

Title	Confirmation of powers of representation for the purposes of the certificate issued under Article 38
Document	Prel. Doc. No 11 of October 2022
Author	PB
Agenda Item	Item VI
Mandate(s)	C&R No 34 of the 2019 CGAP; C&D No 31 of the 2020 CGAP; C&D No 26 of the 2021 CGAP
Objective	To highlight the practical utility of the certificate under Article 38 for the cross-border transportability of “confirmed” powers of representation and to outline an interpretation of what a “confirmation” of powers of representation could entail as well as what minimum conditions could be put in place, at the domestic level, for the purposes of issuing the certificate under Article 38.
Action to be Taken	For Decision <input type="checkbox"/> For Approval <input type="checkbox"/> For Discussion <input checked="" type="checkbox"/> For Action / Completion <input type="checkbox"/> For Information <input type="checkbox"/>
Annexes	Annex I – Relevant extracts from <i>Proceedings of the Special Commission of a diplomatic character of September-October 1999 - Protection of adults</i> Annex II - Relevant extracts from the Explanatory Report of the 2000 Convention Annex III – Relevant extracts from the Explanatory Report and Practical Handbook on the 1996 Protection of Children Convention Annex IV – Relevant extracts from academic discourse Annex V - Relevant extracts from the Questionnaire on the practical operation of the 2000 Convention
Related Documents	N/A

Table of Contents

I.	Introduction	2
II.	What is confirmation?	3
III.	Who can confirm powers of representation?	4
	A. Verification of whether the powers have entered into force	4
	B. Verification that the powers are in compliance with the law	4
	C. Simultaneous verification of both conditions.....	5
IV.	When can confirmation take place?	5
V.	Which (competent) authority has jurisdiction and which law applies to the confirmation?.....	5
VI.	The Article 38 certificate.....	6
VII.	Proposal by the Permanent Bureau, with the assistance of the WG, for Conclusions and Recommendations	8
	Annex I.....	10
	Annex II.....	12
	Annex III.....	14
	Annex IV.....	16
	Annex V.....	20

Confirmation of powers of representation for the purposes of the certificate issued under Article 38

I. Introduction

- 1 This Preliminary Document (Prel. Doc.) arises from the work of the Working Group (WG) tasked with the development of the Practical Handbook on the Operation of the 2000 Protection of Adults Convention (“2000 Practical Handbook”). During this process, the WG questioned what was the intended meaning of “a power of representation confirmed” under Article 38 of the *Hague Convention of 13 January 2000 on the International Protection of Adults* (“2000 Protection of Adults Convention” or “2000 Convention”). The WG highlighted the importance of establishing a common understanding of what is to be considered a “confirmation” of a power of representation for the purposes of the certificate under Article 38. As such, the WG agreed to assist the Permanent Bureau (PB) of the Hague Conference on Private International Law (HCCH) in preparing this Prel. Doc. for the purposes of facilitating discussions on this matter at the First Meeting of the Special Commission on the practical operation of the 2000 Protection of Adults Convention (SC) from 9 – 11 November 2022.
- 2 Article 15 of the 2000 Protection of Adults Convention provides:
 - “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.”¹
- 3 Article 38 of the 2000 Convention provides for a certificate to be issued where a measure of protection was taken or a power of representation was “confirmed”:
 - “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.”
- 4 The certificate provided under Article 38 is an important instrument for the free circulation of confirmed powers of representation as it provides practitioners with security and reliability. “[...] [A]

¹ The Glossary of the Draft Revised 2000 Practical Handbook defines a power of representation as a document (unilateral act or agreement) which enables the adult to plan, in advance, how they want to be supported in the exercise of their legal capacity and autonomy when such adult is not in a position to protect their interests.

certificate with probative force in all Contracting Parties [allows] both costs and disputes to be avoided.”²

- 5 This document aims to highlight the practical utility of the certificate under Article 38 for the cross-border transportability of “confirmed” powers of representation. This document also aims to provide information as to what confirmation procedures can be put in place, at the domestic level, for the purposes of issuing the certificate under Article 38. To do so, the document will outline an interpretation of what a “confirmation” of powers of representation could entail and what the minimum conditions could be.

II. What is confirmation?

- 6 The 2000 Convention does not prescribe a particular process of confirmation. Therefore, confirmation is left to Contracting Parties to regulate at the domestic level.³

- 7 Although confirmation may differ from jurisdiction to jurisdiction, the Explanatory Report provides that it “must give every guarantee of reliability”.⁴ This is to ensure that the certificate provides legal certainty and predictability to the individuals who are tasked with the execution of such powers of representation and third parties, such as financial institutions, that will have to provide services upon the presentation of such powers.⁵

- 8 When discussing the certificate under Article 38 at the 1999 Special Commission of a diplomatic character where the 2000 Convention was adopted, delegates spoke of the importance of “quality control” and the need for certain conditions to be met in order for the powers to be “confirmed” for the purposes of the certificate. The aim was to limit the issuance of the certificate to powers that are truly verified (“...véritablement vérifiés et confirmés”).⁶

- 9 For a power of representation to be confirmed for the purposes of Article 38, and for such a confirmation to ensure “every guarantee of reliability”, the following conditions must be met:

- a. The power of representation must be in force;⁷
- b. The power of representation must be in conformity with the applicable law.

- 10 A confirmed power of representation and a measure of protection are distinct notions under the 2000 Convention. Otherwise, it would not have been necessary to provide for both notions under Article 38.⁸ Generally, the confirmation of a power of representation is not, *stricto sensu*, a measure

² P. Lagarde, *Explanatory Report on the HCCH 2000 Protection of Adults Convention, New and Revised Edition*, The Hague, 2017 (available on the HCCH website at www.hcch.net, under “Publications” and “Explanatory Reports”) (hereinafter referred to as The Explanatory Report), para. 144.

³ The Explanatory report at para 146 reports that some legal systems did provide for “confirmation” of powers of representation; see also *Proceedings of the Special Commission of a diplomatic character (1999), Protection of Adults*, The Hague, SDU, 2003 (available on the HCCH website at www.hcch.net, under “Publications” and “Proceedings of the Diplomatic Sessions”), pp. 294-296, in particular at p. 295, “In Quebec, for example, there was an existing law that ascribes this power to a judicial authority. In other States the authority might be administrative. The aim was not to place limits to who the authority might be.” ... “Under Australian law, there was also a notion of confirmation of powers of representation. He did not consider that there would be problems of liability for the confirming authority, so long as this matter was dealt with by the national law.”

⁴ The Explanatory Report, para. 146.

⁵ *Ibid.*, para. 144.

⁶ See Annex I. It should also be noted that the model certificate (*ibid.*, p. 25) contains a tick box to show that “*the validity of a power of representation has been confirmed*” and mentioned that the “holder of the certificate acts...”. The discussions that took place at the 1999 Special Commission of a diplomatic character, coupled with the fact that a confirmation “must give every guarantee of reliability” (*ibid.*, para. 147), create a high standard for the confirmation of powers of representation. This high standard intends to achieve legal certainty and predictability.

⁷ It should be noted that some States provide for continuing powers of attorney which can come into force prior to the impairment of the personal faculties of the adult. In such cases, for the purpose of confirmation, it would be important to verify the onset and extent of the impairment of the personal faculties of the adult, in addition to the two conditions suggested in this paragraph.

⁸ *Ibid.*, para. 146.

of protection under the 2000 Convention, as it is limited to verifying that the power is in force and in conformity with the applicable law. However, in some jurisdictions, the entry into force of powers of representation may be conditional upon an assessment of the capacity of the adult by a competent authority. Such jurisdictions may be of the view that such a decision by a competent authority constitutes a confirmation and is a measure of protection.⁹

III. Who can confirm powers of representation?

11 It is for each Contracting Party to determine which authority can confirm powers of representation.

12 While a confirmation requires the verification of whether the powers of representation are in force and in conformity with the law, it is important to note that these verifications do not necessarily need to be carried out by the same authority. They can be carried out by different authorities of the same State. However the case may be, the authority that carries out these verifications will need to be one which is independent and impartial.¹⁰ Once those two verifications are completed, the powers of representation can be considered confirmed.

A. Verification of whether the powers have entered into force

13 In some jurisdictions, the coming into force of the powers of representation may be subject to a decision by a judicial or administrative authority, in accordance with the applicable law. This decision can, in and of itself, be considered a verification of the entry into force of the powers. However, in situations where, for example, the certificate is needed some time after the powers come into force, in those States where a decision by a competent authority is a necessary prerequisite to give effect to the powers, confirmation could constitute a separate step.

14 In other jurisdictions, domestic law may foresee that the powers of representation enter into force upon certain conditions being met and assessed by the representative themselves. In that case, the authority confirming the power will have to verify with the representative whether the powers of representation have come into force in accordance with the applicable law and the conditions, if any, found in the powers.

B. Verification that the powers are in compliance with the law

15 The high probative value of powers of representation drafted by a legal practitioner such as a civil law notary¹¹ implies that such powers are, *ab initio*, in compliance with the law applicable, as they

⁹ Para 146 of the Explanatory Report provides that “[t]he 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. 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.” See, also, Work. Doc. No 77, and discussion in Minutes No 10, Nos 51-81 (see *Proceedings of the Special Commission with a diplomatic character (1999)* (*op. cit.* note **Error! Bookmark not defined.**), pp. 294-296).

¹⁰ In this context, an independent and impartial authority would be one which is not otherwise representing or assisting the adult. For example, the lawyer who drafted the powers or the representative of the adult cannot also be the one who verifies their compliance with the law applicable.

¹¹ A civil law notary is a public officer whose task it is to draw up non-contentious, civil legal deeds and authenticate them, thus making the document self-executing and conferring to it a high probative value. The civil law notary is also authorised to offer legal advice and verify that the contents of the document they are authenticating is accurate and in conformity with the law. A civil law notary may draft a power of representation in the form of an authentic instrument. A notary public is also a public officer whose task it is to serve the public in non-contentious matters. However, the functions of a notary public are markedly different from their civil law counterparts. Depending on the jurisdiction, the main functions of a

are authentic instruments. The verification of whether the power of representation is in compliance with the law applicable could also be carried out by the legal practitioner who certifies or attests to the validity of the document according to their domestic law, so long as a detailed examination of the provisions therein is conducted.¹² For powers which have been validly established but have not been subject to the formality of authentication or certification in accordance with domestic law, an authority may undertake the verification of whether they are in conformity with the applicable law.

C. Simultaneous verification of both conditions

16 Depending on the domestic law, a judicial¹³ or administrative¹⁴ authority that intervenes in relation to the power of representation¹⁵ may, as part of their intervention, verify that the power is both in force¹⁶ and in compliance with the applicable law.

17 The confirming authority could also be one that compiles and validates verifications made by other authorities regarding the entry into force of the powers and their conformity with the applicable law.

IV. When can confirmation take place?

18 A confirmation for the purposes of Article 38 can only be done when the powers of representation have entered into force; *i.e.*, the adult's personal faculties have been impaired to the extent that they are totally or partially unable to look after their own interests.¹⁷ Confirmation can take place as soon as the powers have entered into force or any time after they have entered into force, so long as their conformity with the law has also been verified.

V. Which (competent) authority has jurisdiction and which law applies to the confirmation?

19 Since confirmation is generally not, *stricto sensu*, a measure of protection under Article 3 of the 2000 Convention, questions of jurisdiction concerning such confirmations are not governed by the Convention.¹⁸ Jurisdiction will rest with the authority of the State where the confirmation is requested.

notary public are validating signatures, administering oaths and affirmations, taking affidavits and statutory declarations (including from witnesses), authenticating the execution of certain types of documents and providing notarial (*i.e.*, certified) copies of documents. In a few common law jurisdictions, some notaries public are not qualified lawyers (known as lay notaries) and are, therefore, not authorised to draft legal documents and offer legal advice. In those States, notaries public may be requested to simply certify the document establishing the power of representation and validate the signatures. Where notaries public are also qualified lawyers, they may offer legal advice and draft legal documents (known as notarial acts / deeds) which have probative value and executory force, like in civil law jurisdictions. In those States, notaries public may also draft the powers of representation in the form of a notarial deed.

12 It should be noted that the legal practitioner who verifies that the powers are in compliance with the law applicable does not confirm the powers. This is one of the two verifications which are necessary to ensure that the confirmation gives "every guarantee of reliability". In such cases, the powers will only be confirmed once another authority verifies that the powers have entered into force.

13 In order for certain, non-contentious powers of representation to enter into force, the competent authority may delegate the task of verification to a clerk, who will do a formal check of the document containing the powers of representation and any annexes, including any medical / capacity assessment and the acceptance by the representative of their designation. Such a verification may be subject to a final review by the competent authority, for example, in the event of a doubt or dispute. This may be considered an act of confirmation.

14 Such as a public registry where powers of representation governed by the law of the relevant State can be registered.

15 Such an intervention could be a measure within the meaning of Article 3 of the 2000 Convention. It should be noted, however, that in such cases the power of representation that has been confirmed through a measure taken by a competent authority remains governed by Arts 15 and 16. The measure does not replace the power, unless the competent authority takes a decision in relation to the power which modifies it to such an extent that it terminates the power and replaces it with a measure of protection.

16 This will most likely be done by reviewing medical reports and other assessments undertaken to determine the capacity of the adult. Unless domestic law provides otherwise, a legal practitioner (*e.g.*, a lawyer or a notary) cannot make this assessment.

17 See, *supra*, note 7.

18 See, *infra*, para 31.

- 20 In the absence of a specific confirmation procedure in the State concerned, the individual seeking to obtain the certificate under Article 38 could, if possible, seise a competent authority under the 2000 Convention to confirm the power of representation by taking a measure of protection verifying its entry into force and its conformity with the law applicable.
- 21 If the confirmation constitutes a measure of protection within the meaning of Article 3, the jurisdiction and applicable law rules under the 2000 Convention will apply to the confirmation.¹⁹ However, applying the jurisdiction rules under the 2000 Convention may complicate the process of confirmation.²⁰
- 22 To alleviate potential complications regarding jurisdiction and applicable law, two solutions may be envisioned:
- Contracting Parties may consider providing for a confirmation procedure in their domestic legislation, which does not constitute a measure within the meaning of Article 3, namely that it is limited to verifying the entry into force of the powers of representation and their compliance with the applicable law.
 - Where the confirmation is considered a measure under Article 3, it may be good practice to ensure that the authority tasked with confirming the powers of representation is that of the State whose law is applicable to the powers. This could be done, for example, at the time the powers of representation are established, by providing, in the document establishing the powers, a choice of court provision which is consistent with the choice of law rule provided under Article 15 and can be made effective through the transfer mechanism under Article 8.²¹

VI. The Article 38 certificate

- 23 When it comes to a certificate being issued for powers of representation, Article 38 foresees a preliminary step: the confirmation of those powers. Firstly, an independent and impartial authority confirms the powers of representation.²² Secondly, an authority in the same State who is competent to draw up the certificate (which may or may not be the same authority that confirmed the powers in the first place) delivers a certificate of the confirmed powers to the person(s) who will support, assist or represent the adult.
- 24 The certificate under Article 38 may be delivered to every person entrusted with the protection of the person or property of the adult, indicating the capacity in which the person is entitled to act and the powers conferred. If relevant, the certificate may also indicate what powers the person(s) who will support, assist or represent the adult do(es) not have. For instance, a certificate may mention that (one of) the representative(s) of the adult, who habitually resides in one Contracting Party, does not have the power to manage property belonging to the adult that is located in a different Contracting Party. In the absence of proof to the contrary, the capacity and powers of the person supporting, assisting or representing the adult will be presumably vested in them as of the date of the certificate.²³
- 25 The certificate under Article 38 is highly useful to practitioners as it provides added security, legal certainty and predictability to the cross-border transportation of powers of representation. In

¹⁹ In such cases, a transfer of jurisdiction under Article 8 of the 2000 Convention may be possible.

²⁰ See, *supra*, note 9. ²¹ It should be verified that the domestic law of the chosen State provides for powers of representation within the meaning of the 2000 Convention. See also, *supra*, note 9.

²¹ It should be verified that the domestic law of the chosen State provides for powers of representation within the meaning of the 2000 Convention. See also, *supra*, note 9.

²² See, *supra*, Parts II and III.

²³ The Explanatory Report, para. 147.

addition, a certificate having probative force in all Contracting Parties could reduce costs and disputes.²⁴

- 26 Article 38(1) of the 2000 Convention specifies that the State “where [...] a power of representation [has been] confirmed **may deliver** [...] a certificate” **[emphasis added]** to the person supporting, assisting or representing the adult. The delivery of a certificate is, therefore, not mandatory.²⁵ However, if a certificate is to be delivered, it must be issued in the same State where the powers of representation were confirmed.
- 27 Although the 2000 Convention provides that Contracting Parties “shall”²⁶ designate an authority competent to deliver the certificate under Article 38, it is up to each Contracting Party to choose which authority is competent to do so. This authority has the discretion not to deliver the certificate, for example where it considers that the powers have not been confirmed or it considers the confirmation insufficient. It is also up to individual Contracting Parties whether that authority will be separate from the authority which has confirmed the powers. Depending on domestic law, the authorities who are competent to draw up and deliver the certificate may be competent authorities²⁷ under the 2000 Convention, notaries,²⁸ public registrars,²⁹ court clerks, lawyers or public officers.
- 28 The request for the delivery of an Article 38 certificate can be made simultaneously to or after the confirmation.
- 29 The probative force of the certificate “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”.³⁰ Therefore, the issuance of the certificate presupposes that the authority competent to issue the certificate can rely on a recent confirmation of the powers of representation.
- 30 A certificate issued for a confirmed power of representation has the same probative force and effect as a certificate issued for a measure of protection.³¹ However, the drawing up and delivery of a certificate under Article 38 is not to be construed as a measure for the purpose of Article 3. Therefore, the certificate does not replace the confirmed power of representation with a measure.
- 31 It goes without saying that powers of representation that have not been confirmed and, therefore, do not benefit from the certificate under Article 38, will still have cross-border transportability and operability under Article 15. However, the certificate will greatly facilitate this transportability and

²⁴ *Ibid.*, para. 144.

²⁵ *Ibid.* The 1999 Special Commission of a diplomatic character (*op. cit.* note **Error! Bookmark not defined.**) did not wish to oblige Contracting Parties not wishing to deliver a certificate to do so. The certificate, therefore, remains optional. For those Contracting Parties who do wish to issue a certificate, Art. 38(3) provides that “each Contracting State shall designate the authorities competent to draw up the certificate”. The designation, therefore, of an authority competent to issue the certificate is mandatory. For comparison purposes, see HCCH, *Practical Handbook on the operation of the HCCH 1996 Child Protection Convention*, The Hague, 2014 para. 11.31 (available on the HCCH website at www.hcch.net, under “Publications” and “Practical Handbooks”).

²⁶ Art. 38(3).

²⁷ It is important to note that the authority competent to issue the certificate under Art. 38 may not necessarily be a “competent authority” for the purposes of the 2000 Convention (*i.e.*, a judicial or administrative authority). While some States may designate a “competent authority” as the authority competent to issue the certificate under Art. 38, other States may designate another authority, specifically for the task of drawing up and delivering the certificate.

²⁸ For comparison purposes, see P. Lagarde, “Explanatory Report on the HCCH 1996 Protection of Children Convention”, in *Proceedings of the Eighteenth Session (1996)*, Tome II, *Protection of Children*, The Hague, SDU, 1998, para. 154 (available on the HCCH website at www.hcch.net, under “Publications” and “Explanatory Reports”).

²⁹ The registration of a document which establishes powers of representation is likely to be accompanied by the issuance of a document (receipt / certificate) which attests to the registration. This is to be distinguished from the certificate issued under Article 38 of the 2000 Convention, which concerns a certificate attesting to the existence and the extent of the powers of a representative which have been “confirmed”; see also Council of Europe, [Recommendation CM/Rec\(2009\)11 on principles concerning continuing powers of attorney and advance directives for incapacity](#), Principle 8 “certification, registration and notification” and the explanatory memorandum para 130-136.

³⁰ The Explanatory Report, para 147.

³¹ *Ibid.*, para 144.

operability as it provides the person acting upon the powers of representation with a “passport” of sorts, proving the existence and extent of their powers.³² The efficacy and reliability of the certificate emanate from the conditions that must be met for a power to be considered “confirmed”. Without the certificate, if a problem arises with the cross-border operability of the powers, the person acting upon them will have to prove that they can validly represent the adult in the matters detailed in the powers and might need to seise the relevant competent authority in order resolve the problem. Though this may be costly and time-consuming, the powers of representation will still be able to circulate.

- 32 If, in the time between the confirmation takes place and the certificate is to be delivered, there has been a change of circumstances eliminating the basis upon which the competent authority exercised their jurisdiction, the certificate can nevertheless be delivered. The delivery of a certificate will always follow the *lex fori*.³³
- 33 Where the circumstances surrounding the exercise of the powers of representation have changed, a new certificate can be issued which replaces the old, outdated one.

VII. Proposal by the Permanent Bureau, with the assistance of the WG, for Conclusions and Recommendations

- 1 The SC underlined that the use of the certificate under Article 38 could facilitate the cross-border circulation of measures of protection and confirmed powers of representation by increasing legal security, certainty, and predictability.
- 2 Bearing in mind that the 2000 Convention does not prescribe a process for confirmation, the SC reminded Contracting Parties that confirmation of powers of representation, as a prerequisite for the delivery of the certificate, must give “every guarantee of reliability”.
- 3 The SC highlighted that, for a power of representation to be confirmed and to benefit from the certificate under Article 38, it must be in force and in conformity with the law applicable.
- 4 The SC noted that authorities tasked with confirmation, such as administrative, judicial or other public authorities, must carry out the confirmation independently and impartially.
- 5 The SC strongly encouraged Contracting Parties to provide, in their domestic legislation, a procedure for confirmation of powers of representation and for the delivery of certificates under Article 38, in order to facilitate their cross-border transportability and operability.
- 6 The SC also strongly encouraged Contracting Parties to designate an authority competent to draw up and deliver the certificate under Article 38.
- 7 The SC recommended the use of the model form certificate (Art. 38) adopted by the 1999 Special Commission of a Diplomatic Character.

³² *Proceedings of the Special Commission of a diplomatic character (1999)* (op. cit. note 3), see Annex I.

³³ Following the “*locus regit actum*” principle. The domestic law will also indicate whether such issuance may take place *ex officio* and / or at the request of the representative or of any interested person. The Country Profile will be useful in raising awareness to the domestic regulations surrounding the delivery of the certificate.

ANNEXES

Annex I

Relevant extracts from *Proceedings of the Special Commission of a diplomatic character of September-October 1999 - Protection of adults*

Minutes No 10, Meeting of 27 September 1999 (morning)

Page 294

Mr Chalke (Canada) stated that the proposal in this Working Document [Working Document No 77] was that of the Working Group on Certificates. The Working Group was proposing the amendment of article 36(1) to include the possibility that a State could issue a certificate in relation to a power of representation, the validity of which had been confirmed by an authority in the State. He pointed out that some legal systems provided for confirmation of the power of representation by an authority. This was the case in Quebec, for example, where the authority concerned was a judicial authority. In other legal systems there was a system of registration, whereby a registrar would validate a power of representation. It made sense, he stated, that article 36 should contemplate that an authority could issue a certificate similar to that issued in relation to a measure of protection. The Working Group had also considered the Swiss proposal regarding this article, which suggested that States of habitual residence should be able to issue certificates in relation to powers of attorney. However, the Working Group had considered that it should be clear that the certificate should be issued in the jurisdiction where the measure had been taken or where the power of representation had been confirmed.

...

M. Marques dos Santos (Portugal) ne distingue aucune opposition entre les propositions des Documents de travail Nos 77 et 59. Dans la mesure où les délégations à l'origine de ces deux documents de travail n'en voient pas davantage, il estime que toutes les propositions peuvent être acceptables.

Se référant à la notion de pouvoirs de représentation confirmés, il admet, qu'elle apparaît en tant que telle effectivement ici pour la première fois, mais qu'elle correspond à l'idée **de reconnaissance des pouvoirs**, bien que le mot ne soit pas utilisé. [emphasis added]

The Chairman noted that, in relation to certificates, there remained Working Document No 76, proposed by the International Union of Latin Notaries.

Mr Meijer (UINL) stated that the certificate proposed in Working Document No 76 was designed to be as practical as possible. He considered that it was necessary for a person entrusted with the care of an adult **to have a 'passport' which would provide proof of his capacity and powers**. It was necessary to have a **single standard certificate**, so that in each State it would be clear what the content and details of the certificate should be. [emphasis added]

...

Mrs Hodgson (United Kingdom) whilst acknowledging the need for a certificate in relation to measures of protection and to **powers of representation confirmed by a judicial authority, expressed concern regarding the issue of certificates where powers of representation were confirmed by an administrative authority, as proposed in Working Document No 77**. Powers of representation were legal instruments entered into by individuals. If an administrative authority summarized powers incorrectly and the incorrect summary was relied on by a third party to his detriment, it was unclear where liability would lie for any loss. [emphasis added]

Mme Baur (France) [...] Il est exact que, dans certains cas, le pouvoir de représentation fait l'objet d'un simple enregistrement. Elle indique que la proposition vise **à limiter la délivrance du certificat aux pouvoirs véritablement vérifiés et confirmés. Aucun certificat ne peut être obtenu dans le cas d'un seul enregistrement**. [emphasis added]

...

Mr Chalke (Canada) stated that the question of who was the competent authority depended on whether there was a national law permitting an authority to confirm the power of representation. In Quebec, for example, there was an existing law that ascribed this power to a judicial authority. In other States the authority might be administrative. The aim was not to place limits on who the authority might be. Mr Chalke noted that, as the United Kingdom delegation had pointed out, powers of representation were private legal instruments. **The proposal under Working Document No 77 was not that a certificate should be issued in every case where there was an instrument, but that certification should include an element of quality assurance.** [emphasis added]

...

Mrs Jänlerä-Jareborg (Sweden) [...] The notion of 'quality control' as referred to by the Canadian Delegate was very important.

...

Mr Chalke (Canada) answered that the Working Group had discussed this question and **that it was unclear whether, under article 3, confirmation of the power of representation would be considered to be a measure of protection.** The aim of Working Document No 77 was to clarify matters by **imposing standards for the issue of certificates to confirm powers of representation.** [emphasis added]

The Chairman said that it must be borne in mind that article 3 merely provided examples of particular measures of protection. He pointed out that **article 3 d'** referred to the designation and functions of the adult's representative. **It was arguable that a measure confirming validity was already within this provision.** [emphasis added]

...

The Chairman observed that **it would be the act confirming the power of representation that would constitute a measure of protection.** [emphasis added]

Annex II

Relevant extracts from *P. Lagarde, Explanatory Report on the Hague Convention of 13 January 2000 on the International Protection of Adults, New and Revised Edition, 2017*

Chapter VI – General Provisions, Article 38 (international certificate), page 87, para 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.

Page 88, para 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 State 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.

Page 88, para 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 repowers of representation, 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. 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.

Page 88, para 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.

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.

Annex III

Relevant extract from *P. Lagarde, Explanatory Report on 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*

Chapter VI – General Provisions, Article 40 (international certificate), page 597, para 154

The utility for the practice of an international certificate, mentioning the holder of parental authority and his or her powers, was sustained by the International Union of Latin Notaries which invoked the precedent of the *Hague Convention of 2 October 1973 Concerning the International Administration of the Estates of Deceased Persons*. Whether it is the person of the child which is involved, and even more his or her property, practitioners feel the need for security. A certificate, which would have probative force and would be recognised in all the Contracting States, would allow both costs and disputes to be avoided. The Commission accepted this idea, but did not want to place a requirement on those Contracting States which might not wish to deliver such a certificate (paragraph 1). The certificate provided for in Article 40 thus has an optional character. The State whose authorities are competent to deliver the certificate is that of the child's habitual residence, or the State of origin of the measure of protection. It is for each State which accepts the principle of the certificate to designate the authorities to which it will attribute competence to draw it up (paragraph 3). **These authorities will generally not be those which have taken the measure. The issuer of the certificate may be a physical person, for example a notary, or an institution.** (...) [emphasis added]

Relevant extract from the *Practical Handbook on the operation of 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, 2014*

Chapter 11, page 127, para 11.31

The authorities of the Contracting State of the child's habitual residence, or of the Contracting State where a measure of protection has been taken, may deliver to the person having parental responsibility or to the person entrusted with protection of the child's person or property, at his or her request, a certificate indicating the capacity in which that person is entitled to act and the powers conferred upon him or her.

The following points should be noted:

- There is no requirement upon Contracting States to provide such certificates. It is therefore a matter for each Contracting State whether to do so.
- Should it decide to do so, the Contracting State in question must designate the authorities which are competent to draw up these certificates.
- The Contracting State competent to deliver a certificate is the Contracting State of the child's habitual residence, or the Contracting State of origin of the measure of protection.
- The certificate will usually indicate:
 - who is the holder of parental responsibility;
 - whether this results by operation of law (from the law which is applicable under Art. 16) or from a measure of protection taken by a competent authority according to Chapter II of the Convention;
 - the powers of the person having the parental responsibility;

In a suitable case, it may indicate in the negative the powers which the person does not have.

- The capacity and powers indicated in the certificate are presumed to be vested in that person, in the absence of proof to the contrary. “It will therefore be possible for any interested person to contest the correctness of the indications appearing on the certificate but, in the absence of a contest, [a] third party may in all security deal with the person indicated by the certificate, within the limits of the powers which are mentioned there.”

Annex IV

Relevant extracts from academic discourse

Relevant extracts from S. Pfeiff et T. Kruger, « Le mandat extrajudiciaire dans un contexte transfrontière, Individu, Famille, Etat : réflexions sur le sens du droit de la personne, de la famille et de son patrimoine », vol. I (coord. N. Dandoy, J. Sosson, F. Tainmont, G. Willems), *Les cahiers du CeFAP*, Larcier, 2022, p.163

Page 179, para 18

Plus délicate est la question du sort réservée aux mandats confirmés par une autorité ou un tribunal d'un Etat contractant. Celui-ci pourrait-il alors être qualifié de mesure et par conséquent bénéficier de la méthode de la reconnaissance réservée aux « mesures prises par mes autorités d'un Etat contractant » ? Il nous semble qu'il faudra avoir égard au rôle activement joué par la juridiction étrangère

Relevant extracts from S. Pfeiff et T. Kruger, *De buitengerechtelijke lastgeving in internationale context*, T.Fam. 2020/10

Page 289, para 48

Een heikel punt is het lot van een lastgeving die bevestigd is door een autoriteit of rechtbank van een verdragsluitende Staat. Als een dergelijke volmacht de status van een beschermingsmaatgel krijgt, dan rijst de vraag of het erkenningsregime van het Volwassenenverdrag van Den Haag geldt. Dit is niet helemaal duidelijk. Het antwoord hangt wellicht mee af van de rol van de buitenlandse autoriteit of rechtbank. Ging het om eren loutere bevestiging, dan lijkt het moeilijk te argumenteren dat er een beschermingsmaatregel is. Hebben ze een echter grondige controle uitgevoerd van de volmacht, dan komen we in een grijze zone tussen contract en maatregel.

Relevant extracts from S. Pfeiff, JL Van Boxtael, J. Sauvage, *La protection de l'adulte vulnérable et de son patrimoine en droit international privé, La protection extrajudiciaire et judiciaire des adultes vulnérables, des réformes aux bonnes pratiques, actes du XVIème colloque de l'association famille et droit*, le 18 novembre 2021, Larcier, 2021, p. 699

Page 734, para 38

Ajout : si l'autorité qui a confirmé le mandat n'a pas exercé un rôle actif de vérification de son bien-fondé mais uniquement un rôle formel, le mandat, même confirmé par une autorité, ne pourra pas bénéficier des mécanismes prévus au chapitre IV. (...) cela ne veut pas dire que le mandat ne pourra pas être reconnu, mais simplement que la méthode d'accueil sera différente.

Relevant extracts from W. Boente et N.Tschumu, « *L'auto-organisation de la personne par le mandat pour cause d'inaptitude. Réflexions sous l'angle du droit suisse, Individu, Famille, Etat : réflexions sur le sens du droit de la personne, de la famille et de son patrimoine* », vol. I (coord. N. Dandoy, J. Sosson, F. Tainmont, G. Willems), *Les cahiers du CeFAP*, Larcier, 2022, p. 83

Page 92

Pour entrer en vigueur, le mandat en droit suisse doit passer par une procédure de validation par l'Etat (art. 363CC): l'autorité vérifie si le mandat est constitué valablement, si les conditions de mise en œuvre sont remplies si le mandataire est apte à le remplir, si elle doit prendre d'autres mesures de protection de l'adulte. Ensuite, il est soumis au mandataire. S'il l'accepte on lui remet un document qui fait état de ses compétences.

Relevant extracts from A. Ruck Keene, *Hague 35: Private Mandates and other anticipatory measures*, R. Frimston, A. Ruck Keene, C. Van Overdijk and A. Ward, *The International Protection of Adults*, Oxford University Press, 2015

Page 156, para 9.12

It is further important to note that it is suggested that, although in many states it is necessary that a private mandate is the subject of some form of confirmation process (whether judicial or administrative)

before it can be relied upon by a representative and those with whom they deal, that confirmation process does not itself constitute the taking of a protective measure by a contracting state for purpose of Hague 35. In other words, it is suggested that the fact that – for instance – a private mandate has been registered with the relevant official body in the contracting state in which it was granted does not therefor transform that mandate into a protective measure for the purpose of Hague 35.

Page 164, para 9.36

It would appear from the wording of Article 38 that a certificate could not be granted in the case of a Private Mandate which did not require confirmation by the competent authorities before it became operable, because Article 38 only envisages the grant of certificates by the authorities of the Contracting State where the power has been confirmed. This may represent a lacuna in Hague 35, perhaps stemming from the fact that the Special Commission did not appear to have squarely before it consideration for mandates other than those which require “confirmation” by a state authority before they can be operable. It should be noted, however, that a representative under such a mandate would not – within a Contracting State – be able to rely upon proof of registration of that mandate to establish his authority in his dealings with individuals and institutions, so it could properly be said that the fact that they cannot seek to obtain the equivalent by way of an article 38 certificate to deal with individuals and institutions in other Contracting States does not in fact place them at any relative disadvantage. An authority (whether administrative or judicial) in the Contracting State in which the mandate is being exercised would also be directed by article 15 (1) back – in the first instance – to the relevant legal provisions of the state in which the mandate was granted, which would enable the determination of the existence and extent of the powers under which the representative operated by reference to those provisions.

Relevant extracts from E. Clive, *The New Hague Convention on the Protection of Adults, Yearbook of Private International law*, n° 2 (2000)1 – 23

Page 22

E. Mandates with a View to Incapacity

Mandates with a view to incapacity, or enduring powers of attorney, have proved to be popular in those countries which have legislated on them. They give the adult some control over what will happen in the event of supervening incapacity. They can save money on costly procedures. Provided there is adequate public control they need involve no more danger than the appointment of a representative by a judicial or administrative authority. The delegations from the United States of America and Canada were anxious to ensure that the benefits of enduring powers of attorney could be enjoyed across international borders." They therefore argued for a liberal choice of law regime, with maximum autonomy for the adult and maximum respect for the law governing the powers conferred. Some delegations from countries whose legislation does not, or does not yet, provide for mandates with a view to incapacity had reservations about the possibility of a liberal choice of law regime. **There were several fears. One was that if adults could opt too easily for the application of a country's laws, that country might in practice be forced to apply or even introduce protective laws even if it had no real connection with the adult.**" Another was that, **if modification or extinction of the representative's powers were governed by the law of, say, a former habitual residence, the authorities of the current habitual residence might experience difficulties in taking necessary measures of protection.** Another was that the powers conferred might enable the representative to take decisions of a kind which would be unacceptable in the country obliged to give effect to them."

There was a certain underlying tension between these two points of view, both reasonable in themselves, at various points in the debates but the difficulties were eventually resolved. **The solution contained several ingredients.** First, the adult's freedom to choose a governing law was confined to the law of a State with which he or she had a strong connection." Secondly, it was recognised that the authorities of the current habitual residence could take measures of protection, and apply their own laws in doing so, even if there was a representative operating under a mandate governed by a foreign law," provided that they would withdraw or modify the powers of the privately appointed representative only where those powers were not exercised in a manner sufficient to guarantee the protection of the adult and that they would take into account the law governing those powers to the extent possible." Thirdly, it was provided

that the normally applicable law would not prevent the application of provisions of a mandatory nature in the State where the adult was to be protected." And finally it was made clear that the application of the normally applicable law could be refused if this application would be manifestly contrary to public policy, a provision which, although now almost routine, is particularly well calculated to deal with the most controversial types of decision in the medical field. **[emphasis added]**

Relevant extracts from P. Franzina, *The protection of Adults, A Guide to Global Private International Law*, ed. P. Beaumont and J. Holliday, Hart 2022, p. 559-560 (553)

Pages 559-560

The one-stop shop approach followed by the Convention also improves the effectiveness of the protection in another way. Cases exist where various concerns arise and need to be accommodated. They call for balanced answers. A fair balance, however, cannot always be struck on the basis of the rules on jurisdiction alone, or the rules on the applicable law alone. Sensible answers may rather be provided through the combined operation of the two sets of rules.

The Convention's provisions on private mandates are particularly illustrative. Pursuant to Article 15(1), mandates are governed, in principle, by the law of the State of the adult's habitual residence at the time the mandate was entered into. This implies that the powers granted under a mandate made in accordance with the latter law may in principle be relied upon in any other Contracting State.

Occasionally, however, the spatial continuity thus achieved can raise concerns. What if the powers conferred are not exercised in conformity with the fundamental rights of the granter? Where a similar concern is raised, the adult themselves, or anyone else interested, should be able to apply for the necessary court orders or directions. But the courts of which State should have jurisdiction to give such directions? If the Convention were only concerned with applicable law, the answer would be left with the domestic rules of the individual Contracting States. Positive and negative conflicts of jurisdiction would likely ensue, which would defeat the benefits of the unification of applicable law rules. The Convention avoids this risk by laying down rules of direct jurisdiction. Article 16 of the Convention provides that the powers conferred under a private mandate may be withdrawn or modified through judicial or administrative measures 'taken by an authority *having jurisdiction under the Convention*' (emphasis added). This ultimately mitigates the risk of negative and positive conflicts of jurisdiction.

An additional issue, however, may arise in a scenario like the one described, ie, based on which law should the competent court decide whether to modify or withdraw the powers conferred under a mandate.

Article 13(1) of the Convention stipulates that, in exercising their jurisdiction under the Convention, the authorities of a Contracting State generally apply their own law. The problem is that, if the *lex fori* were to apply in all and any circumstances, Article 15(1), which provides for the application of the law of the adult's habitual residence at the time of the mandate, would lose much of its practical effect. In fact, the court with jurisdiction to supervise the attorney's conduct might well sit in a State other than the State where the adult had his or her habitual residence when the mandate was originally entered into. Thus, powers granted under the law of country X could be withdrawn or modified in accordance with the law of country Y. This is something the granter could hardly foresee, and – worse – something the granter will often be unable to redress in person (for, when the problem arises, the adult will most probably be unable to correct, adapt or clarify the power of attorney).

The opposite solution, i.e., the systematic application of the law specified in Article 15, may not lead to sensible results, either. The supervising court might in fact have to apply a foreign law, which could make supervision difficult to carry out and time-consuming. Article 16 of the Convention **helps strike a balance between the above concerns** by providing that, where powers of representation are withdrawn or modified, 'the law referred to in Article 15 should be taken into consideration to the extent possible'.

All in all, the combined harmonisation of rules on jurisdiction and on applicable law allows the supervision of a private mandate to be done in a manner which ensures a high degree of predictability, the efficiency of the concerned courts' action and a rapid response to the needs of the adult concerned. [emphasis added]

Relevant extracts from Council of Europe, Recommendation CM/Rec(2009)11 on principles concerning continuing powers of attorney and advance directives for incapacity

Principle 8 “certification, registration and notification”, page 10

States should consider introducing systems of certification, registration and / or notification when the continuing power of attorney is granted, revoked, enters into force or terminates.

The explanatory memorandum, pages 46-47, paras 130-137

130. Principle 8 lists three different systems which states should consider introducing: certification, registration and notification. They apply in different situations, as they may refer to the time of the creation of the power or to the time when it enters into force. Their purposes may vary. They may constitute alternative solutions, or may supplement each other. Once again, it is necessary to find the right balance between the self-determination of the granter and the need for some degree of public involvement.

131. Certification may be required or available at any time and may serve various purposes.

132. Certification may be carried out by a public authority for various purposes. Such a certificate may be issued as part of a registration procedure connected with the creation as described below, and it is then considered to be a certificate of registration, but it might also be independent of such procedure.

133. As already indicated above under 1.3, states which have ratified the Hague Convention of 2000 may, according to Article 38, deliver, on request, a certificate to the person entrusted with protection of the adult's person and property, indicating the capacity in which the person is entitled to act and the powers conferred. It is recommended that a model form is used. According to the form, the validity of the power of representation is confirmed.

134. Another possibility is certification when a continuing power of attorney enters into force, to confirm that the granter has now become incapacitated, and that other possible procedures, mentioned under Principle 7, paragraph 1, have been duly followed. The purpose may then be to supply the attorney with a certificate stating that he or she has authority to act.

135. As regards continuing powers of attorney that remain in force as well as those that enter into force, the certificate may be sent to the attorney or, where combined with a registration procedure, to whoever initiated the registration. Such a certificate, perhaps annexed to an authenticated copy of the document, may be required for submission to third parties (for instance banks where the granter has accounts or deposits) in order to prove the appointment of the attorney and that he or she has authority to carry out certain transactions on behalf of the granter.

Annex V

Relevant extracts from Extracts from the [Questionnaire on the practical operation of the 2000 Protection of Adults Convention \(Prel. Doc. No 2 of September 2020\)](#)

The following questions were addressed to the States:

Confirmation of such powers of representation

6.37. Can a competent authority in your State confirm powers of representation?

- No
- Yes, please indicate which authority can confirm and explain the effect of confirming or not confirming such powers of representation:

6.38. If yes to question 6.37., can confirmation take place whether such powers of representation are governed by the law of your State or the law of another State?

- No, please explain:
- Yes, please indicate which authority can confirm and explain the effect of confirming or not confirming such powers of representation:

6.39. If yes to question 6.37., can confirmation take place whether the powers of representation have come into effect or not?

- Yes
- No, please explain:

6.40. Do your responses to questions 6.37.- 6.39 differ whether such powers of representation are subject to a formal requirement (e.g., notarised, certified, witnessed) or not subject to any formal requirements?

- No
- Yes, please explain:

To consult the responses to the above questions, click [here](#).