to respect the wishes of the adult led some delegations to call for the deletion of this Article and the application of the law of the mandate, laid down in Article 15, to the modification or termination of the powers conferred by the adult. Conversely, delegations anxious to ensure the immediate protection of the adult sought to confer upon the authorities having jurisdiction under the Convention the task of terminating or modifying these powers, in accordance with the law normally applicable to the measures of protection, laid down in Article 15.

⁷³ By 11 votes to 7 with 4 abstentions, see Minutes No 6, No 82 [see Proceedings of the SC with a diplomatic character (1999), p. 265].

⁷⁴ The modification might, for example, consist of introducing surveillance of the person mandated.

Article 16 is the result of a reconciliation of these two views.⁷⁵ First of all, it lays down in what cases the powers stemming from the mandate will be modified or terminated. It is only “when they are not exercised in a manner sufficient to guarantee the protection of the person or property of the adult”. This obviates the danger that the authorities of the adult’s habitual residence may substitute protection under their own law for that desired by the adult. They will first have to find that the exercise of these powers by the person mandated is poor or inadequate. Secondly, in order to terminate or modify these powers, the competent authorities are asked, to the extent possible, to take into consideration the law laid down in Article 15, in other words, the law governing the mandate in case of incapacity, which may have been chosen by the adult. There was a particular need for this provision in cases where the law of the competent authority does not recognise the mandate in case of incapacity.

Article 17 (protection of third parties)

- 109 Article 17 is directly inspired by Article 19 of the Convention on the Protection of Children and aims to protect a third party who has in good faith dealt with “another person who would be entitled to act as the adult’s representative under the law of the State where the transaction was concluded”. The validity of the act is preserved and the third party is protected from all responsibility arising from this mistake “unless the third party knew or should have known that such capacity was governed by [the law designated by the provisions of the present chapter]”. It is therefore good faith, reinforced by a duty of diligence, which is required of the third party.⁷⁶

The text applies as well when the capacity to act as representative has been conferred by a measure of protection as when it is the result of a voluntary act by the adult himself or herself.

The acts whose validity may not be contested by reason of a defect in the entitlement to act of the adult’s apparent representative and in respect of which third party responsibility may not arise should be understood very broadly. These may just as well be acts involving property, such as the handing over by a banker of funds to the adult’s apparent representative, as medical acts, such as a surgical operation or medical treatment carried out at the request of this apparent representative.⁷⁷

- 110 The text applies only in the case where the third party has dealt with the apparent representative. It does not apply when the third party has dealt with the adult himself or herself in ignorance of the fact that he or she has been deprived of his or her power to deal with his or her own affairs. The explanation for this lacuna is that this situation is covered

⁷⁵ Illustrated by the vote following proposals Nos 50 and 55, representing the two opposite views. See Minutes No 7, No 103 [see Proceedings of the SC with a diplomatic character (1999), p. 272]. Proposals submitted in the second reading attempted to question this reconciliation, either by substituting the participle “implemented” for the words “taken into consideration” (Work. Doc. No 93) or conversely, by deleting the second sentence of Article 16 (Work. Doc. No 94). All were rejected (see Minutes No 16, No 21 [see Proceedings of the SC with a diplomatic character (1999), p. 330]).

⁷⁶ See the explanations set out in the Explanatory Report on the Convention on the Protection of Children, Nos III-114.

⁷⁷ This point was accepted by the Special Commission. The Diplomatic Commission did not discuss Article 17 again, except for a minor drafting matter (Minutes No 7, Nos 17-23 [see Proceedings of the SC with a diplomatic character (1999), p. 267]).

by Article 11 of the *Rome Convention of 19 June 1980 on the Law Applicable to Contractual Obligations*, to which European Union States are Party, and that it was wise to avoid a possible conflict of conventions.⁷⁸ This situation will therefore be governed by Article 11 of the Rome Convention for those States which are Parties to it and by their national law for the other States.

Article 18 (universal character of the conflicts rules)

- III This Article is usual in the Hague Conventions on the conflict of laws. It does not, however, find any application when the Convention refers expressly, as in Article 14, to the law of a Contracting State.

Article 19 (exclusion of *renvoi*)

- II2 This Article, which is also traditional in the Hague Conventions on conflict of laws, sets out the principle that *renvoi* is excluded.

In contrast with Article 21 of the Convention on the Protection of Children, it does not include a rule governing conflict between choice of law systems. This rule was justified in the case where the parental responsibility provided for by this Convention derived from the law itself. It was then appropriate to avoid a situation in which the Convention conflict rule, when combined with the exclusion of *renvoi*, might result in placing in jeopardy the harmonious regulation of parental responsibilities arising from the concordance of the conflicts rules of non-Contracting States with which the situation had the closest links. In the case of the protection of adults, this precaution was not necessary, since the Convention does not lay down any conflict rule relating to *ex lege* representation of the adult (*cf.* above, No 90).

Article 20 (mandatory laws)

- II3 The exception for mandatory laws⁷⁹ of the State in which the adult is to be protected was introduced with the medical field especially in mind. In particular, it was a counterweight to the possibility given to the adult of choosing the law applicable to the powers of representation. The delegation of the Netherlands instanced a Dutch law, which it regards as a mandatory law, which lays down specific forms of representation of the adult in medical matters, which derogate from the common law rules of guardianship and curatorship. Accordingly, it is the spouse who represents the patient for admission to a psychiatric hospital or geriatric clinic, even if this patient has a guardian or curator. The same law requires the representative to obtain authorisation before any confinement. By excluding mandatory laws, the Commission wished to permit States having issued such

⁷⁸ Rome Convention, Article 11: “In a contract concluded between persons who are in the same country, a natural person who would have capacity under the law of that country may invoke his incapacity resulting from another law only if the other party to the contract was aware of this incapacity at the time of the conclusion of the contract or was not aware thereof as a result of negligence”.

⁷⁹ The French expression “*lois de police*” was not used, although the paraphrase used in the text (‘provisions ... where the application of such provisions is mandatory whatever the law which would otherwise be applicable’) corresponds very precisely with its definition. Some delegations noted difficulties in translating the expression.

rules to implement them in their own territory, even if the adult's protection has been arranged according to another law. Although at the end of its session the Commission deleted the reference to the medical field, in conformity with the general decision already indicated (No 42 above), Article 20 will frequently be applied in medical matters and should make it possible to regulate the bulk of the problems encountered in this field during the negotiations.

One delegation would have preferred each Contracting State to draw up a list of its provisions which it considers to be mandatory to enable the other Contracting States to respect them as far as possible when taking the measures of protection falling within their jurisdiction and intended for implementation in another State. This proposal was set aside in view of implementation problems.

Article 21 (public policy)

- 114** This Article reproduces the usual provision in the Hague Conventions on the public policy exception. The reference to the best interests of the adult which appeared in the preliminary draft was deleted. It has been observed that the expression "best interests of the child" is found in the United Nations Convention on the Rights of the Child, but that there is no comparable public international law text in respect of adults.⁸⁰

CHAPTER IV – RECOGNITION AND ENFORCEMENT

- 115** This Chapter follows very closely the corresponding chapter in the Convention on the Protection of Children.⁸¹ In the same way, it distinguishes recognition (Arts 22-24), the declaration of enforceability and registration for the purpose of enforcement (Arts 25 and 26), and finally enforcement (Art. 27).

Article 22 (recognition and grounds for refusal of recognition)

Paragraph 1

- 116** This paragraph sets out the principle of recognition by operation of law in each Contracting State of the measures taken in another Contracting State.⁸² Recognition has as its object the measure as it exists in the Contracting State where it has been taken, including where it concerns a restoration of the legal capacity of which an adult has been deprived. Equally there should be recognition of the powers of representation conferred by the measure or through the institution of supervision in the adult's State of habitual residence.

Recognition by operation of law means that it will not be necessary to resort to any proceeding in order to obtain such recognition, so long as the person who is relying on the measure does not take any step towards enforcement. It is the party against whom the

⁸⁰ See the discussion and the note in Minutes No 7, Nos 74-89 [see Proceedings of the SC with a diplomatic character (1999), pp. 270-271].

⁸¹ This report therefore reiterates certain parts of the report on the 1996 Convention. The same applies to the following chapter.

⁸² The recognition in a Contracting State of the measures taken by the authorities of a non-Contracting State is covered by the national law of each Contracting State.

measure is invoked, for example in the course of a legal proceeding, who must allege a ground for non-recognition set out in paragraph 2. The Convention does not exclude however a preventive procedure, limited to recognition or non-recognition of the measure (see Art. 23 below).

- 117 In order to be recognised, a measure must obviously be proven. This proof results normally from the written document emanating from the authority of origin and incorporating the decision taken by it. In cases of urgency, however, it may happen that the measure is taken by telephone and gives rise simply to a handwritten note in the file. In order to avoid any bureaucratic diversions, the Convention avoided subordinating recognition to the production of a written document, dated and signed by the authority of origin. As a result, a telefax or an e-mail, for example, may serve as proof of the measure with a view to its recognition.

Paragraph 2

- 118 Paragraph 2 lists the grounds on which recognition may be refused. These are the only grounds for non-recognition that may be relied on by the State addressed. In particular, the authority addressed is not authorised to review the law applied by the authority of origin. Moreover, it should be noted that paragraph 2 here authorises refusal of recognition, but does not impose it.

Sub-paragraph a)

- 119 Recognition may be refused 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. The reference to the jurisdiction of the authority of origin being in accordance with Chapter II of the Convention is understandable if it is compared with Article 2, paragraph 2, of the Convention. The Convention applies to measures taken when the adult was still a minor and presumably under rules of jurisdiction other than those of the Convention. Recognition of these measures may be refused if these rules of jurisdiction do not accord with those of the Convention. If the measure relating to a person then minor has been taken under the 1996 Convention, it may therefore be refused recognition if taken under a rule of jurisdiction laid down by the 1996 Convention (such as the divorce forum laid down in Article 10) but not by the Convention on the Protection of Adults (*cf.* above, No 15, note 16).

Sub-paragraph *a)* implies that the requested authority has the power to verify the jurisdiction of the authority of origin for purposes of recognition. It is however bound, in this verification, by the findings of fact on which the authority of origin based its jurisdiction (Art. 24, see below).

Sub-paragraph b)

- 120 The refusal of recognition is possible if, except in a case of urgency, the measure was taken, within the framework of judicial or administrative proceedings, without the adult having been provided the opportunity to be heard in violation of fundamental principles of procedure of the requested State. This ground for refusal does not imply that the adult ought to be heard in every case. It could arise that such a hearing is against his interests, but for the adult, this must remain an exception. No distinction should be made on this point according to whether the measure is taken in the framework of a judicial procedure or an administrative procedure. This amounts to a special clause of procedural public policy. It does not apply in cases of urgency, for which the requirements of procedural due process of law ought to be interpreted more flexibly.

Sub-paragraph c)

- 121** The text sets out manifest incompatibility with the public policy of the requested State as a ground for non-recognition. For the sake of symmetry with Article 20, the text also adds incompatibility with a mandatory law of the State addressed.⁸³

Sub-paragraph d)

- 122** This paragraph, the drafting of which is close to that of Article 27, paragraph 5, of the Conventions of Brussels and Lugano,⁸⁴ envisages the hypothesis of conflict between the measure to be recognised, taken in a Contracting State, and another measure, taken later in a non-Contracting State which would have had jurisdiction under Articles 5 to 9 of the Convention, and fulfilling the requirements for recognition in the requested State. In such a case, if the two measures are incompatible, preference will be given to the second, more recent one, taken by an authority closer to the adult and in a better position to assess the adult's interests.

This preference given to the measure taken subsequently in a non-Contracting State, presupposes that the latter State had jurisdiction under Articles 5 to 9 of the Convention. It is therefore broader here than in the Convention on the Protection of Children, where it was limited to measures taken by an authority in the non-Contracting State of the child's habitual residence.

Sub-paragraph e)

- 123** This final ground for refusal of recognition is linked to Article 33 (see below) which institutes a mandatory procedure of consultation before any measure of placement of an adult in another Contracting State. Article 22, paragraph 2, sub-paragraph *e*), avoids facing the State, in which the measure of placement is to be carried out, with a *fait accompli*, and authorises it to refuse recognition if the procedure for consultation has not been followed.

Article 23 (preventive action for recognition or non-recognition)

- 124** Since recognition is produced by operation of law, it is only at the time when the measure is invoked in a State that a possible dispute over the existence of a ground for non-recognition will be the subject of a ruling. This date may be too late, and any interested person may have a legitimate interest in dispelling, without waiting, any doubt which may exist about the existence of such a ground for non-recognition.

⁸³ A number of delegates observed that this addition was pointless and that, at the recognition stage, the exception of public policy was sufficient to achieve the desired result, particularly to refuse to recognise a medical measure contrary to a mandatory law of the State addressed (see the discussion in Minutes No 7, Nos 126-142 [see Proceedings of the SC with a diplomatic character (1999), pp. 273-274]).

⁸⁴ With this difference, that those Conventions give preference to the decision rendered *earlier* in a non-Contracting State and fulfilling the conditions necessary for its recognition in the requested State, since the *res judicata* status of the first decision precludes the recognition of a later decision which is incompatible with it. By contrast, in this Convention it is the measure taken *later* in the non-Contracting State which is preferred because, in the spirit of Article 10, paragraph 2, Article 11, paragraph 2, and Article 12, the measures taken may always be modified or replaced by the authority having jurisdiction under the Convention.

The text limits the admissibility of the preventive action to the recognition or non-recognition of the *measures*. It does not provide for any such action with a view to a ruling on, for example, the question of the validity or the nullity of a mandate in case of incapacity.

The Convention leaves it to the law of the requested State to define the procedure for this preventive action. This procedure is not necessarily modelled on the procedure for seeking an order of enforceability and the Convention does not impose, as it does for declarations of enforceability, a “simple and rapid” procedure (Art. 25, para. 2). Indeed, the procedure for a declaration of enforceability, in an international convention intended to ensure a sort of free circulation of decisions, ought to be rapid and will often be uncontestable in its first phase.⁸⁵ On the other hand, the preventive procedure tends to initiate immediately a dispute as to the international regularity of the measure and, in the case of an action for a non-recognition of the measure, to paralyse its free circulation. Such dispute should logically involve a full hearing, which would take normally more time than an accelerated procedure for a declaration of enforceability.

Article 24 (findings of jurisdictional facts)

- 125** As has already been indicated in connection with Article 22, paragraph 2 *a* (see above, No 119), the authority of the requested State is bound by the findings of fact on which the authority of origin has based its jurisdiction. If, for example, the authority of origin has made a decision in its capacity as an authority of the State of the adult's habitual residence, the authority of the requested State will not be able to review the facts on which the authority of origin based its assessment of habitual residence. Likewise, where the jurisdiction is grounded upon a preliminary assessment by the authority of origin of the best interests of the adult,⁸⁶ this assessment binds the authority of the requested State. This rule is encountered in other conventions.⁸⁷

Article 25 (declaration of enforceability)

- 126** This Article envisages the case in which the measures taken in a Contracting State and enforceable there require enforcement in another Contracting State. If this is not the case, Article 22 – in other words recognition – suffices to permit the measure to produce its effects. For example the powers conferred on a legal representative by a measure taken in a Contracting State will permit this representative, if there is no ground for non-recognition, to enter into transactions on behalf of the adult in another Contracting State, which transactions concern the protection of the adult's person or property. But if the measure requires enforcement, for example the forced sale of property, the measure will have to be the subject in the second State of a declaration of enforceability or, according to the procedure applicable in certain States, of registration for the purpose of enforcement.

Paragraph 1 of Article 25 recalls this necessity and mentions that the procedure will be initiated, in the requested State, “upon request by an interested party, ... according to the procedure provided in the law of the [requested] State”. The term “*requête*” should not be given the precise procedural meaning that it has in French legal terminology as the

⁸⁵ See the procedure on applications, set in place by the Conventions of Brussels and Lugano, Articles 31 *et seq.*

⁸⁶ See Article 7, paragraph 1, Article 8, paragraph 1, and Article 13, paragraph 2.

⁸⁷ See Article 9, *Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations*; Article 28, paragraph 2, Brussels and Lugano Conventions.

introductory step of an *ex parte* proceeding, addressed directly to the court, for the text, in referring to the procedure provided in the law of the requested State, was not intended, as was the Brussels Convention, to take a position on the procedure to be adopted.

Paragraph 2 is limited to providing that the requested State will apply ‘a simple and rapid procedure’ but leaves this State entirely free as to the means for achieving this and fixes no time period. This is thus a *lex imperfecta*.

Paragraph 3 indicates, as does Article 34, paragraph 2, of the Brussels Convention, that the declaration of enforceability or registration may be refused only for one of the reasons set out in Article 22, paragraph 2.

Article 26 (prohibition of review on the merits)

- 127** The prohibition of review on the merits is a standard clause in the conventions on recognition and enforcement of decisions. It concerns recognition, as well as the declaration of enforceability or the registration.

Article 27 (enforcement)

- 128** This Article, also identical to Article 28 of the Convention on the Protection of Children, sets out the principle that the measures taken in a Contracting State and declared enforceable in another “shall be enforced in the latter State as if they had been taken by the authorities of that State”. This is a sort of naturalisation of the measure in the Contracting State where it is to be enforced. The authorities of the requested State will thus be able to stay execution of a placement measure taken abroad in cases where they would have been authorised to do so for a measure taken in their own State, for example in the event of a refusal by the adult to submit to them.

The second sentence of the Article reinforces this solution by indicating that enforcement takes place “in accordance with the law of the requested State to the extent provided by such law”.

For example, if the authority of the adult's habitual residence has placed the guardian under the supervision of the local social authorities, and if later the adult is transferred to another Contracting State, the enforcement in the second State of the decision taken in the first will be possible only if the authorities of the second State are authorised under their law to carry out the task of supervision with which the social authorities of the first State were charged. In the negative, it would be for the authorities of the second State, if possible after consultation with the authorities of the first State, to adapt the measure taken in the first State or to modify it in accordance with Article 5, paragraph 2.

Certain fears were expressed concerning the application of this provision to adults during the Special Commission. The risk of an infringement of civil liberties arising from recourse to State-imposed restrictions was mentioned. There were also misgivings concerning the financial consequences of this provision if it had the result of obliging the State in which the adult is present to accept responsibility for the expenses of hospitalisation or placement resulting from the enforcement of measures taken by the authorities of another State. These fears were dispelled by the observation that Article 27 applied here only to the enforcement of a measure in its private-law context.

CHAPTER V – CO-OPERATION

- 129** This Chapter also follows quite closely the corresponding Chapter of the Convention on the Protection of Children. Hence, the Convention provides for the institution in each Contracting State of a Central Authority which would be a kind of hub, being contactable by the authorities of the other Contracting States and being able to reply to their requests (Arts 28 to 30). Parallel to the role thus recognised for the Central Authority, the Convention provided, rather broadly, for the possibility of communications and direct requests for information between the authorities of different Contracting States called upon to take measures of protection (Arts 31 to 35), as well as the possibility for the conclusion between them of agreements to facilitate such co-operation (Art. 37). Article 36 provides that each Central Authority will in principle bear its own costs.

Article 28 (creation of a Central Authority)

- 130** This Article requires the Contracting States to designate a Central Authority charged with carrying out the obligations which are imposed on it by the Convention, and provides the possibility of designating several Central Authorities for those States which have non-unified systems. It reproduces Article 29 of the Convention on the Protection of Children, which is itself drafted on the model of Article 6 of each of the Conventions of 25 October 1980 and 29 May 1993.

Article 29 (general obligation of co-operation)

- 131** The Central Authorities have a general mission of co-operation and information. The information to be furnished on request will bear on the legislation in force and on the services available in the State in question for the protection of the adult.

Article 30 (communications, localisation)

- 132** This Article lists certain tasks of the Central Authority. The first of these tasks is to “facilitate the communications, by every means, between the competent authorities in situations to which the Convention applies”. The means used may be electronic ones. This detail was mentioned in the text voted on in the first reading. It was deleted (but not condemned) in the second reading at the request of China, which feared that such a clarification might be wrongly interpreted by developing States.⁸⁸

The Commission did not agree to include among the tasks of the Central Authority that of replying to the requests for information from the authorities of the other Contracting States on the measures to which an adult might have been subject. Nor did it wish to mention in the text the possibility for the authorities of the Contracting States, with the consent of their Central Authorities, of communicating directly among themselves.⁸⁹

⁸⁸ See Work. Docs Nos 66 and 104, Minutes No 13, Nos 44-50 [see Proceedings of the SC with a diplomatic character (1999), pp. 313-314] and Minutes No 16, Nos 23-44 [see Proceedings of the SC with a diplomatic character (1999), pp. 330-332].

⁸⁹ See on these points Work. Doc. No 63 and Minutes No 8, Nos 95-120 [see Proceedings of the SC with a diplomatic character (1999), pp. 280-282].

These clarifications seemed pointless, as there was nothing in the Convention against direct communication among non-Central Authorities or the possibility for one of them to question the Central Authority of another State.

The second task is to “provide, on the request of a competent authority of another Contracting State, assistance in discovering the whereabouts of an adult where it appears that the adult may be present and in need of protection within the territory of the requested State” (Art. 30 *b*)).

Article 31 (mediation)

- 133** The Special Commission’s Preliminary draft, like the corresponding text of the Convention on the Protection of Children, included among the tasks of the Central Authority, on the same basis as providing information and discovering the whereabouts of the adult (see Art. 30 above), that of “facilitat[ing] by mediation, conciliation or similar means, agreed solutions for the protection of the person or property of the adult in situations to which the Convention applies.” Deleted in the first reading after a vote with a small majority in favour,⁹⁰ this provision was taken up again in the second reading in a milder form placing no obligation on the Central Authority, merely recommending it to “encourage” this alternative means of dispute settlement, by recourse, if need be, to “the intervention of other bodies”.⁹¹

When it was asked between which people these attempts at mediation might be made, the reply given was that it could be between the guardian and other persons regarding the fate of the adult or his or her property, or between the adult and those responsible for him or her, in an endeavour to get the adult to accept a measure which seemed beneficial.

Article 32 (requests for concrete information and assistance with regard to a specific adult)

Paragraph 1

- 134** This text authorises the competent authority of a Contracting State, when it envisages taking a measure of protection, to ask any other authority of another Contracting State which has information useful for the protection of the adult to communicate it. Although the letter of the text does not set this forth expressly, it is clear that the authorities here in question are solely public authorities, which are moreover the only ones which the Convention envisages being able to take measures of protection, and not associations and non-governmental organisations.

The possibility of requesting information on the adult should prove to be particularly useful in the event of a change in the adult’s habitual residence to another State, as well as in cases where it is the national authorities who are dealing with the protection and who will be able to put questions to the authorities of the State of the habitual residence.

- 135** Some precautions have been taken in order to avoid the dangers of uncontrolled collection of information. It is only “if the situation of the adult so requires” that the request for information is authorised. It is for the requesting authority to consider this condition and,

⁹⁰ See Minutes No 8, Nos 75-90 [see Proceedings of the SC with a diplomatic character (1999), pp. 279-280].

⁹¹ Work. Doc. No 98 and Minutes No 16, Nos 44-55 [see Proceedings of the SC with a diplomatic character (1999), p. 332].

in the grounds given for its request for information, to show that it is fulfilled. In the same spirit, Article 35 forbids such a request if it would place the adult's person or property in danger, or constitute a serious threat to the liberty or life of a member of the adult's family. The same Article 35 poses a symmetrical bar against transmission by the requested authority of information requested, if this transmission would pose the same risks for the adult or for members of his or her family.

Although the text does not say so formally, it should be understood that the requested authority is never bound to furnish the information requested. It should have its own power of discretion. The Convention does not oblige it to state in writing the grounds for its decision to refuse. It is, moreover, possible that its internal law might not permit it to meet the request for information, in particular where such request would infringe upon the rules of that law concerning confidential communications with members of a profession.

Paragraph 2

- 136 Paragraph 1 leaves for any competent authority of a Contracting State the possibility to address any authority of another Contracting State, in order to request from it the information which is needed. This flexibility of operation may be advantageous but it may also burden the functioning of the desired co-operation if the requested authority cannot conveniently identify the requesting authority and cannot assess its authority to send such a request. Thus paragraph 2 provides the possibility for a Contracting State to make a declaration, according to which the requests made under paragraph 1 may only be routed through its Central Authority.

Paragraph 3

- 137 This paragraph provides for mutual assistance between the competent authorities of the Contracting States for the implementation of measures of protection. Such assistance will often be necessary, in particular in case of removal of the adult or of his or her placement in an appropriate establishment situated in a State other than that which has taken the measure of placement.

Article 33 (transborder placements)

- 138 This Article, already mentioned in connection with Article 22, paragraph 2 *e*) (see above, No 123), institutes the only procedure for obligatory consultation provided by the Convention. This arises when the authority which has jurisdiction under Articles 5 to 8 contemplates the placement of the adult in institutional care, or any other place of protection, where such placement will take place in another Contracting State. This consultation gives a power to review the decision to the authority of the receiving State, and allows the authorities to determine in advance the conditions under which the adult will stay in the receiving State, in particular in respect of immigration laws in force in that State, or even the sharing of the costs involved in carrying out the placement measure.⁹² The text specifies that the consultation will be with the Central Authority or other competent authority of the receiving State, and that it will take the form of the furnishing to that authority of a report on the adult's situation and the reasons for the proposed placement or provision of care.

⁹² See, below, under Article 36.

- 139 Article 33, paragraph 2, grants the Central Authority or any other competent authority of the requested State the right to oppose the placement decision. This is a notable difference as compared with the parallel provision of the Convention on the Protection of Children, which makes the placement decision subject to prior approval by the requested State.⁹³

Failure to follow this procedure for consultation in advance is penalised by refusal of recognition of the placement measure (Art. 22, para. 2 *e*), see above).

Article 34 (adult in serious danger)

- 140 This Article relates to the case in which the competent authorities of a Contracting State, who have taken or are going to take a measure of protection for an adult exposed to serious danger (illness requiring constant treatment, drugs, influence of a sect, for example), are informed of the adult's change of residence to, or of his or her presence in another Contracting State. These authorities have then the obligation to inform the authorities of this other State of this danger and of the measures taken or under consideration. This obligation to notify also applies to the case in which the adult is present in a non-Contracting State.

This provision, in order to function, presupposes obviously that the authorities of the first State are informed of the presence of the adult in the second, which may limit its reach in practice. But nothing prevents the authorities of the first State from resorting first, in any case where the adult is in another Contracting State, to a request to locate the adult on the basis of Article 30 *b*), and then to the provision of information in accordance with this Article 34.

Article 35 (information creating a risk for the adult)

- 141 In connection with Article 32, it was pointed out that this request or transmission of information might place the person or the property of the adult in danger, or constitute a serious threat to the liberty or life of a member of the adult's family. Article 35 takes these remarks into account and instructs the authority who thinks that such a risk exists not to request or transmit the information.

Article 36 (costs)

- 142 The functioning of the mechanisms for co-operation has its costs, and Article 36 sets out the rule, identical to that of the Convention on the Protection of Children (Art. 38) and which is already found in a somewhat different form in the *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (Art. 26), according to which the Central Authorities and the other public authorities of the Contracting States bear their own costs arising from the application of Chapter V. The expression “public authorities” refers to the administrative authorities of the Contracting States, and not to the courts.

⁹³ In the first reading, the text was adopted with the same wording as Article 33 of the Convention on the Protection of Children, but by only a very small majority (11 votes to 10 with 2 abstentions), some delegations having called for its outright deletion, considering the approval procedure far too cumbersome in the event of agreement between authorities of origin and the host institution in the State addressed (see Work. Doc. No 57 and Minutes No 9, Nos 1-29 [see Proceedings of the SC with a diplomatic character (1999), pp. 282-284]). The discussion resumed in the second reading, and the compromise reached was to replace it with non-opposition to explicit, positive approval (Work. Doc. No 108, Minutes No 16, Nos 55-90 [see Proceedings of the SC with a diplomatic character (1999), pp. 332-335]).

Thus, court costs and, more generally, the costs of proceedings and particularly of lawyers are not included in this Article. On the other hand, it does include, in addition obviously to the fixed costs of the functioning of the authorities, the costs of correspondence and transmissions, of seeking out diverse information and of locating an adult, of the organisation of mediation or settlement agreements, as well as the costs of implementation of the measures taken in another State.

However, this paragraph recognises that the authorities of the State retain the “possibility of imposing reasonable charges for the provision of services” which may be, for example, locating an adult, delivering information or certificates. The terms employed let one think that this “imposition” may be a request for reimbursement of costs already incurred, or a request for provision of funds even before the service is furnished, either of which request would have to be formulated with a certain amount of moderation. In addition, paragraph 2 provides the possibility for the Contracting States to enter into agreements among themselves concerning the allocation of these costs.

Article 37 (agreements between Contracting States)

- 143 This Article, also reproduced from the Convention on the Protection of Children (Art. 39) and the equivalent of which is found in Article 39, paragraph 2, of the *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*, provides the possibility for Contracting States to enter into agreements among themselves facilitating the application of the chapter on co-operation. These would only be agreements which reinforce the co-operation instituted by this Chapter, for example, through making certain of its provisions mandatory, and not separate agreements setting out different rules from those of the Convention provided for in Article 49 (see below, No 160 *et seq.*).

CHAPTER VI – GENERAL PROVISIONS

Article 38 (international certificate)

- 144 The Commission reproduced and widened the provision of Article 40 of the Convention on the Protection of Children and provided for the delivery to any person entrusted with protection of the adult's person or property of a certificate indicating the capacity in which that person is entitled to act and the powers conferred. However, the Commission did not wish to oblige Contracting States not wishing to deliver a certificate to do so. The certificate is therefore optional.

The utility for practitioners of such a certificate is clear. Whether it is the person of the adult which is involved, and even more his or her property, practitioners feel the need for security. It was felt that a certificate having probative force in all the Contracting States would allow both costs and disputes to be avoided.

The certificate mentions the capacity and the powers of the person entrusted with the protection of the adult's person or property without making a distinction in accordance with whether this person has been designated, and his or her powers conferred, by a measure of protection or by the adult himself or herself. In an appropriate case, the certificate may in a negative fashion indicate the powers which this person does not have. For example, it may mention that the legal representative of an adult having his or her habitual residence in the United States does not have the power to administer the property that this adult possesses in a foreign State.

- 145 Unlike Article 40 of the Convention on the Protection of Children, Article 38 provides that the certificate may only be delivered by the authorities of the Contracting State⁹⁴ where a measure of protection has been taken or power of representation confirmed. The authorities of the State of the adult's habitual residence cannot therefore, unlike the solution adopted by the Convention on the Protection of Children, issue this certificate if they have not taken any measure of protection or confirmed the mandate in case of incapacity. These authorities do not occupy the central place which they do in the Convention on the Protection of Children and the Commission did not want to add to the number of certificates or to the dangers of their contradicting one another.⁹⁵
- 146 The concept of the confirmation of powers must give every guarantee of reliability and be seen in the light of legal systems which make provision for this confirmation and place it in the hands of a particular authority, judicial in Quebec, administrative elsewhere. The first version of this report, which was based on a reading of the Convention text, set forth that this confirmation is not a measure of protection within the meaning of the Convention. If this indeed were the case, there would be no need to mention it alongside the measures of protection in Article 38. However, some delegations have since asserted that this analysis is not one which, according to them, flows from the discussion, difficult as it was.^{95bis} According to this view, a confirmation could constitute a measure of protection within the meaning of Article 3 and it could only be given by the competent authority under the Convention. A consequence of this might be that, if the adult has, in accordance with Article 15, paragraph 2, submitted the conferred power to an applicable law other than that under which the authorities have jurisdiction under the Convention, the representative risks being deprived of the possibility of having his or her powers confirmed, for instance, by the competent authority of the State whose law is applicable to the power of representation.
- 147 Under Article 38, paragraph 2, the "capacity and powers indicated 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 will therefore be possible for any interested person to contest the correctness of the particulars appearing on the certificate but, in the absence of a contest, the third party may in all security deal with the person indicated by the certificate, within the limits of the powers which are mentioned there. The probative force is limited to the date when the certificate was drawn up. The certificate cannot guarantee that the powers which then existed will remain in force in the future. Specifying this meant that it was possible to dispense with giving the authority issuing the certificate the power to cancel it, as had been proposed.⁹⁶

A Working Group, chaired by Mrs Bauer, delegate of France, prepared a model certificate (Work. Doc. No 90), approved by the Commission. This certificate was not incorporated into the Convention in order to facilitate future amendments. It was decided that it would be transmitted to Member States and that the Permanent Bureau would recommend the Contracting States to use it.

⁹⁴ Paragraph 3 specifies that it is for each Contracting State to designate the authorities competent to draw up the certificate.

⁹⁵ See the rejection of the proposal by the Swiss delegation in this connection, Work. Doc. No 59, Minutes No 10, No 79 [see Proceedings of the SC with a diplomatic character (1999), p. 296].

^{95bis} See Work. Doc. No 77, and discussion in Minutes No 10, Nos 51-81 (see Proceedings of the SC with a diplomatic character (1999), pp. 294-296).

⁹⁶ See Work. Doc. No 59, Minutes No 10, No 55 [see Proceedings of the SC with a diplomatic character (1999), p. 294].

Article 39 (protection of personal data)

- 148** This Article, identical to Article 41 of the Convention on the Protection of Children, reproduces in substance the provision in Article 31 of the Convention of 29 May 1993 on adoption.⁹⁷ The protection of personal data, above all when it is computerised, is moreover a general objective which is common to modern States.

Article 40 (confidentiality of information)

- 149** This text requires the authorities to which information has been transmitted to ensure its confidentiality, in accordance with the law of their State. This will need to be closely monitored as electronic transmissions develop. This obligation of confidentiality will also have to be imposed on the authority transmitting the information, as in a way it too is a receiver of the information it transmits electronically.

Article 41 (dispensation from legalisation)

- 150** Dispensation from legalisation, already provided for by the Convention on the Protection of Children, extends here to all “documents forwarded or delivered under this Convention”, *i.e.* all written information furnished, all judicial and administrative decisions, as well as certificates delivered in accordance with Article 38.

Article 42 (designation of authorities)

- 151** This Article is intended to facilitate the practical operation of the articles to which it refers by permitting the requesting authority of a Contracting State to know which authority should be addressed, in the requested State, when a transfer of jurisdiction to a more appropriate forum (Art. 8) or a placement abroad (Art. 33)⁹⁸ is contemplated. But this designation is optional for the Contracting States which, because of the variety and the great number of the authorities whose jurisdiction might be invoked in different circumstances, may not be able to furnish complete lists.

Article 43 (communication of designations and declarations)

- 152** This text indicates to whom the designations and declarations of the States, made in application of the Convention, must be communicated. It shows a division of tasks between the Permanent Bureau of the Hague Conference and the Depositary of the Convention. Unlike in previous conventions, the Article lays down that these communications must be made not later than the date of the deposit of the instrument of ratification, acceptance or approval of the Convention or of accession thereto. The purpose of this provision, arising from a proposal by the delegation of the Netherlands,⁹⁹ is to

⁹⁷ See, on this article, the Report of Mr Parra-Aranguren, *Proceedings of the Seventeenth Session (1993)*, Tome II, p. 632.

⁹⁸ In fact, Article 33 does not lay down the addressing of a request, but merely prescribes that the authorities of the State of placement should be consulted. Obviously, Article 42 applies to the addressing of this consultation (see Minutes, Plenary Session, Nos 163-167 [see *Proceedings of the SC with a diplomatic character (1999)*, p. 351]).

⁹⁹ Work. Doc. No 87 and the discussion, Minutes No 10, Nos 44-45 [see *Proceedings of the SC with a diplomatic character (1999)*, p. 293] and Minutes No 16, Nos 90-111 [see *Proceedings of the SC with a diplomatic character (1999)*, pp. 335-336].

enable the other Contracting States to perform their obligations under the Chapter on co-operation. Failure to comply with this time-limit does not entail the inadmissibility of the deposit of the instrument, but will strengthen the position of the Permanent Bureau as regards the defaulting State.

Articles 44–47 (federal clauses)

- 153** These Articles contain what are termed federal clauses, concerning the application of the Convention in respect of the States whose legal systems are not unified. These clauses have become customary in the Hague Conventions since some thirty years ago, but they are perfected from Convention to Convention, and their drafting must be adapted to the purposes of each Convention. As has been indicated in the introduction to this Report, a special Working Group chaired by Mrs Alegría Borrás, delegate of Spain, was charged during the Diplomatic Session with preparing draft articles (Work. Doc. No 100), which were adopted almost without change by the Commission. Article 44 concerns the situations which give rise only to conflicts which are internal to a Contracting State, while Articles 45 and 46 look to the application of the Convention in respect of States which have inter-territorial conflicts of laws, and Article 47 does the same for States which have inter-personal conflicts of laws.

Article 44 (non application of the Convention to internal conflicts)

- 154** The Convention is intended to regulate international conflicts of authorities and laws in respect of the protection of adults. A Contracting State in which different systems of law apply in this area may, if it wishes to, apply the Convention's rules to resolve these conflicts, but this Article states that such State is in no way bound to do so.¹⁰⁰ It should be pointed out that the conflicts internal to a Contracting State to which this Article relates may be inter-territorial conflicts, as well as inter-personal conflicts.

Only a small majority voted to keep this Article.¹⁰¹ Since Article 1 lays down - which the Convention on the Protection of Children does not - that the Convention applies “in international situations”, it is clear that it does not apply to internal conflicts. At least Article 44 can be understood as an indirect invitation to rely on the rules it lays down for the solution of such conflicts.

Article 45 (inter-territorial conflicts, general rules)

- 155** This Article, like the following Article, indicates how to apply the Convention in respect of a State comprising several territorial units, to which different systems of law or sets of rules of law apply.

¹⁰⁰ The same rule is found in various Hague Conventions, in particular the *Convention of 14 March 1978 on the Law Applicable to Agency*, Art. 20; the *Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes*, Art. 18; the *Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods*, Art. 20; the *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, Art. 33; the *Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons*, Art. 21; the *Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*, Art. 38; the *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*, Art. 46.

¹⁰¹ By 12 votes to 10 with 1 abstention, see Minutes No 17, Nos 21-27 [see Proceedings of the SC with a diplomatic character (1999), p. 340].

The purpose of this Article is purely technical. It lays down the general rules which may be applied both to questions of the jurisdiction of authorities, of applicable law and of recognition of the measures of protection, but where determination of the applicable law is concerned, its scope of application is severely truncated by Article 46, which lays down special rules in this respect.

- 156 The general idea which inspired Article 45, for which precedents are found in other Conventions,¹⁰² is for the federal or semi-federal State to localise the spatial connecting elements favoured by the Convention in the territorial unit of such State in which they are effectively located. Thus it is with the adult's habitual residence, his or her presence, the location of his or her property, or the substantial connection the situation may have with a State, or with the place of implementation of the measure (sub-paras. *a*), *b*), *c*), *f*) and *i*)). Likewise, the reference to an authority, a law, or a procedure ought to be to the authority authorised to act, or to the law or the procedure in force in the territorial unit concerned (sub-paras. *g*), *h*) and *i*)). The reference to the State of which the adult has the nationality (*cf.* Art. 7 and Art. 8, paragraph 2, sub-paragraph *a*)) should be construed as being 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” (sub-para. *d*)). The reference to the State whose authorities have been chosen by the adult should be construed as being to the territorial unit if the adult has chosen its authorities, or otherwise, the territorial unit with which the adult has the closest connection (sub-para. *e*)).

Article 46 (inter-territorial conflicts, special rules on the applicable law)

- 157 A brief comparative study of the recent Hague Conventions would show that very diverse systems have been used to determine the law of the territorial unit which is applicable, where the conflicts rule of the Convention designates the law of a State which has inter-territorial conflicts of laws. Certain Conventions directly designate the territorial unit, the law of which will be applicable.¹⁰³ Others refer principally to the internal conflicts rules of the State concerned, and subsidiarily to the law of the territorial unit with which the situation has the closest links,¹⁰⁴ or to the law of a territorial unit directly determined.¹⁰⁵ Article 46 of the present Convention, like the Convention on the Protection of Children, favours this latter system. The territorial unit, the law of which is applicable, is that which is identified by the rules in force in the State concerned, but if there are none, then it is that which is defined in Article 45. Thus, where Article 15 designates the law of the State of the adult's habitual residence to govern the powers of representation it has conferred,

¹⁰² See the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, Art. 31; and above all, the *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*, Art. 36.

¹⁰³ See the *Convention of 14 March 1978 on the Law Applicable to Agency*, Art. 19; the *Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes*, Art. 17; the *Convention of 14 March 1978 on Celebration and Recognition of the Validity of Marriages*, Arts 18 and 19; the *Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods*, Art. 19; the *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, Art. 31 *b*; the *Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition*, Art. 23; the *Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*, Art. 36 *b*.

¹⁰⁴ *Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations*, Art. 16.

¹⁰⁵ See *Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes*, Art. 16; *Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons*, Art. 19, para. 2.

and this State comprises several territorial units governed by different laws, it would be necessary first of all to investigate whether in the law of this State there are rules leading to the identification of the territorial unit, the law of which is applicable, and, in the absence of such rules, to apply in accordance with Article 45, sub-paragraph a), the law of the territorial unit in which the adult then had his or her habitual residence.

Article 47 (inter-personal conflicts, applicable law)

- 158** Unlike Articles 45 and 46, Article 47, reproduced from Article 49 of the Convention on the Protection of Children, envisages the States which have inter-personal conflicts, that is to say, those States which have various systems of law or sets of rules applicable to different categories of persons. All the Hague Conventions which deal with determination of the applicable law, where the conflicts rules that they set out designate a State of this type, defer to the internal conflicts rules of this State. Certain of them stop there, without giving any solution for the case where such rules do not exist in the State concerned.¹⁰⁶ Others fill this gap and refer, in the absence of such rules, to the law of the closest connection.¹⁰⁷ Article 47 of this Convention adopts this latter system. In the absence of rules in force in the State concerned identifying the applicable law, the law of the system or the set of rules with which the adult has the closest connection applies.

Article 48 (replacement of the Convention of 17 July 1905)

- 159** This Article declares the replacement, in relations between the Contracting States, of the old Convention of 17 July 1905, by the present Convention.¹⁰⁸ In contrast with the similar provision of Article 51 of the Convention on the Protection of Children, it does not reserve the recognition of measures previously taken in application of the old Convention, which seems hardly any longer to be applied.

If that were not the case, the transition from one Convention to the other could give rise to difficulties similar to those which have been indicated for the succession of the Conventions of 1961 and of 1996.¹⁰⁹ If, for example, the habitual residence of the adult changes from State A to State B, both formerly Parties to the 1905 Convention but having become at the time of the change Parties to the new Convention, this new Convention ought logically to apply in their mutual relations. But if the adult has the nationality of State C, Party to the 1905 Convention but not to the new Convention, the 1905 Convention will continue to bind States A and B to State C which may, by claiming the jurisdiction of its authorities, block the application of the new Convention in the relations between States A and B.¹¹⁰

¹⁰⁶ See *Convention of 14 March 1978 on Celebration and Recognition of the Validity of Marriages*, Art. 20; *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, Art. 32; *Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*, Art. 37.

¹⁰⁷ *Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations*, Art. 16; *Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons*, Art. 20; compare *Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes*, Art. 19.

¹⁰⁸ Compare Art. 51, *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*.

¹⁰⁹ See the Explanatory Report on the 1996 Convention, No 169.

¹¹⁰ The Convention of 17 July 1905 gives a priority jurisdiction to the authorities of the national State to pronounce the interdiction and to organise the guardianship (Art. 2). The authorities of the State of the habitual residence only have a subsidiary jurisdiction in the event of the national authorities abstaining (Art. 6), but the interdiction pronounced by the authorities of the habitual residence may be lifted by the national authorities in accordance with their law (Art. 11).

Article 49 (conflicts with other conventions)

- 160** This Article is reproduced from Article 52 of the Convention on the Protection of Children, adopted with a view to the negotiations then ongoing in the European Union regarding what was to become the Council Regulation on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses.¹¹¹ It nevertheless generated debate, some States fearing that it did not leave them a wide enough margin for manoeuvre to enable them, in future, to conclude separate agreements in the subjects governed by the Convention. The explanations given during the debates showed that there was still a broad margin for manoeuvre.

Paragraph 1

- 161** This paragraph, like the usual compatibility clauses found in numerous conventions, concerns only prior agreements entered into by the Contracting States. It reserves their application, unless the States Parties to such agreements make a declaration to the contrary.

Paragraph 2

- 162** This paragraph 2 permits “one or more Contracting States to conclude agreements which contain, in respect of adults habitually resident in any of the States Parties to such agreements, provisions on matters governed by this Convention”. Such agreements may be concluded between Contracting States or between Contracting States and third States,¹¹² but the agreements mentioned in this paragraph are those which concern “adults habitually resident in any of the States Parties to such agreements”.

This limitation struck the delegations of the Nordic States as excessive, as they wished to be able to conclude separate agreements based not only on habitual residence but also on the nationality or residence of the adult or on the existence of property in the States Parties to those agreements. With this in view they proposed that paragraph 2 be deleted and that the application of conventions concluded or to be concluded by Contracting States¹¹³ be reserved in paragraph 1, on a par with Article 23 of the Convention on Successions. It was objected that this was mainly a convention on the jurisdiction of authorities (and not only a convention on conflicts of laws, like the Convention on Successions) and that an effort should be made to prevent a separate Convention from being concluded by certain States Parties to the Convention on the Protection of Adults, adopting rules of jurisdiction which would upset its smooth operation. This would be the case if such a separate convention were to have effect on adults having their habitual residence outside the closed circle of States which are Parties to it and in a State Party to the Hague Convention. It was also said by way of reply that, although paragraph 2 effectively entailed a limitation of the agreements contemplated to adults having their habitual residence in a State which is Party to them, paragraph 3 does not reiterate this limitation and leaves open the possibility of separate agreements concerning adults not necessarily having their habitual residence in a State Party, on condition, however, that these agreements do not affect the application of the Hague Convention.

¹¹¹ This Regulation will enter into force on 1 March 2001.

¹¹² The latter possibility stems from the fact that the paragraph contemplates a separate agreement concluded by “one or more Contracting States”. If it is concluded by only one Contracting State, this can only be a third State.

¹¹³ A proposal set aside by 12 votes to 7 with 5 abstentions, see the discussion Minutes No 10, Nos 1-40 [see Proceedings of the SC with a diplomatic character (1999), pp. 290-293] and Minutes No 17, Nos 28-34 [see Proceedings of the SC with a diplomatic character (1999), pp. 340-341].

Paragraph 3

- 163** This paragraph indicates that the separate agreements to be concluded by one or several Contracting States "do not affect, in the relationship of such States with other Contracting States, the application of the provisions of this Convention". In other words, the freedom to conclude separate agreements is complete, but the Contracting States which are Parties to such separate agreements may not in any case use these agreements as an argument to free themselves from their obligations towards the other Contracting States which are not Parties to the separate agreements.

The reach of paragraph 3 may be illustrated with the aid of several examples. If there exists, by virtue of the Hague Convention, a basis for jurisdiction in favour of the authority of a State which is a Party to that Convention, but not to the separate agreement, the Contracting States which are also Parties to the separate agreement should recognise that the measures taken by that authority on the basis of this ground of jurisdiction have been taken by a competent authority, even if the separate agreement excluded such a ground for jurisdiction. Reciprocally, the Contracting States which are not Parties to the separate agreement will obviously not be bound to recognise the measures taken in the other Contracting States which are Parties to such agreement on the basis of a ground for jurisdiction provided by the separate agreement but not by the Hague Convention. In addition, the Contracting States which are Parties to the separate agreement should respect the obligations of co-operation that the Hague Convention imposes upon them.

- 164** In the interpretation which prevailed in the discussions of the Diplomatic Commission, the restrictions in paragraph 3 here only concern the agreements mentioned therein, in other words, those which are not limited to adults having their habitual residence in the territory of one of the States Parties to these agreements. The agreements laid down in paragraph 2 are therefore not affected by these restrictions.

Paragraph 4

- 165** This paragraph assimilates to the separate agreements uniform laws based on the existence, among the States concerned, of special ties. This provision is of particular interest to the Nordic States.

Article 50 (temporal application of the Convention)

- 166** This Article repeats in its first two paragraphs the two rules of transitional law provided for by Article 53 of the Convention on the Protection of Children concerning the jurisdiction of authorities and the recognition of measures. It follows logically from paragraph 1 that the rules of jurisdiction will apply in a State only from the time of the entry into force of the Convention in that State. Consequently, the measures taken in a Contracting State before the entry into force of the Convention in that State, in application of the rules of jurisdiction previously in force, will not be invalidated by the entry into force of the Convention, even if the authorities which took them no longer have jurisdiction according to the Convention.
- 167** Paragraph 2 limits the temporal application of Chapter IV (recognition and enforcement) to measures taken after the entry into force of the Convention, both in the State of origin of the measures and in the requested State. However, nothing prevents the requested State from recognising, on the basis of its own national law, decisions taken previously.

- 168 Paragraph 3 is new. It was made necessary by the existence of powers of representation conferred by the adult (Art. 15). The Commission wanted the powers of representation which the adult had conferred previously, if this had been done under conditions corresponding to those set out in Article 15, to be recognised in each Contracting State from the time of the entry into force of the Convention in relation to such State. In summary the Convention requires recognition for the future of the existence of powers conferred before the entry into force of the Convention,¹¹⁴ but it does not require recognition of acts which have been carried out in application of these powers before the entry into force of the Convention in that State.

Article 51 (language of communications)

- 169 This Article, identical to Article 54 of the Convention on the Protection of Children and to Article 24 of the *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, deals with the problems of the language in which communications between authorities are to be drafted or translated. The communication must be in the original language and must be accompanied by a translation into the official language or one of the official languages of the other State, or, where that is not feasible, a translation into French or English. There is provision for making a reservation as regards the use of either English or French.

Article 52 (monitoring of the Convention)

- 170 This Article reproduces Article 54 of the Convention on the Protection of Children which itself reproduced Article 42 of the Convention of 29 May 1993 on Adoption. There is only benefit to be derived from the Conference organising, periodically, meetings to examine the practical operation of the Convention and, as appropriate, making suggestions to improve it.

CHAPTER VII – FINAL CLAUSES

Articles 53-55 (final clauses)

- 171 These Articles, prepared by the Permanent Bureau (Work. Doc. No 65) and adopted without long discussion, are taken from previous Conventions, particularly the Convention on the Protection of Children. They deal with the signature, ratification, acceptance or approval (Art. 53), with accession (Art. 54), with the possibility for States having two or more territorial units in which different systems of law are applicable to declare the units to which the Convention will be applied (Art. 55), with the system of the sole reservation permitted by the Convention¹¹⁵ and its withdrawal (Art. 56), with the entry into force of the Convention (Art. 57), with denunciation (Art. 58), and, finally, with the notifications that the depositary of the Convention will have to make to the Member States of the Conference and to those States which will have acceded to the Convention (Art. 59).

¹¹⁴ Whereas it does not oblige recognition of measures of protection taken previously, see Art. 50, para. 1.

¹¹⁵ This reservation concerns the language of communications, see above, No 169, *ad* Art. 51. The power to make a reservation on the application of the Convention in the medical field, first accepted by the Commission, was set aside after agreement was reached on these matters.

The Convention borrows two innovations from the Convention on the Protection of Children as compared with previous Conventions. Firstly, according to Article 53 and by contrast with the Convention on Adoption which itself departed from previous Conventions, the Convention is only open for signature by States Members of the Conference on 2 October 1999, and not by those States having attended as observers or which became Members after this date. The latter may accede to the Convention by following the procedure laid down in Article 54, in other words, only after its entry into force pursuant to Article 57, paragraph 1. Secondly Article 58 lays down that the denunciation of the Convention may be limited to certain territorial units to which the Convention applies.

Paris, 5 January 2000

Hague Conference on Private International Law
Permanent Bureau
Churchillplein 6b
2517 JW The Hague
The Netherlands

☎ +31 70 363 3303
📠 +31 70 360 4867
secretariat@hcch.net
www.hcch.net

