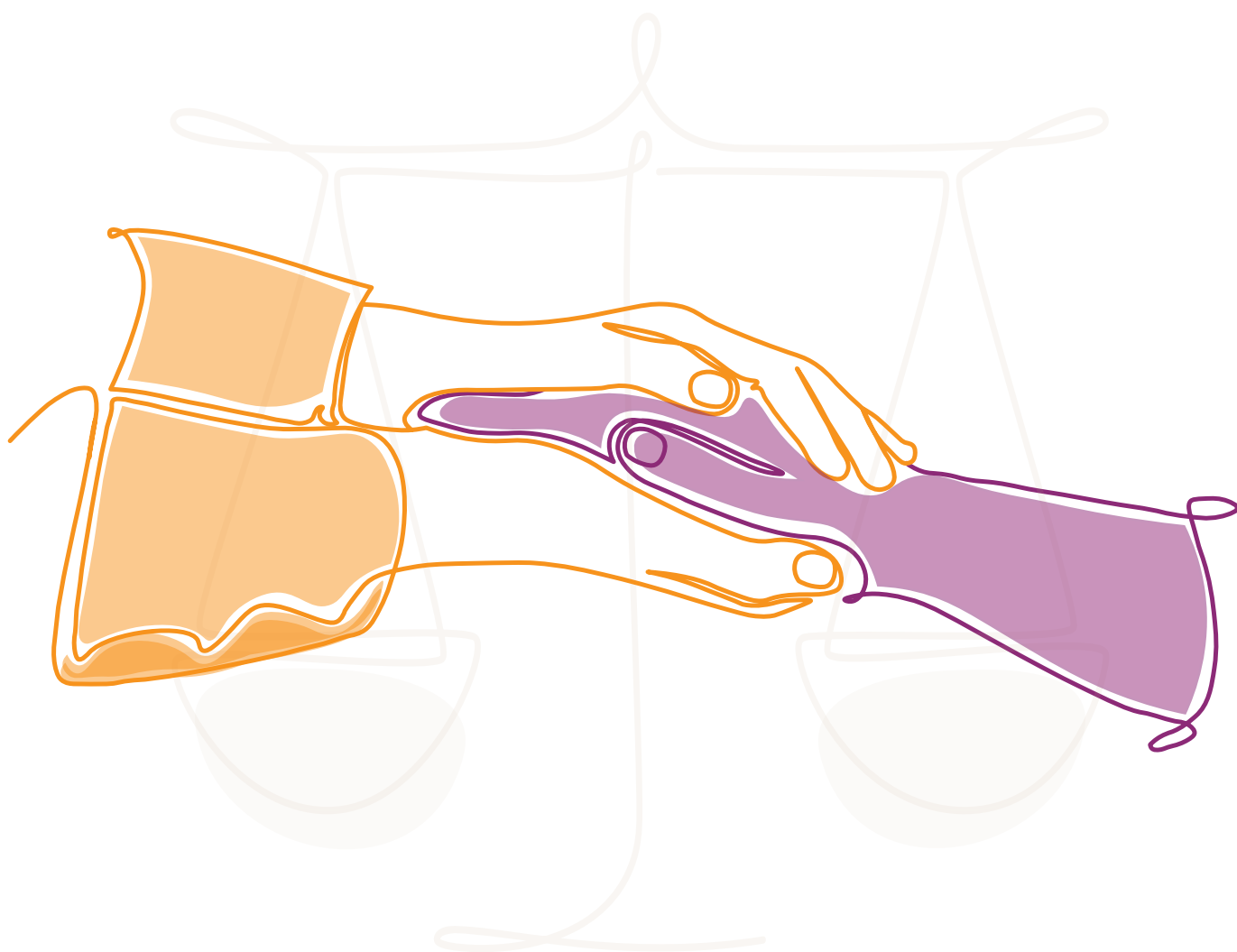


# Practical Handbook on the Operation of the 2000 Protection of Adults Convention



**Practical Handbook on the Operation of the  
2000 Protection of Adults Convention**

@HCCH, 2024  
Hague Conference on Private International Law (HCCH)  
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Churchillplein 6b  
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## Preface

With an increasing global understanding of the importance and strengths of the *Convention of 13 January 2000 on the International Protection of Adults* ("2000 Convention", "Convention" or "2000 Protection of Adults Convention"),<sup>1</sup> and considering the rising number of Contracting Parties, the publication of a Practical Handbook is timely.<sup>2</sup> This Practical Handbook has been developed following requests by a number of States at the 2018 joint conference of the European Commission and the HCCH for further practical guidance on the implementation and operation of the 2000 Convention (e.g., in the form of a guide to good practice, model forms and direct judicial communications).<sup>3</sup> In the responses to the July 2019 Questionnaire,<sup>4</sup> there was strong support in favour of a practical handbook on the 2000 Convention.<sup>5</sup> At its March 2021 meeting, the Council on General Affairs and Policy of the HCCH (CGAP) adopted the following Conclusion and Decision:

"CGAP noted the progress made on the draft Practical Handbook on the Operation of the 2000 Protection of Adults Convention and mandated the [Permanent Bureau] to establish a Working Group to continue the development of the draft Practical Handbook. This Working Group will meet online and will comprise experts with experience on the operation or implementation of the Convention."<sup>6</sup>

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<sup>1</sup> See "EC-HCCH Joint Conference on the Cross-border Protection of Vulnerable Adults" held in Brussels, 5-7 December 2018, available on the HCCH website at [www.hcch.net](http://www.hcch.net) under "Protection of Adults" then "Conferences" ("2018 EC-HCCH Joint Conference"), C&R Nos 1-3, 5 and 6. At the Conference, States were encouraged to join the 2000 Convention, which was recognised as being complementary to the *United Nations Convention of 13 December 2006 on the Rights of Persons with Disabilities* ("UNCRPD"). The general practical usefulness of the 2000 Convention was also stressed. In addition, the importance of cooperation among international / intergovernmental organisations, NGOs and practitioners in raising awareness and promoting the 2000 Convention was highlighted. It was also noted that States having recently reformed their legislative frameworks in relation to vulnerable adults had carried out such reforms in parallel with the implementation of the Convention.

<sup>2</sup> On 31 May 2023, the European Commission made a proposal for a Council Decision which will oblige all EU Member States to become or remain Parties to the 2000 Protection of Adults Convention. Additionally, the Commission made a proposal for a Regulation aimed at the cross-border protection of adults within the EU, which makes reference to the 2000 Convention. For more information, please consult the press release issued by the European Commission.

<sup>3</sup> 2018 EC-HCCH Joint Conference (*op. cit.* note 1), C&R No 6.

<sup>4</sup> "Questionnaire to assess the need to convene a possible meeting of the Special Commission in 2022 to review the practical operation of the Convention of 13 January 2000 on the International Protection of Adults", Prel. Doc. No 1 of July 2019 drawn up for the attention of the First Meeting of the Special Commission on the practical operation of the 2000 Protection of Adults Convention (9-11 November 2022), available on the HCCH website at [www.hcch.net](http://www.hcch.net) under "Protection of Adults" then "Questionnaire and responses".

<sup>5</sup> *Ibid.*, see responses to question 1.2.5. See also "Report on the planning for a first meeting of the Special Commission to review the practical operation of the HCCH 2000 Adults Convention", Prel. Doc. No 10 of December 2019 drawn up for the attention of 2020 CGAP (available on the HCCH website at [www.hcch.net](http://www.hcch.net) under "Governance" then "Council on General Affairs and Policy"): the preparation of a practical handbook on the operation of the 2000 Convention as a possible future implementation tool was identified as high interest.

<sup>6</sup> CGAP 2021, Conclusion & Decision (C&D) No 26 (see path indicated in note 5).

The Permanent Bureau began its work by establishing a Working Group, as per 2021 CGAP's mandate, and drafted a document focusing on practical advice for current and prospective Contracting Parties to the 2000 Convention. A first draft of the Handbook was circulated to HCCH Members for comments in February 2022. Based on the comments received, the draft Handbook was revised and re-circulated to HCCH Members in July 2022. The first revised version was approved, in principle, at the First Meeting of the Special Commission on the practical operation of the 2000 Protection of Adults Convention (First Meeting of the Special Commission) in November 2022.<sup>7</sup> A second revised version was circulated to HCCH Members in the third quarter of 2023, for their comments on the amendments. On this occasion, Observers who were in attendance of the First Meeting of the Special Commission were also invited to contribute further practical examples. At its 2023 meeting, CGAP mandated the Permanent Bureau to finalise the Handbook, in consultation with the Working Group, before submitting a final version to HCCH Members for approval in a written procedure.<sup>8</sup> A third revised version was circulated to HCCH Members in February 2024 and, following a two-month consultation period, was approved in April 2024. The Implementation Checklist in Annex I of this Handbook, was approved by HCCH Members in January 2024.<sup>9</sup>

This Handbook is the culmination of several consultations with the Working Group, comprised of experts from both Contracting Parties and States which are considering becoming Parties to the 2000 Convention. The Handbook draws upon the experiences and practical examples provided by these experts, in order to acknowledge developing good practices as well as areas that could be improved, thereby encouraging other States to become Parties to the 2000 Convention.

In addition, the Permanent Bureau is grateful for the comments received at various points of the drafting process, and for written comments from the members of the Working Group: Abdellah Derraz, Mailys Machiels (Belgium), Marie Riendeau, Emmanuelle Jacques, Helene Habte-Selassie (Canada), Eftychios Hadjichristodoulou (Cyprus), Jana Hofmannová, Alena Vostalova Grüter, Barbora Brozova Rittichova, Petra Pejchova (Czech Republic), Andra Olm, Kristel Vaino (Estonia), Partizia De Luca, Marie Vautravers, Lenka Vysoka (European Union), Kimmo Luojus (Finland), Samantha Millar, Pierre Beaudoin (France), Christian Höhn, Ulrike Kluth, Désirée Wollenschläger (Germany), Pietro Franzina (Italy), Linda Strazdiņa, Maija Laura, Liva Upena, Anastasija Jumakova (Latvia), Inês Robalo, Miguel Ângelo Carmo, Isabel Capela (Portugal), Anna Claudia Alfieri (Switzerland), Wilhelmina Joan Goulbourn, Alex Ruck Keene, Adrian Ward (United Kingdom). The Permanent Bureau further extends its sincere gratitude to the Chair of the WG, Geraldo Rocha Ribeiro (Portugal). This Handbook would not have been possible without the concerted efforts of the Permanent Bureau, especially the following: Philippe Lortie (First Secretary), Nietta Keane (Assistant Legal Officer), Myriam de Hemptinne (Member of the International Hague Network of Judges for Belgium on secondment with the Permanent Bureau), Camille Druilhet (former intern).

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<sup>7</sup> "Conclusions and Recommendations (C&R) adopted by the First Meeting of the Special Commission (SC) on the practical operation of the 2000 Protection of Adults Convention (9-11 November 2022)", C&R Nos 61–62 (C&R of the First Meeting of the SC) (available on the HCCH website at [www.hcch.net](http://www.hcch.net) under "Protection of Adults" then "Special Commission meetings").

<sup>8</sup> CGAP 2023, C&D No 31 (see path indicated in note 5).

<sup>9</sup> CGAP 2024, C&D No 39 (see path indicated in note 5).

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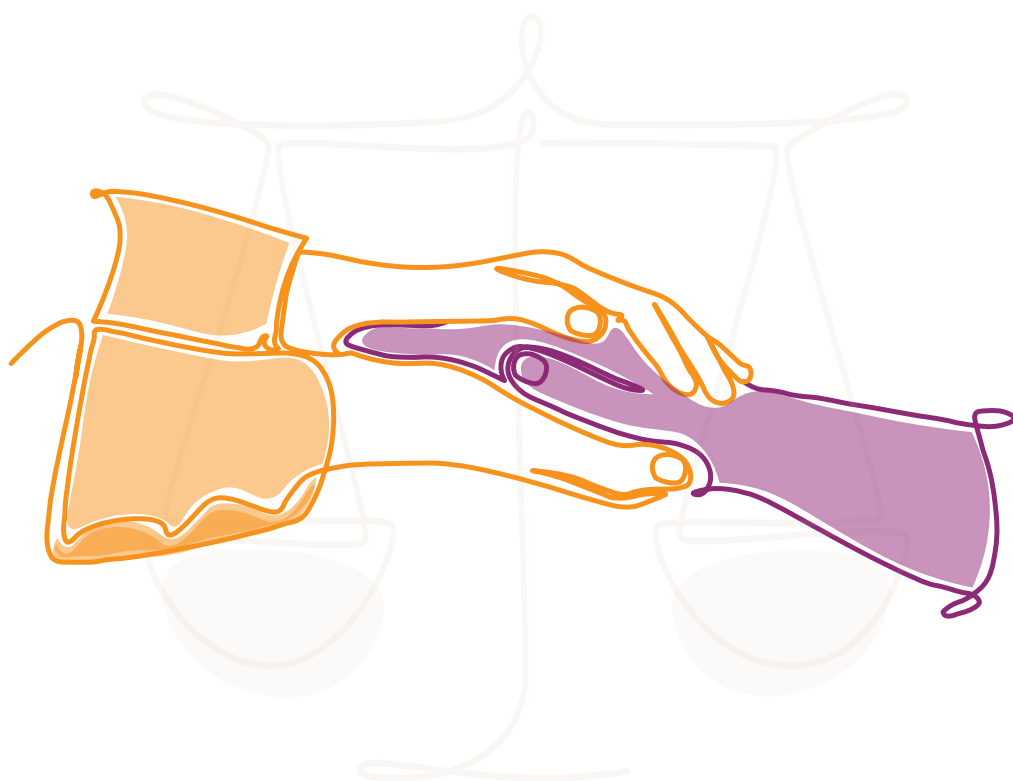


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## Glossary





The following definitions and explanations are limited to the context of this Practical Handbook.

## **2000 Convention**

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

## **Adult**

Article 2 of the Convention defines an adult as any person who has reached the age of 18. Any mention of the term "adult" or "adults" in this Practical Handbook shall, unless otherwise specified or understood by the context, refer to "adults who, by reason of an impairment or insufficiency of their personal faculties, are not in a position to protect their interests", as per the Preamble and Article 1(1) of the 2000 Convention.

## **Advance recognition or non-recognition**

Advance recognition or non-recognition is a preventive action under Article 23 of the Convention through which any interested person who has a legitimate interest in dispelling any doubt surrounding the recognition or non-recognition of a measure of protection, may ensure that said measure, taken by competent authorities, will be recognised or not recognised. In this Handbook, the terms "advance recognition" or "advance non-recognition" are used interchangeably with the terms "preventive action for recognition" or "preventive action for non-recognition" that appear in the Explanatory Report.

## **Central Authorities**

Central Authorities are (public) agencies or organisations that have been designated by Contracting Parties in accordance with Article 28 of the Convention to play a key facilitating role in the implementation and operation of the Convention.

## **Conclusions and Recommendations**

A summary of the outcome and action points discussed and approved by consensus during a Special Commission. Conclusions and Recommendations (C&R) are prepared with the assistance of a small group of delegates representative of the participants at the Special Commission (*i.e.*, a drafting committee).

## **Concurrent jurisdiction**

Competent authorities with concurrent jurisdiction under the Convention have simultaneous jurisdiction over a specific case regarding the protection of the adult or an element of it. The 1997 Special Commission concluded that, to avoid conflicting jurisdictions and decisions, there would be cooperation between competent authorities exercising concurrent bases of jurisdiction, with the understanding that only one competent authority may exercise jurisdiction at a time to make a decision on a specific point.

## **Enforcement**

Enforcement refers to the process by which the remedial consequences of a measure of protection taken by a competent authority in one Contracting Party are given effect in another Contracting Party, through the use of coercive action. Enforceable measures shall be

enforced in another Contracting Party as if they had been taken by the competent authorities of that State (see Art. 27 of the 2000 Convention).

### Enforceable measure

An enforceable measure is a measure which is capable of being imposed, through a coercive action. In accordance with Article 25, if measures taken in one Contracting Party, which are enforceable there, require enforcement in another Contracting Party, 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.

### First Meeting of the Special Commission

The First Meeting of the Special Commission on the practical operation of the *Convention of 13 January 2000 on the International Protection of Adults* was held in The Hague from 9 to 11 November 2022. All relevant documents, as well as the Conclusions & Recommendations of the meeting, can be found on the HCCH website, under the "Protection of Adults Section", then "Special Commission Meetings", then "[First Meeting of the Special Commission](#)".

### General jurisdiction

General jurisdiction refers to the extent to which the competent authorities of a State are entitled to take measures. A competent authority that has general jurisdiction can take any measures that are required by the situation, without any limitations as to material, personal, temporal and territorial scope.

### HCCH

The Hague Conference on Private International Law.

### HCCH Conventions

Conventions adopted under the auspices of the Hague Conference on Private International Law (HCCH).

### Measure

A measure is taken by a competent authority (e.g., judicial or administrative authorities) having jurisdiction under the Convention and is directed to the protection of the person or property of an adult. Measures include but are not limited to those listed under Article 3 of the Convention.

### Preliminary Document

A document produced by the Permanent Bureau (HCCH Secretariat) in preparation for meetings such as Special Commissions and the Council on General Affairs and Policy (CGAP). Unless authored specifically for official HCCH publication purposes, Preliminary Documents (Prel. Docs) are not intended for approval by HCCH Members.

### Primary jurisdiction

The jurisdiction granted to a competent authority that has the priority to take measures of protection regarding the adult over other jurisdiction grounds under the Convention.

**Private international law**

The body of law whose rules govern issues of private law in cross-border situations. It provides solutions to questions concerning jurisdiction, applicable law, and recognition and enforcement.

**Power of representation**

A power of representation is a document (unilateral act or agreement) which enables the adult to plan, in advance, how they want to be supported and by whom, in the exercise of their legal capacity and autonomy when such adult is not in a position to protect their interests.

**Recognition by operation of law**

Recognition by operation of law under Article 22(1) entails that the effects of a measure, as they exist in the domestic legal system of the Contracting Party where the measure was taken, may be relied upon in another Contracting Party without the need of any further action or special processes (*i.e.*, automatically).

**Requested Contracting Party**

The Contracting Party where the measure is relied upon or where advance recognition or recognition and enforcement are sought. While the Convention uses the term "requested State", the Practical Handbook utilises the term "requested Contracting Party" to refer to the same concept.

**Subsidiary jurisdiction**

A competent authority with subsidiary jurisdiction is exercising a ground of jurisdiction which is of secondary importance yet supplementary to primary jurisdiction. This ground of jurisdiction may call for cooperation with competent authorities having primary jurisdiction.

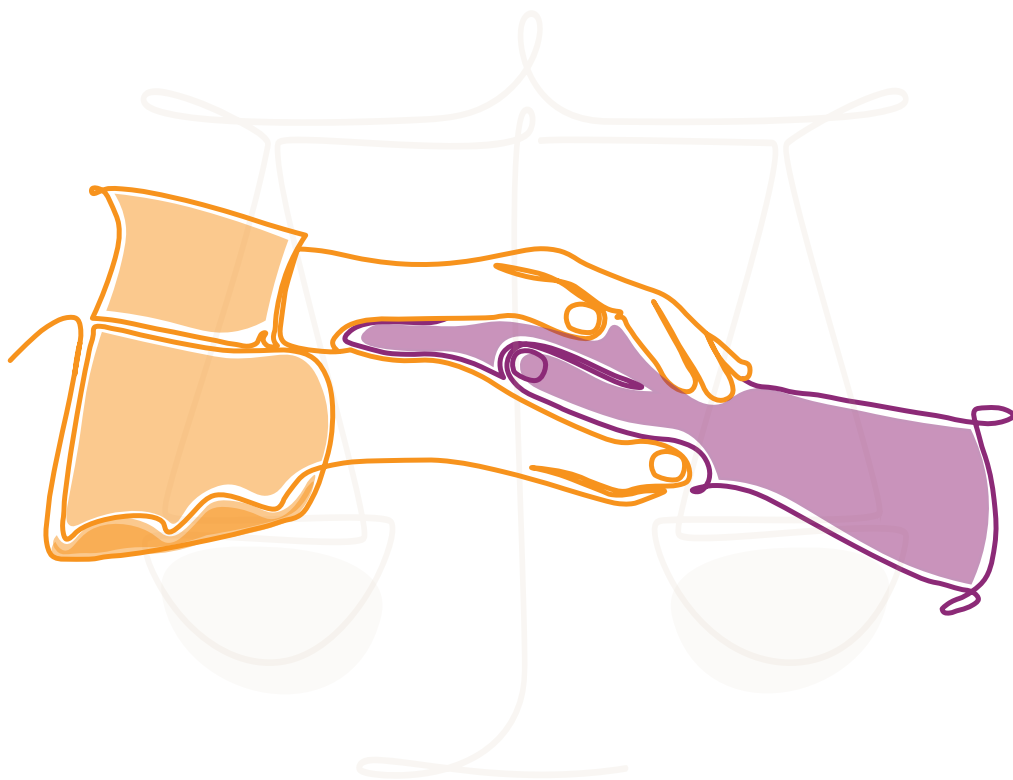
**UNCRPD**

United Nations Convention on the Rights of Persons with Disabilities, 13 December 2006.





# Interpretation of HCCH Conventions





1. The interpretation and application of HCCH Conventions is subject to public international law rules, including those found in the *Vienna Convention of 23 May 1969 on the Law of Treaties*. Specifically, Article 26 provides that a treaty shall be performed in good faith. Article 31 provides that a treaty shall be interpreted in good faith and in accordance with the ordinary meaning of its terms, having regard to its context and in the light of its object and purpose. Other elements must be taken into account, together with the context, including any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation, and any relevant rules of international law applicable in the relations between the parties. Article 32 provides that recourse may also be had to supplementary means of interpretation, including to the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31 leaves its meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable.
2. During the First Meeting of the Special Commission, it was highlighted that "the 2000 Convention should be interpreted having regard to its autonomous nature and in the light of its objects".<sup>10</sup> Furthermore, the Special Commission reminded Contracting Parties that, "in the interpretation of the 2000 Convention, regard shall be had to its international character and to the need to promote uniformity in its application".<sup>11</sup> The interpretation of the 2000 Convention is supported by an Explanatory Report<sup>12</sup> which summarises the discussions around each provision and provides assistance as to their interpretation. In case of doubt, transcripts of the discussions that took place during the Special Commission of a Diplomatic Character<sup>13</sup> at which the Convention was adopted

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<sup>10</sup> See C&R No 5 of the First Meeting of the SC (see path indicated in note 8). See also "Conclusions and Recommendations adopted by the Special Commission on the practical operation of the *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (22 – 28 March 2001)", C&R No 4.1 (available on the HCCH website at [www.hcch.net](http://www.hcch.net) under "Child Abduction Section" then "Special Commission Meetings").

<sup>11</sup> See C&R No 7 of the First Meeting of the SC (see path indicated in note 8). See also Art. 53 of the *Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance*.

<sup>12</sup> P. Lagarde, *Explanatory Report on the HCCH 2000 Protection of Adults Convention*, New and Revised Edition, The Hague, 2017 ("Explanatory Report").

<sup>13</sup> See HCCH, *Proceedings of the Special Commission of a diplomatic character on the Protection of Adults (20 September- 2 October 1999)*, The Hague, SDU, 2003.

are also publicly available, as are reports of meetings of the Special Commission,<sup>14</sup> and to some extent reports of Working Groups,<sup>15</sup> charged with the development of a preliminary draft Convention text for the purpose of the Special Commission of a Diplomatic Character. These supplementary interpretation materials are part of the *Travaux Préparatoires*.<sup>16</sup>

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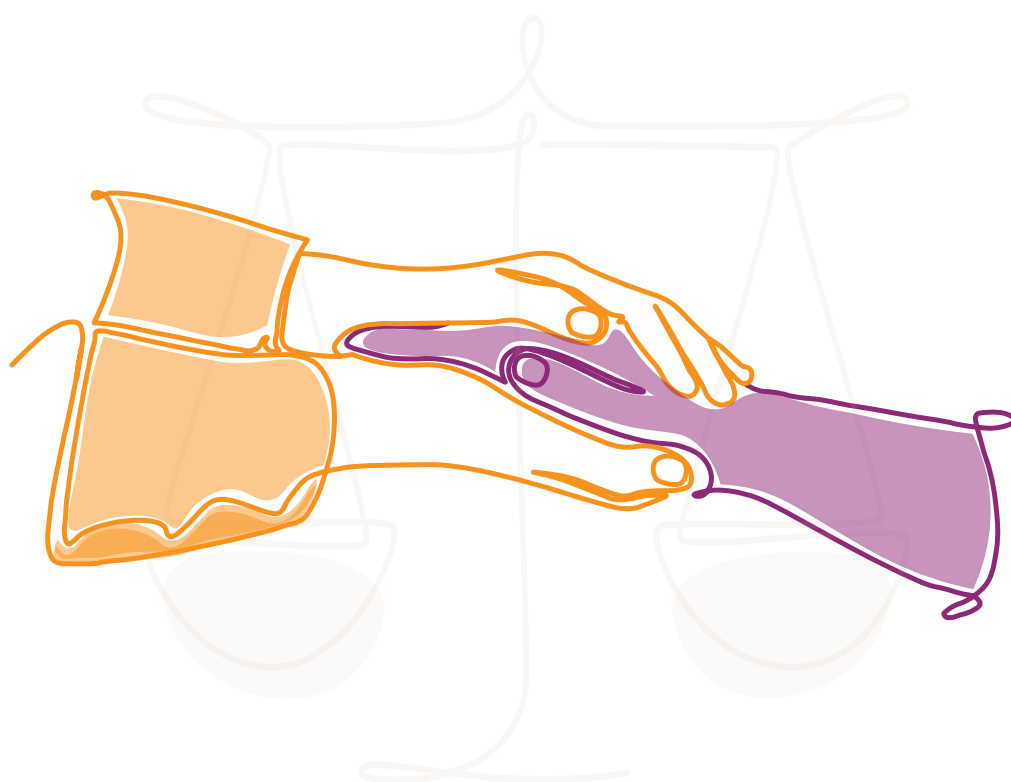
<sup>14</sup> The Special Commission on the Protection of Adults took place from 3 to 12 September 1997. Reports and other relevant materials can be found in the *Proceedings of the Special Commission of a diplomatic character on the Protection of Adults, ibid.*

<sup>15</sup> The Working Group on the Protection of Adults met from 14 to 17 of April 1997 with a view to preparing the 1997 Special Commission on the protection of adults. A summary of the discussions of the Working Group can be found in the *Proceedings of the Special Commission of a diplomatic character on the Protection of Adults, ibid.*

<sup>16</sup> Art. 32 of the Vienna Convention.

# 1

## Introduction





- 1.1 Ever increasing international mobility and the spread of personal assets, interests and relationships give rise to multiple cross-border situations which may involve adults<sup>17</sup> with mental, intellectual, physical or sensory impairments.<sup>18</sup> People work, spend recreational time and marry or form other close relationships in other States. The resulting cross-border situations can range from owning assets and interests in another State (e.g., bank accounts, sources of pensions and owned or rented property), to having emergency or long-term medical or care needs while travelling abroad, from inheriting assets abroad to having a right of action that arises in another State. The international protection of adults gives rise to complex legal questions and practical challenges when there are conflicts between the legal systems of the States involved. The 2000 Convention aims to prevent and resolve difficulties by connecting legal systems and facilitating cooperation between Contracting Parties. For example, when an adult moves from one Contracting Party to another, the Convention clarifies which State has jurisdiction to take measures<sup>19</sup> of protection for this adult and which State law is applicable regarding this matter. The Convention also provides a framework of cooperation between the two States, thus contributing to the smooth relocation of the adult and the elimination of any protection gaps. The Convention also provides for the recognition of a measure of protection taken in a Contracting Party, for instance when an adult needs to be supported in a decision regarding their person or property they own in another Contracting Party.
- 1.2 The 2000 Convention provides rules of private international law<sup>20</sup> and a cooperation framework between States for the protection of adults in international situations. It applies to the protection of the person or the property of adults who, "by reason of an impairment or insufficiency of their personal faculties, are not in a position to protect their interests".<sup>21</sup> Such an "impairment or insufficiency" can arise temporarily, intermittently or permanently, due to a genetic condition, illness or trauma at any time during life. The Convention provides a comprehensive body of rules on jurisdiction, applicable law, recognition and enforcement of protective measures, as well as provisions on the law applicable to powers of representation<sup>22</sup> which give effect to such powers in a cross-border context. It also establishes mechanisms of cooperation between the competent authorities of Contracting Parties and between Central Authorities<sup>23</sup> of Contracting Parties.

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<sup>17</sup> See, Glossary: "Adult".

<sup>18</sup> Art. 1 of the UNCPRD refers to "physical, mental, intellectual or sensory impairments" in its definition of persons with disabilities.

<sup>19</sup> See, Glossary: "Measure".

<sup>20</sup> These rules help individuals and families involved in cross-border situations by facilitating the use, abroad, of arrangements put in place in one jurisdiction, and by providing solutions to questions concerning jurisdiction of competent authorities to be seised of a dispute, the applicable law, and the recognition and enforcement of measures taken by such competent authorities.

<sup>21</sup> Art. 1(1). Unless indicated otherwise references to Articles are references to Articles of the 2000 Convention.

<sup>22</sup> Unless otherwise stated or qualified, this Handbook speaks about powers of representation that arise from an agreement or unilateral act, as provided for under Art. 15 of the 2000 Convention. See, Glossary: "Power of representation".

<sup>23</sup> See, Glossary: "Central Authorities".



- 1.3 The rules of private international law of the 2000 Convention apply to a broad scope of measures of protection and to powers of representation aimed at the protection of the adult. Within that scope, they apply, by nature, regardless of the substantive law that exists in each State and of its development over time. Therefore, the 2000 Convention remains relevant to the continued protection of adults involved in cross-border situations, notwithstanding the rapid evolution of the legal landscape in the field of the protection of adults over the last decades. Since the adoption of the Convention in 2000, there has been growing recognition in domestic substantive law that, in accordance with the principle of autonomy and self-determination, people should be enabled and encouraged to make personal arrangements for actual or potential impairment of their personal faculties, thus allowing them to express their will and preferences in advance of such events. People are increasingly opting to issue voluntary anticipatory acts such as powers of representation, rather than be subject to, for example, involuntary measures taken by a court or other competent authority.<sup>24</sup> Other types of voluntary anticipatory acts such as advance directives, formal arrangements for provision of support, and co-decision-making arrangements are also emerging.
- 1.4 The preamble of the 2000 Convention is in line with the evolution of the law and reflects these values: it affirms that respect for the dignity and autonomy of the adult are to be primary considerations. Such priorities are also captured in the preamble of the UN Convention on the Rights of Persons with Disabilities, adopted in 2006.<sup>25</sup> On the question of the interplay of the 2000 Convention and the UNCPRD, a Conference organised jointly by the HCCH and the European Commission in 2018 acknowledged that both instruments are complementary.<sup>26</sup> Regardless of their distinct scope and objects, they both serve an equally important purpose and can usefully coexist.
- 1.5 The UNCPRD has been ratified and / or acceded to by the vast majority of UN Member States, demonstrating a commitment to advancing the rights of persons with disabilities. The 2000 Convention has the potential to become an equally widely ratified and used instrument, in dealing with the protection of adults in cross-border situations. By harmonising rules of private international law, the 2000 Convention connects different legal systems to facilitate, within the scope of the Convention, non-discriminatory respect for the rights of adults, the protection of their interests and facilitate the exercise of their legal capacity.
- 1.6 During the First Meeting of the Special Commission, it was recalled that "[...] the core purpose of the 2000 Convention [...] is to promote, through rules of private international law, the dignity, autonomy and protection of adults in cross-border situations who, by

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<sup>24</sup> Council of Europe, *Enabling citizens to plan for incapacity. A review of follow-up action taken by member states of the Council of Europe Recommendation CM/Rec(2009)11 on principles concerning continuing powers of attorney and advance directives for incapacity*, Report prepared by Mr. Adrian D. Ward on behalf of the European Committee on Legal Co-operation (CDCJ), 2018, at paras 7 and 13.

<sup>25</sup> UNCPRD, Preamble (a) and (n).

<sup>26</sup> 2018 EC-HCCH Joint Conference (*op. cit.* note 1), C&R No 2. See also "Study: Interpreting the 2000 Hague Convention on the International Protection of Adults consistently with the 2007 UN Convention on the Rights of Persons with Disabilities", S. Rolland and A. Ruck Keene, 3 June 2021, page 16. See also C&R No 4 of the First Meeting of the SC (see path indicated in note 7).

reason of an impairment or insufficiency of their personal faculties, are not in a position to protect their interests.”<sup>27</sup> The Special Commission also confirmed that the Convention is operating smoothly and is fit for purpose.<sup>28</sup>

- 1.7 The chapters that follow are arranged according to subject matter and largely reflect the structure of the 2000 Convention. This Practical Handbook includes chapters dedicated to the scope of the Convention, rules of jurisdiction, the law applicable to measures of protection and powers of representation, recognition and enforcement as well as judicial and administrative cooperation. [Annex I](#) to this Handbook contains the Implementation Checklist under the 2000 Protection of Adults Convention, which was finalised by the Working Group tasked with the development of this Handbook and was approved at the First Meeting of the Special Commission.<sup>29</sup> The Conclusions and Recommendations<sup>30</sup> unanimously adopted at the First Meeting of the Special Commission can be found in [Annex II](#). [Annex III](#) contains the text of the 2000 Protection of Adults Convention. Annex IV contains the recommended Model Forms adopted by the 1999 Special Commission of a diplomatic character.<sup>31</sup>
- 1.8 **Given that there is still limited practice to draw from, this Handbook is not grounded upon the notion of “good practice” *per se*, nor does it necessarily follow the structure of Guides to Good Practice under other HCCH Conventions. Rather, this Handbook aims to be an accessible and easily digestible practical guide to the 2000 Convention, with clear language, relevant and comprehensive examples and flowcharts. In this way, it is hoped that the Handbook will promote a clear understanding of how the Convention is intended to operate in practice, thereby ensuring that good practice under the Convention is established and fostered from the outset. This Handbook draws heavily from the Explanatory Report on the 2000 Convention and should be read and used in conjunction with it. This Handbook does not replace or amend the Explanatory Report in any way, which retains its significance as part of the preparatory work (*travaux préparatoires*) for the 2000 Convention. It should be noted that the function of this Handbook is not to assess the diversity of current provisions in different legal systems, nor to assess or encourage particular developments.**
- 1.9 This Handbook is principally aimed at States’ authorities implementing and operating the 2000 Convention, such as Central Authorities designated under the 2000 Convention, competent authorities, notaries public or latin model notaries competent to certify or authenticate documents, persons, institutions or bodies in charge of representing or assisting adults in matters concerning their personal welfare (*e.g.*, health professionals) and / or handling their financial affairs and / or property (*e.g.*,

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<sup>27</sup> C&R No 2 of the First Meeting of the SC (see path indicated in note 7).

<sup>28</sup> *Ibid.*, C&R No 3.

<sup>29</sup> *Ibid.*, C&R Nos 63 and 64.

<sup>30</sup> See Glossary: “Conclusions and Recommendations”.

<sup>31</sup> Model forms are documents developed by the HCCH that can be used by Contracting Parties to facilitate the practical operation of the Convention.

banks). The Handbook is also relevant to anyone who has an interest in the protection of adults.

- 1.10 This Handbook was approved at the First Meeting of the Special Commission<sup>32</sup> [and has been adopted by HCCH Members].<sup>33</sup> Its publication comes more than 20 years after the finalisation of the Convention text and over 10 years after its entry into force. It is hoped that it will assist existing and future Contracting Parties in the effective implementation of the 2000 Convention, to the benefit of citizens around the world.
- 1.11 Endeavours should continue to be made to encourage ratifications of, and accessions to, the 2000 Convention by States willing and able to undertake the Convention obligations. Contracting Parties are encouraged to arrange meetings at the regional level for this purpose.<sup>34</sup>
- 1.12 **Please note that any guidance provided in this Handbook is not legally binding and nothing in it may be construed as binding on Contracting Parties to the 2000 Convention. It is also worth reiterating that the 2000 Convention should be interpreted having regard to its autonomous nature and in the light of its objects.<sup>35</sup> Additionally, in the interpretation of the Convention, regard shall be had to its international character and to the need to promote uniformity in its application.<sup>36</sup>**

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<sup>32</sup> See C&R Nos 61 and 62 of the First Meeting of the SC (see path indicated in note 7).

<sup>33</sup> See CGAP 2023, C&D No 31 (see path indicated in note 8).

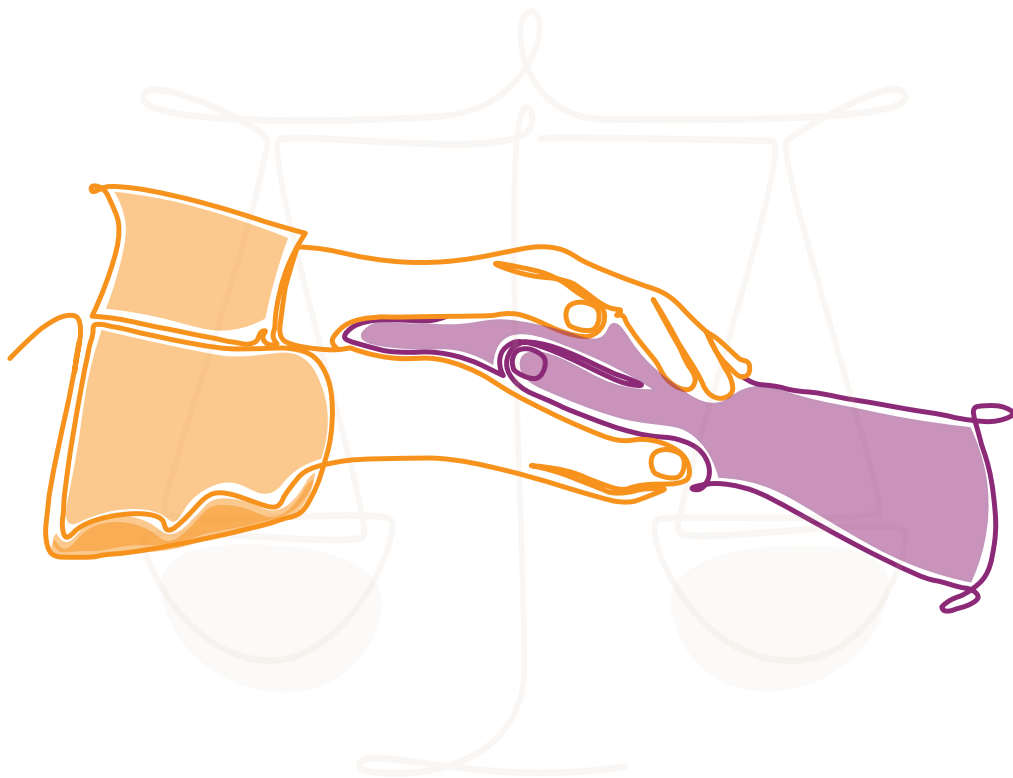
<sup>34</sup> See C&R No 1 of the First Meeting of the SC (see path indicated in note 7).

<sup>35</sup> *Ibid.*, C&R No 5.

<sup>36</sup> *Ibid.*, C&R No 7.

# 2

## Objectives of the 2000 Convention





## A. Preamble of the 2000 Convention

- 2.1 The Preamble recalls the broader goal of the 2000 Convention, which is to protect adults who are affected by an impairment or insufficiency of their personal faculties and are not in a position to protect their own interests in international situations. It aims to do so by avoiding conflicts between legal systems and unifying the basic tenets of private international law: jurisdiction, applicable law, and recognition and enforcement of measures. In addition, the Convention promotes cooperation between the various authorities<sup>37</sup> of Contracting Parties, as a means to enhance the protection of the adults concerned.<sup>38</sup> Importantly, the primary considerations in all elements of legal process are the interests of the adult, support for their autonomy and respect for their rights, will and preferences.
- 2.2 "Wishing to avoid conflicts between [...] legal systems in respect of jurisdiction, applicable law, recognition and enforcement of measures for the protection of adults", the 2000 Convention builds bridges between Contracting Parties. Under the rules of the Convention, if a measure of protection is taken in one Contracting Party by a competent authority, that measure should continue to have effect in another Contracting Party, if, for instance, the adult happens to move from one Contracting Party to another. The Convention also includes safeguards which allow for the measures not to be recognised or enforced if, for example, 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 Convention or the recognition of the measure would be contrary to the public policy of the requested Contracting Party.<sup>39</sup>
- 2.3 In accordance with the rules of the 2000 Convention, through coordination only one competent authority will exercise jurisdiction at a given time over a specific measure.<sup>40</sup> Similarly, if powers of representation were granted by the adult in question, in contemplation of a possible impairment or insufficiency of their personal faculties, the Convention sets out uniform rules on the law applicable to the determination of the existence, scope and manner of exercise of such powers. This is how the Convention avoids conflicting decisions and conflicts between legal systems. As a result, the Convention provides for greater legal certainty and predictability, which is extremely important at a time when the adult in question may be unable to exercise their legal capacity by reason of an impairment or insufficiency of their personal faculties.

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<sup>37</sup> Art. 1(2)(e). "Authorities" in this context can refer to Central Authorities, competent authorities and other public authorities or bodies.

<sup>38</sup> See Chapter V of the 2000 Convention.

<sup>39</sup> See Art. 22 for a list of the grounds available to a competent authority to refuse, on a discretionary basis, recognition and enforcement of a measure.

<sup>40</sup> See C&R No 9 of the First Meeting of the SC (see path indicated in note 7).

## B. Specific objects of the 2000 Convention

### *Article 1*

- 2.4 Article 1 sets out the scope and specific objects of the Convention.
- 2.5 The first paragraph of the Convention, Article 1(1), establishes from the outset the scope of the Convention, namely, the protection of adults. This notion of protection serves as a guide and a yardstick when defining the scope of application.<sup>41</sup> It is intentionally drafted as a broad, factual (rather than legal) description of the adult to whom the Convention applies.<sup>42</sup> An impairment or insufficiency of an adult's personal faculties could be permanent, temporary or intermittent and may affect part or all of the adult's personal faculties. Interests may include financial and property interests, or personal and health interests.<sup>43</sup> For a matter to be international and fall under the Convention, it must be a situation that involves more than one State.<sup>44</sup>
- 2.6 Article 1(2) establishes the specific objects of the 2000 Convention. By virtue of the provisions in Article 1(2)(a), (b) and (d), the Convention provides rules for jurisdiction, applicable law and recognition and enforcement concerning measures of protection taken by competent authorities. Through Article 1(2)(c), the Convention also provides rules of applicable law to give effect to agreed or unilaterally declared powers of representation, which are not measures of protection taken by competent authorities. The objects of the Convention are completed by a system of cooperation provided for in Article 1(2)(e). This list of five objects reflects the structure of the Convention text that follows.
- 2.7 The first object, as set out in Article 1(2)(a), is to determine the State whose competent authorities have jurisdiction to take measures in matters relating to the protection of the person or property of the adult. The Convention is concerned only with international jurisdiction; it does not determine which authorities within the Contracting Parties are competent to deal with matters falling within the scope of the Convention.<sup>45</sup> The organisation of such issues is left to the domestic laws of each Contracting Party. The jurisdictional rules of the Convention are set out in Chapter II of the Convention – Jurisdiction.
- 2.8 The second and third objects, as set out in Article 1(2)(b) and (c), are to determine the law to be applied by the competent authorities, whether they are taking a measure of protection or implementing measures taken by another competent authority, and the law applicable to the representation of the adult arising from the powers granted by the adult. These matters are covered in Chapter III of the Convention – Applicable Law.

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<sup>41</sup> The Explanatory Report (*op. cit.* note 12), para. 8.

<sup>42</sup> *Ibid.*, para. 9.

<sup>43</sup> *Ibid.*, para. 10.

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.*, para. 12.

- 2.9 The fourth object, as set out in Article 1(2)(d), is to provide for the recognition and enforcement of measures in other Contracting Parties. This is covered in Chapter IV of the Convention – Recognition and Enforcement.
- 2.10 The fifth object, as set out in Article 1(2)(e), is to establish cooperation mechanisms to achieve the purposes of the Convention. This is covered in Chapter V of the Convention– Cooperation.

### **C. Autonomy and self-determination: powers of representation, choice of court and choice of law**

- 2.11 Twenty years after its adoption and 10 years after its coming into force, it is fair to say that one of the most novel aspects of the 2000 Convention is probably Article 15, which allows for agreed or unilaterally declared powers of representation to be given effect across borders, through the applicable law rules of the Convention. Giving effect to powers of representation made by an adult provides an excellent means to support their dignity and autonomy and to ensure respect for their rights, will and preferences. In this regard, Article 15 has the potential to become one of the most important features of the Convention.
- 2.12 If the applicable law so provides, an adult can issue powers of representation to plan, in advance, how they want to be supported in the exercise of their legal capacity and by whom, in the event of a future impairment or insufficiency of their personal faculties. Well drafted powers of representation might prevent legal disputes and, as a result, keep matters pertaining to the protection of adults out of contentious litigation, though there may be cases where a representative may seek the guidance and authority of a court as to how to act in a particular situation.
- 2.13 Powers of representation will be governed by the law of the habitual residence of the adult at the time they are drawn up, unless the adult designates, expressly in writing, the law applicable to these powers of representation to be one of the following:
- the law of a State of which the adult is a national;
  - the law of the State of a former habitual residence of the adult;
  - the law of the State in which the property of the adult is located (for matters related to that property).<sup>46</sup>
- 2.14 In cases where powers of representation are not exercised in a manner sufficient to ensure the protection of the adult, they can be modified or withdrawn by the competent authorities exercising jurisdiction under the 2000 Convention. If this happens, the law applicable in accordance with Article 15 (*i.e.*, either that of the habitual residence at the time the power of representation is drawn up or another law designated by the adult) should be taken into account insofar as possible.<sup>47</sup>

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<sup>46</sup> Art. 15(2).

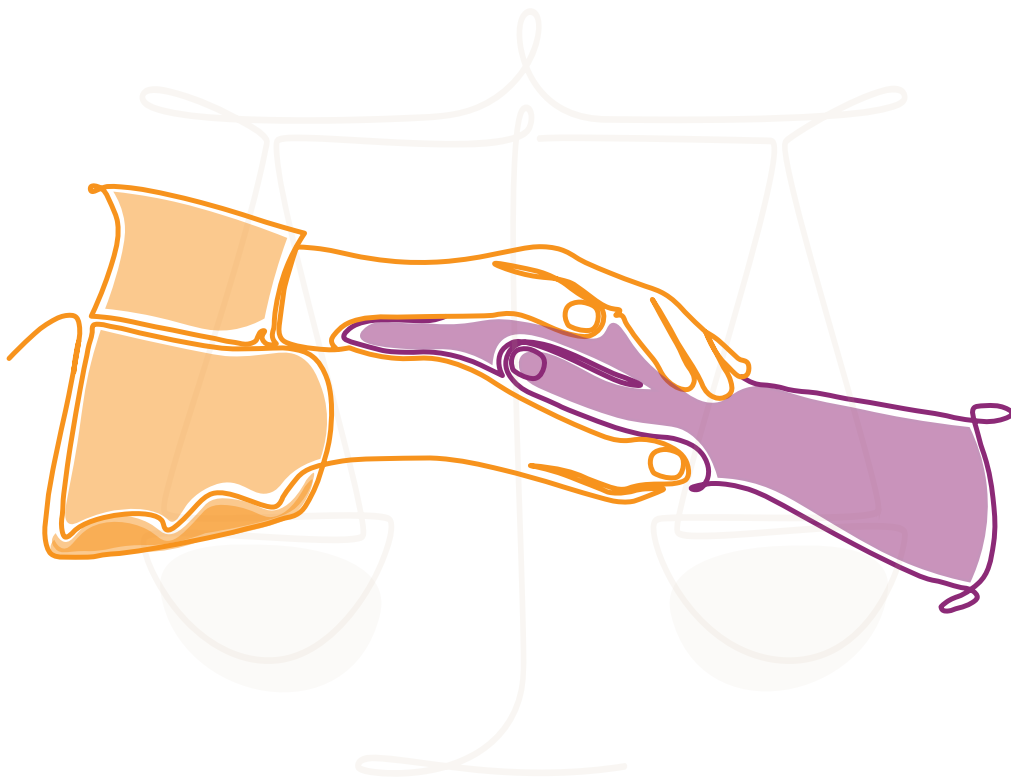
<sup>47</sup> Art. 16.



- 2.15 Finally, the adult can also choose, in advance and in accordance with Article 8(2)(d), the competent authorities of a Contracting Party which could request or be requested to take measures directed to their protection. This choice of competent authorities must be provided for in writing, for example in the powers of representation. The implementation of this choice of competent authorities will be conditional upon a transfer of jurisdiction taking place in accordance with Article 8(1).

# 3

## Scope of application





## A. In which States and from what date does the 2000 Convention apply?

### *Articles 50, 53, 54, 57 and 58*

- 3.1 For the 2000 Convention to apply, a State must have ratified, accepted, approved or acceded to the Convention and it must have entered into force for that State. The provisions on recognition and enforcement and those on cooperation between authorities apply subject to the condition that the Convention is in force for both the States concerned. That is, in the case of recognition and enforcement, the State of origin of the measure and the requested Contracting Party<sup>48</sup> and, in the case of cooperation, the State whose authorities are seeking assistance and the State whose authorities are asked to provide such assistance. Some provisions of the Convention, such as Articles 6, 10 and 11, concerning jurisdiction or rules on applicable law, will apply regardless of whether or not the other State concerned is a Contracting Party to the Convention.<sup>49</sup>
- 3.2 The 2000 Convention only applies to measures of protection taken in a Contracting Party from the time of the entry into force of the Convention in that State.<sup>50</sup> By extension, the rules of jurisdiction apply in a Contracting Party for proceedings in relation to a measure of protection that started after the time of the entry into force of the Convention in that State.<sup>51</sup> Therefore, measures taken in a Contracting Party prior to the Convention's entry into force in that State, in application of the rules of jurisdiction previously in force, will not be affected, even if the competent authorities which took those measures no longer have jurisdiction according to the Convention.<sup>52</sup>

### Example 3.A

Before the Convention entered into force in State A, a competent authority designated a person to assist an adult on the basis of their non-Convention jurisdiction rules. If this competent authority does not have jurisdiction under the rules of the Convention after the entry into force of the Convention, it will not be able to take additional measures for this adult, but the designation of the person to assist the adult will not be affected.

<sup>48</sup> See Glossary: "Requested Contracting Party".

<sup>49</sup> See, *infra*, para. 3.13 and **Chapter 9**.

<sup>50</sup> Art. 50(1).

<sup>51</sup> The Explanatory Report (*op. cit.* note 12), para. 166.

<sup>52</sup> Art. 50(1).

### Example 3.B

Following the entry into force of the Convention in State A, a competent authority is requested to take additional measures regarding a guardianship order originally granted before the Convention entered into force in State A. The jurisdiction rules of the Convention will apply to such additional measures.

- 3.3 The recognition and enforcement provisions of the Convention (Chapter IV) apply only to measures taken after the entry into force of the 2000 Convention between the Contracting Party where the measures have been taken and the requested Contracting Party.<sup>53</sup> That being said, nothing prevents the requested Contracting Party from recognising measures taken previously, if its domestic non-Convention rules allow for such recognition.<sup>54</sup>
- 3.4 The Convention applies to agreed or unilaterally declared powers of representation from the time of entry into force of the Convention in the State concerned. This is the case even if the powers of representation were granted before the Convention entered into force, provided they were granted under conditions corresponding to those set out in Article 15.<sup>55</sup>
- 3.5 To understand whether the 2000 Convention applies in a particular case, one must ascertain:
  - whether the Convention has entered into force in a particular State and upon which date it did, in relation to jurisdiction and applicable law issues;
  - whether the Convention was in force as between particular Contracting Parties when a measure of protection was taken, in relation to recognition and enforcement of this measure.
  - whether the Convention is in force as between particular Contracting Parties in relation to administrative cooperation issues.
- 3.6 The rules regarding whether the 2000 Convention has entered into force in a particular State differ depending on whether the State in question has, on the one hand, ratified, accepted or approved the Convention or, on the other hand, has acceded to the Convention.
  - Ratification, acceptance or approval of the Convention is only open to those States which were Members of the HCCH at the time of its 1999 Special

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<sup>53</sup> Art. 50(2).

<sup>54</sup> The Explanatory Report (*op. cit.* note 12), para. 167.

<sup>55</sup> Art. 50(3).

Commission of a diplomatic character,<sup>56</sup> *i.e.*, States that were Members of the HCCH on or before 2 October 1999.<sup>57</sup>

- All other States may accede to the Convention.<sup>58</sup> When a State accedes to the Convention, Contracting Parties have six months to raise an objection to the accession. Objections to accessions are rare in HCCH Conventions.
- At the time of ratification, acceptance or approval, a State can raise an objection to the accession of any earlier acceding State.<sup>59</sup> The notification of an objection to the depositary (the Ministry of Foreign Affairs of the Kingdom of the Netherlands) will result in no treaty relationship between the State having raised the objection and the acceding State, unless and until the objection is withdrawn.<sup>60</sup>

3.7 The 2000 Convention enters into force for a State as follows:

- for States that ratify the Convention, the Convention enters into force on the first day of the month following the expiration of three months after the date of deposit of the instrument of ratification;<sup>61</sup>
- for States that accede to the Convention, the Convention enters into force between the acceding State and Contracting Parties which did not raise an objection<sup>62</sup> on the first day of the month following the expiration of an additional three months from the end of the six-month objection period.<sup>63</sup>

3.8 The 2000 Convention applies as between Contracting Parties when:

- it has entered into force in both Contracting Parties (see para 3.7 above); and
- in the case of an acceding State, the other Contracting Party which had the option to raise an objection to the accession either did not do so or did so but has since withdrawn its objection.

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<sup>56</sup> Art. 53(1). This is the date on which the Final Act of the Special Commission of a diplomatic character on the protection of adults was signed.

<sup>57</sup> Argentina, Austria, Belgium, Bulgaria, Canada, Chile, China (People's Republic of), Croatia, Cyprus, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Israel, Italy, Japan, Latvia, Luxembourg, Malta, Mexico, Monaco, Morocco, Netherlands, Norway, Poland, Portugal, Republic of Korea, Republic of North Macedonia, Romania, Slovakia, Slovenia, Spain, Suriname, Sweden, Switzerland, Turkey, United Kingdom, United States of America, Uruguay, Venezuela.

<sup>58</sup> Art. 54(1). Accession is only available to States once the Convention itself has entered into force in accordance with Art. 57(1). The Convention entered into force, in accordance with Art. 57(1), on 1 January 2009. Since then, accession has been open to any State.

<sup>59</sup> Art. 54(3).

<sup>60</sup> The 2000 Convention contains no explicit provisions on the withdrawal of such objections. However, in the context of other HCCH Conventions, it has been accepted that such a withdrawal is possible (*e.g.*, see para. 67 of the "Conclusions and Recommendations of the 2009 Special Commission on the practical operation of the Hague Apostille, Service, Taking of Evidence and Access to Justice Conventions", available on the HCCH website at [www.hcch.net](http://www.hcch.net) under "Apostille" then "Special Commissions").

<sup>61</sup> Art. 57(2)(a).

<sup>62</sup> Art. 54(3).

<sup>63</sup> Art. 57(2)(b).

- 3.9 A Contracting Party may denounce the Convention by notification to the depositary.<sup>64</sup> Denunciation takes effect on the first day of the month following the expiration of 12 months after the notification is received by the depositary, unless a longer period is specified.<sup>65</sup>

**Where to find up-to-date information on the status of the 2000 Convention**

One can consult the status table of the 2000 Convention on the website of the HCCH at < [www.hcch.net](http://www.hcch.net) > under "Protection of Adults", then "Status table".

This table provides updated information on the status of the 2000 Convention, including all ratifications of, and accessions to, the Convention as well as any objections to accessions.

## B. To whom does the 2000 Convention apply?

### *Article 2*

- 3.10 The 2000 Convention applies to persons who have reached the age of 18 years<sup>66</sup> who, by reason of an impairment or insufficiency of their personal faculties, are not in a position to protect their interests.<sup>67</sup> This means that it applies to individuals who have reached the age of 18 regardless of the different ages of majority provided in the domestic law of Contracting Parties.
- 3.11 The 2000 Convention also applies to measures taken before the person concerned reached the age of 18,<sup>68</sup> which are envisaged to remain effective into the person's adulthood. This is an important function of the 2000 Convention, as it ensures continuity of protection by allowing for measures taken when the adult was under the age of 18 to remain effective in cross-border situations.<sup>69</sup> Thus, a measure taken under domestic protection law in respect of a person under the age of 18 will be governed by the 1996 Convention<sup>70</sup> until the person reaches the age of 18. After the person concerned has reached the age of 18, the measure of protection that is intended to remain effective will be governed by the 2000 Convention.<sup>71</sup>

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<sup>64</sup> Art. 58(1).

<sup>65</sup> Art. 58(2).

<sup>66</sup> Art. 2(1).

<sup>67</sup> Art. 1(1).

<sup>68</sup> Art. 2(2).

<sup>69</sup> The Explanatory Report (*op. cit.* note 12), para. 15.

<sup>70</sup> *Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children* ("1996 Convention").

<sup>71</sup> See, *infra*, **Chapter 10**, para. 10.17.

- 3.12 In principle, the Convention may not be applied following the death of the adult. It may not be used, for instance, to give effect to *post-mortem* powers of representation of the adult. However, after the death of the adult, some provisions of the Convention may be applicable, insofar as they relate to acts or measures taken during the adult's life (e.g., funeral arrangements or the cancellation of ongoing contracts, such as a housing lease).<sup>72</sup> In addition, some provisions of the Convention may be applicable to powers of representation exercised at the time the adult was still alive.

### Example 3.C

For some time, an adult, habitually resident in Contracting Party A has been living with a terminal illness which increasingly impairs their personal faculties. A few years ago, it became necessary for a competent authority in Contracting Party A to intervene and designate an assistant decision-maker for the adult, in accordance with domestic legislation on the protection of adults. Shortly after their appointment, the adult instructs their assistant decision-maker that following their death, a lease agreement between the adult and tenants who are living in a property the adult owns in Contracting Party B should be terminated. During a recent visit to their healthcare provider, the adult was informed that their illness has taken a turn for the worse and that they will most likely pass away within the next few months. Exercising their powers granted by the competent authority in Contracting Party A and in accordance with the instructions given to them by the adult, the assistant decision-maker arranges for the termination of the lease agreement. The parties agree that the lease agreement will be terminated following the death of the adult and that the tenants will have to vacate the property within six weeks of the death of the adult. Six weeks after the death of the adult, the assistant decision-maker, still acting in accordance with their powers, reminds the tenants that the lease agreement has been terminated and that they must vacate the property, collects their keys, and ensures that the property is in adequate condition.

- 3.13 The 2000 Convention does not require an adult to be habitually resident in a Contracting Party to fall within the scope of the Convention; the geographical scope of the Convention varies with each provision.<sup>73</sup>

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<sup>72</sup> The Explanatory Report (*op. cit.* note 12), para. 16.

<sup>73</sup> *Ibid.*, para. 17.



## C. Which matters are covered by the 2000 Convention?

### Article 3

- 3.14 Article 3 includes an illustrative list of measures which are covered under the 2000 Convention. As measures directed to the protection of the person or property of the adult can be different across domestic legal systems, this list is non-exhaustive and is intended to be broad in scope.<sup>74</sup> In some cases, there may be overlapping measures; this makes no difference, since the set of rules to which they are all subject is the same.<sup>75</sup>

#### Example 3.D

The German institution of "*Betreuung*" constitutes a measure of protection within the meaning of the 2000 Convention. Therefore, it may not be necessary to consider whether it is a "protective regime" (Art. 3(a)), an "analogous institution" (Art. 3(c)), or a "specific intervention" (Art. 3(g)).

- 3.15 Following an application by an interested party, it is up to the competent authorities to decide which measures are to be taken for the protection of the adult and / or their property, in accordance with domestic law. When a competent authority decides not to take a measure and to reject an application, this decision falls under the scope of the Convention and Contracting Parties have a duty to recognise it, without prejudice to reconsideration, if justified by a change of circumstances.<sup>76</sup>
- 3.16 Measures may, in particular, deal with the following:

#### (a) the determination of incapacity and the institution of a protective regime

- 3.17 The placing of an adult in a type of protective regime which corresponds to the support they may need to exercise legal capacity is a measure of protection under the Convention.<sup>77</sup> This regime may be general or relate to one or several areas of activity where the adult needs support in exercising their legal capacity.<sup>78</sup>
- 3.18 Powers of representation do not as such fall under Article 3 of the 2000 Convention, however, measures taken by a competent authority with respect to such powers do fall within the scope of Article 3. In some cases, a competent authority may make a decision on the capacity of the adult that brings the powers into force. In certain legal

<sup>74</sup> *Ibid.*, para. 18.

<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid.*, para. 28.

<sup>77</sup> *Ibid.*, para. 20.

<sup>78</sup> *Ibid.*

systems, this decision may be considered a measure of protection falling within the scope of Article 3.

- 3.19 This also applies to the revocation of a specific protective regime<sup>79</sup> as well as to decisions that reject applications made in view of such a specific regime.<sup>80</sup>

**(b) the placing of the adult under the protection of a judicial or administrative authority**

- 3.20 This covers situations where an adult retains their full legal capacity, remains largely in control of their affairs, and is able to manage them without the assistance of a third party, but is placed under the protection of a judicial or administrative authority to assist or oversee, in an effort to minimise a risk which arises from an impairment or insufficiency of their personal faculties.<sup>81</sup>

**(c) guardianship, curatorship and analogous institutions**

- 3.21 This applies to protective regimes established when the adult, due to an impairment or insufficiency of their personal faculties, is in need of continuous representation or simply needs assistance, supervision or advice in relation to acts of civil life.<sup>82</sup> It must be recalled at the outset that the 2000 Convention does not, in and of itself, regulate or establish any protective regime. Rather, it deals with issues that may arise in connection to a protective regime – whatever its denomination and characteristics – where a cross-border element is present. The inclusion of the terms “guardianship” and “curatorship” in the text of the Convention is meant to ensure that the Convention may perform its task – that of bridging gaps between legal systems – whenever the protection of an adult is at issue. Their inclusion is important to ensure the continued protection of adults in a cross-border context, as Contracting Parties do provide for these regimes in their domestic law.<sup>83</sup>
- 3.22 At the time the Convention was being drafted and negotiated, guardianships, curatorships and analogous institutions carried connotations of substituted decision-making in most States. Since then, many States have been amending their legislation to reflect the notion that such protective institutions are in place in order to support adults in exercising their capacity. This is an area that is evolving at varying rates from jurisdiction to jurisdiction and, as such, terms such as “guardian” and “curator” may not always carry the same meaning across jurisdictions.
- 3.23 During the First Meeting of the Special Commission, possible amendments to the Convention were discussed, including the deletion of the terms “guardianship” and

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<sup>79</sup> The Explanatory Report (*op. cit.* note 12), para. 20.

<sup>80</sup> *Ibid.*, para. 28.

<sup>81</sup> *Ibid.*, para. 21.

<sup>82</sup> *Ibid.*, para. 22.

<sup>83</sup> 2018 EC-HCCH Joint Conference (*op. cit.* note 1), C&R No 7.

"curatorship" from Article 31.<sup>84</sup> However, the Special Commission concluded and recommended the following:

"The SC recalled that the 2000 Convention does not, in and of itself, regulate or establish any protective regime. Noting that, in some States, the institutions of guardianship and curatorship are now based on supported decision-making regimes, the SC recommended keeping the terms "guardianship" and "curatorship" in the text of the Convention."<sup>85</sup>

**(d) the designation and functions of any person or body having charge of the adult's person or property, representing or assisting the adult**

- 3.24 The terms of this provision are broad. This provision includes both long and short-term arrangements, such as the designation by a competent authority of a representative, a supporter or co-decision-maker, a guardian, curator, or *Betreuer*, a managing guardian without full guardianship authority, or guardian *ad litem* for specific legal matters.<sup>86</sup> It also covers third parties who may be required to take decisions in the absence of a legal representative, for example, medical decisions in a nursing or retirement home if domestic law allows a competent authority to confer such power upon them.<sup>87</sup>

**(e) the placement of the adult in an establishment or other place where protection can be provided**

- 3.25 This provision covers both voluntary and involuntary placements of the adult.<sup>88</sup> However, safeguards are in place, under Article 33, to ensure that a decision on the placement cannot be made if, following a consultation with the Central or other competent authority of the State of the envisioned placement, said authority opposes the placement within a reasonable time.<sup>89</sup>

**(f) the administration, conservation or disposal of the adult's property**

- 3.26 This provision encompasses all matters and operations ordered by a competent authority regarding the property of the adult, including the sale of immovables, the

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<sup>84</sup> See, also, "Possible Amendments to the 2000 Protection of Adults Convention.", Prel. Doc. No 12 of October 2022 drawn up for the attention of the First Meeting of the SC (see path indicated in note 7).

<sup>85</sup> See C&R No 69 of the First Meeting of the SC (see path indicated in note 7). This was endorsed by CGAP during its March 2023 meeting (see CGAP 2023, C&D No 33 (see path indicated in note 8)).

<sup>86</sup> The Explanatory Report (*op. cit.* note 12), para. 23.

<sup>87</sup> *Ibid.*

<sup>88</sup> The Explanatory Report (*op. cit.* note 12), para. 24.

<sup>89</sup> Art. 33(1). See, also, **Chapter 11**, paras 11.31-11.36.

management of securities, trusts,<sup>90</sup> investments, and the handling of successions devolving to the adult.<sup>91</sup>

- 3.27 The 2000 Convention does not encroach on systems of property law, whether or not in a matrimonial context. The Convention does not cover the substantive law relating to rights over property, such as disputes in relation to the ownership of or title to property. However, in relation to adults who fall within the scope of the Convention, it is applicable to the ways in which relevant substantive law is operated. For instance, in matters relating to the protection of an impaired adult, the Convention can be applied in determining how and by whom transactions are negotiated and entered or consented to (where such consent might be required), how and by whom disputes are handled and how and by whom instructions in mediation, arbitration or litigation are given.

**(g) the authorisation of a specific intervention for the protection of the person or property of the adult**

- 3.28 This provision envisages situations where protection is limited to a specific intervention, for example, a surgical operation or the sale of an asset.<sup>92</sup>

**(h) other measures**

- 3.29 As mentioned above, the list in Article 3 is indicative, and there are other measures that could fall under the Convention, including new types of measures developed since the 2000 Convention was drafted, or to be developed in future.
- 3.30 During the First meeting of the Special Commission, it was noted that "[...] the domestic laws of Contracting Parties to the 2000 Convention do not have to provide for all types of measures of protection that fall under the scope of the Convention and [it was] acknowledged that some measures, taken in one State, may be unknown in another."<sup>93</sup>
- 3.31 In addition to guardian *ad litem*, *Betreuer* and "placement sous sauvegarde de justice", some States have identified other measures which are also considered to fall within the scope of Article 3, including but not limited to:<sup>94</sup>
- Conservatorships.<sup>95</sup>

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<sup>90</sup> Issues concerning the law applicable and the recognition of a trust in a cross-border context will be covered by the *Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition*. See, *infra*, paras 3.42 - 3.44.

<sup>91</sup> The Explanatory Report (*op. cit.* note 12), para. 25.

<sup>92</sup> *Ibid.*, para. 26.

<sup>93</sup> See C&R No 18 of the First Meeting of the SC (see path indicated in note 7).

<sup>94</sup> "Responses to the Questionnaire on the practical operation of the HCCH 2000 Protection of Adults Convention", Prel. Doc. No 2 of September 2020 drawn up for the attention of the First Meeting of the SC (available on the HCCH website at [www.hcch.net](http://www.hcch.net) under "Protection of Adults" then "Questionnaire and responses"). See responses to question 3.3.

<sup>95</sup> Hungary. This measure may fall under Art. 3(c) "analogous institutions".

- *Ad hoc* guardian appointed by a court in the event of a conflict of interest.<sup>96</sup>
- Intervention order, which is analogous to a “one-off” guardianship order.<sup>97</sup>

### Article 15

- 3.32 While agreed or unilaterally declared powers of representation are not a measure of protection under Article 3, they are covered by the Convention in its Chapter III on applicable law<sup>98</sup> and Chapter V on cooperation.

## D. Which matters are not covered by the 2000 Convention?

### Article 4

- 3.33 Article 4 provides an exhaustive list of matters or questions which are excluded from the scope of the 2000 Convention. Unlike Article 3 which is open-ended, Article 4 is finite, and any measure intended for the protection of the person or property of an adult which is not excluded by Article 4 may fall under the scope of the Convention.<sup>99</sup>
- 3.34 Since the 2000 Convention deals exclusively with measures that relate to the protection of the adult, issues surrounding, for instance, the adult's nationality or matters relating to any civil liability on the adult's part, do not come under the scope of the Convention, without the need for these matters to be explicitly listed under Article 4.<sup>100</sup>
- 3.35 Article 4(2) ensures that these exclusions are limited to what is strictly necessary.<sup>101</sup> These exclusions should all be understood narrowly, and measures of protection relating to those matters do fall under the Convention, when they concern the representation of the adult, in accordance with Article 4(2).<sup>102</sup>

### (a) maintenance obligations

- 3.36 Maintenance obligations are excluded from the scope of application of the Convention. When the 2000 Convention was adopted, the subject matter was covered by the two HCCH Conventions of 2 October 1973.<sup>103</sup> These have since been replaced by the *Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance* (“2007 Child Support Convention”) and the *Protocol*

<sup>96</sup> Slovakia. This measure may fall under Art. 3(d).

<sup>97</sup> United Kingdom (Scotland). This measure may fall under Art. 3(g).

<sup>98</sup> See, *supra*, **Chapter 2, section C**. See also, *infra*, **Chapter 9, section C**.

<sup>99</sup> The Explanatory Report (*op. cit.* note 12), para. 29.

<sup>100</sup> *Ibid.*, para. 30.

<sup>101</sup> *Ibid.*, para. 46.

<sup>102</sup> For more detailed explanations of this issue, please refer to the Explanatory Report (*op. cit.* note 12), para. 46. See also, *infra*, paras 3.41, 3.43 and 3.48.

<sup>103</sup> *Ibid.*, para. 32. *Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations* and *Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations*.

of 23 November 2007 on the Law Applicable to Maintenance Obligations ("2007 Maintenance Obligations Protocol").

**(b) the formation, annulment and dissolution of marriage or any similar relationship, as well as legal separation**

- 3.37 Matters that relate to marriage or any similar relationship are excluded in an effort to avoid conflict with the *Convention of 14 March 1978 on Celebration and Recognition of the Validity of Marriages* ("1978 Marriage Convention").<sup>104</sup> The term "any similar relationship" is to be understood as any officially recognised form of union.
- 3.38 It should be noted that the 2000 Convention will still apply to the effects of marriage and similar relationships.<sup>105</sup> That is, rules governing relations between partners, and particularly the representation between partners independently of the applicable matrimonial property regime, are included in the Convention insofar as they are aimed at the protection of the impaired partner.<sup>106</sup>

**(c) property regimes in respect of marriage or any similar relationship**

- 3.39 Matrimonial property regimes are excluded in an effort to avoid conflict with the *Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes* ("1978 Matrimonial Property Regimes Convention").<sup>107</sup>
- 3.40 This exclusion is aimed at the functioning of a property regime. Similar to the exclusion in Article 4(b), it would not extend to the effects of marriage and similar relationships which are within the scope of the Convention.<sup>108</sup>

**Example 3.E**

A couple, both nationals of Contracting Party B, habitually reside in Contracting Party A. They have each granted a power of representation wherein they have each designated a representative in accordance with the law of Contracting Party A. The powers give general authority to representative(s) in all matters, which includes the power to sign a marriage contract or contracts to change the matrimonial property regime.

The couple have since moved back to Contracting Party B (their new State of habitual residence) and got married there. Upon the impairment of one of the spouse's personal faculties, their power has now become

<sup>104</sup> The Explanatory Report (*op. cit.* note 12), para. 33.

<sup>105</sup> *Ibid.*, para. 35.

<sup>106</sup> *Ibid.*

<sup>107</sup> *Ibid.*, para. 36.

<sup>108</sup> *Ibid.*

operational. To cover the costs of medical treatment for them, their representative wants to sell marital property. For this, the matrimonial property regime must be changed with a marriage contract.<sup>109</sup> Article 4(1)(c) of the Convention excludes property regimes in respect of marriage from its scope. However, Article 4(2) provides that Article 4(1) does not affect the entitlement of a person to act as the representative of the adult. The power granted may be relied upon in this situation in accordance with Article 15.

#### (d) trusts or succession

- 3.41 Trusts are excluded as the 2000 Convention should not encroach on systems of ownership and more generally on the categories of property rights. This also avoids conflict with the *Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition* ("1985 Trusts Convention").<sup>110</sup>
- 3.42 This exclusion is limited to the rules relating to the functioning of the trust. For example, the designation of a representative who is authorised to receive trust revenues or to receive trust property in the adult's name would still fall within the scope of the 2000 Convention because the designation of a representative is a measure of protection of the adult and the trust in this case is an ancillary issue.<sup>111</sup>
- 3.43 Succession is excluded in an effort to avoid conflict with the *Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons* ("1989 Succession to Estates Convention").<sup>112</sup>

#### (e) social security

- 3.44 Matters relating to social security are excluded because the determination of benefits depends on precise connecting factors, such as the place of work or habitual residence of the adult, which do not necessarily correspond with the 2000 Convention rules.<sup>113</sup>
- 3.45 Designating a representative to receive social security benefits on behalf of the adult who is not in a position to protect their interests, would come within the scope of the 2000 Convention, except insofar as social security regulations provide specific rules.<sup>114</sup>
- 3.46 Cash benefits or social welfare benefits in kind are also excluded from the scope of the 2000 Convention. This allows a State to offer these benefits without other Contracting

<sup>109</sup> In this example, other issues may have to be considered such as jurisdiction, manner of exercise of powers of representation (Art 15(3)) and public policy (*i.e.*, mandatory rules (Art. 20)).

<sup>110</sup> The Explanatory Report (*op. cit.* note 12), para. 37.

<sup>111</sup> *Ibid.*

<sup>112</sup> *Ibid.*, para. 38.

<sup>113</sup> *Ibid.*, para. 39.

<sup>114</sup> *Ibid.*

Parties being bound to recognise those decisions and, where appropriate, assume responsibility for implementing them.<sup>115</sup>

- 3.47 The exclusion from the scope of the Convention of social security as a measure *per se* does not limit the competence of social security services to take measures of protection, when domestic law provides for it, such as the designation of a person to assist the adult.

#### (f) public measures of a general nature in matters of health

- 3.48 This exclusion is not intended to capture health in its entirety. Rather, it is targeted towards public measures of a general nature, such as compulsory vaccination, mandatory health check-ups (e.g., cancer prevention check-ups) or the prohibition of certain drugs.<sup>116</sup>

#### Example 3.F

Following the outbreak of a global pandemic, Contracting Party A passes a law making the vaccination of all residents above the age of 60 mandatory. Contracting Party B, the State of habitual residence of an adult, has not legislated in that regard. If this adult were to seek treatment in Contracting Party A, the issue of compulsory vaccination would not fall within the scope of the 2000 Convention in accordance with Article 4(1)(f).

- 3.49 The Special Commission of a diplomatic character considered that, while medical acts or interventions carried out by medical practitioners (who are not competent authorities within the meaning of the Convention) fall outside of its scope, legal questions regarding the representation of an adult in connection with such medical acts or interventions do fall within the scope of the Convention and are, as such, subject to its rules.<sup>117</sup> Therefore, specific decisions about the care of a particular adult will fall within the scope of the 2000 Convention.<sup>118</sup> For instance, decisions such as placing an adult in a specialised care institution (Art. 3l) or having an adult undergo a surgical procedure (Art. 3(g)) are specific measures of protection that may be taken by a competent authority in accordance with the Convention. These decisions may also be within the powers of a person to whom the adult has granted powers of representation or within the authority of the person designated to represent the adult as a result of a measure of protection taken in accordance with the Convention. As a result, Article 4(2) keeps all matters regarding the legal representation of the adult within the scope of the Convention, even when such matters relate to fields excluded by Article 4(1).

<sup>115</sup> *Ibid.*

<sup>116</sup> *Ibid.*, para. 40.

<sup>117</sup> *Ibid.*, para. 42.

<sup>118</sup> *Ibid.*



- 3.50 The provisions of Article 20, on mandatory laws, and of Article 21, on public policy, sufficiently address the concerns of those States which were opposed to the inclusion of medical matters within the scope of the Convention.<sup>119</sup> Article 20 provides that, where the application of certain provisions of the law relating to, for example, health is mandatory in the State where the adult is to be protected, the Convention does not prevent the application of those provisions, even if the protection of the adult has been arranged according to another law. Furthermore, in accordance with Article 21, the application of a law designated by the 2000 Convention can be refused, but only if this application would be manifestly contrary to the public policy of the State concerned.

**(g) measures taken in respect of a person as a result of penal offences committed by that person**

- 3.51 This exclusion recognises the competence of Contracting Parties to respond to penal offences with the legal consequences which they deem appropriate, whether punitive or educational.<sup>120</sup> This is limited to consequences resulting from the offences committed by the person requiring protection and not offences committed by third parties.<sup>121</sup>
- 3.52 For this exclusion to apply, it is necessary that the act committed by the person in need of protection be an act which is criminal under penal law.<sup>122</sup>
- 3.53 The use of the term "person" as opposed to "adult" in this provision should be construed as an inclusion of cases where the offence was committed by the person requiring protection when they were still a minor, meaning that the measure is taken after the person who has committed the offence has attained 18 years of age.<sup>123</sup>

**(h) decisions on the right of asylum and on immigration**

- 3.54 This exclusion is based upon the understanding that matters of asylum and immigration are decisions which derive from the sovereign power of States.<sup>124</sup> It is limited to decisions directly relating to asylum and immigration, such as the granting of asylum or a residence permit; the protection and representation of adults applying for asylum, or a residence permit would still fall within the scope of the Convention.<sup>125</sup>

**(i) measures directed solely to public safety**

- 3.55 This exclusion primarily concerns the confinement of adults who are a danger to third parties, due to an impairment or insufficiency of their personal faculties.<sup>126</sup> Such

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<sup>119</sup> *Ibid.*

<sup>120</sup> *Ibid.*, para. 43.

<sup>121</sup> *Ibid.*

<sup>122</sup> *Ibid.*

<sup>123</sup> *Ibid.*

<sup>124</sup> *Ibid.*, para. 44.

<sup>125</sup> *Ibid.*

<sup>126</sup> *Ibid.*, para. 45.

excluded placement is of the sort ordered on the grounds of public safety and not of the sort prescribed to protect the adult; an enforced placement measure order in the interests of both public safety and the adult is still included within the scope of the Convention.<sup>127</sup>

## E. The case of *ex lege* representation

- 3.56 *Ex lege* representation is not, as such, a measure of protection under Article 3 because it is not put in place by a competent authority, nor is it a power of representation under Article 15 because it has not been granted by the adult. *Ex lege* representation is a representation that arises by operation of law, for which there is no specific conflict rule in the Convention.<sup>128</sup> While there is no provision in the Convention that deals with *ex lege* representation *per se*, such representation falls under the scope and object of the Convention by virtue of Article 1 when it is aimed at the protection of adults who, by reason of an impairment or insufficiency of their personal faculties, are not in a position to protect their interests (Art. 1(1)). Thus, *ex lege* representation may be the subject of cooperation between the authorities of Contracting Parties (Art. 1(2) and Chapter V).<sup>129</sup> In general, competent authorities will give effect to *ex lege* representation in accordance to their own law, including, where appropriate, their rules of private international law.<sup>130</sup>
- 3.57 Moreover, it is important to note that a number of States may provide mandatory laws that require the authorisation of the spouse (*i.e.*, a spouse covered by the marital *ex lege* representation) or next of kin for certain medical treatments for the adult or their placement in a health institution.

### Example 3.G

A couple, habitually resident in Contracting Party A, are visiting family in Contracting Party B. An accident plunges one of the partners into a coma, making them an "adult" within the meaning of the 2000 Convention. By virtue of the domestic laws in both Contracting Party A and B, the partner

<sup>127</sup> *Ibid.*

<sup>128</sup> It is to be noted that, a person representing the adult *ex lege* may also be the representative of the adult either under Art. 3 when they are designated as a representative by a competent authority or Art. 15 where they are appointed as a representative by the adult themselves in a power of representation.

<sup>129</sup> The Explanatory Report (*op. cit.* note 12), paras 35 and 90. See, also, "Application of the 2000 Protection of Adults Convention to *ex lege* representation", Prel. Doc. No 5 of October 2022 (revised version) drawn up for the attention of the First Meeting of the SC (see path indicated in note 7). See, also, C&R No 22 of the First Meeting of the SC (see path indicated in note 7). It should be noted that reference to this Prel. Doc. is for background information only, since the First Meeting of the SC concluded and recommended differently than what was suggested in the Prel. Doc.

<sup>130</sup> It is noted that the laws of some States may not give effect to *ex lege* representation established abroad. For more information on the laws of specific States, please refer to Section VIII, question 30 of the Country Profile under the 2000 Convention.

of the adult would become their representative by operation of law and would be responsible for taking medical decisions on behalf of the adult. Before any serious medical decisions are taken regarding the treatment of the adult, the hospital in Contracting Party B seises a local competent authority. The competent authority directly contacts the Central Authority of Contracting Party B under Article 32(1), which then, in the spirit of cooperation under the Convention, requests more information from the Central Authority of Contracting Party A regarding their domestic legislation on *ex lege* representation. Such cooperation between Central Authorities will ensure that there is no gap in the protection of the adult.

- 3.58 During the First Meeting of the Special Commission, possible amendments to the Convention were discussed, including the addition of a new conflict rule for *ex lege* representation.<sup>131</sup> The Special Commission discussed the past lack of consensus regarding the inclusion of a conflict rule on *ex lege* representation in the text of the 2000 Convention and, given that no States had reported any practical issues in this area to date, the Special Commission noted that the absence of such a conflict rule from the Convention would not create insurmountable difficulties. It was, therefore, concluded that, at the time of writing, there is currently no need or interest in adding a new conflict rule for *ex lege* representation.<sup>132</sup>

## F. Voluntary anticipatory acts containing the instructions given and wishes made by an adult

- 3.59 Instructions given and wishes made by an adult can be found in various types of voluntary, anticipatory acts such as advance directives<sup>133</sup>, advance arrangements, advance healthcare decisions or (continuing) powers of attorney. Unilateral acts containing instructions and wishes, without necessarily designating an individual to carry them out, are important tools in ensuring the exercise of the adult's autonomy.<sup>134</sup>

<sup>131</sup> See, also, "Possible Amendments to the 2000 Protection of Adults Convention.", Prel. Doc. No 12 of October 2022 drawn up for the attention of the First Meeting of the SC (see path indicated in note 7).

<sup>132</sup> See C&R Nos 70 and 71 of the First Meeting of the SC (see path indicated in note 7). This was endorsed by CGAP at its March 2023 meeting (see CGAP 2023, C&D No 33 (see path indicated in note 8).

<sup>133</sup> Council of Europe, "Principles concerning continuing powers of attorney and advance directives for incapacity (Recommendation CM/Rec(2009)11 and explanatory memorandum)" ("Council of Europe Recommendation (2009)11"), Council of Europe Publishing, May 2011. The Recommendation defines "advance directives" as "instructions given or wishes made by a capable adult concerning issues that may arise in the event of his or her incapacity".

<sup>134</sup> See C&R No 24 of the First Meeting of the SC (see path indicated in note 7). See, also, "Instructions given and wishes made by the adult within the scope of the 2000 Protection of Adults Convention", Prel. Doc. No 6 of October 2022 (revised version) drawn up for the attention of the First Meeting of the SC (see path indicated in note 7). It should be noted that reference to this Prel. Doc. is for background information only, since the First Meeting of the SC concluded and recommended differently than what was suggested in the Prel. Doc.

- 3.60 Voluntary anticipatory acts containing instructions given and wishes made by an adult, in anticipation of a future impairment or insufficiency of their personal faculties may outline the representation and / or assistance they require, to receive the support / care they need in various aspects of their life (e.g., daily assistance, health and wellbeing support etc). Such voluntary anticipatory acts may also contain instructions and wishes as to how the adult would like their property to be managed.
- 3.61 Voluntary anticipatory acts containing the instructions given and wishes made by an adult fall within the general scope of the 2000 Convention under Article 1 and are subject to the cooperation provisions in Chapter V.<sup>135</sup>
- 3.62 The appreciation of whether or not a particular voluntary anticipatory act constitutes a power of representation under Articles 15 and 16 could be undertaken by competent authorities on a case-by-case basis.<sup>136</sup>
- 3.63 The Country Profile is an extremely helpful tool in bringing to the attention of competent authorities, practitioners, and other interested parties the various types and forms of voluntary anticipatory acts containing the instructions and wishes of the adult in different jurisdictions.<sup>137</sup>
- 3.64 During the First Meeting of the Special Commission, possible amendments to the Convention were discussed, including the addition of a provision on instructions given and wishes made by an adult.<sup>138</sup> The Special Commission acknowledged that the absence of a specific conflict rule that covers instructions given and wishes made by an adult, where no powers of representation have been conferred, does not appear to create practical difficulties. It was, therefore, concluded that, at the time of writing, there is currently no need or interest in adding a provision regarding instructions given and wishes made by an adult.<sup>139</sup>

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<sup>135</sup> See C&R No 23 of the First Meeting of the SC (see path indicated in note 7).

<sup>136</sup> *Ibid.*, C&R No 25.

<sup>137</sup> *Ibid.*, C&R Nos 26 and 65. See, also, "2000 Protection of Adults Convention Draft Country Profile", Prel. Doc. No 7 of May 2023 (second revised version) drawn up for the attention of the First Meeting of the SC (see path indicated in note 7).

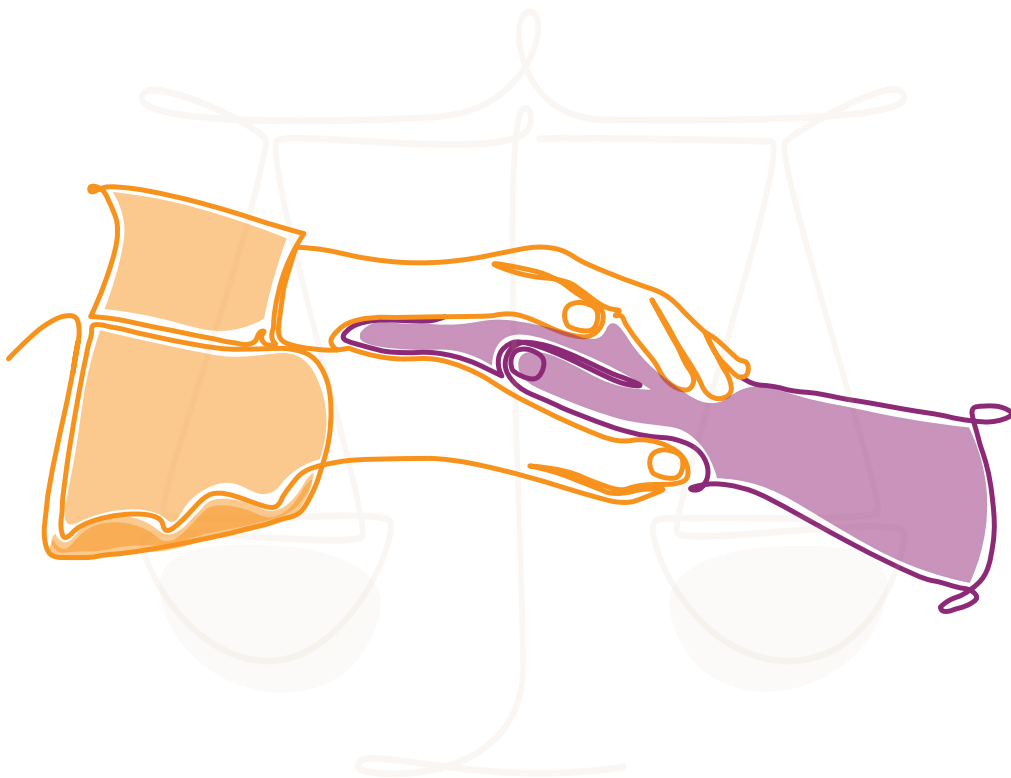
<sup>138</sup> See "Possible Amendments to the 2000 Protection of Adults Convention", Prel. Doc. No 12 of October 2022 (revised version) drawn up for the attention of the First Meeting of the SC (see path indicated in note 7).

<sup>139</sup> See C&R Nos 72 and 73 of the First Meeting of the SC (see path indicated in note 7). This was endorsed by CGAP at its March 2023 meeting (see CGAP 2023, C&D No 33 (see path indicated in note 8)).



# 4

## Jurisdiction to take measures of protection





## A. Introduction

- 4.1 The rules on jurisdiction are laid down in Articles 5 to 12 of the 2000 Convention.
- 4.2 The rules on jurisdiction, contained in Chapter II of the 2000 Convention and analysed in the following Chapters, form a complete and closed system which applies as an integral whole to Contracting Parties.<sup>140</sup> This "complete and closed system" does not allow for conflicting jurisdictions among Contracting Parties and, as an "integral whole", may necessitate coordination between competent authorities when taking, assuming or transferring jurisdiction under the Convention.<sup>141</sup> Through such coordination, only one competent authority may take jurisdiction at a given time, over a specific matter, thus avoiding conflicting decisions.<sup>142</sup> Under the Convention, competent authorities are not authorised to exercise jurisdiction over an adult that habitually resides in another Contracting Party if such jurisdiction is not provided for in the text of the Convention (*i.e.*, in Arts 5, 6, 7, 8, 9, 10 and 11).<sup>143</sup>
- 4.3 Where the habitual residence of the adult is in a non-Contracting Party, additional bases of jurisdiction may be applied by the competent authorities of a Contracting Party in accordance with their non-Convention domestic rules. In such cases, other Contracting Parties are not bound to recognise the measures of protection taken under these bases of jurisdiction, which are not provided for in the 2000 Convention.<sup>144</sup>

## B. When do the authorities of a Contracting Party have jurisdiction to take measures of protection?

- 4.4 While the Convention outlines which Contracting Party has jurisdiction, it does not determine which authority within that Contracting Party is competent. This is a matter to be determined by domestic laws.
- 4.5 Primary jurisdiction<sup>145</sup> is attributed to the competent authorities of the State of the habitual residence of the adult<sup>146</sup> or, in the case of refugees and internationally displaced persons or adults whose habitual residence cannot be established, the presence of the adult.<sup>147</sup>
- 4.6 Concurrent subsidiary jurisdiction<sup>148</sup> is given to the competent authorities of the State of the nationality of the adult.<sup>149</sup> In addition, the Contracting Party having primary

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<sup>140</sup> The Explanatory Report (*op. cit.* note 12), para 89.

<sup>141</sup> See C&R No 8 of the First Meeting of the SC (see path indicated in note 7).

<sup>142</sup> *Ibid.*, C&R No 9.

<sup>143</sup> The Explanatory Report (*op. cit.* note 12), para. 89.

<sup>144</sup> *Ibid.* See, also, Art. 22(2)(a).

<sup>145</sup> See Glossary: "primary jurisdiction".

<sup>146</sup> Art. 5.

<sup>147</sup> Art. 6(1) and 6(2).

<sup>148</sup> See Glossary: "concurrent jurisdiction" and "subsidiary jurisdiction".

<sup>149</sup> Art. 7.



jurisdiction under Article 5 or 6 may consent to the transfer of jurisdiction to another Contracting Party under Article 8 of the Convention. The request for a transfer of jurisdiction can take place on the motion of the competent authorities having primary jurisdiction under Article 5 or 6 or on an application by the competent authority of another Contracting Party.<sup>150</sup>

- 4.7 General jurisdiction<sup>151</sup> refers to the extent to which the competent authorities of a State are entitled to take measures. Competent authorities with general jurisdiction are entitled to take any measures that are required by the situation, without any limitations as to material, personal, temporal and territorial scope. This means that such measures can relate to any matter pertaining to the protection of the person or property of the adult concerned and that they will have effect in any territory, with no limitation as to their duration. General jurisdiction is given to competent authorities exercising jurisdiction under Articles 5, 6, 7 and 8.
- 4.8 The 2000 Convention also provides for jurisdiction based on where property of the adult is situated, but only for measures of protection concerning that property.<sup>152</sup> It also provides for jurisdiction based on urgency,<sup>153</sup> whereby the competent authorities of the Contracting Party where the adult is present, or their property is located, may take emergency measures. Exceptionally, competent authorities of the Contracting Party in the territory of which the adult is present may exercise jurisdiction to take temporary measures, with limited territorial effect, independently of the cases of urgency.<sup>154</sup>
- 4.9 The 1997 Special Commission<sup>155</sup> discussed the applicability of a *lis pendens* rule but, ultimately, it was preferred to have a ground of primary jurisdiction under Articles 5 and 6. Instead of *lis pendens*, it was concluded that there would be cooperation between competent authorities as to when the competent authorities which would have concurrent subsidiary jurisdiction (*i.e.*, under Arts 7, 9, 10 and 11) could exercise that jurisdiction.<sup>156</sup> Given that any urgent measures of protection taken by the competent authorities of the Contracting Party exercising jurisdiction under Article 10 will lapse as soon as the competent authorities with jurisdiction under Articles 5 to 9 have taken a

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<sup>150</sup> Art. 8.

<sup>151</sup> See Glossary: "general jurisdiction".

<sup>152</sup> Art. 9.

<sup>153</sup> Art. 10.

<sup>154</sup> Art. 11.

<sup>155</sup> The Eighteenth Session of the HCCH decided that a draft Convention on the protection of adults should be adopted during a Special Commission instituted for that purpose, following the adoption of what became the 1996 Child Protection Convention. Based on that decision, the Permanent Bureau set up a Special Commission whose work was prepared by a Working Group which met in The Hague from 14 to 16 April 1997. This Working 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 draft Convention met in The Hague from 3 to 12 September 1997. This Special Commission drew up a draft Convention which, together with the accompanying Report, served as a basis for discussion in the proceedings of the Special Commission of a diplomatic character which met in The Hague from 20 September to 2 October 1999. Reports and other relevant materials can be found in the *Proceedings of the Special Commission of a diplomatic character* (*op. cit.* note 13).

<sup>156</sup> The Explanatory Report (*op. cit.* note 12), para. 47.

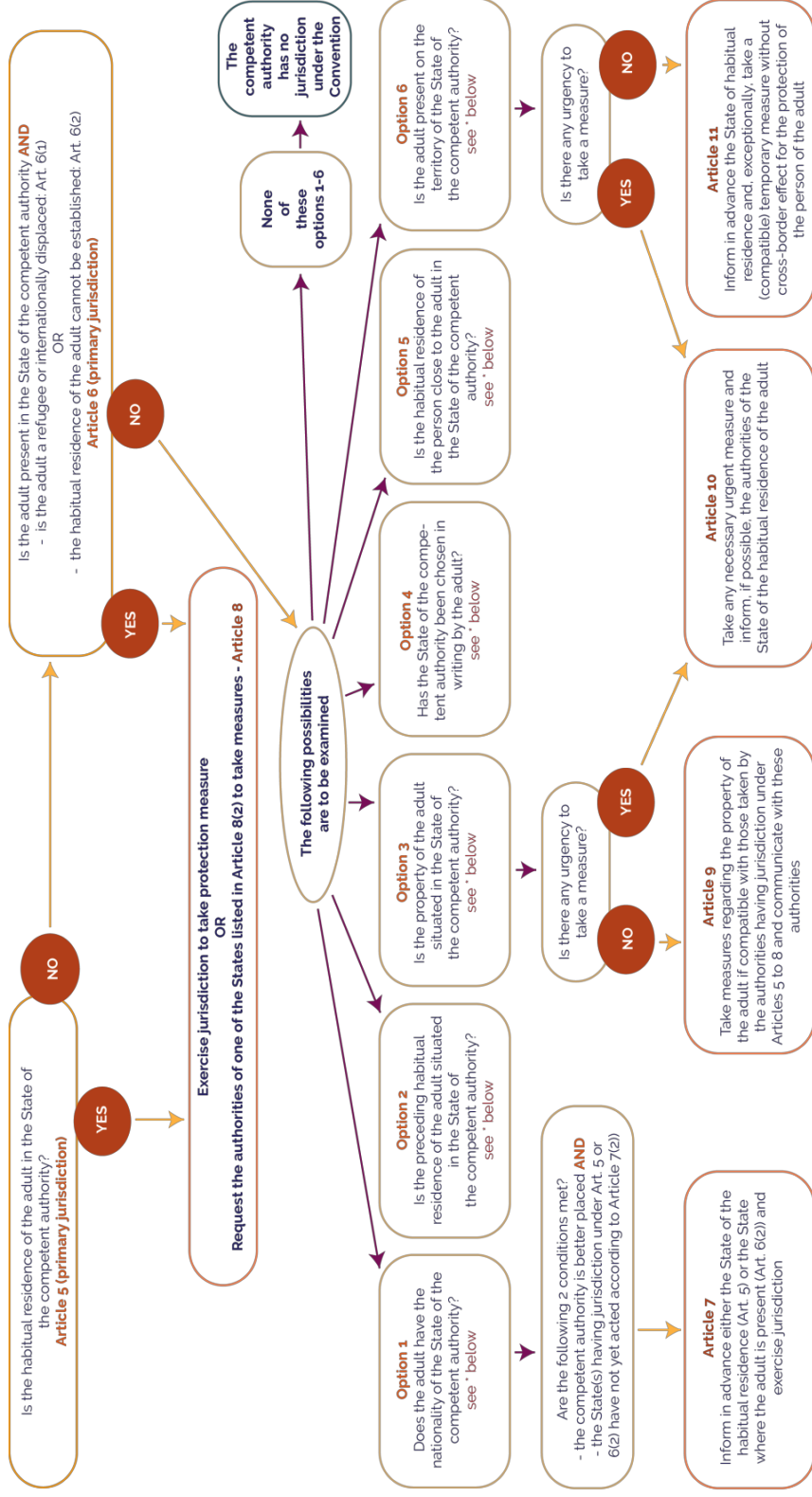
decision, Contracting Parties should communicate regarding the most effective way to protect the interests of the adult.<sup>157</sup>

- 4.10 When an application concerning measures directed at the protection of the adult or their property is made to a competent authority of a Contracting Party, the following analysis should be carried out to determine if that competent authority has jurisdiction to take measures of protection.

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<sup>157</sup> Art. 10(4). See also **Chapter 6**, para. 6.3 and **Chapter 7**, para. 7.2.

#### 4.11 The rules of jurisdiction under the 2000 Convention



\* Under options 1 to 6, it is possible for these competent authorities to make an application to the authorities having jurisdiction under Article 5 or 6 for the primary jurisdiction of the latter to be transferred to the former competent authorities (Article 8)

It is to be noted that:

- In option 1, the only interest that the competent authorities may have in giving preference to the transfer mechanism of Art. 8, instead of taking full jurisdiction under Art. 7, would rest on the consideration that the measure taken would not be subject to a possible future termination by the competent authorities having jurisdiction under Art. 5 or 6(2), as provided by Art. 7(3).
- In option 3, by making an application to receive the jurisdiction under Art. 8, the competent authorities can obtain a free scope jurisdiction even in a non-urgent situation, while the scope of the jurisdiction they have under Art. 9 is limited to the property of the adult.
- In options 2, 4 and 5, the competent authorities have no inherent jurisdiction and as a result they can only make an application to the authorities having jurisdiction under Article 5 or 6 for the primary jurisdiction of the latter to be transferred to them.
- In option 6, by making an application to receive the jurisdiction under Art. 8, the competent authorities can obtain the jurisdiction for the protection of the personal matters of the adult, even in a non-urgent situation, which, unlike the jurisdiction based on Art. 11, has unlimited effect territorially and temporally.

## C. The general rule – the authorities of the Contracting Party of the habitual residence of the adult

### Article 5

#### QUICK OVERVIEW of the jurisdiction under Article 5

- Connecting factor: the habitual residence of the adult / new habitual residence of the adult
- Primary jurisdiction
- Free scope of jurisdiction: unlimited subject matter jurisdiction
- This jurisdiction can be delegated to competent authorities of a State listed under Article 8(2)
- COMMUNICATION/CO-OPERATION requirements:
  - ✓ Communication recommended in case of change of habitual residence of the adult (Art. 5(2))
  - ✓ Communication required if measures have been taken or are to be taken in another State under Article 7
  - ✓ Communication recommended if urgent or temporary measures have been taken or are to be taken in another State under Article 10 or 11
  - ✓ Co-operation

4.12 The main rule of jurisdiction under the 2000 Convention is that measures of protection should be taken by the competent authorities of the Contracting Party of the habitual residence of the adult.<sup>158</sup>

#### (a) The meaning of “habitual residence”

4.13 Habitual residence is not defined under any of the HCCH Conventions which make use of the concept and the 2000 Convention is no exception. The interpretation of the concept of habitual residence has been left intentionally open, as providing a concrete definition in one Convention could cause interpretational doubts in the numerous other Conventions in which the term is used. Therefore, habitual residence is to be understood as an autonomous concept and should be interpreted in light of the objectives of the Convention in which it is used, in this case the 2000 Convention.

<sup>158</sup> Art. 5(1).

Habitual residence should be determined by the relevant competent authorities in each case on the basis of factual elements.<sup>159</sup>

- 4.14 The concept and interpretation of habitual residence is elaborated upon in more detail in Chapter 13 of this Handbook.

### **(b) What happens when the “habitual residence” of the adult changes?**

- 4.15 Since jurisdiction follows the habitual residence of the adult, if the habitual residence of the adult changes to another Contracting Party, the competent authorities of the new habitual residence will have primary jurisdiction.<sup>160</sup> This change may be, depending on the circumstances, instantaneous or may occur after a certain lapse of time. Depending on the particular circumstances, the relocation of the adult to another State may result in their acquisition of a new habitual residence. Either way, this is a question of fact which will be assessed by the competent authorities called upon to make a decision on this matter.<sup>161</sup> The competent authority seised is the only one that has to determine the habitual residence of the adult and whether it has jurisdiction under the Convention.<sup>162</sup> This will be determined based on the facts presented by the parties. In case of a change of habitual residence, the competent authority seised could consult, if necessary, the competent authorities of the former State of habitual residence, to obtain information relevant to determining whether the former competent authority is also seised and would continue to exercise jurisdiction under other grounds (e.g., Art. 7) or if it would be appropriate to request a transfer of jurisdiction under Article 8.<sup>163</sup>
- 4.16 It should be noted that a change of the habitual residence of the adult does not terminate any measures already taken. These measures will remain in force until competent authorities having jurisdiction under the Convention modify, replace or terminate them.<sup>164</sup>
- 4.17 Where the habitual residence of the adult changes from one Contracting Party to another, including during pending proceedings for a measure of protection<sup>165</sup>, the previous State of habitual residence will no longer have primary jurisdiction by virtue of Article 5(1). Primary jurisdiction will move to the competent authority of the Contracting Party of the new habitual residence of the adult.<sup>166</sup> As far as the competent

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<sup>159</sup> See C&R No 6 of the First Meeting of the SC (see path indicated in note 7).

<sup>160</sup> Art. 5(2). *Ibid.*, C&R No 11.

<sup>161</sup> The Explanatory Report (*op. cit.* note 12), para. 50. See, also, C&R No 10 of the First Meeting of the SC (see path indicated in note 7).

<sup>162</sup> It may be that, in rare circumstances, several authorities are seised at the same time. It is important to understand that authorities that are consulted but not seised cannot make a determination regarding the habitual residence of the adult.

<sup>163</sup> See C&R No 10 of the First Meeting of the SC (see path indicated in note 7).

<sup>164</sup> Art. 12. For further discussion on the continuation of measures, see, *infra*, **Chapter 8**.

<sup>165</sup> The Explanatory Report (*op. cit.* note 12), para. 51.

<sup>166</sup> *Ibid.* See, also, C&R No 11 of the First Meeting of the SC (see path indicated in note 7).

authorities of the former habitual residence are concerned, a change of habitual residence obliges them to verify, if seised, whether they may still exercise concurrent, subsidiary jurisdiction in accordance with the Convention (e.g., on the basis of nationality or the location of the property, or whether they need to take a provisional or urgent measure) and, if not, to declare that they do not have jurisdiction. In cases where the jurisdiction of the previous State of habitual residence does continue to apply on another ground, the competent authority can pursue the examination of the case but must take into account that the new ground of jurisdiction is no longer primary but subsidiary. This entails an obligation or recommendation to inform the competent authority of the new habitual residence, depending on the relevant rules and circumstances.<sup>167</sup> Of course, in circumstances of urgency, this duty is imposed only to the extent that carrying it out is within the realm of possibility.<sup>168</sup> When it comes to the ground of jurisdiction under Article 9, the competent authorities of the State where the property of the adult is located must ensure that the measures taken or contemplated are compatible with those taken by the competent authorities with general jurisdiction under Articles 5 to 8. The jurisdiction of the previous State of habitual residence may also continue to apply by virtue of a transfer of jurisdiction under Article 8(2)(b) or 8(2)(d) (where the competent authorities of that State were designated in writing by the adult). This will be discussed in detail in Chapter 5 of this Handbook.

- 4.18 Where the habitual residence of the adult changes to a non-Contracting Party,<sup>169</sup> including during proceedings for a measure of protection, the competent authorities of the previous State of habitual residence may still be in a position to exercise jurisdiction in accordance with the Convention (e.g., to take urgent measures on the basis of the location of the property) or they may base their jurisdiction on their domestic non-Convention rules, assuming the Contracting Party has different jurisdictional rules for Convention and non-Convention cases.<sup>170</sup> However, the 2000 Convention does not oblige other Contracting Parties to recognise any measures taken by an authority whose jurisdiction was not based on, or was not in accordance with, one of the grounds of jurisdiction provided for by the Convention.<sup>171</sup>

## D. Additional grounds of jurisdiction

- 4.19 Articles 6, 7, 9, 10<sup>172</sup> and 11<sup>173</sup> set out additional grounds of jurisdiction, i.e., instances where jurisdiction lies with a Contracting Party that is not the habitual residence of the adult, as established by Article 5. These additional grounds can either provide primary jurisdiction (i.e., Art. 6 which provides a level of jurisdiction tantamount to that

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<sup>167</sup> Art. 7(1).

<sup>168</sup> The Explanatory Report (*op. cit.* note 12), para. 82.

<sup>169</sup> *Ibid.*, para. 52.

<sup>170</sup> It is important to note that some Contracting Parties may have decided to apply the jurisdiction rules of the 2000 Convention to all cross-border situations, including with non-Contracting Parties.

<sup>171</sup> Art. 22(2)(a). See, also, the Explanatory Report (*op. cit.* note 12), para. 52.

<sup>172</sup> See, *infra*, Chapter 6.

<sup>173</sup> See, *infra*, Chapter 7.

envisioned in Art. 5) or provide concurrent and subsidiary jurisdiction (*i.e.*, Arts 7, 9, 10 and 11).

- 4.20 It should be noted that the provisions in Articles 6, 9,<sup>174</sup> 10<sup>175</sup> and 11 may apply to adults even if their present State of habitual residence is not a Contracting Party to the 2000 Convention.<sup>176</sup>

#### QUICK OVERVIEW of the jurisdiction under Article 6

- Connecting factor: presence of the adult
- Condition: 1) the adult is a refugee or internationally displaced OR 2) the habitual residence of the adult cannot be determined
- Primary jurisdiction
- Free scope of jurisdiction: unlimited subject matter jurisdiction
- This jurisdiction can be delegated to competent authorities of a State listed under Article 8(2)
- COMMUNICATION/CO-OPERATION requirements:
  - ✓ Communication required if measures have been taken or are to be taken in another State under Article 7
  - ✓ Communication recommended if urgent or temporary measures have been taken or are to be taken in another State under Article 10 or 11
  - ✓ Co-operation required in case of use of the transfer mechanism under Article 8

<sup>174</sup> The Explanatory Report (*op. cit.* note 12), para. 75.

<sup>175</sup> *Ibid.*, para. 81.

<sup>176</sup> For instance, the habitual residence of an adult could be in a non-Contracting Party but an authority in a Contracting Party can be seised on the basis of Article 6. Additionally, this same adult could have property in another Contracting Party and the authorities of this State could be seised on the basis of Art. 9.

**(a) Refugees<sup>177</sup> or internationally displaced adults****Article 6(1)**

- 4.21 If an adult is a refugee or is internationally displaced, the competent authorities of the Contracting Party in the territory of which the adult is present have jurisdiction to take measures of protection.<sup>178</sup> The term "internationally displaced" is intended to be sufficiently broad to overcome limits that may be attached to the definition of "refugee".
- 4.22 By virtue of their international displacement, the adult may have broken all links with the State of their previous habitual residence, or it would be unrealistic to seek a measure of protection from that State, but the adult cannot be considered sufficiently settled for the purposes of acquiring a new habitual residence.<sup>179</sup> Measures of protection that can be ordered under this general ground of jurisdiction are not limited to urgent measures prescribed under Article 10. They include all measures that a State could take under the main ground of jurisdiction in Article 5.

**Example 4.A**

An adult experiencing early-stage Alzheimer's disease leaves Contracting Party A, which is in a state of civil unrest, and arrives in Contracting Party B to seek asylum. Not long after arriving in Contracting Party B, the cognitive condition of the adult deteriorates drastically, resulting in an inability to perform most common activities of daily living. Under Article 6(1), Contracting Party B has jurisdiction to take measures for the protection of the adult, such as placing them in a care institution which offers the full-time attention they need. While the Convention does not apply to decisions on the right of asylum and on immigration, the Convention will apply to the question of arranging representation for the adult in any asylum claim.

**Example 4.B**

A young adult is living with cerebral palsy. Due to the severity and complexity of their particular condition, the young adult requires the full-time care and support of their parent. The family holds political views that have made them the targets of political persecution in their home State, State A (which is not a Contracting Party to the 2000 Convention). The parent manages to get the young adult safely on a boat with the help of bystanders, in order to flee the State, but is apprehended before they

<sup>177</sup> This provision intends to cover refugees at any time during the process of their refugee status.

<sup>178</sup> Art. 6(1).

<sup>179</sup> The Explanatory Report (*op. cit.* note 12), para. 54.



could get on board themselves. The young adult arrives in State B (a Contracting Party to the 2000 Convention). Under Article 6(1), State B has the general jurisdiction normally attributed to the competent authorities of the State of the habitual residence of the young adult and may, therefore, take measures for the protection of the young adult, such as appointing a full-time caretaker. Again, while the Convention does not apply to decisions on the right of asylum and on immigration, the Convention does apply to the question of arranging representation for the young adult in any asylum claim.

## (b) Adults whose habitual residence cannot be established

### *Article 6(2)*

- 4.23 If the habitual residence of an adult cannot be established, the competent authorities of the Contracting Party in the territory of which the adult is present have jurisdiction to take measures of protection.<sup>180</sup>
- 4.24 This ground of jurisdiction will cease whenever it has been established that the adult has a habitual residence somewhere.<sup>181</sup> If this habitual residence is within the territory of a Contracting Party, the competent authorities of that State will have primary jurisdiction and the competent authorities of the Contracting Party where the adult is present will only retain jurisdiction if it can be exercised in accordance to the conditions in Article 7, 9 10 or 11.<sup>182</sup> A transfer of jurisdiction can also be contemplated under Article 8(2)(f). If the habitual residence is in a non-Contracting Party, the competent authorities of the Contracting Party in which the adult is present will retain the limited jurisdiction of Articles 10 and 11 of the 2000 Convention<sup>183</sup> or may fall back on grounds provided under their domestic non-Convention rules.<sup>184</sup> That is of course if the adult is not a refugee or an internationally displaced person.
- 4.25 The situation envisaged by Article 6(2) is to be distinguished from that of the change of habitual residence provided for in Article 5(2) and should be understood as a provision

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<sup>180</sup> Art. 6(2).

<sup>181</sup> The Explanatory Report (*op. cit.* note 12), para. 55.

<sup>182</sup> In other words, if the competent authorities of the Contracting Party of which the adult is a national (Art. 7) need to take measures of protection, if the competent authorities of the Contracting Party where the property of the adult is located need to take measures of protection that concern that property (Art. 9), if the competent authorities in whose territory the adult is present need to take urgent (Art. 10) or temporary (Art. 11) measures of protection.

<sup>183</sup> It should be noted that, if the property of the adult is located in a Contracting Party, Art. 9 is applicable for matters concerning that property only.

<sup>184</sup> The Explanatory Report (*op. cit.* note 12), para. 55.

that allows for the exercise of jurisdiction in cases of necessity, to ensure measures can be taken if required.<sup>185</sup> This may arise, for example, where a previous habitual residence has been lost, or where there is insufficient evidence to establish habitual residence.

- 4.26 This provision should not be used to give general jurisdiction to the competent authorities of the State in which the adult is present, immediately after arriving in that State, on the basis that the adult would have lost their former habitual residence without yet having acquired a new one. Therefore, a reasonable waiting time is necessary before invoking Article 6(2), in order to ensure that the previous habitual residence has definitely been abandoned. In the interim, in situations of urgency, the competent authorities of the State in which the adult is present could exercise jurisdiction on the basis of Article 10. A mistaken interpretation of Article 6(2) would be especially dangerous in cases where the adult has been transferred without their consent.

#### Example 4.C

A young adult is travelling by train from Contracting Party A to Contracting Party B. The train is involved in a major public transport accident leaving the young adult seriously injured and in a comatose state, from which it is yet unknown when or if they will recover. When the young adult was rescued from the train wreck, no means of identification could be found. As a result, the identity and habitual residence of the young adult could not be established. Six months later, with the adult still in a coma, long-term care and residency arrangements have to be put in place. Therefore, the competent authorities in Contracting Party B take jurisdiction on the basis of Article 6(2).

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<sup>185</sup>

*Ibid.*

### (c) When an adult is a national of the jurisdiction

#### Article 7

##### QUICK OVERVIEW of the jurisdiction under Article 7

- Connecting factor: the nationality of the adult
- Condition: to be in a better position to assess the interest of the adult
- Concurrent subsidiary jurisdiction: jurisdiction ground not available if the authorities having jurisdiction under Article 5, 6(2) or 8 have informed about a decision (to take measures or not to take measures) or about a pending proceeding
- Free scope of jurisdiction: unlimited subject matter jurisdiction
- Measures taken are subject to replacement, termination or modification by the competent authority of another Contracting Party
- COMMUNICATION/CO-OPERATION requirements:
  - ✓ Obligation to communicate: advise the authorities having jurisdiction under Article 5 or 6(2) prior to the taking of any measure
  - ✓ Communication recommended if urgent or temporary measures have been taken in another State under Article 10 or 11

4.27 The competent authorities of a Contracting Party of which the adult is a national may exercise jurisdiction to take measures of protection for the adult or their property, if they consider that they are in a better position to assess the interests of the adult.<sup>186</sup> This may be more than one Contracting Party, if the adult has multiple nationalities.<sup>187</sup>

4.28 This ground of jurisdiction is concurrent yet subsidiary to the jurisdiction set out in Articles 5, 6(2) and 8.<sup>188</sup> Under Article 7, competent authorities may only exercise jurisdiction after giving advance notice of this intention to the competent authorities having primary jurisdiction under Article 5 or 6(2). Moreover, this jurisdiction shall not be exercised if the competent authorities having jurisdiction under Article 5, 6(2), or 8 have informed the competent authorities of the State of which the adult is a national that proceedings are pending before them, that they have taken the measures required

<sup>186</sup> Art. 7(1).

<sup>187</sup> The Explanatory Report (*op. cit.* note 12), para. 57.

<sup>188</sup> *Ibid.*, paras 56 and 61. See also Art. 7(2).

by the situation or have decided that no measures are to be taken.<sup>189</sup> The requirement of the State of the nationality of the adult to notify the competent authorities of the State of the habitual residence of the adult presupposes that the State of habitual residence is a Contracting Party to the 2000 Convention.<sup>190</sup> Otherwise, if an adult is habitually resident or present in a non-Contracting Party, there is nothing to prevent the State of the nationality of the adult from taking measures of protection under its domestic non-Convention rules, without communication mechanisms. In the latter case, Contracting Parties may not be bound to recognise measures taken by the State of nationality of the adult.<sup>191</sup>

- 4.29 The situation foreseen by Article 6(1), where the adult is a refugee or internationally displaced, is excluded from this concurrent subsidiary jurisdiction. In the case of a refugee having been forced to leave their State of nationality and seek international protection in a State of which they are not a national, it is only reasonable that Article 7 cannot apply. Only the State where the adult is present, by virtue of Article 6(1), can assure the protection of the adult.<sup>192</sup> However, if the adult has more than one nationality, it might be possible for one national State, other than the one from which the adult has fled, to exercise jurisdiction under Article 7.<sup>193</sup>
- 4.30 The competent authorities of the State of nationality of the adult may only exercise jurisdiction "if they consider that they are in a better position to assess the interests of the adult".<sup>194</sup> Jurisdiction under Article 7 is attributed concurrently, with no need for any supplementary connecting factors (*e.g.*, previous residence, residence of relatives or presence of property). However, such connecting factors may be taken into account in the national competent authorities' determination of whether they are in a better position to assess the interests of the adult.<sup>195</sup>
- 4.31 The 2000 Convention prioritises those decisions taken by competent authorities with jurisdiction under Article 5, 6(2) or 8 in order to avoid disorderly or contradictory measures of protection. To that effect, after taking measures, the competent authorities exercising jurisdiction under Article 7 could inform the competent authorities with jurisdiction under Article 5, 6(2) or 8 of the measures taken. The measures taken by the authorities under Article 7 will lapse as soon as the competent authorities with jurisdiction under Article 5, 6(2) or 8 take the measures required by the situation or decide that no measures are to be taken.<sup>196</sup> The authorities exercising

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<sup>189</sup> Art. 7(2). See also The Explanatory Report (*op. cit.* note 12), para. 61. The jurisdiction of the State of nationality shall not be exercised even if the pending proceedings do not concern the same matter and the seizure of the competent authorities of the State with primary jurisdiction happened after the competent authorities of the State of nationality were seized.

<sup>190</sup> The same would apply in relation to Art. 6(2), regarding the presence of the adult.

<sup>191</sup> The Explanatory Report (*op. cit.* note 12), para. 59.

<sup>192</sup> *Ibid.*, para. 58.

<sup>193</sup> *Ibid.*

<sup>194</sup> Art. 7(1); *Ibid.*, para. 60.

<sup>195</sup> *Ibid.*, paras 57 and 60.

<sup>196</sup> Art. 7(3). See also, the Explanatory Report (*op. cit.* note 12), para. 64.

jurisdiction under Articles 5, 6(2) or 8 must inform the authorities of the State of nationality which have taken measures under Article 7 of the measures or decisions they have taken.<sup>197</sup>

- 4.32 By giving competent authorities which have jurisdiction under Article 8 (*i.e.*, following a transfer of jurisdiction) the ability to block the jurisdiction of competent authorities in the State of nationality of the adult, the risk of concurrent jurisdiction being exercised in parallel and contradictorily is eliminated. Of course, where the scope of jurisdiction of competent authorities to take measures under Article 8 is limited to a specific aspect of the protection of the adult, that authority should refrain from blocking the competent authority of the State of nationality from exercising jurisdiction in relation to other aspects of protection.<sup>198</sup>
- 4.33 When a competent authority of a multi-unit State takes jurisdiction on this ground, and the Convention is not in force in every territorial unit, it is important to recall Article 45(d) which provides that "[i]n 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 [...] 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."<sup>199</sup>
- 4.34 This jurisdiction relies on communication between Contracting Parties. Jurisdiction under Article 7 requires that, prior to taking a measure, the competent authorities of the State of nationality communicate, directly or through Central Authorities, with the competent authorities having primary jurisdiction under Article 5 or 6(2). This communication must take into account the present circumstances of the adult in which the competent authorities of the State of nationality of the adult intend to intervene and exclude any previous, outdated measures. The 1999 Special Commission of a diplomatic character endorsed the use of a model form titled "Information Relating to Measures of Protection Concerning an Adult" which can be used to communicate measures envisaged and taken under Article 7.<sup>200</sup> To facilitate communications relating to jurisdiction issues, during the First Meeting of the Special Commission, competent authorities were strongly encouraged to make use of the Model Form regarding "Information Relating to Measures of protection concerning an adult".<sup>201</sup>

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<sup>197</sup> Art. 7(3). For more information on communication and cooperation between competent authorities see **Chapter 11**.

<sup>198</sup> The Explanatory Report (*op. cit.* note 12), para. 63.

<sup>199</sup> Art. 45(d). See also C&R No 12 of the First Meeting of the SC (see path indicated in note 7).

<sup>200</sup> The Model Form can be found on p. 30 of the Explanatory Report (*op. cit.* note 12) and on the HCCH website at [www.hcch.net](http://www.hcch.net) under "Protection of Adults" then "Miscellaneous".

<sup>201</sup> See C&R No 15 of the First Meeting of the SC (see path indicated in note 7). For more information on communication and cooperation between competent authorities see **Chapter 11**.

**(d) When property is situated in the jurisdiction***Article 9***QUICK OVERVIEW of the jurisdiction under Article 9**

- Connecting factor: the location of the property of the adult
- Concurrent subsidiary jurisdiction: limited to measures that are compatible with those taken by the authorities having jurisdiction under Articles 5 to 8
- Scope of jurisdiction: limited to measures concerning the property of the adult located in that State
- Measures taken are subject to replacement, termination or modification by later measures taken by the competent authority of another Contracting Party (see Explanatory Report, para. 76)
- COMMUNICATION/CO-OPERATION requirements:
  - ✓ Recommendation to communicate following Article 10(4): to verify the **compatibility** of the intended measures with those taken by the authorities having jurisdiction under Articles 5 to 8
  - ✓ Communication recommended if urgent measures have been taken in another State under Article 10

4.35 The competent authorities of a Contracting Party have concurrent subsidiary jurisdiction to take measures of protection concerning property situated in their territory.<sup>202</sup> This allows for the taking of measures of protection which are adapted to the (property) laws of the State in which the property is located, which in turn makes the implementation of those measures more straightforward.<sup>203</sup> If, for example, an adult would like to sell property they own in a State other than that of their habitual residence in order to cover their medical expenses, it would be more efficient to place the matter directly before the competent authorities of the State where the property is located, as they would more likely be aware of property law regulations and formalities in that State.

4.36 Article 9 provides a ground of jurisdiction to competent authorities in the State where the property of the adult is situated. This jurisdiction is accepted only for matters which have not yet been decided by competent authorities with jurisdiction under Articles 5

<sup>202</sup> Art. 9.

<sup>203</sup> The Explanatory Report (*op. cit.* note 12), para. 75.

to 8 or for the purpose of measures that can be superimposed on existing measures taken by such competent authorities (e.g., a person designated to assist the adult might want to rent the property, or take action for infringement of property rights and might need authorisation from the competent authority of the State where the property is situated). To ensure that the measure taken in accordance with Article 9 is compatible with those taken by competent authorities having jurisdiction under Articles 5 to 8, consideration should be given to having proper communication / coordination between the concerned competent authorities.

- 4.37 Measures taken under Article 9 must, therefore, be compatible with the measures taken by competent authorities with jurisdiction under Articles 5 to 8. This limitation aims to avoid any inconsistency between measures for the protection of the property of the adult taken by competent authorities in the State where the property is located, and measures taken by the competent authorities who have jurisdiction under Articles 5 to 8. If measures taken by the competent authorities of the State where the property is located precede any measures taken by competent authorities with jurisdiction under Articles 5 to 8, then those measures will be invalidated to the extent of any incompatibility.<sup>204</sup>
- 4.38 While Article 9 does not impose any obligations for communication as Article 7 does, it is useful for competent authorities of the Contracting Party where property of the adult is situated to contact the competent authorities of Contracting Parties that have jurisdiction under Articles 5 to 8, to ascertain what measures have already been taken, in order to assure the necessity, the relevance and the compatibility of the envisaged measures. Such communications between competent authorities could be done similarly to what is provided for under Article 10(4). Namely, the competent authorities which contemplate taking measures under Article 9 are encouraged, if possible, to exchange information with the competent authorities of the Contracting Party of the habitual residence of the adult.<sup>205</sup>

#### Example 4.D

The competent authority in Contracting Party A, where property of the adult is situated, contemplates taking measures under Article 9 in relation to that property and wants to ascertain whether the envisaged measures are compatible with the measures that have already been taken in Contracting Party B, where the adult habitually resides. The competent authority in Contracting Party A thus asks their Central Authority to seek information in Contracting Party B, under Article 32, on any measures that may have been taken under Articles 5 to 8. When the measures of protection in relation to the property of the adult under Article 9 have been

<sup>204</sup> *Ibid.*, para. 76.

<sup>205</sup> See, *infra*, Chapter 11.

taken, the competent authority in Contracting Party A asks their Central Authority to transmit that decision to the competent authority that took a measure under Articles 5 to 8 in Contracting Party B via the Central Authority in the latter State.

#### Example 4.E

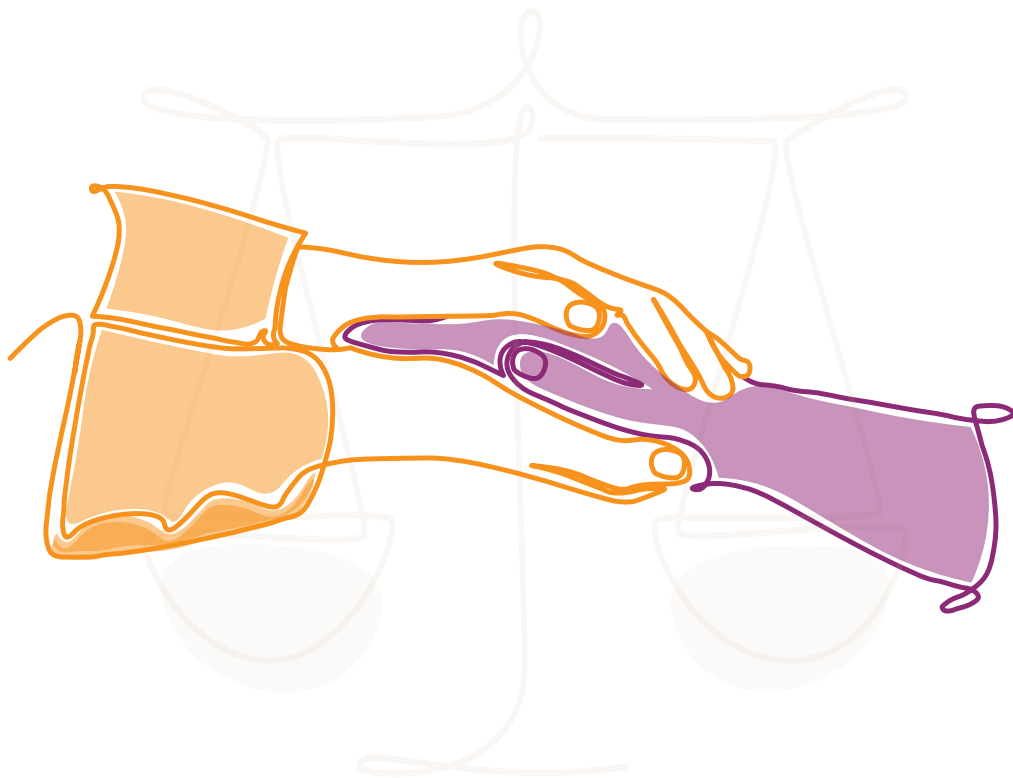
An adult, who used to habitually reside in Contracting Party A but still owns immovable property there, has been placed by their family in a care facility in Contracting Party B. A few months later, a court in Contracting Party B exercises its jurisdiction in accordance with Article 5 and appoints a person to represent the adult. Back in Contracting Party A, a legal issue arises regarding the use of the property owned by the adult. The adult now needs to be represented in a court proceeding in relation to this issue. A family member of the adult asks a competent authority in Contracting Party A to be appointed as an *ad hoc* representative of the adult in these proceedings. To ensure the necessity and compatibility between any future measures to be taken in the two Contracting Parties for the protection of the adult and their property, an exchange of information takes place between the competent authorities to verify whether the appointment of this *ad hoc* representative is compatible with the measure that is already in place in Contracting Party B (the person appointed to represent the adult). Such an exchange of information prior to the taking of any measures in Contracting Party A ensures that there will be no conflicting decisions.





# 5

## Transfer of jurisdiction





### QUICK OVERVIEW of the jurisdiction under Article 8

- Connecting factor: one of the following
  - a) the nationality of the adult
  - b) the preceding habitual residence of the adult
  - c) the location of the property
  - d) the State whose authorities have been chosen in writing by the adult
  - e) the habitual residence of a person close to the adult prepared to undertake their protection
  - f) the presence of the adult
- Condition: the jurisdiction for the protection of the person and / or property of the adult is delegated from the competent authorities having jurisdiction under Article 5 or 6, in the interests of the adult
- Delegated jurisdiction
- Scope of jurisdiction:
  - ✓ for the States listed under a) to e): free or limited subject matter jurisdiction depending on the delegation
  - ✓ for the State listed under f): limitation to the protection of the person of the adult and possible limitation by the delegation
- COMMUNICATION/CO-OPERATION requirements:
  - ✓ Obligation to communicate: the authorities must go through the transfer mechanism
  - ✓ Communication required if measures have been taken or are to be taken in another State under Article 7
  - ✓ Communication recommended if urgent or temporary measures have been taken in another State under Article 10 or 11

## A. When can jurisdiction to take measures of protection be transferred?

### Article 8

- 5.1 Competent authorities which have primary jurisdiction under Article 5 (*i.e.*, those authorities in the State of the adult's habitual residence) or Article 6 (*i.e.*, those authorities in the State where the adult is present<sup>206</sup>) may not be the best placed to assess the interests of the adult.<sup>207</sup> In that case, Article 8 allows for the transfer of jurisdiction to Contracting Parties whose competent authorities might be better placed.<sup>208</sup> The competent authorities that have primary jurisdiction under Article 5 or 6 may request the competent authorities of one of the Contracting Parties listed in Article 8(2) to take measures.<sup>209</sup> The authorities of a Contracting Party may also ask the competent authorities that have primary jurisdiction under Article 5 or 6 to make a request for a transfer of jurisdiction. This transfer of jurisdiction may be to any of the competent authorities listed in Article 8(2). A transfer of jurisdiction should always be based on whether the interests of the adult so require. In addition, such a transfer can relate to all or specific aspects of protection, depending on what the competent authorities with primary jurisdiction deem necessary under the circumstances.
- 5.2 If the transfer only concerns one aspect of the protection of the adult, once the jurisdiction is exercised and the measure is in place, the competent authority to which jurisdiction has been transferred must stop exercising that jurisdiction. As a result, the Contracting Party having primary jurisdiction under Article 5 or 6 retains jurisdiction over the matter that was originally the subject of the transfer.
- 5.3 During the First Meeting of the Special Commission, it was underlined that the Convention promotes party autonomy while ensuring the protection of the adult. In particular, Article 8(2)(d) allows the adult to choose, in writing, the State the competent authorities of which are to take measures of protection in the context of a possible transfer.<sup>210</sup>

### Example 5.A

An adult previously had their habitual residence in Contracting Party A, where they also own property. The adult now habitually resides in Contracting Party B and their personal faculties have been significantly

<sup>206</sup> See, *supra*, paras 4.21 - 4.26.

<sup>207</sup> The Explanatory Report (*op. cit.* note 12), para. 66. See, also, C&R No 14 of the First Meeting of the SC (see path indicated in note 7).

<sup>208</sup> Art. 8(2).

<sup>209</sup> Art. 8(1).

<sup>210</sup> See C&R No 13 of the First Meeting of the SC (see path indicated in note 7).

impaired due to an underlying medical condition. Under the 2000 Convention, the competent authorities of Contracting Party B have primary jurisdiction to take measures of protection. The property of the adult located in Contracting Party A now needs to be sold. Contracting Party B may, by virtue of Article 8(2)(c), request the competent authorities of Contracting Party A to take measures of protection in relation to the property of the adult located in their territory.

### Example 5.B

An adult, who habitually resides in Contracting Party A but is a national of Contracting Party B, has been placed under State-mandated institutional care by the competent authorities in Contracting Party A for the past 15 years. Family members of the adult, residing in Contracting Party B, would like for the adult to be transferred to Contracting Party B. The adult is in need of constant supervision and care, so the doctors of the adult in Contracting Party A have concluded that the adult cannot live outside an institutional setting. Therefore, the competent authorities in Contracting Party A decided to postpone the transfer of the adult to Contracting Party B, until an appropriate facility was found there. During the search for an appropriate facility, the competent authorities in Contracting Party A realised that the institutions in Contracting Party B refused to consider the transfer of a person who was not already known to the competent authorities of Contracting Party B. In response to this, the Central Authority in Contracting Party A contacts, upon request of the competent authority of its State, the Central Authority in Contracting Party B in order to request a transfer of jurisdiction under Article 8, based on the nationality of the adult. Through the assistance of Central Authorities, the competent authorities of both Contracting Parties agree that the jurisdiction to decide on a new measure of protection (*i.e.*, State-mandated institutional care) will be transferred to Contracting Party B before the habitual residence of the adult changes, provided, of course, that such a measure is possible under the law of Contracting Party B.

### Example 5.C

An elderly adult with late-stage dementia is residing in an assisted living facility in Contracting Party A. Prior to the deterioration of their personal faculties, the adult made it clear, through a written end-of-life wish, that they wish to spend their final years in their State of origin (*i.e.*, nationality), Contracting Party B. Upon request of the competent authority of its State, the Central Authority in Contracting Party A contacts the Central Authority in Contracting Party B in order to request a transfer of jurisdiction under Article 8, based on the nationality of the adult. The competent authorities in Contracting Party B, by accepting jurisdiction, may take a measure of protection to place the adult in an assisted living facility in Contracting Party B.

- 5.4 The wording of Article 8 provides for the competent authorities of a Contracting Party having jurisdiction under Article 5 or 6 to make such a request but excludes the competent authorities having jurisdiction under Article 7 (*i.e.*, those of the State of nationality of the adult) from making such a request, as they may exercise jurisdiction directly – but only subsidiarily – if they consider themselves better placed to do so. If such is not the case, they may only abstain.<sup>211</sup>
- 5.5 Article 8 relies on communication between Contracting Parties.<sup>212</sup> To that effect, the 1999 Special Commission of a diplomatic character endorsed the use of a model form titled “Measures of Protection Concerning an Adult”, which can be used to communicate requests under Article 8.<sup>213</sup> To facilitate communications relating to jurisdiction issues, during the First Meeting of the Special Commission, competent authorities were strongly encouraged to make use of this form.<sup>214</sup>

## B. Conditions to be fulfilled before a transfer of jurisdiction can take place

- 5.6 It should be noted that, under the 2000 Convention, jurisdiction can only be transferred between **Contracting Parties**; it cannot be transferred to the competent authorities of non-Contracting Parties, even if they satisfy the requirements.
- 5.7 Article 8(2) exhaustively lists the States whose competent authorities may be requested, or may request, to take measures of protection under the conditions provided for in Article 8(1). These are:
- *A State of which the adult is a national.* This provision is distinct from and does not overlap with Article 7, as the jurisdiction which can be exercised under Article 7 is subsidiary to the jurisdiction under Articles 5, 6(2) and 8.<sup>215</sup> This means that jurisdiction exercised under Article 7 will cease to have effect when the competent authorities which have jurisdiction under Articles 5, 6(2) or 8 decide to take the measures required by the situation or that no measures need to be taken or if there are pending proceedings before them.<sup>216</sup> On the other hand, if jurisdiction is transferred under Article 8 to a Contracting Party of which the adult is a national, the relevant competent authority has general jurisdiction, within the limits of the jurisdiction which they have been requested to exercise.<sup>217</sup> As such, the jurisdiction exercised by the Contracting Party of which the adult is a national, via a transfer under Article 8, is not subject to the limitations described in

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<sup>211</sup> The Explanatory Report (*op. cit.* note 12), para. 66; see also **Chapter 4**.

<sup>212</sup> See *Proceedings of the Special Commission of a diplomatic character* (*op. cit.* note 13), p. 378.

<sup>213</sup> The Explanatory Report (*op. cit.* note 12), p. 28. The Recommended Model Forms under the 2000 Protection of Adults Convention, including the one regarding “Measures of protection concerning an adult”, can also be found in Annex IV.

<sup>214</sup> See C&R No 15 of the First Meeting of the SC (see path indicated in note 7).

<sup>215</sup> Art. 7(3).

<sup>216</sup> The Explanatory Report (*op. cit.* note 12), paras 64 and 68.

<sup>217</sup> *Ibid.*, para. 68.

Article 7(3). In cases where the adult is a refugee or internationally displaced, the competent authorities of the State in which the adult is present, and which have primary jurisdiction by virtue of Article 6(1), are strongly encouraged to refrain from transferring jurisdiction to the competent authorities of the State of nationality of the adult.<sup>218</sup>

- *The State of the preceding habitual residence of the adult.* This means the State of the last habitual residence and does not include other previous habitual residences.<sup>219</sup>
- *A State in which property of the adult is located.* Jurisdiction transferred under Article 8 to a Contracting Party in which the adult's property is located is broader than the jurisdiction provided under Article 9 since it is not limited to measures concerning the property and enjoys general jurisdiction, within the limits of the transfer, without any requirement for the compatibility of measures.<sup>220</sup>
- *The State whose authorities have been chosen in writing by the adult to take measures directed to his or her protection.* This is intended to recognise and promote the autonomy of the adult.<sup>221</sup> In practice, the adult can include their choice of competent authorities in the instrument establishing the agreed or unilaterally declared powers of representation. In the case of a transfer of jurisdiction under Article 8, the competent authorities that have primary jurisdiction under Article 5 or 6 are encouraged to take into account the choices of the adult, especially in cases of powers of representation.
- *The State of the habitual residence of a person close to the adult prepared to undertake his or her protection.* This provision intends to allow decisions to be made in the State of habitual residence of the person who is likely to care for the adult. This may be the jurisdiction of the State where the adult will reside in the future. The transfer of jurisdiction must be in the interests of the adult. Therefore, the circumstances of Article 8(2)(e) will usually require that the competent authorities having primary jurisdiction under Article 5 or 6 make a *prima facie* evaluation of the suitability of the person prepared to undertake the protection of the adult. The interpretation of the term "close to the adult" is not limited to relatives but can also include friends, companions and anyone else who is devoted to the adult.<sup>222</sup>
- *The State in whose territory the adult is present, with regard to the protection of the person of the adult.* If jurisdiction is transferred under Article 8 to a Contracting Party where the adult is present, the delegated competent authority obtains general jurisdiction with regard to the protection of the person, rather than the

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<sup>218</sup> *Ibid.*

<sup>219</sup> *Ibid.*, para. 69. This provision is distinct from that under Art. 15(2)(b), which deals with the law applicable to powers of representation and enables the adult to designate the law of the State of any former habitual residence.

<sup>220</sup> *Ibid.*, para. 70.

<sup>221</sup> *Ibid.*, para. 71.

<sup>222</sup> *Ibid.*, para. 72.



limited or temporary exercise of jurisdiction under Articles 10 and 11.<sup>223</sup> The protection of the property of the adult is not included within the scope of this transfer.

- 5.8 Under the 2000 Convention, competent authorities that make a request to the competent authorities of another Contracting Party to exercise jurisdiction cannot compel those requested competent authorities to accept their invitation to transfer jurisdiction.<sup>224</sup> The transfer of jurisdiction is always subject to the control of the relevant competent authorities having primary jurisdiction under Article 5 or 6. Additionally, the Convention does not provide any timeframes for the request or response under Article 8. Nevertheless, it is recommended that this be done as expeditiously as possible in order to protect the adult by avoiding parallel proceedings and delays arising from the transfer request.<sup>225</sup>
- 5.9 Whether and how the parties are heard regarding the issue of the transfer will be determined by the domestic procedural laws of each Contracting Party. It will be important for the competent authority requesting the transfer to keep the parties informed about such transfers, in order to protect their rights to due process under the domestic laws of the Contracting Parties involved.
- 5.10 The competent authority from which jurisdiction was transferred cannot exercise jurisdiction over the particular matter which was the subject of the transfer. They must wait until the decision by the delegated competent authority becomes binding and produces legal effects. The previous transfer, however, does not preclude jurisdiction under Article 5 or 6 for future proceedings, given the conditions for jurisdiction under the 2000 Convention are then provided.
- 5.11 To avoid any breaks in the continuity of the protection of the adult, the Contracting Party which has primary jurisdiction under Article 5 or 6 will retain jurisdiction if the competent authority that is addressed does not accept the transfer.<sup>226</sup> Non-acceptance may occur by a formal refusal of jurisdiction or could be inferred from a prolonged failure to respond.<sup>227</sup>

## C. Procedure for transfer of jurisdiction

- 5.12 Where a competent authority in one Contracting Party is considering a transfer of jurisdiction to another Contracting Party, the following analysis should be undertaken:

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<sup>223</sup> *Ibid.*, para. 73.

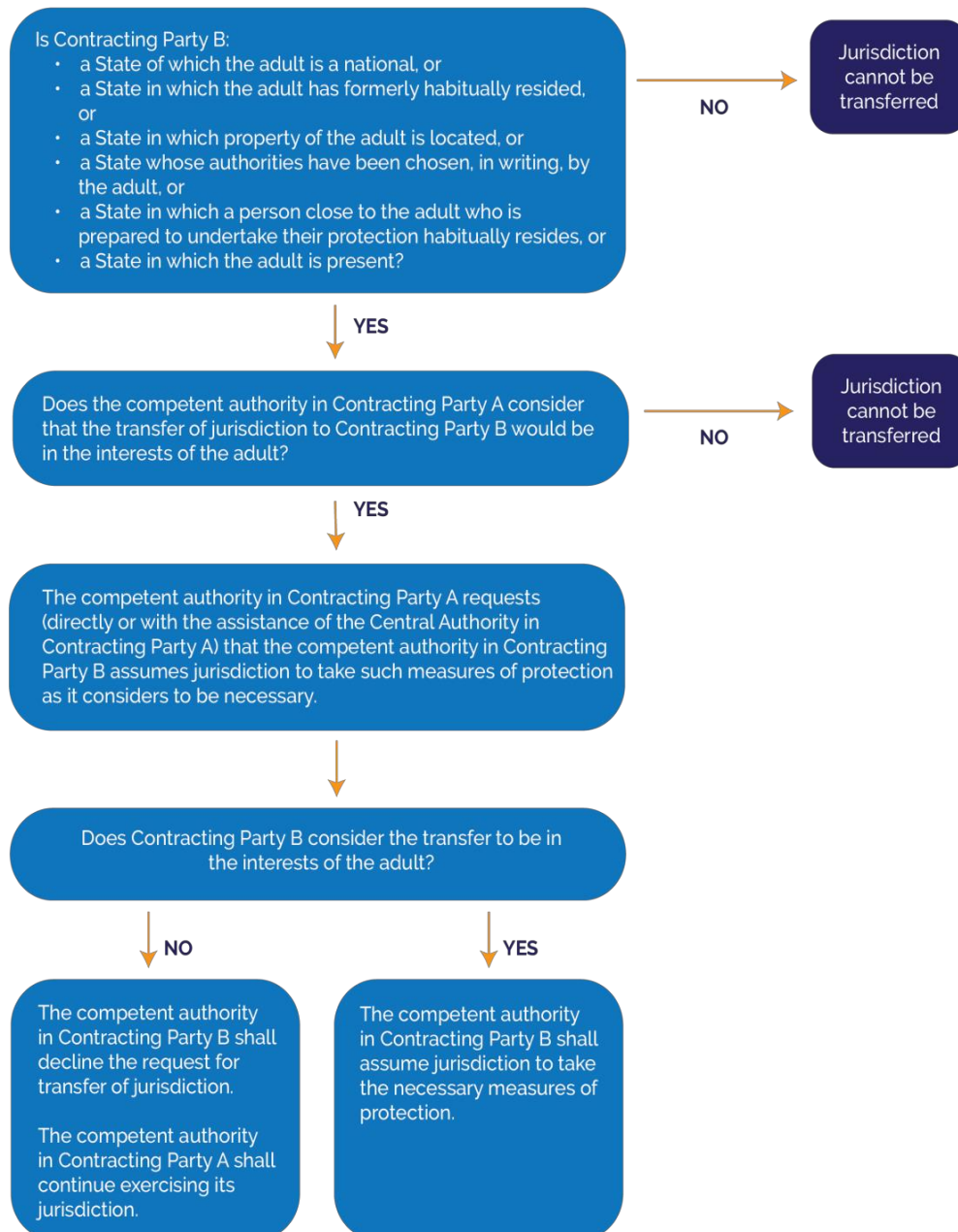
<sup>224</sup> *Ibid.*, para. 74.

<sup>225</sup> For example, the requesting Contracting Party proceeds to exercise jurisdiction because no response was received within what it conceives as a reasonable timeframe. Subsequently, the requested Contracting Party accepts and also exercises jurisdiction.

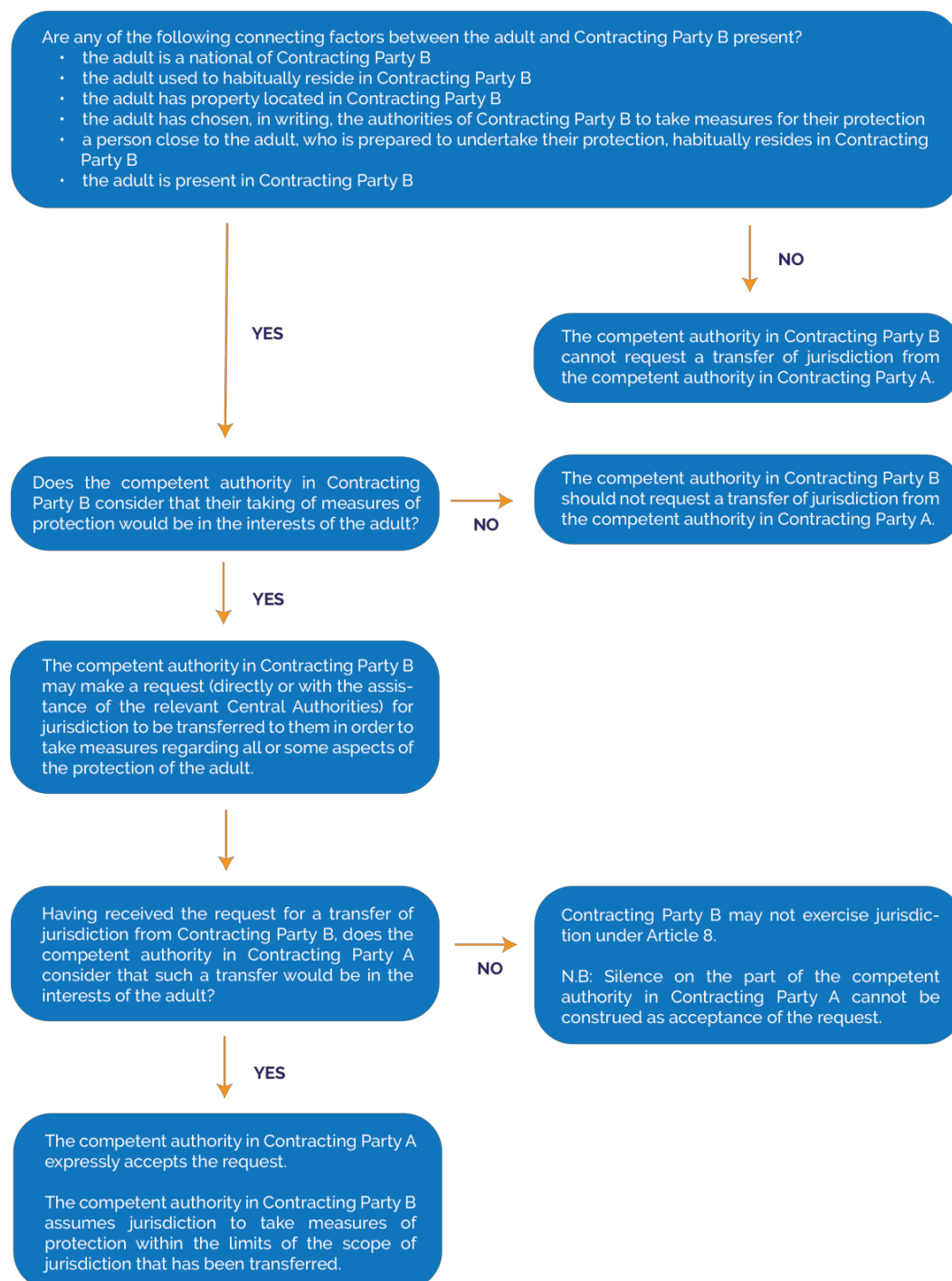
<sup>226</sup> Art. 8(3).

<sup>227</sup> The Explanatory Report (*op. cit.* note 12), para. 74.

**Request initiated by a competent authority in Contracting Party A,  
which has jurisdiction under Article 5 or 6 of the Convention,  
to a competent authority in Contracting Party B (Art. 8)**



**Request made by a competent authority in Contracting Party B to a competent authority in Contracting Party A, who has primary jurisdiction under Article 5 or 6, for a transfer of jurisdiction under Article 8**



## D. Practical aspects of a transfer of jurisdiction

### (a) To which authorities should a request for transfer of jurisdiction be addressed?

- 5.13 When making an application for a transfer of jurisdiction, it is important that competent authorities can locate each other, and that Contracting Parties adequately communicate.
- 5.14 Contracting Parties may designate authorities to which requests under Article 8 are to be addressed.<sup>228</sup> If such a designation has been made then all requests concerning the transfer of jurisdiction should be sent to those designated authorities. This designation is optional<sup>229</sup> and any such designation must be communicated to the Permanent Bureau of the HCCH.<sup>230</sup>
- 5.15 If no designation has been made under the 2000 Convention, there are three other ways to contact authorities:
- Option 1: Competent authorities may wish to communicate directly with one another, if feasible.
  - Option 2: the competent authority may contact the Central Authority in the requested Contracting Party, either directly or through its own Central Authority. Contracting Parties are required to designate a Central Authority upon joining the Convention,<sup>231</sup> and these Central Authorities have obligations to facilitate communication.<sup>232</sup> A list of Central Authorities is available on the Protection of Adults Section on the HCCH website ([www.hcch.net](http://www.hcch.net), under "Protection of Adults", then "Authorities").
  - Option 3: depending on national rules and availability, judicial authorities may get in touch via the International Hague Network of Judges (IHNJ). If both Contracting Parties have designated members to the Network, the contact points can provide information on aspects of the law and procedure, including assisting with locating the relevant competent authority and introducing the direct judicial communication. A list of members of the IHNJ is available on the HCCH website ([www.hcch.net](http://www.hcch.net)).<sup>233</sup>
- 5.16 Central Authorities may also be useful in helping to transmit documents between competent authorities. In addition, certain Central Authorities, if requested, may assist with the interpretation or translation of documents or with locating such services. The members of the IHNJ may also provide useful advice on the best ways to proceed, for

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<sup>228</sup> Art. 42.

<sup>229</sup> The Explanatory Report (*op. cit.* note 12), para. 151.

<sup>230</sup> Art. 43(1). Such designations can be found on the Protection of Adults Section on the HCCH website at [www.hcch.net](http://www.hcch.net), under "Protection of Adults", then "Authorities".

<sup>231</sup> Art. 28; Art. 43(1).

<sup>232</sup> Art. 30(a).

<sup>233</sup> See C&R Nos 16, 17 and 57 from the First Meeting of the SC (see path indicated in note 7). See, also, CGAP 2023, C&D No 32 (see path indicated in note 8).

instance, regarding the information or documentation that the competent authority may require before considering the transfer.

### **(b) Medium of communication between authorities**

- 5.17 The 2000 Convention does not prescribe the medium with which authorities should communicate. Various mediums of communication may be utilised, including e-mail, telephone, or videoconference facilities as long as any information exchanged is properly protected.

### **(c) Information and documents which should accompany the communication**

- 5.18 To facilitate communications relating to jurisdiction issues, during the First Meeting of the Special Commission, competent authorities were strongly encouraged to make use of the Model Form regarding "Measures of protection concerning an adult".<sup>234</sup> Although the Convention does not prescribe a particular form of communication, it is strongly advised that at least the initial communication requesting the transfer be in writing<sup>235</sup> and should particularly identify:<sup>236</sup>
- the name and contact details of the initiating authority;
  - the reference number of the case;
  - the nature of the case (with due regard to confidentiality concerns);
  - the issue on which the communication is sought;
  - whether the parties concerned have consented to the communication taking place;
  - when the communication may occur (with due regard to any time differences);
  - any specific questions which the initiating authority would like answered;
  - any other pertinent matters.
- 5.19 The communication should be accompanied by the relevant documents which are necessary for the appreciation of the requested authority and requests for further information by the requested authority should be limited to what is necessary. If the initial request is formulated in a judicial or administrative decision, it is recommended that the factual elements and the considerations on which the request is founded be detailed within the motivation of the decision that will be communicated. It is also

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<sup>234</sup> See C&R No 15 of the First Meeting of the SC (see path indicated in note 7).

<sup>235</sup> See Principle 8 of the "Emerging Guidance regarding the development of the International Hague Network of Judges and General Principles for Judicial Communications, including commonly accepted safeguards for Direct Judicial Communications in specific cases, within the context of the International Hague Network of Judges" ("Emerging Guidance on Direct Judicial Communications") (available on the HCCH website at [www.hcch.net](http://www.hcch.net) under "Child Abduction" then "Judicial Communications"). See, also, C&R No 17 from the First Meeting of the SC (see path indicated in note 7).

<sup>236</sup> Emerging Guidance on Direct Judicial Communications, Principle 7 (*ibid.*). See, also, C&R No 17 from the First Meeting of the SC (see path indicated in note 7).

recommended to inform the addressee whether this decision could be appealed under the domestic law. This is the case for every decision taken within the transfer process (request and acceptance).

- 5.20 It should be noted that "all documents forwarded or delivered under the 2000 Convention shall be exempt from legalisation or any analogous formality".<sup>237</sup> This extends to all documents submitted or exchanged, including all decisions of competent authorities as well as certificates delivered in accordance with Article 38.<sup>238</sup>
- 5.21 In accordance with Article 51, any communications under the Convention between authorities, including attachments, must be in their original language and accompanied by a translation into the official language or one of the official languages of the other Contracting Party. Where that is not feasible, the communication must be translated into either French or English, keeping in mind that, under Article 56, a Contracting Party may make a reservation to the use of either French or English, but not both.<sup>239</sup>

#### **(d) Communication safeguards for communications between competent authorities<sup>240</sup>**

##### **Overarching principles**

- 5.22 Each authority engaging in direct communications must respect the law of its own jurisdiction.
- 5.23 When communicating, each authority seized should maintain its independence in reaching any decision on the matter at hand.
- 5.24 Communications must not compromise or in any way affect the independence of the authority seized in reaching any decision on the matter at hand.

##### **Commonly accepted procedural safeguards**

- 5.25 In Contracting Parties in which direct communications between competent authorities are practiced, the following are commonly accepted procedural safeguards:
- except in special circumstances, parties are to be notified of the nature of the proposed communication (e.g., the subject matter, the purpose, the intended outcome, etc);

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<sup>237</sup> Art. 41.

<sup>238</sup> The Explanatory Report (*op. cit.* note 12), para. 150.

<sup>239</sup> Art. 51; *Ibid.*, para. 169. See, also, C&R No 50 from the First Meeting of the SC (see path indicated in note 7).

<sup>240</sup> Emerging Guidance on Direct Judicial Communications (*op. cit.* note 235), Principle 6. The Emerging Guidance on Direct Judicial Communications was endorsed by the Sixth Meeting of the Special Commission on the Practical Operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention (1-10 June 2011). See "Conclusions and Recommendations and Report of Part I of the Sixth Meeting of the Special Commission on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention (1-10 June 2011)", Prel. Doc. No 14 of November 2011, available on the HCCH website at [www.hcch.net](http://www.hcch.net) under "Child Abduction" then "Special Commission meetings" and "Sixth Special Commission meeting (Part I, June 2011; Part II, January 2012)". See, also, C&R No 17 from the First Meeting of the SC (see path indicated in note 7).

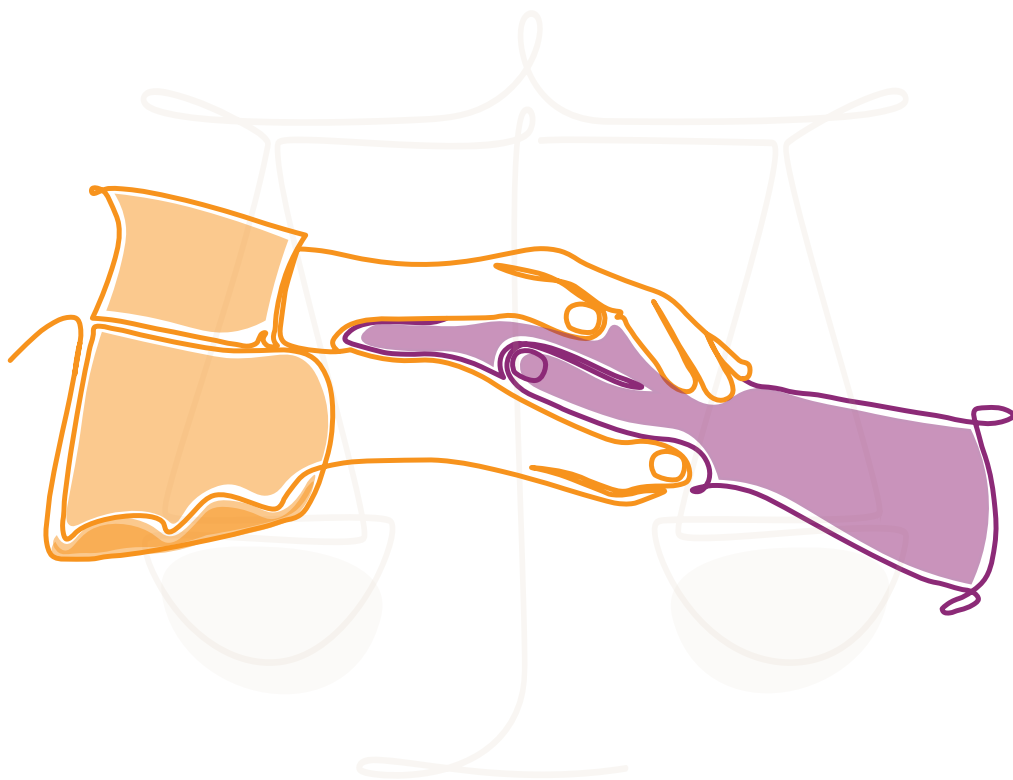
- a record is to be kept of all communications and these are to be made available to the parties;
- any conclusions reached should be in writing;
- parties or their representatives should have the opportunity to be present in certain cases, for example, via conference call facilities.

**(e) Communication between authorities**

- 5.26 As transfer of jurisdiction is only made in relation to a specific proceeding or application. It is important for authorities to be as explicit as possible in their communication regarding the envisaged scope of any transfer of jurisdiction.
- 5.27 Any requesting authority, whether requesting to assume or transfer jurisdiction, should ensure its request is explicit as to:
- the scope of the transfer. This includes what matters would be covered under an envisaged transfer of jurisdiction, and what circumstances this would apply to, including ongoing measures and decisions to be made;
  - why the jurisdiction in question is in a better position to assess the interests of the adult in relation to the matters to be transferred.
- 5.28 When a transfer of jurisdiction is agreed to and concluded, both authorities should record this conclusion in a manner appropriate to its jurisdiction. An explicit conclusion and / or record of these terms may avoid confusion at a future date and may prove important in the case of a possible review or appeal of the decision to transfer jurisdiction.

# 6

## Measures of protection in cases of urgency







### QUICK OVERVIEW of the jurisdiction under Article 10

- Connecting factor: the presence of the adult or location of their property
- Condition: urgency situation
- Concurrent subsidiary jurisdiction: limited to measures necessary to stop the urgency of the situation
- Specific jurisdiction: unlimited extraterritorial effect, unlimited temporal effect, limited *res judicata*: *only for* provisional measures: the measures lapse as soon as authorities having jurisdiction under Articles 5 to 9 have taken measures required by the situation or authorities of non-contracting Parties have taken measures required which are recognised
- Scope of jurisdiction: unlimited subject matter jurisdiction, limited to measures necessary to address the urgency of the situation
- Measures taken are subject to replacement, termination or modification by the competent authority of another Contracting Party
- COMMUNICATION/CO-OPERATION requirements:
  - ✓ Communicate (if possible): Inform the authorities of the State of the habitual residence of the adults about the measures taken – which is recommended to do as soon as possible

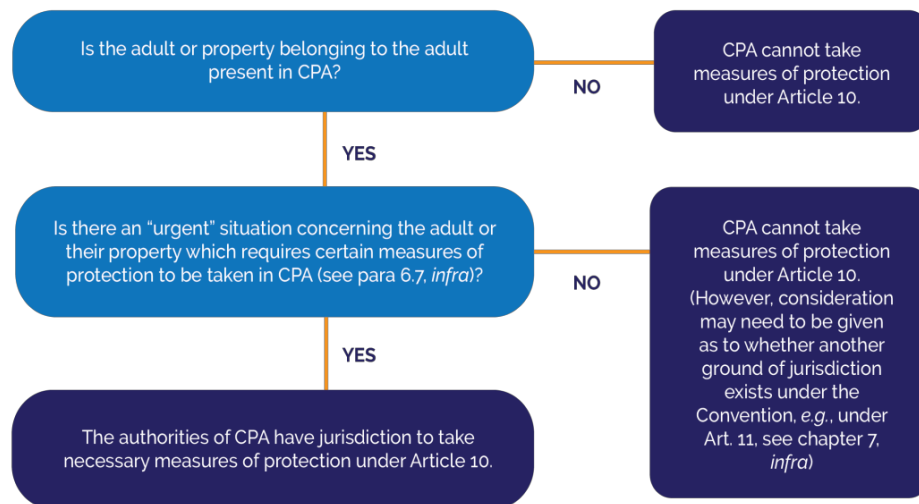
## A. Taking necessary measures of protection in cases of urgency

### Article 10

- 6.1 In all cases of urgency, the competent authorities of any Contracting Party on the territory of which the adult or their property is present have jurisdiction to take any necessary measures of protection.<sup>241</sup>

<sup>241</sup> Art. 10(1).

### Can measures of protection be taken in Contracting Party A ("CPA") under Article 10?



- 6.2 The exercise of jurisdiction provided for in Article 10 is concurrent with that of the competent authorities of the State of habitual residence of the adult,<sup>242</sup> although it remains subsidiary.<sup>243</sup> This jurisdiction ensures that the protection or the interests of the adult are not jeopardised in the event of a delay in the taking of measures by the competent authorities which have jurisdiction under Articles 5 to 9.

#### Example 6.A

An adult, habitually resident in Contracting Party A, is present in Contracting Party B when they get seriously ill and are placed in a medically induced coma. The adult requires urgent surgical intervention. In order to fund this urgent surgical intervention, access is needed to the bank account of the adult back in Contracting Party A, which has been denied as a standard banking protocol measure. After assessing the nature and degree of the urgency, the competent authorities in Contracting Party B make an order to allow access to the adult's bank account in Contracting Party A.

- 6.3 The 1997 Special Commission discussed the applicability of a *lis pendens* rule but, ultimately, it was preferred to have a ground of primary jurisdiction under Articles 5 and 6. Instead of *lis pendens*, it was concluded that there would be cooperation

<sup>242</sup> The Explanatory Report (*op. cit.* note 12), para. 78.

<sup>243</sup> *Ibid.*, para. 80.

between competent authorities as to when the competent authorities with concurrent subsidiary jurisdiction (*i.e.*, under Arts 7, 9, 10 and 11) could exercise that jurisdiction.<sup>244</sup> Given that any urgent measures of protection taken by the competent authorities of the Contracting Party exercising jurisdiction under Article 10 will lapse as soon as the competent authorities with jurisdiction under Articles 5 to 9 have taken a decision, Contracting Parties should communicate regarding the most effective way to protect the interests of the adult.<sup>245</sup>

- 6.4 The competent authorities which may be addressed on the basis of urgency are the ones on the territory of which the adult is present or the property of the adult is located.
- 6.5 This extends to both situations envisioned by Article 6, namely refugees or internationally displaced adults and adults whose habitual residence cannot be established. Although in the aforementioned situations, the competent authorities of the State where the adult is present have general jurisdiction under Article 6, for the purposes of Article 10 the scope of jurisdiction is limited to cases of urgency.<sup>246</sup> Where necessary, jurisdiction under Article 10 could be exercised during the time it takes to verify that the habitual residence of the adult cannot be established for the purpose of Article 6.
- 6.6 Unlike Article 9, it should be noted that under Article 10, the jurisdiction of the competent authorities in the State where property of the adult is located is not limited to measures concerning the protection of the said property. For instance, it is conceivable that in a situation of urgency, property of the adult located in one State may need to be sold in order to provide resources for other measures of protection to be taken for the adult who is present in another State.

### Example 6.B

A person who has their habitual residence in Contracting Party A, is visiting friends in Contracting Party B. While in Contracting Party B, they are involved in a serious motorcycle accident, suffering significant brain trauma which leaves them in a comatose state. While the adult is in a coma in Contracting Party B, the older brother of the adult in Contracting Party A needs to ensure that there are enough funds to pay for the medical treatments. As there is no other way to secure funds, and the adult has no representative, the brother of the adult seizes a competent authority in Contracting Party B in order to be entitled to urgently sell some shares the adult owns in Contracting Party B. The competent authority of Contracting Party B contacts the competent authority of Contracting Party A to inform them of the urgent measures taken.

<sup>244</sup> *Ibid.*, para. 47.

<sup>245</sup> Art. 10(4).

<sup>246</sup> The Explanatory Report (*op. cit.* note 12), para. 79.

### (a) When is a case considered “urgent”?

- 6.7 The 2000 Convention does not elaborate on what would constitute a case of urgency. The urgency of a particular situation is a matter for the competent authorities of each Contracting Party to determine, according to the factual circumstances of the case. The Explanatory Report suggests that a situation of urgency would arise in a case where, if measures of protection were sought through the normal channels of Articles 5 to 9, the adult would suffer irreparable harm or the interests of the adult or their property would be compromised.<sup>247</sup> Therefore, a useful approach for competent authorities would be to consider, on a case-by-case basis, whether the interests of the adult will be irreparably compromised if immediate measures are not taken for the interim period until the competent authorities with jurisdiction under other grounds take the necessary measures.
- 6.8 Given that the situation of urgency justifies a derogation from the normal rules under Articles 5 to 9, it must be interpreted rather strictly.<sup>248</sup>

#### Example 6.C

A couple habitually resident in Contracting Party A were staying at their holiday home in Contracting Party B when one partner suddenly passed away. The other partner, who was already experiencing some health problems, suffered a breakdown due to the shock and grief from the sudden loss of their partner. Being alone in Contracting Party B, there was no one to care for the surviving partner, who found themselves in a severe state of abandonment. The competent authorities in Contracting Party B have jurisdiction to take an urgent measure of protection.

### (b) What are “necessary” measures of protection?

- 6.9 Measures of protection taken under Article 10 have the same material scope as the measures that can be taken under Articles 5 to 9 of the 2000 Convention, *i.e.*, they are measures which are directed to the protection of the adult or their property, in accordance with Articles 3<sup>249</sup> and 4.<sup>250</sup>
- 6.10 The Convention does not elaborate on what particular “necessary” measures can be taken for the protection of the adult in an urgent situation. The competent authority concerned shall assess the nature, degree and impact of the urgency. Although it is the urgency in and of itself that should dictate what necessary measures should be taken in each case, “any necessary measures” should be limited to address the urgency

<sup>247</sup> *Ibid.*, para. 78.

<sup>248</sup> *Ibid.*

<sup>249</sup> Art. 3 provides a non-exhaustive list of measures included in the scope of application of the Convention. See, *supra*, **Chapter 3** regarding the scope of the Convention.

<sup>250</sup> Art. 4 provides an exhaustive list of matters excluded from the scope of application of the Convention. See, *supra*, **Chapter 3** regarding the scope of the Convention.

of the situation. This is, of course, a matter for the competent authorities in each Contracting Party to determine on a case-by-case basis.

### (c) Duration of urgent measures

- 6.11 Given the concurrent but subsidiary nature of the jurisdiction envisioned in Article 10, the necessary and urgent measures taken in application thereof shall cease to have effect as soon as the competent authorities that have jurisdiction under Articles 5 to 9 have taken the requisite measures.<sup>251</sup> From that moment, there is no longer any need to maintain the jurisdiction of the competent authorities of the State in which the adult, or the property belonging to the adult, is present, nor is there any need for all Contracting Parties to continue to recognise the measures taken under those urgent circumstances.<sup>252</sup>
- 6.12 If the adult is habitually resident in a non-Contracting Party, the measures taken under Article 10 will lapse as soon as the competent authorities of another State take measures which are recognised in the Contracting Party concerned.<sup>253</sup>
- 6.13 Because the recognition of measures taken by a non-Contracting Party in a Contracting Party depends on the domestic non-Convention rules of each Contracting Party, the effect of urgent measures will likely not cease uniformly and simultaneously across all Contracting Parties concerned. The measures will no longer have effect as soon as the decision taken by a non-Contracting Party is recognised in the Contracting Party where recognition is sought.
- 6.14 Therefore, it can be said that the lasting power of an urgent measure taken in a Contracting Party is tied to either the measure taken by another Contracting Party based on the grounds of jurisdiction of Articles 5 to 9 or the recognition by all Contracting Parties of the measures taken by a non-Contracting Party.

### (d) What other steps should be taken to ensure the continued protection of the adult?

- 6.15 In cases where urgent measures of protection have been taken, in accordance with Article 10, the competent authority which has taken such measures shall, if possible, inform the competent authorities of the Contracting Party of the habitual residence of the adult of the measures taken.<sup>254</sup> Communication may take place directly between competent authorities<sup>255</sup> or, where appropriate, with the assistance of the relevant Central Authorities.<sup>256</sup> When the competent authority of the State where the urgent measure was taken informs, for example, the competent authority of the State of habitual residence of the adult for whom measures have been taken, this will ensure

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<sup>251</sup> Art. 10(2).

<sup>252</sup> The Explanatory Report (*op. cit.* note 12), para. 80. See also, *infra*, **Chapter 8**, para. 8.4.

<sup>253</sup> Art. 10(3).

<sup>254</sup> Art. 10(4). Such communication or cooperation is not limited to Contracting Parties and can take place between any States.

<sup>255</sup> For judicial authorities, this may involve direct judicial communications. See, *infra*, para. 11.7.

<sup>256</sup> See further **Chapter 11**.

that the competent authority of the State of habitual residence adequately looks into the situation of the adult and takes any necessary measures, in particular for the long-term protection of the adult.

- 6.16 A model form<sup>257</sup> for this communication was approved by the 1999 Special Commission of a diplomatic character. To facilitate communications relating to jurisdiction issues, during the First Meeting of the Special Commission, competent authorities were strongly encouraged to make use of the Model Form regarding "Information relating to measures of protection concerning an adult".<sup>258</sup>

#### Example 6.D

An adult who has their habitual residence in Contracting Party A is visiting friends in Contracting Party B when a viral pandemic hits the global community. The adult is infected with the virus and, due to underlying conditions, must be intubated and placed in intensive care in Contracting Party B. On the condition that the competent authorities in Contracting Party B assessed the urgency of the situation, these authorities will have concurrent, subsidiary jurisdiction under Article 10 to ensure that the adult receives the care they need. Additionally, the competent authority in Contracting Party B should inform, if possible, the competent authority in Contracting Party A of the situation and of the protective measures taken.

- 6.17 The obligation to inform set out by Article 10(4) denotes the primacy of the jurisdiction of the competent authorities in the State of habitual residence of the adult. Competent authorities in the Contracting Party where the urgent measures were taken need only inform "if possible" and communication, due to the urgency of the circumstances, will usually take place after the urgent measures have already been taken.<sup>259</sup> It is, nevertheless, recommended that communication takes place as soon as possible.
- 6.18 The competent authorities that have taken the urgent measures are only obliged to inform the State of habitual residence of the adult and not necessarily the competent authorities which may have jurisdiction under Article 6(2), bearing in mind it could be possible that these competent authorities are not from the same State. For instance, when the adult whose habitual residence cannot be determined is present in one State and the authorities of another State, where property of the adult is located, take an urgent measure of protection for that property. Competent authorities taking urgent measures are encouraged to communicate and cooperate with any other competent authorities (e.g., with jurisdiction under Arts. 7, 9), if need be, in order to ensure the continued protection of the adult.

<sup>257</sup> See, *supra*, note 200.

<sup>258</sup> See C&R No 15 of the First Meeting of the SC (see path indicated in note 7).

<sup>259</sup> The Explanatory Report (*op. cit.* note 12), para. 82.

- 6.19 Only in situations of urgency can the competent authorities of the State where the adult is present, or their property, is located set aside any measures previously taken by competent authorities under the Convention. In other words, the urgent measures taken under Article 10 may not be compatible with other measures previously taken under the Convention. Therefore, such measures shall lapse as soon as the competent authorities with jurisdiction under Articles 5 to 9 have taken the measures required by the situation.<sup>260</sup>

## B. Are measures of protection taken under Article 10 entitled to recognition and enforcement under the 2000 Convention?

- 6.20 Measures of protection taken by a Contracting Party under Article 10 – in contrast to temporary measures under Article 11 – are entitled to recognition and enforcement in accordance with Chapter IV of the 2000 Convention.<sup>261</sup>
- 6.21 It should be noted that the recognition in a Contracting Party of measures taken by competent authorities of a non-Contracting Party will depend on the domestic non-Convention rules of the Contracting Party concerned. Urgent measures taken in a Contracting Party do not constitute an obstacle to the recognition in other Contracting Parties of measures taken in a non-Contracting Party.<sup>262</sup>
- 6.22 Since an obligation to inform beforehand may be impracticable in situations of urgency, it does not form a condition of the jurisdiction laid down in Article 10. Therefore, failure to inform the competent authority in the State of habitual residence of the adult before taking a measure is not, as such, a ground for non-recognition of the urgent measure.<sup>263</sup> However, as outlined above, communication remains obligatory “if possible” under Article 10, in particular after the urgent measure is taken.

### Example 6.E

A young adult habitually resident in non-Contracting Party A travels to Contracting Party B for medical treatment without their parents, who also act as the representatives of the young adult. During the scheduled medical treatment, the young adult becomes in urgent need of a surgical intervention for which the consent of the patient is needed. However, the young adult does not have the capacity to express their will and their representatives cannot be contacted at that moment. The authorities of Contracting Party B have jurisdiction to take the necessary, urgent measures which are permitted by their domestic law to ensure that the emergency surgical intervention of the young adult may proceed without contacting the competent authorities of the place of habitual residence

<sup>260</sup> *Ibid.*, para. 80.

<sup>261</sup> Art 22 *et seq.*

<sup>262</sup> The Explanatory Report (*op. cit.* note 12), para. 81.

<sup>263</sup> *Ibid.*, para. 82.



beforehand.<sup>264</sup> Even if the State of habitual residence of the adult is not a Contracting Party to the Convention, the competent authorities of Contracting Party B should, as a good practice, endeavour to inform those authorities afterwards, similarly to the practice under Article 10(4).

### Example 6.F

An adult habitually resides in Contracting Party A and owns property in Contracting Party B. The adult has a representative designated by a competent authority of Contracting Party A. The powers of the representative are limited to Contracting Party A.

A gas company carrying out an annual security check of the property in Contracting Party B notices that the property is infested by wood worm. The gas company notifies the representative of the adult in Contracting Party A who in turn urgently seises a competent authority in Contracting Party B to take any necessary measures to protect the property before it is completely destroyed. Additionally, the competent authority in Contracting Party B should inform, if possible, the competent authority in Contracting Party A of the situation and of the protective measure taken.

### Example 6.G

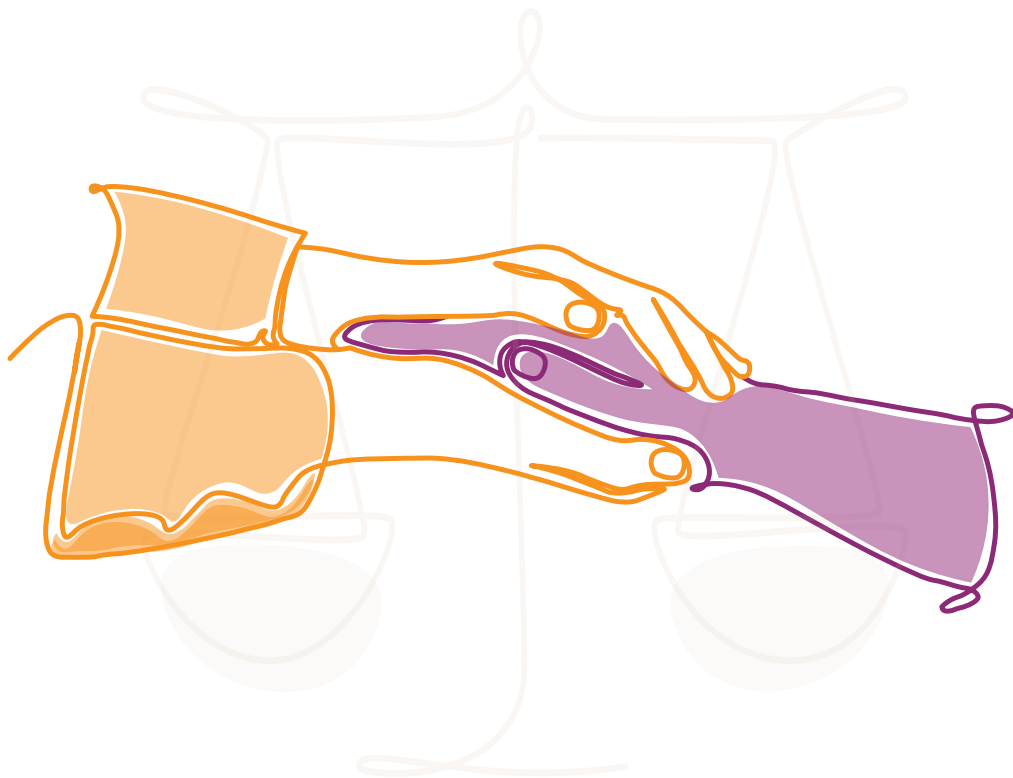
An adult habitually resident in non-Contracting Party A owns a property in Contracting Party B. Their state of health has deteriorated rapidly and the adult is now in need of urgent medical intervention. In order to cover the costs of treatment, the property in Contracting Party B needs to be sold promptly. Under Article 10, the representative of the adult in non-Contracting Party A can arrange for the authorities in Contracting Party B to take the urgent measures necessary for the representative to proceed with the sale of the property in Contracting Party B.

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<sup>264</sup> It is important to note that in some States, medical personnel can take decisions concerning urgent medical interventions on the basis of their substantive domestic laws, the application of which is mandatory. See, *infra*, **Chapter 9**, paras 9.36 – 9.37.

# 7

## Temporary measures





### QUICK OVERVIEW of the jurisdiction under Article 11

- Connecting factor: the presence of the adult
- Condition: exceptional situation
- Concurrent subsidiary jurisdiction: limited to measures that are compatible with those already taken by the authorities having jurisdiction under Articles 5 to 8
- Scope of jurisdiction: limited to measures of protection of the person of the adult, limited territorial effect, limited to temporary measures
- Measures taken are subject to replacement, termination or modification by the competent authority of another Contracting Party
- COMMUNICATION/CO-OPERATION requirements:
  - ✓ Obligation to communicate: to verify the compatibility of the intended measures with those taken by the authorities having jurisdiction under Articles 5 to 8 and to advise the authorities having jurisdiction under Article 5 prior to the taking of the measure

## A. When can temporary measures be taken?

### Article 11

7.1 Distinct from cases of urgency, Article 11 provides for a specific ground of jurisdiction which allows the competent authorities of the Contracting Party on the territory of which the adult is present to take temporary measures of protection. From the outset, the following points should be kept in mind regarding temporary measures:

- temporary measures for the protection of the adult are to be taken on an exceptional basis;<sup>265</sup>
- temporary measures taken under Article 11 must only concern the person of the adult and not their property;<sup>266</sup>
- the effect of temporary measures taken under Article 11 is limited to the territory of the Contracting Party in which they were taken;<sup>267</sup>

<sup>265</sup> Art. 11(1).

<sup>266</sup> The Explanatory Report (*op. cit.* note 12), para. 84.

<sup>267</sup> Art. 11(1).

- the jurisdiction provided for in Article 11 is concurrent and subsidiary to that of the competent authorities with primary jurisdiction under Article 5 or 6(2);<sup>268</sup>
  - the competent authorities of a Contracting Party can only take measures under Article 11 that are compatible with measures that have already been taken by the competent authorities that have jurisdiction under Articles 5 to 8.<sup>269</sup>
- 7.2 The 1997 Special Commission discussed the applicability of a *lis pendens* rule but, ultimately, it was preferred to have a ground of primary jurisdiction under Articles 5 and 6. Instead of *lis pendens*, it was concluded that there would be cooperation between competent authorities as to when the competent authorities which have concurrent subsidiary jurisdiction (*i.e.*, under Arts 7, 9, 10 and 11) could exercise that jurisdiction.<sup>270</sup>

### (a) What are “temporary” measures?

- 7.3 The 2000 Convention does not explain what would constitute a temporary measure. The Explanatory Report helps paint a picture of the potential scenarios that may fall under Article 11.<sup>271</sup>

#### Example 7.A

A young adult with a severe drug addiction is temporarily present in Contracting Party A. This drug addiction impairs the personal faculties of the adult and as a result they are not in a position to protect their interests. However, the adult is not yet protected by a measure. Following several overdoses and to protect the young adult from themselves and their immediate environment, the competent authorities of Contracting Party A decide to temporarily place the young adult in a rehabilitation facility for the rest of their stay in Contracting Party A and to designate the rehabilitation facility to represent the adult or assist them in the exercise of their legal capacity while at the facility. This situation would fall within the scope of Article 11 because, although it is a worrying situation, it is temporary and limited to its jurisdiction.

### (b) Duration of temporary measures

- 7.4 Article 11, similarly to Article 10, is a concurrent but subsidiary ground of jurisdiction to the primary grounds of jurisdiction under Articles 5 and 6.

<sup>268</sup> The Explanatory Report (*op. cit.* note 12), para. 83.

<sup>269</sup> Art. 11(1); *Ibid.*, para. 84. This is in contrast with Art. 10, under which competent authorities in the State where the adult is present may set aside measures previously taken by the competent authorities that have jurisdiction under Arts 5 to 9 (see, *supra*, **Chapter 6**, para. 6.19).

<sup>270</sup> *Ibid.*, para. 47.

<sup>271</sup> *Ibid.*, para. 84.

- 7.5 Measures taken in one Contracting Party under Article 11 will lapse under similar conditions to those in Article 10. Temporary measures taken by the competent authorities of a Contracting Party where the adult is present shall lapse as soon as the competent authorities having jurisdiction under Articles 5, 7 or 8 have taken the measures of protection required by the situation.<sup>272</sup> It is possible that the competent authorities which have jurisdiction under one of the aforementioned Articles decide that no measures need to be taken. In this case, the temporary measures no longer have any reason to continue having effect.<sup>273</sup> The temporary measures only have effect in the State where they are taken and are therefore not subject to recognition and enforcement in other Contracting Parties once the adult leaves the jurisdiction.<sup>274</sup>
- 7.6 Where the adult has their habitual residence in a non-Contracting Party, and the competent authority of that State has taken other measures of protection required by the situation, the temporary measures taken by the authorities of a Contracting Party under Article 11 no longer have any reason to continue having effect. It is important to note that, in that case, for the temporary measures taken under Article 11 to cease to have effect, the measures taken by the competent authority in the non-Contracting Party of habitual residence of the adult will have to be recognised in the Contracting Party where the temporary measures were taken. Because these new measures are taken in a non-Contracting Party, their recognition is not governed by the 2000 Convention.<sup>275</sup>
- 7.7 The jurisdiction provided for under Article 11 is conditional upon the competent authorities of the habitual residence of the adult being advised in advance.<sup>276</sup> The competent authorities of both Contracting Parties must cooperate in order to avoid any duplication of measures and determine the best way forward to ensure the protection of the adult.<sup>277</sup> For example, the competent authorities which contemplate taking a measure under Article 11 should communicate with the competent authorities in the State of habitual residence of the adult and inform them of the situation and of the temporary measures contemplated. This would enable the competent authorities in the State of habitual residence to thoroughly examine the situation of the adult and take any necessary long-term measures for their protection.
- 7.8 A model form for this communication was approved by the 1999 Special Commission of a diplomatic character.<sup>278</sup> To facilitate communications relating to jurisdiction issues, during the First Meeting of the Special Commission, competent authorities were

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<sup>272</sup> Art. 11(2); *Ibid.*, para. 85. See also, *infra*, **Chapter 8**, para. 8.4. Reference to Art. 6 in this context is unnecessary, as, if the conditions of Art. 6 are present, this Article confers primary jurisdiction on the State in which the adult is present.

<sup>273</sup> *Ibid.*, para. 85.

<sup>274</sup> See, *infra*, para. 7.13.

<sup>275</sup> The Explanatory Report (*op. cit.* note 12), para. 85.

<sup>276</sup> *Ibid.*, para. 84.

<sup>277</sup> See, *infra*, **Chapter 11**.

<sup>278</sup> See, *supra*, note 200.

strongly encouraged to make use of the Model Form regarding "[Information relating to measures of protection concerning an adult](#)".<sup>279</sup>

### (c) What other steps should be taken to ensure the continued protection of the adult?

- 7.9 After having taken measures on the basis of Article 11, a competent authority may also cooperate with the competent authorities in any other State it considers necessary, in the spirit of the continued protection of the adult. For example, the competent authorities of the Contracting Party that took measures under Article 11 could communicate with the competent authorities of the adult's State of nationality (Art. 7) and inform them of the situation of the adult and of the temporary measures taken. This would avoid any incompatibility or duplication of measures, as the competent authorities exercising jurisdiction under Article 7 would have no other way of being informed of the measures taken by competent authorities under Article 11.
- 7.10 Such communication may be carried out directly between competent authorities<sup>280</sup> or, where appropriate, with the assistance of the Central Authorities.<sup>281</sup>
- 7.11 It is important to note that such communications could take place between Members of the IHNJ.<sup>282</sup> In that context, where necessary for the purpose of the 2000 Convention (e.g., when the habitual residence of the adult is in a non-Contracting Party and a temporary protective measure has been taken for the adult under Article 11 in a Contracting Party), communications could take place between judges from Contracting Parties and non-Contracting Parties.
- 7.12 Specific cooperation provisions in the 2000 Convention may be relevant in such cases and must be carefully considered.<sup>283</sup>

## B. Are temporary measures entitled to recognition and enforcement under the 2000 Convention?

- 7.13 Temporary measures of protection taken under Article 11 are not subject to the rules on recognition and enforcement under the Convention, since such temporary measures are limited to the territory of the Contracting Party in which they were taken.<sup>284</sup>

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<sup>279</sup> See C&R No 15 of the First Meeting of the SC (see path indicated in note 7).

<sup>280</sup> For judicial authorities, this may involve direct judicial communications. See, *infra*, para. 11.7.

<sup>281</sup> See, *infra*, **Chapter 11**.

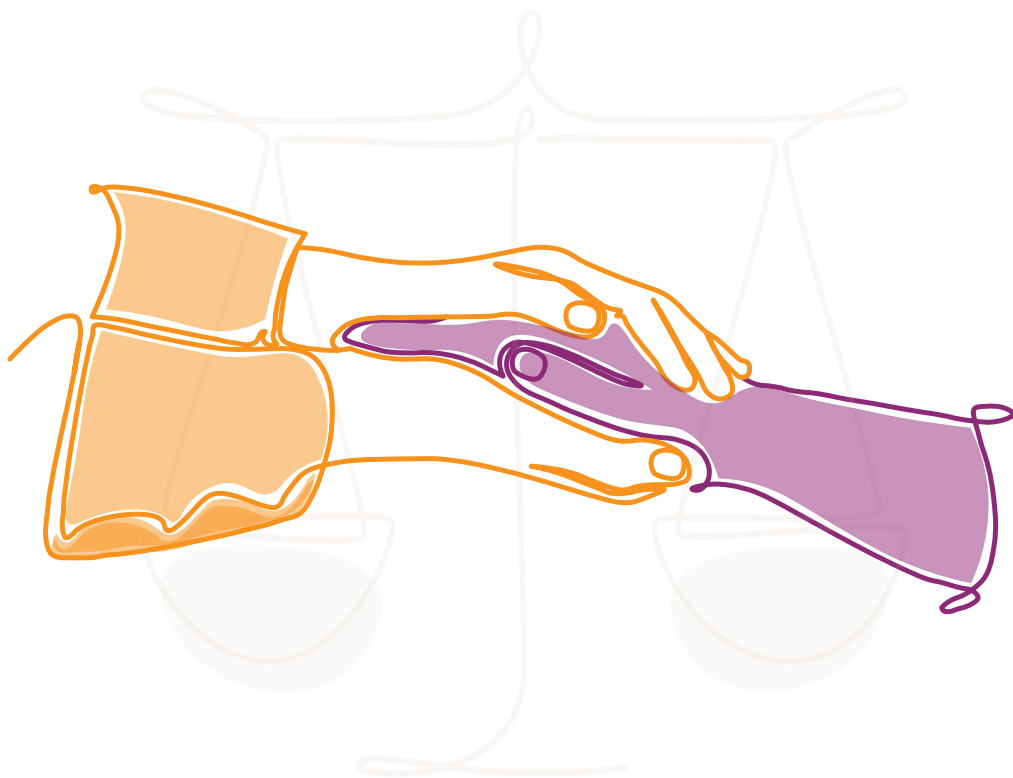
<sup>282</sup> See Emerging Guidance on Direct Judicial Communications (*op. cit.* note 235). See, also, C&R No 59 of the First Meeting of the SC (see path indicated in note 7) and CGAP 2023, C&D No 32 (see path indicated in note 8).

<sup>283</sup> See, *infra*, **Chapter 11**.

<sup>284</sup> The Explanatory Report (*op. cit.* note 12), para. 85.

# 8

## Continuation of measures taken







## A. Do measures of protection remain in force despite a change of circumstances?

### Article 12

- 8.1 Article 12 ensures that a measure taken by a competent authority with jurisdiction under Articles 5 to 9 remains in force even when the ground of jurisdiction upon which the measure was taken has subsequently ceased to exist due to a change of circumstances.<sup>285</sup>
- 8.2 Measures taken by a competent authority under Articles 5 to 9 shall remain in force as long as they have not been modified, replaced or terminated by measures taken by competent authorities that have jurisdiction under the 2000 Convention, as a result of the new circumstances.<sup>286</sup>
- 8.3 Article 12 is an important provision, as it ensures a certain continuity of protection for the adult and their property.<sup>287</sup> For example, a change of habitual residence will not, in and of itself, alter any arrangements made in the previous habitual residence. The measures already taken in the former State of habitual residence will remain in force unless and until the competent authorities of the new State of habitual residence modify, replace or terminate them, in accordance with Article 5(2). In the interim, Article 14 provides that the conditions of implementation of the measures already taken in the former State of habitual residence and implemented in the new State of habitual residence will be governed by the law of that latter State.<sup>288</sup> The competent authorities of the new State of habitual residence may modify or replace any existing measures where, for instance, the measures taken in the former State of habitual residence prove difficult to implement because they are unknown in the State of the new habitual residence. In doing so, they would apply their own law, in accordance with Article 13(1) or they could apply or take into consideration the law of another State with which the situation has a substantial connection, in accordance with Article 13(2).<sup>289</sup>

### Example 8.A

An adult in their mid-30s living with a low-functioning autism spectrum disorder has their habitual residence in Contracting Party A. The competent authorities of Contracting Party A have designated a person to support and assist the adult in daily life tasks. After some time, the adult moves to Contracting Party B, which becomes their new habitual

<sup>285</sup> Art. 12; *Ibid.*, para. 86. See, also, C&R No 19 of the First Meeting of the SC (see path indicated in note 7).

<sup>286</sup> The Explanatory Report (*op. cit.* note 12), para. 86.

<sup>287</sup> *Ibid.*

<sup>288</sup> See, *infra*, paras 9.4 – 9.6.

<sup>289</sup> See C&R No 20 of the First Meeting of the SC (see path indicated in note 7).

residence. Article 12 enables the person designated to support and assist the adult to continue to exercise their functions for as long as the competent authorities of the new habitual residence have not taken any decisions to revoke the previous measures.

- 8.4 Article 12 applies only to measures taken by authorities which have jurisdiction under Articles 5 to 9. However, for measures taken under Article 7 (*i.e.*, measures taken by the authorities of the nationality of the adult), Article 12 applies without prejudice to Article 7(3) which determines the ways in which the measures cease to have effect. Measures taken in cases of urgency (Art. 10), as well as temporary measures (Art. 11), are excluded from the scope of this provision because they provide for their own rules on the lapsing of measures.<sup>290</sup>

## **B. What constitutes a “change of circumstances” under Article 12?**

- 8.5 The exact change of circumstances referred to in Article 12 will depend on the basis of jurisdiction provided by the Convention upon which the measure of protection was taken.
- 8.6 While Article 22(1) ensures that measures in force taken by competent authorities under Articles 5 to 9 are recognised by operation of law in other Contracting Parties, Article 12 ensures that those measures remain in force after a change of circumstances eliminating the basis of jurisdiction upon which they were taken, so long as no other measures or decisions have been taken by competent authorities with jurisdiction under the Convention.<sup>291</sup>
- 8.7 If jurisdiction to take a particular measure was based on Article 5 or 6, the change of circumstances would either be the change in the State of habitual residence or the presence of the adult, respectively.<sup>292</sup> It can also be the integration of the displaced adult within a State or the determination of the habitual residence that puts an end to the ground of jurisdiction in Article 6(1) or 6(2).

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<sup>290</sup> The Explanatory Report (*op. cit.* note 12), para. 87.

<sup>291</sup> *Ibid.*, para. 86. The conditions of implementation of a measure taken in a Contracting Party and implemented in another Contracting Party are governed by the law of that other State. That question is governed by Art. 14 and is distinct from the question of whether a measure remains in force following a change of circumstances. See, *infra*, **Chapter 9**.

<sup>292</sup> *Ibid.*, para. 88.

### Example 8.B

A person was designated to assist an adult by a competent authority in Contracting Party A, the State of their former habitual residence. The adult has since moved to Contracting Party B, their new State of habitual residence. It is important that this person designated to assist the adult continues to exercise their functions even though the adult is now habitually resident in another Contracting Party. In accordance with Article 5(2), the competent authorities in the new habitual residence now have jurisdiction to take measures for the protection of the adult and possibly to revoke those previously taken. However, as long as they do not act, the measures taken before the adult moved to Contracting Party B should remain in force to ensure continuity of protection.

- 8.8 Under Articles 7 and 9, the change may be that of the nationality of the adult or the location of their property. It should be noted that, for the purposes of Article 8, Article 12 will have a more limited application due to the fact that the grounds of jurisdiction which are envisioned in sub-paragraphs (b) and (d) of Article 8(2) 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.<sup>293</sup> It should also be borne in mind that delegated jurisdiction under Article 8 is limited to the pending proceedings in question. When new proceedings are launched, jurisdiction will return to the State the competent authorities of which had jurisdiction prior to the delegation.
- 8.9 The expression "according to their terms" found in Article 12 takes into account the possibility that the competent authorities in the State of habitual residence or presence of the adult have taken measures which are, wholly or in part, only relevant as long as the adult resides in that State.<sup>294</sup> The expression "according to their terms" means that the measures will remain in force within the limitations envisioned by those measures in question. For instance, the purpose of the measure and its intended result, the period of time for which the measure is intended, whether the measure is conditional upon the situation of the adult for whom it has been taken and whether or not the nature of the measure permits its application cross border.

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<sup>293</sup> *Ibid.*

<sup>294</sup> *Ibid.*

### Example 8.C

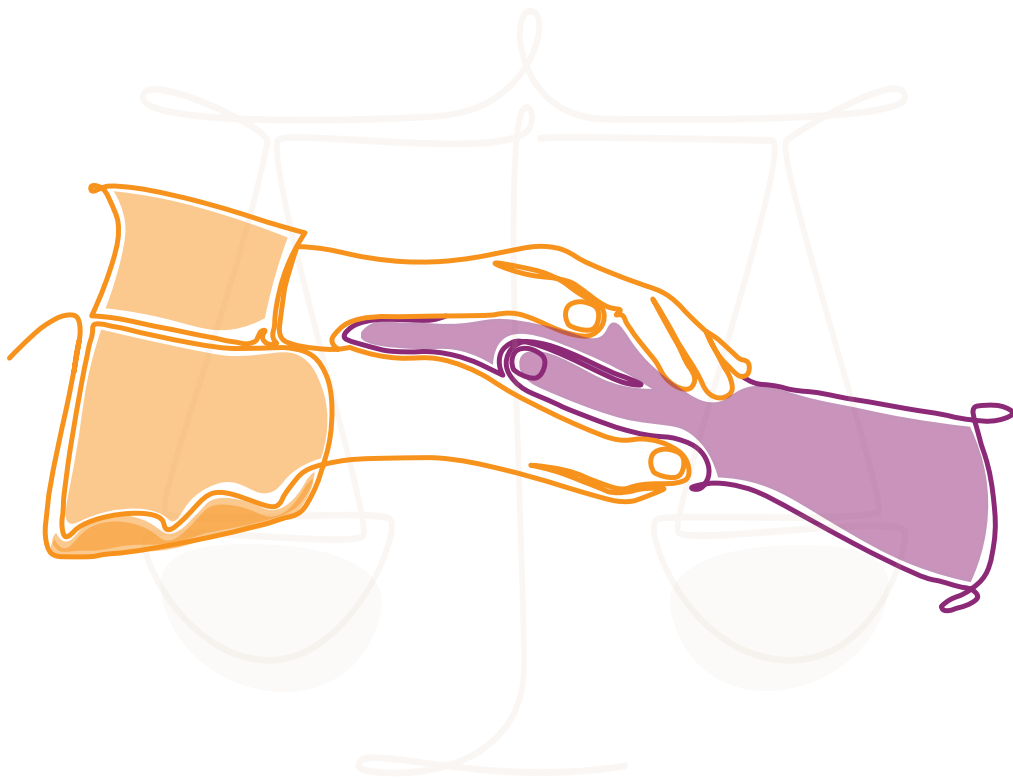
An adult has been placed under the surveillance of a public social service by the competent authorities of their habitual residence. While the impairment of the adult remains unchanged, this measure will usually not survive a change in the habitual residence of the adult because, as opposed to private assistants or representatives, a public body will not be in a position to perform its mission abroad, as its statutory mission is, generally, limited to the jurisdiction where they are established.

### Example 8.D

The competent authorities of the State of habitual residence of the adult have provided that the adult is obliged to declare any change of residence to the public authorities of their new place of residence. This obligation cannot have extraterritorial effect.

# 9

Law applicable to measures  
of protection and agreed  
or unilaterally declared  
powers of representation





- 9.1 Once the State having jurisdiction in accordance with the Convention rules is identified and the appropriate competent authority is seised in accordance with the domestic laws, the questions to be answered next are those concerning the applicable law. Namely, what law governs the determination of measures of protection by the competent authority and their implementation thereafter. The Convention also includes rules with regard to the law applicable to powers of representation granted by the adult themselves, to be exercised when they are not in a position to protect their interests.

## A. Law applicable when determining measures of protection

### Article 13

- 9.2 The competent authorities of Contracting Parties, in exercising their jurisdiction to take measures of protection in relation to the person or property of the adult, shall apply their "own law",<sup>295</sup> *i.e.*, their domestic law.<sup>296</sup> This general rule allows competent authorities exercising jurisdiction to apply the law with which they are most familiar. Since the measures will be carried out more often in the State of the competent authority which has taken them, it makes the execution of measures of protection smoother and more straightforward.<sup>297</sup>
- 9.3 In order to avoid undue rigidity in the determination of the law applicable to measures of protection, Article 13 allows Contracting Parties to, exceptionally, apply or take into consideration the law of another State with which the situation has a substantial connection, insofar as the protection of the person or property of the adult requires.<sup>298</sup> The Convention is not prescriptive as to the criteria to be applied in making that decision. It is a matter for the relevant competent authorities of that State.

### Example 9.A

The competent authorities of Contracting Party A, where the adult is habitually resident, are seised with a request to authorise the sale of the property of the adult which is located in Contracting Party B. When property in Contracting Party B is to be sold, the intervention of a public officer (*e.g.*, from the Lands Registration Office) or a notary is necessary. Therefore, in order to meet the particular legal / administrative requirements of Contracting Party B (*e.g.*, tax and registration

<sup>295</sup> Art. 13(1). See also Art. 19, which provides that the term "law", in Chapter III of the Convention, means the law in force in a State other than its choice of law rules.

<sup>296</sup> The Explanatory Report (*op. cit.* note 12), para. 90.

<sup>297</sup> *Ibid.*, para. 91

<sup>298</sup> *Ibid.*, para. 92.



responsibilities), it may be easier for the authorisation of the sale to be carried out in accordance with the law of Contracting Party B. Contracting Party A, therefore, authorises the sale of the property in accordance with the law of Contracting Party B.

### Example 9.B

An adult habitually resides in Contracting Party A. They own property in non-Contracting Party B. In Contracting Party A, the personal faculties of the adult become impaired and a competent authority in Contracting Party A designates the oldest child of the adult to represent them, in accordance with domestic law. In non-Contracting Party B, where the property is located, such a designation is limited under domestic law by a council consisting of relatives. Certain decisions by a person designated to represent the adult require the approval of this council to be effective. Although the designation of this person to represent the adult in Contracting Party A is made by court order, the adult files an appeal in order to have the designation made under the conditions established in non-Contracting Party B. In the context of the appeal, the competent authority in Contracting Party A decides, in accordance with Articles 13(2) and 18 of the Convention, that a person may be designated to represent the adult under the domestic law of non-Contracting Party B. However, competent authorities in Contracting Party A should verify whether their decision will be recognised in non-Contracting Party B. Should the decision of the competent authorities in Contracting Party A not be recognised under the domestic law of non-Contracting Party B, the application of Article 13(2) is ineffective.

## B. Law applicable when implementing measures of protection

### Article 14

- 9.4 Article 14 establishes that when a measure of protection ordered in one Contracting Party is implemented in another Contracting Party, the conditions of its implementation are governed by the law of that other Contracting Party.<sup>299</sup> This will be the case in situations such as a change of habitual residence,<sup>300</sup> a temporary placement abroad for a specialised medical treatment or the sale of property in one Contracting Party

<sup>299</sup> The Explanatory Report (*op. cit.* note 12), para. 94. See, also, C&R No 19 of the First Meeting of the SC (see path indicated in note 7).

<sup>300</sup> In the case of a change of habitual residence, the measures already taken in the former State of habitual residence will remain in force unless and until the competent authorities of the new habitual residence modify, replace or terminate them (Art. 12; see, *supra*, **Chapter 8**). In the interim, the implementation of the measures already taken will be governed by the law of the new State of habitual residence.

ordered in another Contracting Party. Article 14 does not apply to the implementation of powers of representation granted by the adult themselves, because powers of representation are not measures of protection *per se*, in accordance with Article 3.<sup>301</sup>

### Example 9.C

An adult is habitually resident in Contracting Party A. Due to the personal faculties of the adult becoming significantly impaired, competent authorities in Contracting Party A take a measure of protection for the adult by designating a person to assist them. After a number of years, the adult relocates to Contracting Party B, where they own property. However, since the impairment of the adult's personal faculties also affects their physical mobility, that property is no longer suitable for the adult to reside in. The adult and the person assisting them, therefore, decide to lease the property in order to pay the rent of a residence more suited to the adult's present needs. To sign the lease agreements for both properties on behalf of the adult, the law of Contracting Party B requires that the person designated to assist the adult obtains the authorisation of a judge in Contracting Party B, the State of the adult's new habitual residence. In this case, this requirement was considered a condition of implementation under Article 14.

- 9.5 The term "conditions of implementation", which is not defined by the Convention, is to be understood in quite a broad sense.<sup>302</sup> Conditions of implementation cover the steps, if any, to be taken in order to give effect to a measure, the essence of which should not be interfered with.<sup>303</sup>

### Example 9.D

An adult is habitually resident in Contracting Party A and a person is designated there to assist them in financial and property matters. The adult and their siblings inherit a cottage which is situated in Contracting Party B. The person designated to assist the adult and the adult's siblings agree that the cottage should be sold to one of the children of the person designated to assist the adult. They also agree that the price should be 50% below market value to keep ownership of the property within the family. Depending on the domestic laws of Contracting Party B, this could give rise to several problems:

<sup>301</sup> See Art. 15.

<sup>302</sup> The Explanatory Report (*op. cit.* note 12), para. 94.

<sup>303</sup> "Conditions of implementation" could be formalities regarding transactions (*e.g.*, notarisation). The monitoring of measures through, for instance, the requirement that the person designated to assist an adult submits reports to their supervising authority, is also a "condition of implementation".

- According to the laws of Contracting Party B, the sale is subject to authorisation by the competent authorities of that State. Even if the law of Contracting Party A does not require this authorisation, it is necessary to apply the law of Contracting Party B.<sup>304</sup>
- Conflict of interests. The person designated to assist the adult, in Contracting Party A, contemplates selling immoveable property owned by the adult in Contracting Party B. The intended buyers are the children of this person. According to the law of Contracting Party B transactions involving a potential conflict of interests, such as this, require prior judicial authorisation and / or the appointment of an *ad hoc* attorney who would assist the adult instead of the person designated to do so. Such requirements amount to conditions of implementation within the meaning of Article 14. They must accordingly be fulfilled no matter whether the law of Contracting Party A provides otherwise.
- The sale of the property at 50% below market value can be considered a donation. The domestic law of Contracting Party B could forbid a person designated to assist an adult from donating the adult's property .

### Example 9.E

An adult who is habitually resident in Contracting Party A both at the time when a measure of protection is taken and at the time when it is to be implemented owns a holiday home in the territory of Contracting Party B. The measure of protection authorises the sale of that property. The law of Contracting Party B, in accordance with which the property will be sold, provides that the consent of the spouse of the adult is necessary for such a sale. The consent of the spouse will be required to sell the property in the territory of Contracting Party B.

- 9.6 It is important not to confuse "implementation" and "enforcement". Implementation refers to the performance or realisation of a measure, including, where necessary, the concrete steps towards such performance or realisation. Enforcement refers to the use of coercive action to give effect to the remedial consequences of a measure.<sup>305</sup>

<sup>304</sup> The Explanatory Report (*op. cit.* note 12), para. 94.

<sup>305</sup> See Glossary: "Enforcement".

## C. Law applicable to agreed or unilaterally declared powers of representation

### *Article 15*

- 9.7 Article 15 concerns the question of applicable law regarding 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 their interests by reason of an impairment or insufficiency of their personal faculties. The applicable law rules outlined in Article 15 govern the cross-border effect to be given to such powers of representation.
- 9.8 Powers of representation have legal effect in a cross-border context through the rules on applicable law. They are not subject to the rules on recognition and enforcement which are limited to measures taken by competent authorities.
- 9.9 This conflict of law rule is concerned with voluntary anticipatory acts such as (continuing) powers of attorney. Some voluntary anticipatory acts contain the instructions and wishes made by the adult<sup>306</sup> in anticipation of a future impairment or insufficiency of their personal faculties and may outline the representation and / or assistance they require, to receive the support / care they need or to manage their property. The question of whether or not a particular voluntary anticipatory act constitutes a power of representation under Articles 15 and 16 is to be assessed by competent authorities on a case-by-case basis.<sup>307</sup>
- 9.10 Article 15 does not prescribe any particular procedure or requirement in relation to the designation of the representative. This flexibility provides the adult with the possibility to designate one or more specific representatives or to leave the representation to any person who will be in charge of taking care of and assisting the adult, in accordance with the law applicable. It is also possible for the adult to designate a combination of both specific and non-specific representatives, depending on the matters at hand and on the applicable law.
- 9.11 Some States have identified agreements or unilateral acts which can fall within the scope of Article 15.<sup>308</sup>

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<sup>306</sup> Council of Europe, "Principles concerning continuing powers of attorney and advance directives for incapacity (Recommendation CM/Rec(2009)11 and explanatory memorandum)" ("Council of Europe Recommendation (2009)11"), Council of Europe Publishing, May 2011. The Recommendation defines "advance directives" as "instructions given or wishes made by a capable adult concerning issues that may arise in the event of his or her incapacity".

<sup>307</sup> See C&R No 25 of the First Meeting of the SC (see path indicated in note 7).

<sup>308</sup> See responses to question 3.3 of the "Questionnaire on the practical operation of the HCCH 2000 Protection of Adults Convention", Prel. Doc. No 2 of September 2020 drawn up for the attention of the First Meeting of the Special Commission on the practical operation of the 2000 Protection of Adults Convention, available on the HCCH website at [www.hcch.net](http://www.hcch.net) under "Protection of Adults" then "Questionnaires and Responses" and "Responses to the Questionnaire on the practical operation of the HCCH 2000 Protection of Adults Convention".

- supported decision-making, whereby adults who are fully capable of expressing their will and preferences, appoint one or more persons of trust to assist them in their decision-making, following the onset of an impairment or insufficiency of their personal faculties;<sup>309</sup>
- declarations in anticipation of an impairment or insufficiency of personal faculties, assisted decision-making, representation by a household member.<sup>310</sup>

### (a) What law applies to powers of representation?

#### *Article 15(1)*

- 9.12 By virtue of Article 15, powers of representation granted by the adult, including their existence, extent, modification and extinction, are generally governed by the law of the State of the habitual residence of the adult at the time of the agreement or unilateral act that granted such powers.<sup>311</sup>
- 9.13 The adult may also designate the law of another State to govern the powers of representation they grant. However, at the 1999 Special Commission of a diplomatic character it was decided that such freedom of choice ought to be limited.<sup>312</sup>
- 9.14 If the adult chooses to designate as applicable the law of a State other than that of their habitual residence, such designation must be "expressly in writing".<sup>313</sup> As powers of representation are to be exercised when the adult who granted them is no longer able to look after their own interests, and may no longer be able to grant such powers, this is an important requirement which serves to avoid any uncertainty in the law applicable to powers of representation, when the time comes to give effect to them.<sup>314</sup>
- 9.15 Article 15(1) covers the existence, extent, modification and extinction of powers of representation. The term "extent" refers to the scope of the powers of a representative designated by the adult and any limitations thereto, meaning the acts which a representative may carry out alone or pursuant to an authorisation or those acts which a representative may not carry out.<sup>315</sup> In effect, this provision clarifies that the scope of the powers will not go beyond what was intended by the adult who granted them, for instance, by a representative seeking to exercise these powers of representation in a different jurisdiction.

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<sup>309</sup> Brazil.

<sup>310</sup> Czech Republic.

<sup>311</sup> The Explanatory Report (*op. cit.* note 12), para. 98.

<sup>312</sup> Art.15(2); see *Proceedings of the Special Commission of a diplomatic character* (*op. cit.* note 13), p. 261.

<sup>313</sup> Art. 15(1).

<sup>314</sup> The Explanatory Report (*op. cit.* note 12), para. 101.

<sup>315</sup> *Ibid.*, para. 99. According to the comments of the Uniform Law Conference of Canada (ULCC) Uniform Recognition of Substitute Decision-making Documents Act (2016), the governing law will determine whether the power to manage property on behalf of the adult includes the power to dispose of such property and / or whether judicial authorisation may be necessary before doing so. It will also determine whether a representative with authority over insurance transactions has the power to change beneficiary designations. The governing law will also determine whether the power to consent to health care on behalf of the adult extends to all forms of treatment or is limited to certain forms of treatments.

### Example 9.F

An adult habitually resident in Contracting Party A granted powers of representation which also authorised their representative to manage their finances. The adult has an account at a bank in Contracting Party B. The representative sought to transfer some funds from the adult's chequing account in Contracting Party B to their savings account in Contracting Party B. Despite the existence of a power of representation, which is valid and legally effective under the law specified pursuant to the Convention, the bank in Contracting Party B refused to make the transfer requested by the representative. Instead, the bank required a certificate stating that the representative has been appointed as the adult's representative by a competent authority. The representative seised a court in Contracting Party B to resolve the matter. The court found that this requirement from the bank was illegitimate since the power of representation authorised the representative to manage the financial affairs of the adult. By refusing to comply with the requested transfer, the bank was held liable under domestic legislation to pay compensation (*i.e.*, costs for legal representation and proceedings).<sup>316</sup>

### Example 9.G

An adult living with terminal cancer is on bed rest and requires full-time care. They habitually reside in an assisted living facility in Contracting Party A. The adult granted a power of representation to their daughter, authorising her to manage their finances. When the daughter attempted to manage some funds of the adult in a bank account in Contracting Party B, the power of representation was not accepted by the bank. In order to manage the adult's finances in Contracting Party B, the daughter seised a court in Contracting Party B to appoint her as a representative. The court appointed her as a guardian but held that there was no legal ground or need to do so, as a power of representation has already been granted in Contracting Party A. The court held the bank liable for the costs of the proceedings, since there was no reason to doubt the validity of the power of representation. It should be noted that, in such cases, the designation of a guardian by the court would not be necessary.

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<sup>316</sup> This example is inspired by German domestic jurisprudence from Detmold Regional Court (LG Detmold: Umfang einer Vorsorgevollmacht bei Bankgeschäften (ZEV 2015, 353)) and Hamburg Regional Court (LG Hamburg, Beschl. v. 30.08.2017 – 301 T 280/17).

### Example 9.H

An adult, habitually residing in Contracting Party A, has granted powers of representation under the law of the State of their habitual residence, which may cover medical issues. The adult has family in Contracting Party B, who they visit every year. Prior to their impairment, the adult has always arranged to have their dental surgeries done in Contracting Party B. The adult, who is now impaired, is in need of dental surgery. The law of Contracting Party B does not provide for powers of representation when it comes to medical matters. Since the extent of the powers of representation is governed by the law of Contracting Party A, the representative of the adult should be able to arrange for the surgery to take place in Contracting Party B.

### Example 9.I

An adult establishes a power of representation in Contracting Party B (their State of nationality) while habitually residing in Contracting Party A. In the document, the adult indicates that the power of representation will be governed by the law of Contracting Party B. According to the law of Contracting Party B, a power of representation must be brought into operation by a decision of a competent authority. In Contracting Party A, there is no such requirement, as powers of representation may enter into force upon the decision of a representative to that effect. The requirement that the power of representation be brought into operation via a decision by a competent authority can be considered as part of "the existence" of the power (Art.15(1)). Therefore, in this context, it is the law of Contracting Party B which is applicable.

When the personal faculties of the adult become impaired, the adult still habitually resides in Contracting Party A. As such, Contracting Party A has primary jurisdiction to take measures regarding the protection of the adult. Therefore, the power of representation will need to be brought into operation by a competent authority in Contracting Party A. The competent authority in Contracting Party A may apply its own law in dealing with the request to bring the power of representation into operation (Art. 13(1)) but may prefer to apply the law of Contracting Party B, insofar as the interests of the adult require (Art. 13(2)).<sup>317</sup>

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<sup>317</sup> See, *supra*, para 9.3.

### Example 9.J

An adult habitually resides in Contracting Party A and is a national of Contracting Party B. The adult has assets and property interests in both States. According to the law of Contracting Party A, a power of representation must be brought into effect by a decision of a competent authority. In Contracting Party B, there is no such requirement. To reduce the administrative efforts for their representative, the adult asks a notary in Contracting Party B to prepare a power of representation in accordance with the laws of Contracting Party B and to designate the law of Contracting Party B as applicable to the powers.

The requirement that the power of representation must be brought into effect by a decision of a competent authority can be considered part of "the existence" of the power (Art.15(1)). In this case, since it is the law of Contracting Party B which is applicable to the powers, they can be used in Contracting Party A without a decision by the competent authority to bring them into effect.

### Example 9.K

An adult has granted powers of representation in accordance with the law of Contracting Party A, the State of their habitual residence. The powers provide explicitly for the representative to sub-delegate, which is permitted under the law of Contracting Party A. The representative intends to sell a valuable car belonging to the adult, which is located in Contracting Party B. However, the law of Contracting Party B prohibits representatives from sub-delegating. This may be considered a question of the extent of the power under Article 15(1). In this case, the representative of the adult is permitted to sub-delegate their power and appoint a sub-representative to sign the sale deed, notwithstanding the law of Contracting Party B.

### Example 9.L

An adult has granted powers of representation in accordance with the law of Contracting Party A, the State of their habitual residence. According to the law of Contracting Party A, the power has been registered and the original document has been deposited at the competent authority in Contracting Party A. It is possible for individuals to check this register online. To cover medical bills for treatment the adult has recently undergone, a representative of the adult would like to withdraw some funds from a bank account the adult holds in Contracting Party B. The banking regulations in Contracting Party B require that the original document of the power be presented to the bank in Contracting Party B. This is not feasible since the document is deposited at the



competent authority in Contracting Party A. In this case, the bank in Contracting Party B may consider adapting its internal procedures by either accepting a certificate of the confirmed powers of representation under Article 38 or a validly authenticated copy or by verifying the document electronically by consulting the online register.

## (b) What other laws can be designated to apply to powers of representation?

### Article 15(2)

- 9.16 Article 15(2) provides an exhaustive list of the laws which may be designated by the adult.<sup>318</sup>
- 9.17 The laws which the adult may designate expressly in writing are the law of their State of nationality,<sup>319</sup> the law of a former habitual residence<sup>320</sup> and / or the law of the State in which their property is located (but only for matters which relate to that property).<sup>321</sup>
- 9.18 This provision implicitly enables the adult to designate several laws, altogether, to govern the powers of representation they grant. Conceivably, the adult is able to designate a different law to govern each individual element of the powers of representation, especially in situations where the adult has property in several States. Although there is no express provision to this effect, Article 15(2) should be interpreted in light of this fact.<sup>322</sup> Furthermore, nothing prevents the adult from designating different laws to the powers of representation that are applicable alternatively (in favour of validity) or cumulatively (validity subject to compliance with all of the laws designated) to the powers of representation as a whole.<sup>323</sup>

### Example 9.M

An adult habitually resides in Contracting Party B. They are a national of Contracting Party A, and formerly habitually resided there. The adult has assets and property interests in both Contracting Parties. They have family in Contracting Party A and continues to visit Contracting Party A for varying periods. The family lawyers are also based in Contracting Party A. The adult

<sup>318</sup> The Explanatory Report (*op. cit.* note 12), para. 102.

<sup>319</sup> Art. 15(2)(a).

<sup>320</sup> Art. 15(2)(b).

<sup>321</sup> Art. 15(2)(c).

<sup>322</sup> The Explanatory Report (*op. cit.* note 12), para. 103.

<sup>323</sup> *Ibid.*

instructs those lawyers to prepare a power of representation in accordance with the laws of Contracting Party A but specifies that the part of the power of representation concerned with the property located in Contracting Party B should be governed by the laws of that State.

- 9.19 During the First Meeting of the Special Commission, the utility of aligning the choice of forum under Article 8(2)(d) with the choice of law provision under Article 15(2) was highlighted.<sup>324</sup>

### (c) What law applies to the manner of exercise of powers of representation?

#### *Article 15(3)*

- 9.20 The manner of exercise of the powers of representation granted by an adult is subject to the law of the State in which they are to be exercised.<sup>325</sup> During the negotiations, concerns were expressed that more or less scrupulous foreign representatives might invoke their powers, against local law, to authorise, for example, certain medical interventions (e.g., blood transfusions or organ donation). To set aside this fear, it should be noted that this concern is resolved by recourse to the public policy exception of the State in which the measures will be exercised, as provided for under Article 21.<sup>326</sup> That being said, at the 1999 Special Commission of a diplomatic character, it was decided that the application of the law of the State where the powers granted by the adult will be exercised should be limited to the "manner of exercise" and would not cover the "exercise" of those powers.<sup>327</sup>
- 9.21 Article 15(3) is comparable to Article 14 in the sense that the manner of exercise of powers of representation and the conditions of implementation of a protective measure are both subject to the laws of the State where they are to be exercised / implemented.<sup>328</sup> However, the scope of application of the law of the State where the powers of representation are to be exercised is more limited when those powers are granted by the adult themselves than when those powers are derived from a measure of protection.<sup>329</sup> The term "conditions of implementation" in Article 14 is to be understood more broadly than the wording "manner of exercise" used in Article 15(3).<sup>330</sup>
- 9.22 The language of Article 15(3) is more restrictive than that of Article 15(1). Under Article 15(3), the manner of exercise should only comprise points of detail, such as the

<sup>324</sup> See C&R No 27 of the First Meeting of the SC (see path indicated in note 7).

<sup>325</sup> Art. 15(3).

<sup>326</sup> The Explanatory Report (*op. cit.* note 12), para. 106.

<sup>327</sup> This was a decision by formal vote – 11 votes to 7 with 4 abstentions (see *Proceedings of the Special Commission of a diplomatic character* (*op. cit.* note 13), p. 265).

<sup>328</sup> The Explanatory Report (*op. cit.* note 12), para. 106.

<sup>329</sup> *Ibid.* See also, *supra*, para 9.6.

<sup>330</sup> The Explanatory Report (*op. cit.* note 12), para. 94.

verification of the existence and extent of the powers in accordance with domestic procedural law, the deposit of the act granting the powers, or the authorisation procedure (*i.e.*, registration requirements), where the law applicable to the powers of representation foresees such authorisation.<sup>331</sup>

- 9.23 At the 1999 Special Commission of a diplomatic character, it was also decided that the law of the State in which the powers are exercised should be applied *per se* to the manner of exercise and not simply taken into consideration.<sup>332</sup>

### Example 9.N

An adult, habitually resident in Contracting Party B, inherits some assets of very limited value in Contracting Party A. The representative of the adult, acting under powers granted to them by the adult through a power of representation issued in accordance with the law of Contracting Party B, would like to waive this inheritance<sup>333</sup> on behalf of the adult. For the representative of the adult to waive the inheritance, an authorisation by a competent authority is required under the law of Contracting Party B. This requirement may be considered part of the extent of the power of representation and would, therefore, be governed by the law of Contracting Party B.<sup>334</sup> The representative seizes the court of the location of the property (Contracting Party A) to obtain this authorisation. According to domestic law, to make such a request in Contracting Party A, the power of representation must be registered. This requirement could be considered, in Contracting Party A, as a manner of exercise (Art. 15(3)) and the representative would have to comply with it.

### Example 9.O

An adult, habitually resident in Contracting Party A, has established powers of representation wherein they designate a representative. Upon the impairment of the adult's personal faculties, the powers have now become operational. To cover the costs of medical treatment for the adult, the representative has decided to sell some financial assets (stocks and bonds) the adult owns in Contracting Party B. The law of Contracting

<sup>331</sup> *Ibid.*, para. 107.

<sup>332</sup> *Ibid.*, para. 106.

<sup>333</sup> Generally, succession matters fall outside the scope of the 2000 Convention by virtue of Art. 4(1)(d). However, the entitlement of a person to act as the representative of the adult in succession matters is included by virtue of Art. 4(2).

<sup>334</sup> Competent authorities of Contracting Party B would have jurisdiction to provide this authorisation under Art. 5 and those of Contracting Party A under Art. 9.

Party B provides that a notary must draw up and certify the deed of sale, as well as perform all the necessary checks and assist the parties. The representative must exercise their powers and finalise the sale of the adult's assets in accordance with the law of Contracting Party B, by retaining a notary in Contracting Party B. In Contracting Party B, retaining the notary and the subsequent certification to be carried out by the notary would be considered a manner of exercise falling under Article 15(3).

## D. Withdrawal or modification of powers of representation

### Article 16

- 9.24 Article 16 allows the competent authorities that have jurisdiction under the Convention to withdraw or modify<sup>335</sup> the powers of representation granted by the adult by virtue of Article 15.<sup>336</sup>
- 9.25 This provision aims to reconcile the respect for the will, preferences, instructions and wishes expressed by an adult in advance of their impairment and the need to protect the adult when their condition deteriorates, and the powers of representation have become effective.<sup>337</sup>
- 9.26 The application of Article 16 is limited to cases where powers granted by an adult are "not exercised in a manner sufficient to guarantee the protection" of the adult or their property. In such cases, the powers can be modified or withdrawn following a decision by a competent authority that the person exercising them is doing so poorly or inadequately. In taking this decision, competent authorities should take into consideration (insofar as possible) the law governing the powers of representation, which may have been designated by the adult themselves.<sup>338</sup>

## E. Protection of third parties

### Article 17

- 9.27 If a third party enters into a transaction, in good faith, with a person who "would be entitled to act as the representative of the adult under the law of the State where the transaction was concluded",<sup>339</sup> that third party cannot be held liable on the sole ground that the other person was in fact not entitled to represent the adult under the law

<sup>335</sup> The modification might, for example, consist of introducing surveillance of the person exercising the powers of representation.

<sup>336</sup> The Explanatory Report (*op. cit.* note 12), para. 108.

<sup>337</sup> See *Proceedings of the Special Commission of a diplomatic character* (*op. cit.* note 13), p. 272.

<sup>338</sup> The Explanatory Report (*op. cit.* note 12), para. 108.

<sup>339</sup> Art. 17(1).

designated by the applicable law rules of the 2000 Convention. Article 17, thus, preserves the validity of the act and protects the third party from any liability.

- 9.28 However, this protection does not apply if the third party knew or ought to have known that the power of representation was governed by a law other than that of the State where the transaction was concluded, being the law designated by the applicable law rules of the 2000 Convention.<sup>340</sup> Therefore, good faith and due diligence are necessary in order for the third party to come under the protection of Article 17.<sup>341</sup> The protection also only applies if the transaction was entered into between persons who were present in the territory of the same State.<sup>342</sup>
- 9.29 Article 17 applies when the capacity to act as representative has been conferred by a measure of protection or was the result of a voluntary anticipatory act issued by the adult themselves.<sup>343</sup>
- 9.30 The acts which fall within the scope of Article 17 should be understood very broadly. These could range from acts involving property (e.g., a banker providing the apparent representative of the adult with funds) to medical acts (e.g., surgery or medical treatment carried out at the request of the apparent representative).<sup>344</sup>
- 9.31 It should be noted that Article 17 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 themselves in ignorance of the fact that the adult is no longer in a position to look after their own interests.<sup>345</sup>

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<sup>340</sup> *Ibid.*

<sup>341</sup> The Explanatory Report (*op. cit.* note 12), para. 109.

<sup>342</sup> Art. 17(2).

<sup>343</sup> The Explanatory Report (*op. cit.* note 12), para. 109.

<sup>344</sup> This point has been accepted by the Special Commission (see *Proceedings of the Special Commission of a diplomatic character* (*op. cit.* note 13), p. 267).

<sup>345</sup> For European Union Member States to which *Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations* ("the Rome I Regulation") applies, this scenario may be covered by Art. 13 of the Regulation, for contracts falling within the scope of the Regulation (Article 1) concluded after 17 December 2009. The Rome I Regulation does not apply to Denmark as well as to some overseas territories of the Member States which are not considered EU territories, to which the 1980 Rome Convention on the law applicable to contractual obligations applies. For other States, this scenario will be governed by their domestic law.

## F. General provisions on applicable law

### Articles 18-21

#### (a) Do the applicable law rules apply even if the designated law is not that of a Contracting Party?

##### Article 18

- 9.32 The rules concerning applicable law set out in the 2000 Convention are of universal application, which means they apply in all instances, including in a situation where the law designated is the law of a non-Contracting Party to the Convention.
- 9.33 The only exception to this general rule is when the Convention refers expressly to the law of a Contracting Party (*e.g.*, Art. 14).<sup>346</sup>

#### (b) Does a reference to the law of another State include a reference to the private international law rules of that State?

##### Article 19

- 9.34 Article 19 sets out the principle that *renvoi* is excluded. When the law of a State is designated, such designation refers only to the domestic law of that State and not its private international law rules.

#### (c) Do mandatory provisions of law in the State where the adult is to be protected apply?

##### Article 20

- 9.35 As an exception to the applicable law rules of Chapter III of the 2000 Convention, Article 20 provides for the possibility of applying mandatory laws of the State in which the adult is to be protected. Such mandatory laws may be in relation to various areas, including but not limited to public health policies, anti-money laundering rules and consumer protection.
- 9.36 This provision allows States to implement mandatory laws in their own territory, even if the protection of the adult has been arranged in accordance with the law of another State.<sup>347</sup>

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<sup>346</sup> The Explanatory Report (*op. cit.* note 12), para. 111.

<sup>347</sup> *Ibid.*, para. 113.

### Example 9.P

An adult, habitually resident in Contracting Party A, has designated a representative other than their spouse, to arrange for any care the adult may need. The adult and their spouse have now relocated to Contracting Party B, where the adult is to be placed in a mental health facility. In their former State of habitual residence (Contracting Party A) there is no need to obtain the authorisation of the spouse for such a placement. However, in their new State of habitual residence (Contracting Party B), the law on authorisation by the spouse for placement in a mental health facility is a mandatory law.<sup>348</sup>

## (d) Are there any circumstances where the law designated under the rules of the 2000 Convention does not have to be applied?

### Article 21

- 9.37 Article 21 provides for the public policy exception, something that is common to many HCCH Conventions. The public policy exception means that if the application of the law designated under the rules described above is manifestly contrary to the public policy of the Contracting Party involved, the competent authorities of that State can refuse to apply it.

### Example 9.Q

An adult, while habitually resident in Contracting Party A, has established powers of representation and designated an attorney in the event that their personal faculties become impaired to the extent where they can no longer look after their own interests. In their powers of representation, the adult also provided some advance arrangements in signed writing which included, among other things, that they wish to die by euthanasia in the event of a terminal disease. Such arrangements are possible under the domestic law of Contracting Party A. Some years later, the adult relocates to Contracting Party B. While habitually residing in Contracting Party B, the adult is diagnosed with a neurodegenerative disease which quickly renders them significantly impaired. The domestic law of Contracting Party B does not allow for voluntary euthanasia. Therefore, the competent authorities in Contracting Party B may refuse to give effect to the advance arrangements made by the adult in Contracting Party A, on the basis that they are manifestly contrary to the public policy of Contracting Party B.

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<sup>348</sup> *Ibid.*

## G. Applicable law issues relating to enforcement

9.38 Issues relating to enforcement, regulated by Chapter IV of the Convention, are covered in the following chapter of this Handbook, which deals with recognition and enforcement. However, for sake of completeness in relation to applicable law issues, it should be noted that the declaration of enforceability or registration for the purpose of enforcement is done according to the procedure provided in the law of the requested Contracting Party.<sup>349</sup> Furthermore, the enforcement *per se* takes place in accordance with the law of the requested Contracting Party to the extent provided by such law.<sup>350</sup>

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<sup>349</sup> Art. 25(1).

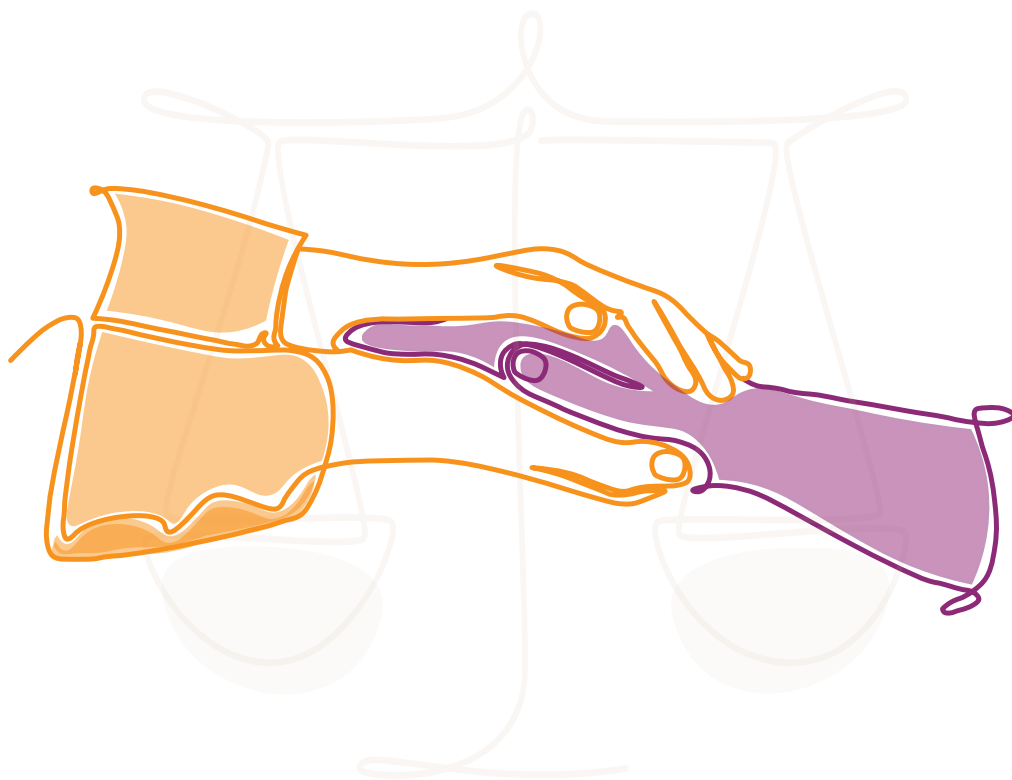
<sup>350</sup> Art. 27.





# 10

## Recognition and enforcement





- 10.1 Chapter IV of the 2000 Convention sets out the provisions for both the recognition and the enforcement of a measure falling under the scope of Article 3. Recognition entails that the effects of a measure, as they exist in the domestic legal system of the Contracting Party where the measure was taken (*i.e.*, the Contracting Party of origin), may be relied upon in the legal order of another Contracting Party (*i.e.*, the requested Contracting Party). Recognition should be distinguished from enforcement, which gives effect to the remedial consequences of the measure by the use of coercive action. Certain types of measures, such as those relating to the status and capacity of persons (*e.g.*, measures designating a person to assist the adult) are generally not considered “enforceable”.
- 10.2 The Chapter sets out the provisions for the recognition of a measure by operation of law *i.e.*, automatically (Art. 22(1)), including the grounds according to which the recognition of a measure may be refused (Art. 22(2)), and for the advance (“preventive”) recognition of a measure (Art. 23). This “preventive” recognition may be used by someone who wants to dispel, in advance, any doubt about the recognition of a measure before it is invoked or relied upon or when it is known in advance that some parties may not abide by a measure for which enforcement may not be available (*e.g.*, a measure appointing a representative to an adult). As for enforcement, Chapter IV sets out provisions covering declarations of enforceability and registration of measures for the purpose of enforcement (Art. 25) as well as for the enforcement of a measure in accordance with the law of the requested Contracting Party (Art. 27). Finally, Chapter IV includes provisions to the effect that the authority of the requested Contracting Party is bound by the findings of fact upon which the competent authority of the Contracting Party where the measure was taken based its jurisdiction (Art. 24) and that there shall be no review of the merits of the measure taken, without prejudice to such review as is necessary in the application of Articles 22-25 (Art. 26).<sup>351</sup>

## A. Recognition in one Contracting Party of a measure of protection taken in another Contracting Party

### Article 22

- 10.3 Article 22 covers the recognition of a measure. Recognition should be distinguished from enforcement, which may require a declaration of enforceability or registration for the purpose of enforcement as provided for in Article 25. Under Article 22, measures of protection taken in one Contracting Party are recognised “by operation of law” (*i.e.*, automatically) in all other Contracting Parties.<sup>352</sup> However, recognition may be refused under strict and limited grounds.<sup>353</sup>
- 10.4 Article 22 applies to any measures taken by the competent authorities of a Contracting Party within the scope of application of the Convention, including, for example, a measure whereby the limits imposed on the capacity of the adult, pursuant to a

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<sup>351</sup> The Explanatory Report (*op. cit.* note 12), para. 115.

<sup>352</sup> See Glossary: “Recognition by operation of law”.

<sup>353</sup> See, *infra*, Section B.

previous measure, are revoked. Article 22 also applies to a measure designating a representative or to a measure modifying or withdrawing powers of representation granted by the adult themselves, for instance in the context of a proceeding under Article 16.<sup>354</sup>

- 10.5 The recognition foreseen by Article 22 is one that is established by operation of law, meaning that no proceedings under the Convention are required in order for the measure to be recognised in the requested Contracting Party.<sup>355</sup> The recognition of a measure of protection by operation of law will be sufficient for a measure to have effect, insofar as the measure is voluntarily complied with or where there is no opposition to it.<sup>356</sup>

### Example 10.A

The authorities of Contracting Party A, the State of the habitual residence of the adult, appoint a legal representative to act on behalf of the adult with regard to transactions concerning their person or property. This appointment will be recognised by operation of law in Contracting Party B, where property of the adult is located. The legal representative will not have to take any other steps with regard to the recognition of the measure, including, for example, the recognition proceedings before the competent authority, to have their appointment as representative recognised in order to be able to enter into transactions on behalf of the adult.

- 10.6 Article 22 provides for the cross-border effect and validity of foreign measures in the requested Contracting Party while safeguarding due process rights to refuse recognition of a measure on the basis of specific grounds. A party against which the measure is invoked or an interested party, for example a family member of the adult, a financial institution or the public prosecutor opposing the measure, can allege (*e.g.*, in the course of a proceeding) one of the grounds for non-recognition set out in Article 22(2).<sup>357</sup> The Convention also allows for the possibility of formal advance "recognition or non-recognition" of a measure of protection.<sup>358</sup>
- 10.7 In order for the recognition to take place, the existence of the measure must be evidenced in the requested Contracting Party. In order to avoid placing undue bureaucratic hurdles in the way of the protection of adults, the Convention does not subject recognition to the production of any special or formal written document. In

<sup>354</sup> The Explanatory Report (*op. cit.* note 12), para. 116. See, also, C&R No 28 of the First Meeting of the SC (see path indicated in note 7).

<sup>355</sup> See C&R No 28 of the First Meeting of the SC (see path indicated in note 7). The terminology of "requested Contracting Party" is used in this Chapter to refer to the Contracting Party which is requested to recognise and / or enforce the measure of protection taken in another Contracting Party.

<sup>356</sup> If there is no voluntary compliance with a measure, or where there is opposition to the measure, see, *infra*, **section D** on enforcement.

<sup>357</sup> The Explanatory Report (*op. cit.* note 12), para. 116.

<sup>358</sup> *Ibid.* See also Art. 23.

some cases, presenting the written document incorporating the decision which gave rise to the measure and a document indicating that the decision is enforceable in the State of origin is sufficient. However, sending the decision by e-mail or a telefax could also be sufficient under the Convention and serve as proof, if permitted by the applicable law, of the measure with a view to its recognition *per se*.<sup>359</sup> In cases of urgency, it may also happen that the measure is taken by telephone and gives rise simply to a handwritten note in the file. In such cases, it may be possible that the competent authorities of the Contracting Party which took the measure inform the authorities in the requested Contracting Party of the measure by telephone or other means of communication<sup>360</sup> and then follow up with a written document evidencing the measure.

- 10.8 It is important to recall that Article 41 of the Convention exempts all documents forwarded or delivered under the Convention from legalisation or any other analogous formality. The application of the Convention between Contracting Parties is based on mutual trust and confidence. This being said, when implementing a measure of protection, the person entrusted with the protection of the person or property of the adult is advised to use the certificate delivered under Article 38 indicating the capacity in which they are entitled to act, and the powers conferred to them.<sup>361</sup>
- 10.9 On a practical basis, with a view to facilitate the implementation of the measure, the competent authority which took the measure should, if the information is not already available in the measure itself, endeavour to provide, and the authorities to which the measure is being communicated should look for:
- A description of the terms of the measure;
  - Any description of the circumstances which the measure intended to address;
  - Powers conferred and acts authorised;
  - The date of the measure;
  - The duration of the measure and any requirements for review; and
  - If possible, a website or other resource through which it is possible to check the up-to-date position regarding any revocation or changes to the measure.
- 10.10 It should be noted that, while Article 22(1) provides for the principle of recognition of measures by operation of law, Article 12 states, for certainty and predictability purposes, that measures taken in application of Articles 5 to 9 remain in force according to their terms,<sup>362</sup> even if a change of circumstances has eliminated the basis upon which jurisdiction was founded.<sup>363</sup>

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<sup>359</sup> The Explanatory Report (*op. cit.* note 12), para. 117.

<sup>360</sup> *Ibid.* See also *Proceedings of the Special Commission of a diplomatic character* (*op. cit.* note 13), p. 278.

<sup>361</sup> See C&R No 29 of the First Meeting of the SC (see path indicated in note 7). See, also, *infra*, paras 11.50-11.62.

<sup>362</sup> The Explanatory Report (*op. cit.* note 12), para. 86. See, *supra*, para. 8.9.

<sup>363</sup> So long as the competent authorities which have jurisdiction under the Convention have not modified, replaced or terminated such measures. See, also, C&R Nos 18 – 20 of the First Meeting of the SC (see path indicated in note 7).

- 10.11 The 2000 Convention provides for the recognition and enforcement of "measures" taken by competent authorities, not "decisions" taken by competent authorities. Therefore, unlike other HCCH Conventions,<sup>364</sup> there is no provision that deals with "severability and partial recognition and enforcement" of decisions taken by competent authorities. Each relevant measure will be recognised individually, as appropriate.

## B. Grounds for non-recognition of a measure of protection

- 10.12 As explained earlier, 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 measure is invoked (e.g., in the course of a legal proceeding) who must allege a ground for non-recognition set out in Article 22(2). However, the Convention does not exclude a preventive procedure, limited to recognition or non-recognition of the measure (see section C on Art. 23 below).<sup>365</sup>
- 10.13 Article 22(2) provides an exhaustive list of the grounds upon which recognition may be refused. Therefore, the Contracting Party addressed cannot base its refusal of recognition on other grounds. In particular, the competent authority addressed is not authorised to review the law applied by the competent authority of origin. Furthermore, it must be understood that Article 22(2) authorises refusal of recognition but does not make it mandatory.<sup>366</sup>
- 10.14 Recognition may be refused only in the following five circumstances:
- (a) **the measure was taken by an authority the jurisdiction of which was not based on, or was not in accordance with, one of the grounds provided for by the provisions of Chapter II**<sup>367</sup>
- 10.15 Where the recognition is subject to a possible refusal under Article 22(2) or in the case of an advance "preventive" recognition or non-recognition under Article 23, this provision authorises the requested competent authority to verify the jurisdiction of the competent authority of origin for the purposes of recognition.<sup>368</sup> The verification of the jurisdiction concerns all the jurisdictional provisions contained in Articles 5 to 11 of the Convention at the time the measure which is subject to recognition was taken.
- 10.16 The requested Contracting Party is not obliged to recognise measures that are based on domestic jurisdictional rules of the Contracting Party of origin that are inconsistent with the jurisdictional rules set out in Chapter II of the Convention.

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<sup>364</sup> See, for example, Art. 21 of the 2007 Child Support Convention.

<sup>365</sup> The Explanatory Report (*op. cit.* note 12), para. 116.

<sup>366</sup> *Ibid.*, para. 118.

<sup>367</sup> Art. 22(2)(a).

<sup>368</sup> The Explanatory Report (*op. cit.* note 12), para. 119.

- 10.17 As the 2000 Convention applies to measures taken when the adult had not yet reached the age of 18 years,<sup>369</sup> the recognition of these measures may be refused if they were taken under rules of jurisdiction that do not accord with those of the Convention, for example, pursuant to a ground of jurisdiction established by the 1996 Convention and not by the 2000 Convention.<sup>370</sup>

### Example 10.B

The authorities of Contracting Party A, having jurisdiction according to Article 10 (divorce forum) of the 1996 Convention, took a measure of protection concerning the property belonging to a child whose personal faculties are impaired for life and who, as a consequence, will not be able to protect their own interests in adulthood. The child has now reached the age of majority and recognition of this measure is sought in Contracting Party B. The authorities of Contracting Party B may refuse recognition of this measure, as it was taken under a rule of jurisdiction provided in the 1996 Convention which is not provided for in the 2000 Convention.

- (b) 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 Contracting Party<sup>371</sup>**

- 10.18 This ground for non-recognition allows the competent authority of the requested Contracting Party to refuse the recognition of a measure if the adult in question was not given the opportunity to be heard,<sup>372</sup> contrary to the fundamental rules of procedure set out in the requested Contracting Party. This is a special clause of procedural public policy. This ground is not relevant in cases of urgency, where the requirements of procedural due process of law ought to be applied more flexibly.<sup>373</sup> If an adult has lost the ability to be heard, presenting evidence regarding their condition could facilitate the recognition of the measure. This could be done, for example, through a medical assessment, in accordance with the applicable domestic laws.
- 10.19 To facilitate the recognition and enforcement of measures, with regard to the adult having the opportunity to be heard (Art. 22(2)(b)), competent authorities are encouraged to incorporate a record of whether the adult was heard into their orders for measures. If a decision is made not to hear the adult, competent authorities are encouraged to

<sup>369</sup> Art. 2(2).

<sup>370</sup> The Explanatory Report (*op. cit.* note 12), para. 119.

<sup>371</sup> Art. 22(2)(b).

<sup>372</sup> With regard to adults' equal recognition before the law and access to justice see Arts 12 and 13 of the UNCRRDP.

<sup>373</sup> The Explanatory Report (*op. cit.* note 12), para. 120.



indicate that consideration was given to doing so and to provide the reasons for the ultimate decision not to hear the adult.<sup>374</sup>

### Example 10.C

The competent authority of Contracting Party A designated a person to represent the adult without providing them with the opportunity to be heard. The representative now wants this measure to be recognised in Contracting Party B, where the adult has property. The Constitution of Contracting Party B has a provision stating that adults must be consulted and heard before such a measure is taken by a competent authority. Because the adult was not given the opportunity to be heard, and this is a violation of the fundamental principles of procedure of Contracting Party B, the competent authority of the latter State may refuse to recognise the measure taken in Contracting Party A.

### Example 10.D

An adult, habitually resides in Contracting Party A. A competent authority there took a measure designating the son of the adult to assist them. The adult is currently visiting their nephew in Contracting Party B, whom the adult always wanted to have as the designated person to assist them. Following discussions with the adult, the nephew suspects that the adult was not given the opportunity to participate or be heard in the proceedings designating the son as the person assisting the adult. The nephew seises a competent authority in Contracting Party B, with a view to have the recognition of this measure refused. The competent authority in Contracting Party B enquires after evidence proving that all practical measures were taken to facilitate participation by the adult or that all practical measures were taken to ascertain the will and preference of the adult (or the best interpretation of it). Failing such evidence, the competent authority in Contracting Party B has the option to refuse recognition of the measure taken in Contracting Party A. If successful, the nephew could thereafter seise the competent authority in Contracting Party B on the

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<sup>374</sup>

See C&R No 30 of the First Meeting of the SC (see path indicated in note 7).

basis of Article 10 to be designated as the person assisting the adult while the adult is visiting him in Contracting Party B, if there is a need for such an urgent appointment.

### Example 10.E

An adult, habitually resident in Contracting Party A, suffers a heart attack in a neurological rehabilitation clinic in Contracting Party B. The authority of Contracting Party A is competent, according to Article 5 of the Convention, to take a measure of protection of the adult, since they are habitually resident in Contracting Party A and only temporarily located in Contracting Party B to receive medical treatment. Since it was a situation of urgency, a measure of protection ordering the representation of the adult was immediately taken, in Contracting Party A, without providing the adult with the opportunity to be heard. In the short time available, it was impossible to do otherwise. In that case, the measure should normally be recognised in Contracting Party B.

**(c) The recognition is manifestly contrary to the public policy of the requested Contracting Party, or conflicts with a provision of the law of that State which is mandatory whatever law would otherwise be applicable<sup>375</sup>**

- 10.20 This ground of refusal may be used only if there is a manifest incompatibility with the public policy or a mandatory law of the requested Contracting Party.<sup>376</sup>
- 10.21 It should be noted that the use of the public policy exception is rare in private international law generally and, particularly, in the context of HCCH Conventions.

### Example 10.F

An adult is habitually resident in Contracting Party A. Their sibling, who is habitually resident in Contracting Party B, is in need of a kidney transplant. The adult, who is under a protective regime in Contracting Party A, expresses the wish to give one of their kidneys to their sibling. The representative of the adult, appointed by competent authorities in Contracting Party A, brings a request to a competent authority in Contracting Party A, which authorises the organ donation, given the wishes

<sup>375</sup> Art. 22(2)(c).

<sup>376</sup> The Explanatory Report (*op. cit.* note 12), para. 121.

expressed by the adult. The health condition of the sibling in Contracting Party B suddenly deteriorates. The representative of the adult makes arrangements for the adult to travel to Contracting Party B for the organ donation and transplant to take place there. However, the hospital in Contracting Party B refuses to act upon the authorisation granted by the competent authority in Contracting Party A and seises a competent authority in Contracting Party B. The competent authority in Contracting Party B refuses to recognise the decision taken in Contracting Party A, as it is against the public policy of Contracting Party B to allow adults whose personal faculties are impaired to donate organs that cannot regenerate themselves.

### Example 10.G

An adult habitually resides in Contracting Party A, where competent authorities have placed them under a guardianship regime. The institution of guardianship in Contracting Party A renders the adult unable to exercise their right to vote, due to their lack of legal capacity. While the adult will be on holidays next month in their State of nationality, Contracting Party B, the adult would like to exercise their right to vote there. To ensure that the adult will be able to exercise their right to vote, relatives of the adult in Contracting Party B make an application, in accordance with Article 23 of the Convention, for the advance non-recognition of the measure taken in Contracting Party A. Contracting Party B is a State Party to the UNCPRD.<sup>377</sup> On this basis, the competent authorities in Contracting Party B refuse to recognise this measure taken by competent authorities in Contracting Party A, as it is contrary to Article 29 of the UNCPRD and thus, against the public policy of Contracting Party B.

### (d) The measure is incompatible with a later measure taken in a non-Contracting Party which would have had jurisdiction under Articles 5 to 9, where this later measure fulfils the requirements for recognition in the requested Contracting Party<sup>378</sup>

- 10.22 This provision covers a potential conflict between the measure to be recognised, taken in a Contracting Party, and another measure, taken later in a non-Contracting Party. In this case, if the two measures are incompatible, preference will be given to the second, more recent one, taken by a competent authority closer to the adult and in a better position to assess their interests. This preference given to the measure taken subsequently in a non-Contracting Party, presupposes that the latter State would have

<sup>377</sup> See Glossary: "UNCPRD".

<sup>378</sup> Art. 22(2)(d).

had jurisdiction under Articles 5 to 9 of the Convention and that the measure is capable of recognition in the requested Contracting Party in accordance with the domestic laws on recognition and enforcement.<sup>379</sup>

### Example 10.H

If a guardianship measure supporting the exercise of the legal capacity of an adult is lifted, any previous measures which rely on the status of the adult as a subject of a guardianship will be incompatible with the new measure which removes that protective regime. Therefore, if the competent authorities that have taken the new decision, in a non-Contracting Party, would have had jurisdiction according to Articles 5 to 9 of the Convention and where this later measure fulfils the requirements for recognition in the requested Contracting Party, the previous measures may not be recognised there.

### (e) The procedure provided in Article 33 has not been complied with<sup>380</sup>

- 10.23 The final ground of non-recognition concerns Article 33, which institutes a mandatory procedure of consultation before any measure to place an adult in another Contracting Party is taken. It allows the Contracting Party in which the placement measure is to be executed to refuse recognition if the procedure for consultation has not been followed.<sup>381</sup>

## C. Ensuring the recognition or non-recognition of a measure in another Contracting Party (advance recognition or non-recognition<sup>382</sup>)

### Article 23

- 10.24 Article 23 provides a "preventive"<sup>383</sup> mechanism to address potential issues that may need to be resolved, in order to ensure that measures of protection taken in one Contracting Party will be recognised in another Contracting Party before being invoked or relied upon in that latter State.<sup>384</sup> Given that, under the Convention, the recognition of measures from other Contracting Parties occurs by operation of law, it is only at the

<sup>379</sup> The Explanatory Report (*op. cit.* note 12), para. 122.

<sup>380</sup> Art. 22(2)(e).

<sup>381</sup> The Explanatory Report (*op. cit.* note 12), para. 123.

<sup>382</sup> See Glossary: "Advance recognition or non-recognition".

<sup>383</sup> The Explanatory Report (*op. cit.* note 12), para. 124.

<sup>384</sup> See C&R No 31 of the First Meeting of the SC (see path indicated in note 7).

time when the measure is invoked or relied upon that a possible dispute over the existence of a ground for non-recognition will be the subject of a ruling.<sup>385</sup> It may be in the interest of anyone concerned to dispel any doubt that may exist about the recognition or non-recognition of a measure of protection at an earlier stage. Therefore, through this provision, the 2000 Convention provides a legal basis for any interested party to seek, in advance, the recognition or non-recognition of a measure, before it is invoked or relied upon in another State.

- 10.25 This provision is limited to the recognition or non-recognition of a measure and does not apply to an action to obtain a decision on, for example, whether a power of representation (*e.g.*, a continuing power of attorney) issued by an adult is valid or void.<sup>386</sup>
- 10.26 It is up to the domestic law of the requested Contracting Party to set out the procedure for the "preventive" mechanism under Article 23. The 2000 Convention does not impose a "simple and rapid" procedure to this provision, as it does with declarations of enforceability under Article 25,<sup>387</sup> but to apply a simple and rapid procedure to this "preventive" mechanism would be consistent with the object and purpose of the Convention.<sup>388</sup> Unlike the proceedings for declarations of enforceability, the "preventive" proceedings envisioned in Article 23 tend to initiate immediately a dispute as to the international regularity of the measure.<sup>389</sup> Such proceedings, which usually entail a full hearing, should be kept as short as possible so as not to defeat the purpose of the advance recognition or non-recognition *e.g.*, in case of a relocation to another State.
- 10.27 An effective implementation of Article 23 invites Contracting Parties to clearly identify in their domestic laws the competent authorities which will handle requests for advance recognition or non-recognition of measures of protection.

### Example 10.I

The habitual residence of an adult is in Contracting Party A. Their family disagrees on whether the adult should receive treatment in a specialised care institution located in Contracting Party A or Contracting Party B, where most of the children of the adult are living. It is clear to the court in Contracting Party A that the relocation of the adult to Contracting Party B is in line with their will and preferences, as the adult would like to be closer to their children. The court in Contracting Party A also consulted the Central Authority in Contracting Party B concerning the proposed

<sup>385</sup> The Explanatory Report (*op. cit.* note 12), para. 124.

<sup>386</sup> *Ibid.*

<sup>387</sup> Art. 25(2).

<sup>388</sup> See C&R No 32 of the First Meeting of the SC (see path indicated in note 7).

<sup>389</sup> The Explanatory Report (*op. cit.* note 12), para. 124.

placement (in accordance with Art. 33) and decided that the adult would be better cared for in the medical facilities in Contracting Party B. Under Article 22, this measure would be recognised by operation of law (*i.e.*, automatically) as soon as the measure is invoked or relied upon in Contracting Party B. To ensure the continuity of care of the adult, the family would like to dispel any doubt by any interested party about the recognition of the relocation of the adult before it takes place. Hence, the family will seek an advance recognition, under Article 23, of the decision to relocate the adult, in order to guarantee that the relocation will take place as smoothly and as expeditiously as possible and to avoid any interruption of the adult's medical treatment.

#### Example 10.J

In the context of a protective regime instituted for the benefit of an adult, a competent authority in Contracting Party A, the State of habitual residence of the adult, appoints the niece of the adult to support them in managing their property. The adult has a property located in Contracting Party B which is currently subject to a lease. The property needs to be sold urgently to cover medical expenses of the adult. The niece knows that the current tenants are very difficult, and she has valid reasons to believe that they may not respect the powers conferred upon her by the competent authority in Contracting Party A and may create difficulties regarding the sale of the property, such as not allowing potential buyers to visit. Normally, the decision by a competent authority in Contracting Party A to appoint someone as the representative of an adult would be recognised by operation of law (*i.e.*, automatically) in Contracting Party B in accordance with Article 22. Because the appointment is a measure for which there is no enforcement mechanism, the niece may want to dispel in advance any doubt about the recognition of the powers conferred upon her by seeking an advance recognition under Article 23. This would ensure that any interested party in Contracting Party B will respect the powers conferred upon the niece and abide by them, thus avoiding time-consuming and costly litigation as well as any uncertainties.

#### Example 10.K

A competent authority in the State of habitual residence of the adult, Contracting Party A, institutes a protective regime for the benefit of the adult. In this context, powers to represent the adult regarding their property are conferred on Y, their nephew. The savings of the adult are held in a bank located in Contracting Party B. Acting in his capacity as representative of the adult, Y instructs the bank to transfer half of the savings of the adult to a bank located in Contracting Party A, where the funds will be used to provide the adult with the assistance they need. In

accordance with Article 22, the measure taken in Contracting Party A would be recognised by operation of law in Contracting Party B. This entails that the bank located in Contracting Party B can consider that Y is entitled to act on behalf of the adult as regards the savings of the adult, in accordance with the measure. The measure is not one that requires enforcement pursuant to Article 25, as it merely confers on Y the power to act on behalf of the adult, without ordering anybody to do, or refrain from doing, something. With a view to facilitate its implementation, the measure could be accompanied by a certificate issued under Article 38 indicating the capacity in which Y is entitled to act and the powers conferred. If Y were to know in advance that certain parties may not respect his powers to represent the adult, he should seek an advance recognition under Article 23.

## D. Enforcement of a measure of protection

### *Articles 25 and 27*

- 10.28 If a measure of protection taken in one Contracting Party is not being respected in another Contracting Party, it may be necessary to commence enforcement proceedings in that latter Contracting Party.<sup>390</sup>
- 10.29 It is important to note that a measure whereby a court appoints a representative for an adult is not, as such, a measure that requires enforcement.<sup>391</sup> The purported effect of a measure like this is simply to enable the representative to act on behalf of the adult concerned. With a view to facilitate the implementation of such a measure, it could be accompanied by a certificate issued under Article 38 indicating the capacity in which a representative of an adult is entitled to act and the powers conferred.<sup>392</sup> If the party invoking such a measure were to know, in advance, that certain parties may not respect or abide by these powers conferred by a court, the party relying on this measure could seek an advance recognition under Article 23 in order to dispel any doubts as to its recognition and effect.
- 10.30 Where it is necessary to commence enforcement proceedings in another Contracting Party, Article 25 of the Convention sets out a procedure where an interested party (*e.g.*, the representative of the adult) must request that the measure be declared enforceable or registered for the purpose of enforcement in the requested Contracting Party according to the procedure provided for by the law of that State.<sup>393</sup> Article 25

<sup>390</sup> Art. 25; See, also, Explanatory Report (*op. cit.* note 12), para. 126.

<sup>391</sup> See C&R No 28 of the First Meeting of the SC (see path indicated in note 7).

<sup>392</sup> *Ibid.*, C&R No 29.

<sup>393</sup> The Explanatory Report (*op. cit.* note 12), para. 126. See, also, C&R No 33 of the First Meeting of the SC (see path indicated in note 7).

applies to both measures of protection the purported effects of which may not be achieved without some form of coercion by the competent enforcing authorities of the requested Contracting Party and measures of protection that may, where necessary, require some form of coercion to achieve their purported effects.<sup>394</sup>

- 10.31 The First Meeting of the Special Commission noted that measures taken for the protection of an adult only exceptionally require enforcement under Article 25. This may occur, for instance, where a decision is taken by a competent authority to place the adult in an establishment or to authorise a specific intervention by health care practitioners or medical staff (e.g., tests or treatments).<sup>395</sup> It is recommended that Contracting Parties and competent authorities, in their laws and procedures respectively, differentiate between those measures that require enforcement and those that do not.<sup>396</sup>

#### Example 10.L

A competent authority in Contracting Party A, the adult's State of habitual residence, has taken a measure of protection for an adult by appointing a legal representative for them. The powers conferred onto this representative by the competent authority in Contracting Party A permit this person to enter into any transactions on behalf of the adult in Contracting Party B, concerning property belonging to the adult which is located there. Due to the high medical expenses associated with the adult's condition, it is no longer possible to cover mortgage payments on their property, necessitating a judicial / forced sale to avoid bankruptcy. The property now needs to be sold to pay the creditors of the adult. The competent authority of Contracting Party A instructs the representative of the adult to proceed with the forced sale / judicial sale of the property, a measure that needs to be enforced by a public authority in Contracting Party B. In this case, the forced sale will have to be declared enforceable or registered for the purpose of enforcement in Contracting Party B, depending on the domestic procedure applicable.

#### Example 10.M

An adult is not in a position to manage their own finances due to mental health issues. The family members of the adult cannot agree on a representative and the state of the adult's mental health has now deteriorated significantly, necessitating institutional care for some time. The family members seize a competent authority (in this case, a court) in

<sup>394</sup> The Explanatory Report (*op. cit.* note 12), para. 126.

<sup>395</sup> See C&R No 33 of the First Meeting of the SC (see path indicated in note 7).

<sup>396</sup> *Ibid.*, C&R No 34.



Contracting Party A (the current habitual residence of the adult and the State in which the adult is to receive care), in order to resolve the matter and make the necessary arrangements for the adult. The competent authority designates a representative for the adult and provides a list of measures this representative must undertake on behalf (and in the interest) of the adult. One such measure is to close a savings account the adult has in Contracting Party B (the former State of habitual residence of the adult) and transfer the funds to a current account of the adult in Contracting Party A. If all goes well, this type of decision does not in itself require enforcement to be effective. However, if the bank in Contracting Party B was not to abide by the orders of the representative to transfer the funds and close the account, it may be necessary for the representative to request, under Article 25, that these measures be declared enforceable or registered for the purpose of enforcement in Contracting Party B, according to the domestic procedures. The bank may, then, assert one or more of the grounds of refusal of recognition under Article 22(2), which the competent authority in Contracting Party B will assess prior to making a decision regarding enforcement.

- 10.32 A simple and rapid procedure must be applied to the declaration of enforceability or registration for the purposes of enforcement.<sup>397</sup> Contracting Parties are free to define the means for achieving this and the Convention does not provide a fixed time period within which the procedure must be completed; however, the Convention does state that the procedure should be one which is "simple and rapid".<sup>398</sup> For example, the competent authority responsible for the registration of the measure for the purpose of enforcement could be the Registrar of the court, though it would be appropriate for this to be aligned with arrangements for registration of domestic orders.
- 10.33 During the First Meeting of the Special Commission, the importance of employing simple and rapid procedures was highlighted in the context of the recognition and / or declaration of enforceability of measures or the registration for the purposes of enforcement of measures taken in other Contracting Parties. States are encouraged to consider implementing legislation providing for stipulated time frames, the use of specialised judges or registrars and the concentration of jurisdiction for procedures in certain courts, among others.<sup>399</sup>
- 10.34 Importantly, this declaration of enforceability or registration for the purposes of enforcement can only be refused by the requested Contracting Party on the grounds listed above in relation to the non-recognition of a measure (Art. 22(2)).<sup>400</sup>

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<sup>397</sup> Art. 25(2). See, also, Explanatory Report (*op. cit.* note 12), para. 126.

<sup>398</sup> *Ibid.*

<sup>399</sup> See C&R No 32 of the First Meeting of the SC (see path indicated in note 7).

<sup>400</sup> Art. 25(3).

- 10.35 Once the declaration of enforceability or registration for the purpose of enforcement has been made, the measures are to be enforced in the requested Contracting Party as if they had been originally taken by the competent authorities of that State, according to its domestic law.<sup>401</sup> This includes all the enforcement modalities available for similar domestic measures under the law of the requested Contracting Party.

#### Example 10.N

A year ago, an adult habitually residing in Contracting Party A, suddenly needed to undergo an expensive surgical procedure, for which they had no readily available funds. To cover those costs, the adult's spouse re-mortgaged property they jointly owned in Contracting Party B. It is now no longer possible to cover the mortgage costs, necessitating a judicial / forced sale to avoid bankruptcy. However, the spouse of the adult objects to the sale of the property. The competent authority in Contracting Party A takes a measure to sell the property co-owned by the adult in Contracting Party B. Such a measure, which requires enforcement to be effective, will be subject to a registration for the purpose of enforcement or a declaration of enforceability in Contracting Party B in accordance with Article 25.

- 10.36 Enforcement should take place in accordance with, and to the extent of, the domestic law of the requested Contracting Party.<sup>402</sup> The Convention acknowledges that Contracting Parties regulate enforcement differently and provides for the enforcement of measures to the extent permitted by the domestic law of each State.

#### Example 10.O

The enforcement in Contracting Party B of a measure of placement taken in Contracting Party A can be suspended by a competent authority in Contracting Party B if this competent authority is allowed to do so for a similar domestic measure, for example, if the adult does not consent to the measure.<sup>403</sup>

#### Example 10.P

An adult is habitually resident in Contracting Party A. For the last several years, the adult has loaned a valuable painting of theirs to a museum located in Contracting Party B. The adult is in need of long-term medical care. In order to cover the expenses of this care, the painting needs to be sold. The museum is hesitating to return the painting, as it attracts many

<sup>401</sup> Art. 27. See, also, C&R No 35 of the First Meeting of the SC (see path indicated in note 7).

<sup>402</sup> Art. 27.

<sup>403</sup> The Explanatory Report (*op. cit.* note 12), para. 128.

visitors, and the museum would lose profit. Taking the property by force is not an enforcement mechanism available in Contracting Party B. The only available enforcement mechanism in Contracting Party B is a fine.

### Example 10.Q

In Contracting Party A, a protection measure is taken for the adult that involves their placement in an institution (e.g., health facility or residence suitable for their needs) located in Contracting Party B. Regardless of whether a dispute arises or not, the domestic law of Contracting Party B may require that the measure be executed through a court decision. This means that the court may provide instructions regarding the placement of the adult for the enforcement authority to carry out.

### Example 10.R

An adult, habitually resident in Contracting Party A, has suffered an impairment and requires expensive medical intervention. Soon after their impairment, the adult was declared bankrupt in Contracting Party A and it is no longer possible to cover mortgage costs on property they own in Contracting Party B. The competent authority (in this case, a court) in Contracting Party A has been asked to take measures of protection for the adult in order to cover their healthcare costs. In that regard, the competent authority orders the immediate sale of the property. This measure could be subject to proceedings for a declaration of enforceability or registration for the purpose of enforcement in Contracting Party B in accordance with Article 25. Once declared enforceable or registered for the purpose of enforcement, this measure shall be enforced as though it was taken by a competent authority in Contracting Party B and such enforcement will be subject to the domestic law of Contracting Party B, to the extent that the domestic law provides (Art. 27).

- 10.37 At the 1999 Special Commission of a diplomatic character, concerns were raised regarding the application of Article 27, such as the risk of an infringement of civil liberties arising from recourse to State-imposed restrictions or the financial consequences of this provision, if it results in obliging the State in which the adult is present to accept responsibility for the expenses of hospitalisation resulting from the enforcement of measures taken by the competent authorities of another State. These concerns are resolved, as Article 27 only applies to the enforcement of a measure in its private-law context.<sup>404</sup>

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<sup>404</sup> *Ibid.*

## E. Findings of jurisdictional facts and prohibition of review on the merits

### *Articles 24 and 26*

- 10.38 In determining whether a ground for refusal of recognition is established, the competent authority of the requested Contracting Party is bound by the factual findings upon which the competent authority of origin has based its jurisdiction.<sup>405</sup>
- 10.39 Where the jurisdiction is grounded upon a preliminary assessment of the interests of the adult by the competent authority of origin,<sup>406</sup> this assessment binds the competent authority of the requested Contracting Party.<sup>407</sup>
- 10.40 If the competent authority of origin based its jurisdiction on the habitual residence of the adult, the competent authority of the requested Contracting Party cannot review the facts on which the competent authority of origin based its assessment of habitual residence.<sup>408</sup>
- 10.41 The requested authority shall not review the facts upon which the competent authorities of the State of origin identified as urgent a situation that enabled these authorities to take an urgent measure based on Article 10.
- 10.42 For recognition purposes, declaration of enforceability or registration for the purpose of enforcement, Article 26 provides that there shall be no review of the merits of the measure as is necessary to determine the possible refusal grounds in the context of applying Articles 22 to 25.
- 10.43 The authorities of the requested Contracting Party shall refrain from re-examining the facts and reassessing the reasoning of the competent authority of origin. However, the proviso “beyond what was necessary”, in Article 26, is meant to clarify that the authorities of the requested Contracting Party can make the verifications that are necessary to determine, for example, the grounds upon which a competent authority exercised jurisdiction, where a measure fails to state so explicitly. To the extent to which jurisdiction in accordance with the Convention is a pre-requisite for recognition, nothing prevents the authorities of the requested Contracting Party from obtaining information on the facts of the case, beyond what appears in the text of the measure, as a means to assessing whether jurisdiction was exercised in accordance with the Convention.

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<sup>405</sup> Art. 24.

<sup>406</sup> Arts 7(1) and 8(1).

<sup>407</sup> The Explanatory Report (*op. cit.* note 12), para. 125.

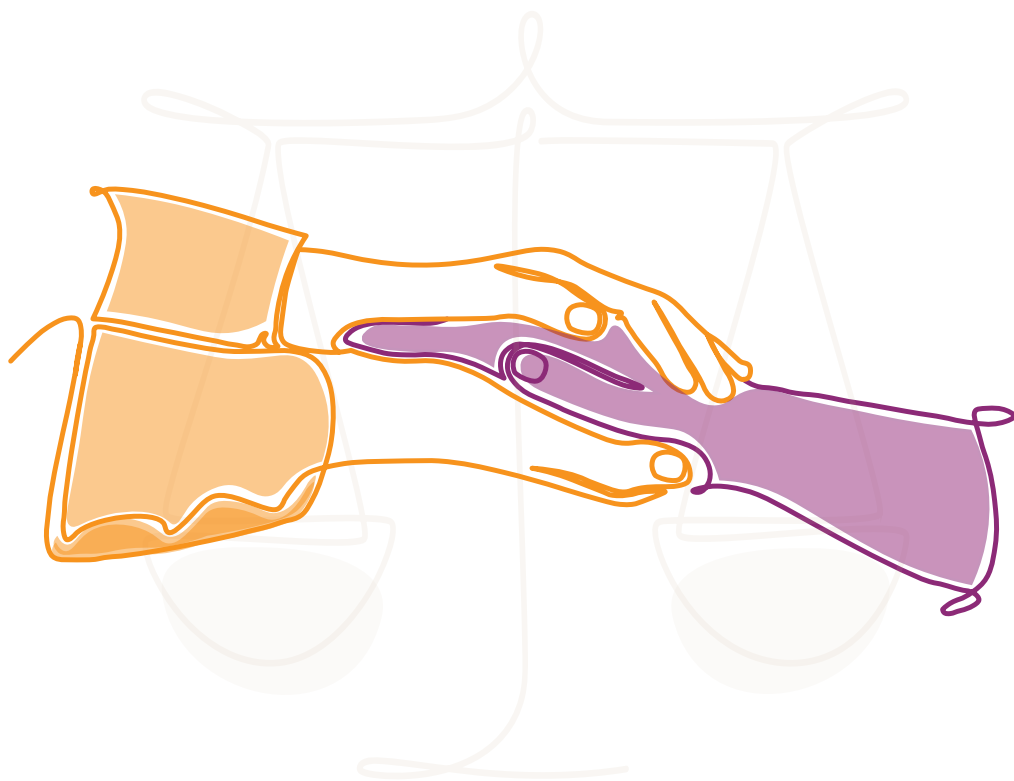
<sup>408</sup> *Ibid.*

**Example 10.S**

A competent authority in Contracting Party A appoints X as the representative of the adult. Upon recognition of the measure in Contracting Party B (the requested Contracting Party) the competent authorities of that State cannot inquire into whether it was appropriate to appoint X rather than Y.

# 11

## Cooperation, Central Authorities and General Provisions





## A. The role of a Central Authority under the 2000 Convention

### *Articles 28-37*

- 11.1 Central Authorities play an important role in the practical operation of the 2000 Convention. The cooperation provisions of the Convention, which are essential to its successful operation, rely on Central Authorities to either put them into effective practice directly, or to assist and facilitate the cooperation of other Convention actors. Therefore, competent, cooperative and responsive Central Authorities are at the heart of this Convention.<sup>409</sup>
- 11.2 One of the main functions of Central Authorities under the 2000 Convention is to facilitate communication and cooperation between competent authorities in their respective Contracting Parties. Central Authorities in each Contracting Party constitute a hub of sorts, serving as a contact point for the competent authorities of other Contracting Parties (Arts 28-30).<sup>410</sup>
- 11.3 The Convention also provides that, in principle, each Central Authority will bear its own costs.<sup>411</sup>
- 11.4 During the First Meeting of the Special Commission, it was agreed that Central Authorities should be given a mandate which is sufficiently broad, qualified personnel and resources, including modern means of communication, all of which are necessary to carry out their functions effectively. Central Authorities should have a regular staff which is able to develop expertise in the operation of the 2000 Convention.<sup>412</sup>

## B. Cooperation amongst competent authorities

- 11.5 The Convention broadly provides for the possibility of communications and direct requests for information between the competent authorities of Contracting Parties called upon to take measures of protection for the person of the adult and / or their property (Arts 31-34).<sup>413</sup> However, where the counterpart competent authority is unknown or if there is not enough information to initiate contact, it is advisable to initiate communications via the Central Authorities.
- 11.6 It is important to note that cooperation amongst competent authorities takes place in the context of jurisdiction issues (Arts 7-11).<sup>414</sup> In certain cases, competent authorities

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<sup>409</sup> See C&R No 36 of the First Meeting of the SC (see path indicated in note 7).

<sup>410</sup> The Explanatory Report (*op. cit.* note 12), para. 129.

<sup>411</sup> Art. 36. It is possible, under Art. 36(2), for Contracting Parties to draw up agreements regarding the allocation of costs with one another to facilitate and enhance their cooperation. It is also possible, under Art. 37, for Contracting Parties to draw up agreements with one another, to facilitate and enhance their cooperation.

<sup>412</sup> See C&R No 36 of the First Meeting of the SC (see path indicated in note 7).

<sup>413</sup> The Explanatory Report (*op. cit.* note 12), para. 129.

<sup>414</sup> Depending on the ground of jurisdiction, cooperation is either specifically required or recommended.



have to advise<sup>415</sup> the competent authorities having primary jurisdiction under Article 5 or 6 before taking jurisdiction (Art. 7(1) and 11). Competent authorities exercising jurisdiction under Articles 5, 6(2) and 8 may have to inform the competent authorities having jurisdiction under Article 7 of measures or any decisions taken (Art. 7(2) and (3)). Applications for transfer of jurisdiction under Article 8(1) and ensuing communications are made between, on the one hand, competent authorities having jurisdiction under Article 5 or 6 and, on the other hand, competent authorities listed under Article 8(2). Competent authorities having jurisdiction under either Article 9 or Article 11 will have to verify the compatibility of the contemplated measures with those taken by the competent authorities exercising jurisdiction under Articles 5 to 8. Finally, competent authorities may coordinate the measures taken under either Article 10 or Article 11 that will eventually lapse in relation to measures taken by competent authorities having jurisdiction under Articles 5 to 9, as applicable, or by a competent authority from a non-Contracting Party.<sup>416</sup>

- 11.7 During the 2018 EC-HCCH Joint Conference on the Cross-Border Protection of Vulnerable Adults, the potential of direct judicial communications in this area was underlined.<sup>417</sup> Such potential was reiterated during the First Meeting of the Special Commission.<sup>418</sup> Pursuant to the mandate by CGAP 2023 to extend the scope of the IHNJ to matters relating to the 2000 Convention,<sup>419</sup> Contracting Parties are invited to consider designating one or more members of the judiciary for the purpose of judicial communications under the 2000 Convention. Designated members of the judiciary should be sitting judges, or members of the judiciary bound by the same standards of independence and impartiality as a sitting judge, with authority and, ideally, with experience in the area of protection of adults.<sup>420</sup> Following a recommendation to this effect from the First Meeting of the Special Commission, CGAP 2023 mandated the extension of the Emerging Guidance on Direct Judicial Communications to the 2000 Protection of Adults Convention.<sup>421</sup>

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<sup>415</sup> While the term "advise" is used in the English text of Art.7(1), for the purposes of this Handbook, the term is to be understood as "to inform" or "to notify", which is closer to the French term "aviser" used in the French version of the text of Art.7(1). The term "advise" is not to be interpreted as "to advise legally".

<sup>416</sup> The Model Forms for such communications can be found at pp. 28-31 of the Explanatory Report (*op. cit.* note 12).

<sup>417</sup> See C&R No 14 of 2018 EC-HCCH Joint Conference (*op. cit.* note 1).

<sup>418</sup> See C&R No 56 of the First Meeting of the SC (see path indicated in note 7). See, also, "Direct judicial communications and a possible network of judges under the 2000 Protection of Adults Convention", Prel. Doc. No 8 of July 2022 drawn up for the attention of the First Meeting of the SC (see path indicated in note 7).

<sup>419</sup> See C&D No 32 of CGAP 2023 (see path indicated in note 8).

<sup>420</sup> See C&R No 57 of the First Meeting of the SC (see path indicated in note 7). See, also, C&D No 32 of CGAP 2023 (see path indicated in note 8).

<sup>421</sup> See C&R No 58 of the First Meeting of the SC (see path indicated in note 7). See, also, C&D No 32 of CGAP 2023 (see path indicated in note 8).

## Practical aspects of communication

### How may competent authorities communicate?

- 11.8 Competent authorities may wish to communicate directly with one another, if feasible and if in line with declarations made under Articles 32(2)<sup>422</sup> and 42<sup>423</sup> of the Convention,
- 11.9 The competent authority may also contact the Central Authority in the requested Contracting Party, either directly or through its own Central Authority. Contracting Parties are required to designate a Central Authority upon joining the Convention,<sup>424</sup> and these Central Authorities have obligations to facilitate communication.<sup>425</sup> A list of Central Authorities is available on the Protection of Adults Section on the HCCH website ([www.hcch.net](http://www.hcch.net), under "Protection of Adults", then "Authorities").
- 11.10 Depending on national rules and availability, judicial authorities may get in touch via the International Hague Network of Judges (IHNJ). If both Contracting Parties have designated members to the Network, the contact points can provide information on aspects of the law and procedure, including assisting with locating the relevant competent authority and introducing the direct judicial communication. A list of members of the IHNJ is available on the HCCH website ([www.hcch.net](http://www.hcch.net)).<sup>426</sup>
- 11.11 Central Authorities may also be useful in helping to transmit documents between competent authorities. In addition, certain Central Authorities, if requested, may assist with the interpretation or translation of documents or with locating such services.

### Medium of communication

- 11.12 The 2000 Convention does not prescribe the medium with which authorities should communicate. Various mediums of communication may be utilised, such as e-mail, telephone, or videoconference facilities as long as any information exchanged is properly protected.

### Information and documents which should accompany the communication

- 11.13 The First Meeting of the Special Commission strongly encouraged competent authorities to make use of the Model Form regarding "Measures of protection concerning an adult" and the Model Form regarding "Information relating to measures of protection concerning an adult".<sup>427</sup> Although the Convention does not prescribe a

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<sup>422</sup> Pertaining to requests made under Art. 32(1).

<sup>423</sup> Pertaining to requests made under Arts 8 and 33.

<sup>424</sup> Art. 28; Art. 43(1).

<sup>425</sup> Art. 30(a).

<sup>426</sup> See C&R Nos 16, 17 and 57 from the First Meeting of the SC (see path indicated in note 7). See, also, CGAP 2023, C&D No 32 (see path indicated in note 8).

<sup>427</sup> The Recommended Model Forms under the 2000 Protection of Adults Convention can be found in Annex IV.

particular form of communication, it is strongly advised that at least the initial communication be in writing<sup>428</sup> and should particularly identify:<sup>429</sup>

- the name and contact details of the initiating authority;
- the reference number of the case;
- the nature of the case (with due regard to confidentiality concerns);
- the issue on which the communication is sought;
- whether the parties concerned have consented to the communication taking place;
- when the communication may occur (with due regard to any time differences);
- any specific questions which the initiating authority would like answered;
- any other pertinent matters.

- 11.14 The communication should be accompanied by the relevant documents which are necessary for the appreciation of the requested authority and requests for further information by the requested authority should be limited to what is necessary. If the initial request is formulated in a judicial or administrative decision, it is recommended that the factual elements and the considerations on which the request is founded be detailed within the motivation of the decision that will be communicated.
- 11.15 It should be noted that "all documents forwarded or delivered under the 2000 Convention shall be exempt from legalisation or any analogous formality".<sup>430</sup> This extends to all documents submitted or exchanged, including all decisions of competent authorities as well as certificates delivered in accordance with Article 38.<sup>431</sup>
- 11.16 In accordance with Article 51, all communications under the Convention between authorities must be in their original language and accompanied by a translation into the official language or one of the official languages of the other Contracting Party. Where that is not feasible, the communication must be translated into either French or English, keeping in mind that, under Article 56, a Contracting Party may make a reservation to the use of either French or English, but not both.<sup>432</sup>

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<sup>428</sup> See Emerging Guidance on Direct Judicial Communications, Principle 8 (*op. cit.* note 235). See, also, C&R No 17 from the First Meeting of the SC (see path indicated in note 7).

<sup>429</sup> Emerging Guidance on Direct Judicial Communications, Principle 7 (*ibid.*). See, also, C&R No 17 from the First Meeting of the SC (see path indicated in note 7).

<sup>430</sup> Art. 41.

<sup>431</sup> The Explanatory Report (*op. cit.* note 12), para. 150.

<sup>432</sup> Art. 51; *ibid.*, para. 169. See, also, C&R No 50 from the First Meeting of the SC (see path indicated in note 7).

## Communication safeguards for communications between competent authorities<sup>433</sup>

### Overarching principles

- 11.17 Each authority engaging in direct communications must respect the law of its own jurisdiction.
- 11.18 When communicating, each authority seized should maintain its independence in reaching any decision on the matter at hand.
- 11.19 Communications must not compromise or in any way affect the independence of the authority seized in reaching any decision on the matter at hand.

### Commonly accepted procedural safeguards

- 11.20 In Contracting Parties in which direct communications between competent authorities are practiced, the following are commonly accepted procedural safeguards:
  - except in special circumstances, parties are to be notified of the nature of the proposed communication (e.g., the subject matter, the purpose, the intended outcome, etc);
  - a record is to be kept of all communications and these are to be made available to the parties;
  - any conclusions reached should be in writing;
  - parties or their representatives should have the opportunity to be present in certain cases, for example, via conference call facilities.

## C. The designation and establishment of a Central Authority

### Article 28

- 11.21 Article 28 requires Contracting Parties to designate a Central Authority to carry out the obligations imposed on it by the Convention.<sup>434</sup>
- 11.22 It is possible to designate several Central Authorities for the Contracting Parties which have non-unified systems (i.e., federal States, States with more than one legal system, or States having autonomous territorial units). In this case, the Contracting Party must

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<sup>433</sup> Emerging Guidance on Direct Judicial Communications, Principle 6 (*op. cit.* note 235). The Emerging Guidance on Direct Judicial Communications was endorsed by the Sixth Meeting of the Special Commission on the Practical Operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention (1-10 June 2011). See "Conclusions and Recommendations and Report of Part I of the Sixth Meeting of the Special Commission on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention (1-10 June 2011)", Prel. Doc. No 14 of November 2011, available on the HCCH website at [www.hcch.net](http://www.hcch.net) under "Child Abduction" then "Special Commission meetings" and "Sixth Special Commission meeting (Part I, June 2011; Part II, January 2012)". See, also, C&R No 17 from the First Meeting of the SC (see path indicated in note 7).

<sup>434</sup> Art. 28(1).

designate a Central Authority to which any communication may be addressed for transmission to the appropriate Central Authority within that State.<sup>435</sup>

- 11.23 The details of the designated Central Authority (and, where a Contracting Party has designated more than one Central Authority, of Central Authorities) must be communicated to the Permanent Bureau of the HCCH.<sup>436</sup>
- 11.24 Central Authorities are encouraged, where feasible, to establish and regularly update their website.<sup>437</sup>

## D. What assistance must a Central Authority provide?

### *Articles 29-31*

- 11.25 Under Article 29, Central Authorities have two general duties under the 2000 Convention which cannot be performed through other bodies:
- to cooperate with each other regarding all matters under the 2000 Convention<sup>438</sup> and to promote cooperation among competent authorities in their States to achieve the purposes of the Convention;<sup>439</sup> and
  - to take appropriate steps to provide information as to the laws of their States and services available therein, regarding the protection of adults.<sup>440</sup>
- 11.26 Article 30 elaborates on further, specific duties that are placed on Central Authorities. In accordance with this provision, Central Authorities must "either directly or through public authorities or other bodies" take appropriate steps to:
- facilitate communications "by every means"<sup>441</sup> between competent authorities in situations to which the Convention applies<sup>442</sup>;
  - on the request of a competent authority of another Contracting Party, provide assistance to discover the whereabouts of an adult, if the adult is present in the territory of the requested Contracting Party and in need of protection.<sup>443</sup>
- 11.27 During the First Meeting of the Special Commission, Central Authorities were strongly encouraged to cooperate closely and respond promptly to requests for cooperation.

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<sup>435</sup> Art. 28(2).

<sup>436</sup> Art. 43(1). This information will be made available on the HCCH website ([www.hcch.net](http://www.hcch.net), under "Protection of Adults" then "Authorities"). See, also, C&R Nos 37 and 38 of the First Meeting of the SC (see path indicated in note 7).

<sup>437</sup> See C&R No 38 of the First Meeting of the SC (see path indicated in note 7).

<sup>438</sup> *Ibid.*, C&R No 41.

<sup>439</sup> Art. 29(1).

<sup>440</sup> Art. 29(2).

<sup>441</sup> The interpretation of this term should also include electronic means of communication and any other rapid means of communication, bearing in mind the need for confidentiality (see C&R No 39 of the First Meeting of the SC (see path indicated in note 7)).

<sup>442</sup> Art. 30(a).

<sup>443</sup> Art. 30(b).

To this end, it was recommended that Central Authorities use rapid means of communication as far as possible, bearing in mind the need for confidentiality.<sup>444</sup> In addressing any practical problems concerning the proper functioning of the 2000 Convention, Central Authorities are encouraged to engage in dialogue and, where a group of Central Authorities share a common problem, consideration should be given to having joint meetings which might, in some cases, be facilitated by the Permanent Bureau of the HCCH.<sup>445</sup>

- 11.28 The text of Article 30 intentionally contains no qualifying language as to the identity of the public authorities or other bodies which may carry out these tasks.<sup>446</sup> This is to avoid unduly limiting the scope of the bodies which may be able to provide assistance. Where possible and appropriate, such bodies should carry out, at the request of Central Authorities, searches in databases under their responsibilities to assist with discovering the whereabouts of the adult.
- 11.29 It should be noted that Article 30 leaves open the possibility for competent authorities other than Central Authorities to request information directly from the Central Authority of another Contracting Party, or to communicate directly amongst each other.<sup>447</sup>

## **E. Situations where it is obligatory for competent authorities to cooperate / communicate**

### ***Articles 33 and 34***

- 11.30 The 2000 Convention sets out two situations wherein cooperation and communication between competent authorities is obligatory. It should be noted that these obligations are not placed specifically on Central Authorities but on any competent authorities that wish to take, or have taken (in the case of Art. 34), a measure of protection under the Convention.<sup>448</sup> However, it is anticipated that the communication and cooperation required by Articles 33 and 34 will take place through, or with the assistance of, the relevant Central Authority / Authorities. Article 33 stipulates that the authority having jurisdiction under Articles 5 to 8 "shall first consult with the Central Authority or other competent authority" of the requested Contracting Party, prior to placing the adult in an institution in their territory.

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<sup>444</sup> See C&R No 39 of the First Meeting of the SC (see path indicated in note 7).

<sup>445</sup> *Ibid.*, C&R No 40.

<sup>446</sup> There is no requirement for the Central Authorities to delegate tasks to "duly accredited" bodies, such as that found in Art. 9 of the *Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*.

<sup>447</sup> The Explanatory Report (*op. cit.* note 12), para. 132. See also Art. 32.

<sup>448</sup> Art. 33 refers to "an authority having jurisdiction under Articles 5 to 8" and Art. 34 mentions "the competent authorities" of the relevant Contracting Party. Both provisions, therefore, refer to the competent authority which is about to take, or has already taken, a measure of protection in respect of the person or property of the adult. It is interesting to note that, in the French version of the text of the Convention, Art. 33 speaks of "[...] l'autorité compétente, en vertu des articles 5 à 8 [...]", while, in the English version, the term used is "[...] an authority having jurisdiction [...]".

(a) **When a competent authority is contemplating the placement of an adult in an institution / facility**

**Article 33**

- 11.31 Article 33, which has already been mentioned in the context of the ground for non-recognition under Article 22(2)(e),<sup>449</sup> sets out the only procedure for compulsory consultation in the Convention.
- 11.32 This provision arises when competent authorities with jurisdiction under Articles 5 to 8 are contemplating the placement of the adult in institutional care, or any other facility intended for their protection, in another Contracting Party.<sup>450</sup>
- 11.33 Under Article 33, the competent authority considering the placement of the adult must first consult with the Central Authority or competent authority of the other Contracting Party. To that effect, it must then transmit:
- a report on the adult; together with
  - the reasons for the proposed placement.<sup>451</sup>

**Example 11.A**

An adult, who is living with a drug addiction and a severe psychological impairment, is a national of Contracting Party A. The adult is habitually resident in Contracting Party B and, while there, is placed in a healthcare facility following a court decision. The adult has a representative appointed for them in Contracting Party A who is attempting to repatriate the adult to the State of their nationality. In order to place the adult in an appropriate healthcare institution in Contracting Party A, the court in Contracting Party B opens a consultation procedure under Article 33 by providing the reasons for the proposed placement in Contracting Party A and a report on the adult. It notably explains the reasons behind the initial decision to temporarily place the adult in the healthcare facility in Contracting Party B (Art. 3(e)) and attaches the relevant decision, which is supported by relevant medical reports as well as any available records of hearing the adult on the matter. The relevant court in Contracting Party A does not express any opposition, under Article 33, within a reasonable time. Thereafter, the competent authorities in Contracting Party B can take the necessary measures to place the adult to the appropriate healthcare institution in Contracting Party A.

<sup>449</sup> See, *supra*, **Chapter 10**.

<sup>450</sup> The Art. 33 consultation only applies to measures contemplated by competent authorities. It does not cover placements of a private nature.

<sup>451</sup> Art. 33(1).

- 11.34 This obligation to consult, under Article 33(1), gives the competent authority of the receiving State a power to review the intended placement.<sup>452</sup> It also allows the competent authority in the receiving State to ascertain and coordinate, in advance, the conditions under which the adult may stay in that State (*e.g.*, immigration rules, the sharing of costs associated with the placement<sup>453</sup> and any other entry requirements).

### Example 11.B

An adult habitually residing in Contracting Party A is receiving treatment in a psychiatric clinic there. The condition of the adult has drastically worsened and they now require immediate, specialist psychiatric treatment which is available in Contracting Party B. ... In accordance with Article 33, prior to arranging for the transfer of the adult, the competent authorities in Contracting Party A consult the competent authorities in Contracting Party B and transmit a report on the condition of the adult and the reasons for the proposed placement. The competent authority in Contracting Party B does not oppose the placement. The competent authority in Contracting Party A then makes an order under Article 3(e) that the adult is to be placed in a specialised facility in Contracting Party B.

- 11.35 Under Article 33(2), the Central Authority or other competent authority of the requested Contracting Party may oppose the placement of the adult, in which case the decision to place the adult cannot be finalised.<sup>454</sup> It should be noted that what is envisioned by Article 33(2) is not an explicit, positive approval procedure. If the Central Authority or other competent authority of the requested Contracting Party disagrees with the placement, they must indicate their opposition within a reasonable time. If the Central Authority or other competent authority does not oppose within a reasonable time, the placement can go forward.<sup>455</sup> If this consultation procedure is not followed, the measure may be refused recognition under the Convention.<sup>456</sup> According to practice, if the requested Central Authority, in its response to the requesting Central Authority, provides only a report which would lead to the placement of the adult, this may also be construed as a lack of opposition.
- 11.36 Each Contracting Party may<sup>457</sup> designate the authority to which requests under Article 33 should be addressed.<sup>458</sup> If any such designation is made, it must be communicated to the Permanent Bureau of the HCCH. This information will be made

<sup>452</sup> The Explanatory Report (*op. cit.* note 12), para. 138.

<sup>453</sup> See, *infra*, paras 11.67 – 11.70.

<sup>454</sup> The Explanatory Report (*op. cit.* note 12), para. 139.

<sup>455</sup> See *Proceedings of the Special Commission of a diplomatic character* (*op. cit.* note 13), pp. 332-335.

<sup>456</sup> Art. 22(2)(e). See also, *supra*, **Chapter 10**.

<sup>457</sup> This designation is not obligatory but may facilitate efficient communications.

<sup>458</sup> Art. 42.



available on the HCCH website ([www.hcch.net](http://www.hcch.net), under "Protection of Adults" then "Authorities").

## **(b) Sharing of information in situations where an adult is in serious danger and changes residence / presence**

### **Article 34**

- 11.37 This provision covers situations where the adult changes residence or is present in another Contracting Party and appears to be in serious danger. In this case, the competent authorities of the Contracting Party which have taken or are contemplating to take a measure of protection are obliged to inform the competent authorities of the new State of residence, or presence, of the danger and of the measures taken or contemplated.<sup>459</sup>
- 11.38 According to the Explanatory Report, this obligation to notify also applies to cases where the adult has become resident or is present in a non-Contracting Party.<sup>460</sup> In such cases, where the counterpart competent authority is unknown or if there is not enough information to initiate contact, it is advisable to initiate communications via the International Hague Network of Judges (IHNJ) or, if feasible, the relevant diplomatic / consular channels.
- 11.39 It will be a matter for the relevant competent authorities to determine whether, in the particular case, the adult concerned is "exposed to a serious danger". Possible examples of such cases would be if the physical or mental condition of the adult requires constant treatment or where the adult is exposed to drugs or other unhealthy influences.<sup>461</sup> Other examples might be where the carer of the adult is under the supervision of competent authorities in the first Contracting Party due to allegations of neglect or abuse.

### **Example 11.C**

An adult habitually resides in Contracting Party A and their representative decides to relocate them to Contracting Party B. The adult did not consent to this relocation and the law of Contracting Party A provides that such a relocation requires a prior consultation with a competent authority. As the adult has been forcibly relocated to Contracting Party B by their representative, it is possible that the adult could be in danger. An authority in Contracting Party A informs an authority in Contracting Party B about the relocation, the possible danger and the possible whereabouts of the adult. The authority in Contracting Party B considers taking an urgent measure of protection and, while repatriation to Contracting Party A is being

<sup>459</sup> The Explanatory Report (*op. cit.* note 12), para. 140.

<sup>460</sup> *Ibid.*

<sup>461</sup> *Ibid.*

organised, the authority orders that the adult stays with a family member of their choice or in a specialised establishment in Contracting Party B. Meanwhile, through cooperation, the authority in Contracting Party A designates a new representative for the adult in order to prepare for their return to Contracting Party A.

- 11.40 Article 34 presupposes that the competent authorities that took, or are contemplating to take, a measure of protection are aware that the adult has acquired a new residence or is present in another State. If they only suspect that the adult may be present in another Contracting Party, they may make a request for assistance to locate the adult pursuant to Article 30(b) before proceeding, in order to inform the competent authorities in the State where the adult is present or their new State of residence of the danger and of the measure taken or contemplated, in conformity with Article 34.<sup>462</sup>

## F. Situations where cooperation / communication is encouraged

### *Articles 31, 32 and 38*

- 11.41 In addition to the obligations set out above, the 2000 Convention provides for specific instances where cooperation between competent authorities<sup>463</sup> is envisaged, and may be thought of as good practice, but is not mandatory. The fact that these specific instances are provided for in the Convention does not prevent cooperation in other circumstances.<sup>464</sup> In fact, during the First Meeting of the Special Commission, Central Authorities were strongly encouraged to cooperate regarding other matters, under Article 29, to achieve the purposes of the 2000 Convention.<sup>465</sup>

### (a) Encouraging the use of alternative dispute resolution

#### *Article 31*

- 11.42 Article 31 encourages, but does not oblige, competent authorities to facilitate alternative means of dispute resolution such as "mediation, conciliation or similar means", with a view to bringing about solutions for the protection of the person or property of the adult in situations to which the Convention applies. This can be done, on the basis of Article 31, through other bodies, such as Central Authorities, which can play a relevant mediating role. Alternative dispute resolution might be utilised in cases between the person designated to assist the adult and other persons regarding the

<sup>462</sup> *Ibid.* It is important to note that national data protection and privacy regulations are to be respected but this should not result in any delays in the taking of protective measures concerning the adult.

<sup>463</sup> See, *infra*, para. 11.47.

<sup>464</sup> See the general duty to cooperate placed upon Central Authorities – Art. 29.

<sup>465</sup> See C&R No 41 of the First Meeting of the SC (see path indicated in note 7).

steps to be taken for the protection of the person or property of the adult, or between the adult and those supporting them, in an endeavour to find an agreement on the implementation of a measure.

## **(b) Requesting information relevant to the protection of the adult when contemplating taking a measure of protection**

### *Article 32*

- 11.43 If a competent authority is contemplating taking a measure of protection and it considers that the situation of the adult so requires, it may request any authority of another Contracting Party which has information relevant to the protection of the adult or their property to communicate such information. It is to be understood that the authorities envisioned by Article 32 are solely public authorities and not associations or non-governmental organisations.<sup>466</sup>
- 11.44 The possibility of requesting information on the adult would be especially useful if the adult changes habitual residence. This request for information on the adult will also be useful in cases where it is the national authorities who are dealing with the protection of the adult or their property; they will be able to put questions to the authorities of the State of the habitual residence.<sup>467</sup>
- 11.45 The phrase "if the situation of the adult so requires"<sup>468</sup> serves as a precaution in order to avoid the dangers of uncontrolled and unnecessary collection of information. It is for the requesting authority to consider this condition and ensure that it is fulfilled in their jurisdiction. Transmission of any information must be in conformity with Article 35.
- 11.46 Although the text of Article 32(1) does not say so explicitly, it is to be understood that the requested authority is not bound to furnish the requesting competent authority with the information requested. Rather, the requested authority is to make the assessment based on its own discretion and is under no obligation, under the Convention, to state the reasons behind its decision to refuse the transmission of the requested information.<sup>469</sup> This being said, cooperation, insofar as possible, is encouraged in order to promote the protection of the adult concerned.
- 11.47 Article 32(1) allows any competent authority of a Contracting Party to contact any authority of another Contracting Party and 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 cooperation, if the requested authority cannot easily identify the requesting authority and cannot assess whether or not to fulfil such a request. Such

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<sup>466</sup> The Explanatory Report (*op. cit.* note 12), para. 134.

<sup>467</sup> *Ibid.*

<sup>468</sup> Art. 32(1).

<sup>469</sup> Art. 32(1). It could be that the domestic law of the requested Contracting Party does not permit the transmission of certain information (*e.g.*, because of domestic laws concerning confidential communications with members of a profession, including but not limited to doctors or lawyers).

communication may be facilitated by the IHNJ<sup>470</sup> or by the Central Authorities. Article 32(2) also provides the possibility for a Contracting Party to declare that requests under Article 32(1) may only be communicated through its Central Authority(ies).<sup>471</sup> This declaration should be made to the depositary of the Convention<sup>472</sup> which will notify Contracting Parties of the declaration.<sup>473</sup> In addition, the Permanent Bureau of the HCCH will ensure that such information is placed on the HCCH website ([www.hcch.net](http://www.hcch.net), under "Protection of Adults" then "Authorities").

- 11.48 Article 32(3) provides for mutual assistance between the competent authorities of Contracting Parties for the implementation of measures of protection, such as providing information about the law applicable in the other State in relation to the implementation of such measures (e.g., Arts 14 and 20). This mutual assistance will often be necessary, particularly in cases of relocation of the adult or their placement in an appropriate establishment located in a State other than the one in which the measure of protection was taken.<sup>474</sup>
- 11.49 It should be noted that all authorities concerned must respect the general rules applicable to information gathered or transmitted, provided for by Articles 39 and 40 of the Convention.<sup>475</sup>

### Example 11.D

An adult habitually resides in Contracting Party A, where measures are in place for their protection. The adult would like to relocate to Contracting Party B, the State of their nationality. Family members of the adult seise a competent authority in Contracting Party B in order to put the necessary measures in place for the protection of the adult in Contracting Party B. As part of its deliberation, the competent authority in Contracting Party B, with the assistance of the Central Authority, contacts the competent authority in Contracting Party A. To assist them in their decision and to make sure that there is no gap in the protection of the adult, the competent authority in Contracting Party A, with the assistance of the Central Authority, informs the competent authority in Contracting Party B of all the measures that are

<sup>470</sup> Judicial authorities may connect via the IHNJ. If both Contracting Parties have designated members to the IHNJ, the network judges can assist with locating the relevant competent authority and introducing the direct judicial communication. A list of members of the IHNJ is available on the HCCH website. See *Emerging Guidance on Direct Judicial Communications* (*op. cit.* note 235).

<sup>471</sup> The Explanatory Report (*op. cit.* note 12), para. 136.

<sup>472</sup> Art. 43(2). The depositary of the Convention is the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

<sup>473</sup> Art. 59(d).

<sup>474</sup> The Explanatory Report (*op. cit.* note 12), para. 137.

<sup>475</sup> See, *infra*, paras 11.64-11.66.

currently in place for the protection of the adult in Contracting Party A, and shares the latest medical records of the adult (after informing the adult that they were going to do so). Based on the information given, the competent authority in Contracting Party B takes the appropriate measures of protection, ensuring the smooth relocation of the adult.

## G. Certificate issued under Article 38

### *Article 38*

- 11.50 Where a measure of protection has been taken or a power of representation has been confirmed, Article 38 provides for a certificate to 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.<sup>476</sup> The certificate under Article 38 is an important instrument in the cross-border transportability and operability of measures of protection and confirmed powers of representation.<sup>477</sup>
- 11.51 A certificate under Article 38 may pertain to measures of protection taken by a competent authority or to powers of representation under Article 15, but only when such powers have been confirmed.<sup>478</sup> This certificate is highly useful to practitioners as it provides legal security, certainty and predictability, whether the protection measure or the confirmed power of representation concerns the adult themselves or their property. In addition, a certificate having probative force in all Contracting Parties could reduce costs and disputes.<sup>479</sup> The presumption of the powers established by the certificate is limited to the date on which it is issued. Later on, the position disclosed in the certificate may change. That applies whether the certificate relates to a measure of protection or to a power of representation, and for whatever reasons have given rise to the change.
- 11.52 The certificate mentions the capacity and the powers of the person(s) entrusted with the protection of the adult or their property, whether they have been designated through a measure of protection or by the adult themselves through a power of representation which has been confirmed.<sup>480</sup>

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<sup>476</sup> Art. 38(1).

<sup>477</sup> See C&R No 46 of the First Meeting of the SC (see path indicated in note 7).

<sup>478</sup> See "Confirmation of powers of representation for the purposes of the certificate issued under Article 38", Prel. Doc. No 11 of October 2022 drawn up for the attention of the First Meeting of the SC (see path indicated in note 7). It should be noted that reference to this Prel. Doc. is for background information only, since the First Meeting of the SC concluded and recommended differently than what was suggested in the Prel. Doc.

<sup>479</sup> The Explanatory Report (*op. cit.* note 12), para. 144.

<sup>480</sup> *Ibid.*

- 11.53 If relevant, the certificate may also indicate what powers the person(s) entrusted with the protection of the adult or their property do(es) not have. For instance, a certificate may mention that the legal representative of an adult having their habitual residence in one Contracting Party does not have the power to administer property this adult owns in another Contracting Party.<sup>481</sup>
- 11.54 It should be noted that the certificate may only be delivered by an authority designated by the Contracting Party<sup>482</sup> where a measure of protection has been taken or a power of representation confirmed.<sup>483</sup> Therefore, if a competent authority has not taken any measure of protection or if powers of representation granted by the adult have not been confirmed, the certificate cannot be issued.<sup>484</sup> It is important to note, however, that this certificate may be delivered by an authority other than the competent authority which has taken the measure or the authority that has confirmed the power of representation but that is within the same Contracting Party.
- 11.55 The First Meeting of the Special Commission encouraged Contracting Parties that have not yet done so to designate the authorities competent to draw up the certificate in accordance with Article 38(3) of the 2000 Convention.<sup>485</sup>

### Example 11.E

A competent authority in the State of habitual residence of the adult, Contracting Party A, confers powers to Y, the nephew of the adult, to represent them in matters relating to their property. The savings of the adult are held in a bank located in Contracting Party B. Acting in their capacity as representative of the adult, Y instructs the bank to sell assets belonging to the adult and to transfer the proceeds to a bank located in Contracting Party A, in order to cover medical expenses for the adult. With a view to facilitate its implementation by the bank staff, Y obtains a certificate issued under Article 38 from the authority competent to issue it, indicating the capacity in which Y is entitled to act and the details of the powers conferred, specifying that they include, among other things, the acts of disposal of movables located abroad (*i.e.*, in a State other than that of the adult's habitual residence).

- 11.56 The 2000 Convention does not define the term "confirmation", nor does it prescribe a particular process for the confirmation of powers of representation. Therefore, confirmation is left to each Contracting Party to regulate at the domestic level. Whether Contracting Parties entrust the task of confirmation to a judicial or administrative

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<sup>481</sup> *Ibid.*

<sup>482</sup> Art. 38(3).

<sup>483</sup> The Explanatory Report (*op. cit.* note 12), para. 145.

<sup>484</sup> This is to avoid adding to the number of certificates or to the dangers of their contradicting one another. See *Proceedings of the Special Commission of a diplomatic character* (*op. cit.* note 13), pp. 294-296.

<sup>485</sup> See C&R No 48 of the First Meeting of the SC (see path indicated in note 7).

authority, a public body or an appropriate professional, it is important that, in any case, safeguards are in place to avoid conflicts of interest.<sup>486</sup> Although confirmation may differ from jurisdiction to jurisdiction, the Explanatory Report provides that it "must give every guarantee of reliability".<sup>487</sup> 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. At the First Meeting of the Special Commission, it was agreed that, for a power of representation to be confirmed and to benefit from the certificate under Article 38, it must at least be in force and in conformity with the law applicable.<sup>488</sup> The entry into force of the powers and their conformity with the law applicable is the minimum standard for the confirmation of powers of representation for the purpose of the certificate issued under Article 38. Of course, depending on domestic law, some Contracting Parties may include other, additional substantive or procedural elements in their process of confirmation.

- 11.57 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.<sup>489</sup> The confirmation of a power of representation is generally not a measure of protection under the 2000 Convention. 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.<sup>490</sup>
- 11.58 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.<sup>491</sup> 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.

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<sup>486</sup> *Ibid.*, C&R No 44.

<sup>487</sup> The Explanatory Report (*op. cit.* note 12), para. 146 (as amended). See, also, C&R No 42 of the First Meeting of the SC (see path indicated in note 7).

<sup>488</sup> See C&R No 43 of the First Meeting of the SC (see path indicated in note 7).

<sup>489</sup> The Explanatory Report (*op. cit.* note 12), para. 146 (as amended).

<sup>490</sup> See "Confirmation of powers of representation for the purposes of the certificate issued under Article 38", Prel. Doc. No 11 of October 2022 drawn up for the attention of the First Meeting of the SC (see path indicated in note 7). It should be noted that reference to this Prel. Doc. is for background information only, since the First Meeting of the SC concluded and recommended differently than what was suggested in the Prel. Doc. If the confirmation does constitute a measure of protection within the meaning of Art. 3, the jurisdiction and applicable law rules under the 2000 Convention will apply to it. See, also, the Explanatory Report (*op. cit.* note 12), para. 146 (as amended).

<sup>491</sup> *Ibid.*, para. 144.

### Example 11.F

An adult habitually residing in Contracting Party A has granted powers of representation to be exercised in the event of an impairment or insufficiency of their personal faculties. Since issuing the powers, the adult has relocated to Contracting Party B. The mental and physical faculties of the adult are now significantly impaired, and the powers of representation must be exercised. In order for the representative to rely more effectively on the powers of representation in both Contracting Party A and Contracting Party B, they would like to have their powers confirmed for the purposes of obtaining a certificate under Article 38. To do so, and if possible under the law of Contracting Party B, the representative may seise an authority competent in Contracting Party B to confirm the powers and deliver the certificate to the representative. Alternatively, if the law of Contracting Party A provides for a confirmation process, the representative can seise an authority competent in Contracting Party A to do the same.

- 11.59 Article 38(2) indicates that 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 remains, therefore, possible for any interested person to contest the correctness and up-to-dateness of the particulars appearing on the certificate but, in the absence of a contestation, a third party may securely deal with the person indicated in the certificate, within the limits of the powers mentioned therein.<sup>492</sup> The probative force of the certificate is limited to the date it was drawn up, meaning that powers which existed prior to the date of the certificate cannot be guaranteed to remain in force in the future. It is to be noted that Article 38 does not provide for the cancellation of certificates. As a result, only a new certificate will replace an older one.<sup>493</sup> It is, therefore, recommended to always use certificates that are as recent as possible.

### Example 11.G

An adult whose habitual residence is in Contracting Party A has two bank accounts, one in Contracting Party A and another in Contracting Party B. Under measures of protection taken by the authorities of Contracting Party A, the adult benefits from the support of a person in connection with the management of their property. The same measures also entrust that

<sup>492</sup> *Ibid.*, para. 147.

<sup>493</sup> See *Proceedings of the Special Commission of a diplomatic character* (*op. cit.* note 13), p. 294. The Model Form of the certificate can be found at p. 25 of the Explanatory Report (*op. cit.* note 12) and on the HCCH website.



person with the power to represent the adult in all relations with banks and financial institutions. With a view to facilitating the management of the adult's account in Contracting Party B, the authorities of Contracting Party A deliver, upon a request by the adult's representative, a certificate under Article 38 indicating the powers conferred onto the representative. After some time, the authorities of Contracting Party A decide that a different person should be entrusted with the representation of the adult and replace the person originally appointed, pending an investigation on the alleged misuse of the adult's funds. The powers conferred on the originally appointed representative immediately cease to exist. The change should then be reflected in a new certificate, delivered, again, upon request, by the authorities of Contracting Party A, and indicating that the newly appointed person, rather than the predecessor, is entitled to act on behalf of the adult. The newly appointed representative may then want to communicate the certificate to the bank in Contracting Party B, to avert the risk that the bank might execute instructions given by the predecessor.

- 11.60 If, in the time between a measure being taken or a power confirmed and the delivery of the certificate, 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*.<sup>494</sup>
- 11.61 During the First Meeting of the Special Commission, Contracting Parties were strongly encouraged 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.<sup>495</sup> The Special Commission also 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.<sup>496</sup>
- 11.62 A model certificate<sup>497</sup> was approved by the 1999 Special Commission of a diplomatic character. The First Meeting of the Special Commission on the practical operation of the 2000 Convention recommended the use of this model certificate.<sup>498</sup>

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<sup>494</sup> 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 is a useful tool in raising awareness to the domestic regulations surrounding the delivery of the certificate.

<sup>495</sup> See C&R No 45 of the First Meeting of the SC (see path indicated in note 7).

<sup>496</sup> *Ibid.*, C&R No 46.

<sup>497</sup> The Explanatory Report (*op. cit.* note 12), p. 25.

<sup>498</sup> See C&R No 47 of the First Meeting of the SC (see path indicated in note 7).

## H. Transmission of information under the Convention that could create a risk

### *Article 35*

- 11.63 If the transmission of any information under the Convention would likely place the adult or their property in danger or constitute a serious threat to the liberty or life of a member of the family of the adult, the authority must not transmit that information.<sup>499</sup> In light of such danger, Article 35 forbids both the transmission of such a request (by the requesting authority) as well as the transmission of information (by the requested authority).<sup>500</sup>

## I. Transmission of personal data and information

### *Articles 39 and 40*

- 11.64 It should be noted that the personal data gathered or transmitted under the 2000 Convention is to be used only for the purposes for which it was gathered or transmitted.<sup>501</sup>
- 11.65 In any case, the requested authorities shall comply with their obligations vis-à-vis data protection and assess what data is necessary and sufficient to be transmitted, in order to guarantee efficient cooperation.
- 11.66 Further, authorities to which information is transmitted are to ensure its confidentiality in accordance with the domestic law of their State.<sup>502</sup> The obligation of confidentiality is also imposed on the authority transmitting the information.<sup>503</sup>

## J. Central Authority and public authority costs

### *Article 36*

- 11.67 Generally, Central Authorities and other public authorities are to bear their own costs in carrying out their tasks under the 2000 Convention.<sup>504</sup> In this context, the term "public authorities" refers to the administrative authorities of the Contracting Parties and not to the courts.<sup>505</sup> Therefore, court costs and, more generally, the costs of proceedings and lawyers' fees are excluded from the scope of Article 36.

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<sup>499</sup> Art. 35.

<sup>500</sup> The Explanatory Report (*op. cit.* note 12), para. 135.

<sup>501</sup> Art. 39.

<sup>502</sup> Art. 40.

<sup>503</sup> The Explanatory Report, (*op. cit.* note 12) para. 149.

<sup>504</sup> Art. 36(1).

<sup>505</sup> The Explanatory Report (*op. cit.* note 12), para. 142.

- 11.68 The costs envisioned by this provision include, but are not limited to:
- the fixed costs of the functioning of the competent authorities;
  - the costs of correspondence and transmissions, including translation costs;
  - the costs of seeking out information regarding an adult and / or their property;
  - the costs of assisting with discovering the whereabouts of an adult;
  - the costs of the organisation of mediation or settlement agreements;
  - the costs of implementation of the measures taken in another State.<sup>506</sup>
- 11.69 It should be noted that the Central Authorities and other public authorities of Contracting Parties retain the "possibility of imposing reasonable charges for the provision of services".<sup>507</sup> These charges may include, for example, the costs of locating an adult through the use of extraordinary means, such as a private investigator, or delivering certificates. If a State does impose such charges, whether to reimburse costs already incurred or to pre-emptively cover the cost of providing the service itself, the charges should be formulated "with a certain amount of moderation".<sup>508</sup> In addition, authorities should provide clear information about such charges in advance.
- 11.70 Article 36(2) provides the possibility for Contracting Parties to enter into agreements among themselves concerning the allocation of charges when applying the Convention.<sup>509</sup>

## K. Legalisation

### *Article 41*

- 11.71 Article 41 provides for dispensation from legalisation, in that "all documents forwarded or delivered under the 2000 Convention shall be exempt from legalisation or any analogous formality".<sup>510</sup> This extends to all documents submitted or exchanged, including all decisions of competent authorities as well as certificates delivered in accordance with Article 38.<sup>511</sup>

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<sup>506</sup> *Ibid.*

<sup>507</sup> Art. 36(1).

<sup>508</sup> The Explanatory Report (*op. cit.* note 12), para. 142.

<sup>509</sup> *Ibid.*

<sup>510</sup> Art. 41.

<sup>511</sup> The Explanatory Report (*op. cit.* note 12), para. 150.

## L. Language requirements for communications

### *Article 51*

- 11.72 Article 51 addresses language issues which may arise in the drafting or translation of communications (including documents) between Central or other authorities. It provides that all communications between authorities must be in their original language and accompanied by a translation into the official language or one of the official languages of the other Contracting Party. Where that is not feasible, the communication must be translated into either French or English, keeping in mind that, under Article 56, a Contracting Party may make a reservation to the use of either French or English, but not both.<sup>512</sup>

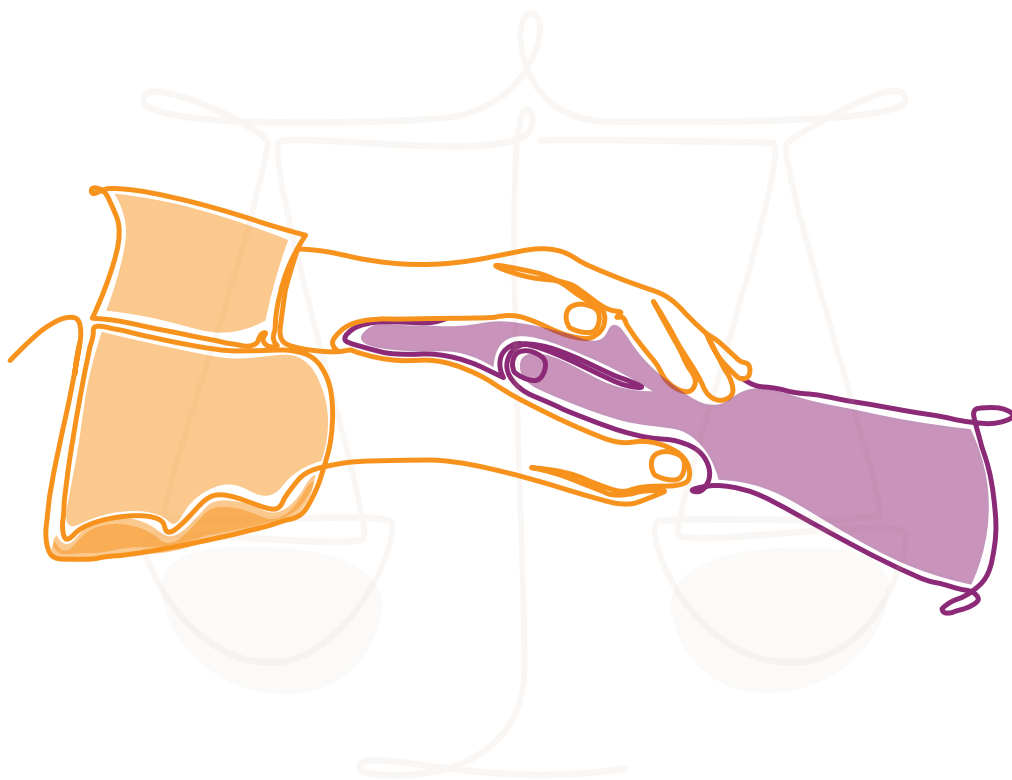
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<sup>512</sup> Art. 51; *Ibid.*, para. 169. See, also, C&R Nos 49 and 50 of the First Meeting of the SC (see path indicated in note 7).



# 12

## Relationship between the 2000 Convention and other Instruments





**A. How does the 2000 Convention affect the operation of the 1905 Convention concernant l'interdiction et les mesures de protection analogues governing the protection of persons?**

**Article 48**

- 12.1 In relations between Contracting Parties to the 2000 Convention, the 2000 Convention replaces the 1905 Convention.<sup>513</sup>
- 12.2 It should be noted that Article 48 does not reserve the recognition of measures previously taken in application of the old Convention, which is now very rarely applied. If that were not the case, the transition from one Convention to the other could give rise to difficulties.<sup>514</sup>

**Example 12.A**

The habitual residence of an adult has changed from State A to State B. Both States were formerly Parties to the 1905 Convention but are now Parties to the 2000 Convention. Therefore, the 2000 Convention applies in their mutual relations.

**Example 12.B**

The habitual residence of the adult has changed from State A to State B, both formerly Parties to the 1905 Convention and both Parties to the 2000 Convention. The adult is also a national of State C, Party to the 1905 Convention but not to the 2000 Convention. In this case, the 1905 Convention will continue to bind States A and B to State C, which may claim jurisdiction and block the application of the 2000 Convention in the relations between States A and B.<sup>515</sup>

<sup>513</sup> Convention du 17 Juillet 1905 concernant l'interdiction et les mesures de protection analogues (« 1905 Convention »).

<sup>514</sup> The Explanatory Report (*op. cit.* note 12), para. 159.

<sup>515</sup> The 1905 Convention gives a priority jurisdiction to the authorities of the State of nationality 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 that the authorities of the State of nationality abstain (Art. 6), but the interdiction pronounced by the authorities of the habitual residence may be lifted by the authorities of the State of nationality in accordance with their law (Art. 11).



## B. Relationship between the 2000 Convention and the *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*

### *Article 2*

- 12.3 The 2000 Convention applies to persons who have reached the age of 18, making the lower limit of the 2000 Convention naturally coincide with the upper limit of the 1996 Convention.<sup>516</sup>
- 12.4 The 2000 Convention also applies to measures taken by competent authorities under the 1996 Convention for the protection of a child whose personal faculties are impaired, with the intention that the measures will continue to have effect into their adulthood. When the child in question reaches the age of 18, that protective measure will be governed by the 2000 Convention.
- 12.5 As stated earlier in this Handbook, the provision in Article 2(2) serves the particularly important function of ensuring the continuity of protection for individuals who fall under the scope of the 1996 Convention and subsequently the 2000 Convention.<sup>517</sup>

## C. Relationship between the 2000 Convention and the 2006 UN Convention on the Rights of Persons with Disabilities

- 12.6 As has already been mentioned, the 2000 Convention and the UNCRPD are complementary instruments.<sup>518</sup> The 2000 Convention furthers some important objectives of the UNCRPD. For example, the Convention supports the implementation of Article 12 of the UNCRPD on the right to equal recognition everywhere before the law.<sup>519</sup> Through provisions such as those on powers of representation under Article 15, the Convention supports States Parties to the UNCRPD in taking "appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity".<sup>520</sup>
- 12.7 By establishing a system of Central Authorities, the 2000 Convention also gives effect to Article 32 on international cooperation and its promotion.<sup>521</sup>

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<sup>516</sup> The Explanatory Report (*op. cit.* note 12), para. 15.

<sup>517</sup> See **Chapter 3**, paras 3.10 – 3.13.

<sup>518</sup> See C&R No 2 of 2018 EC-HCCH Joint Conference (*op. cit.* note 1). See also, C&R No 4 of the First Meeting of the SC (see path indicated in note 7).

<sup>519</sup> UNCRPD, Art. 12(1).

<sup>520</sup> UNCRPD, Art. 12(3).

<sup>521</sup> UNCRPD, Art. 32(1).

## D. How does the 2000 Convention affect the operation of other instruments?

### *Article 49*

- 12.8 The 2000 Convention does not affect the operation of any international instrument previously ratified by Contracting Parties, which contains provisions on matters governed by the Convention, unless a declaration to the contrary is made by the Contracting Parties to such instruments.<sup>522</sup>
- 12.9 The Convention also does not affect the possibility for one or more Contracting Parties 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 the 2000 Convention.<sup>523</sup> Such agreements may be concluded between Contracting Parties or between Contracting Parties and third parties (*i.e.*, non-Contracting Parties).
- 12.10 Any agreements concluded by Contracting Parties on matters falling within the scope of the 2000 Convention will not affect the application of the Convention between those Contracting Parties and other Contracting Parties who are not parties to such agreements.<sup>524</sup> In other words, although Contracting Parties have the freedom to conclude separate agreements among themselves, they may not use these agreements as an opportunity to free themselves from obligations towards other Contracting Parties which are not parties to those separate agreements.
- 12.11 Although Article 49(2) is limited to those agreements in respect of adults habitually resident in any of the Contracting Parties which concluded them, Article 49(3) leaves open the possibility of separate agreements concerning adults not necessarily having their habitual residence in a Contracting Party. However, this possibility is conditional upon such agreements not having an effect on the operation of the 2000 Convention.<sup>525</sup>

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<sup>522</sup> Art. 49(1).

<sup>523</sup> Art. 49(2).

<sup>524</sup> Art. 49(3).

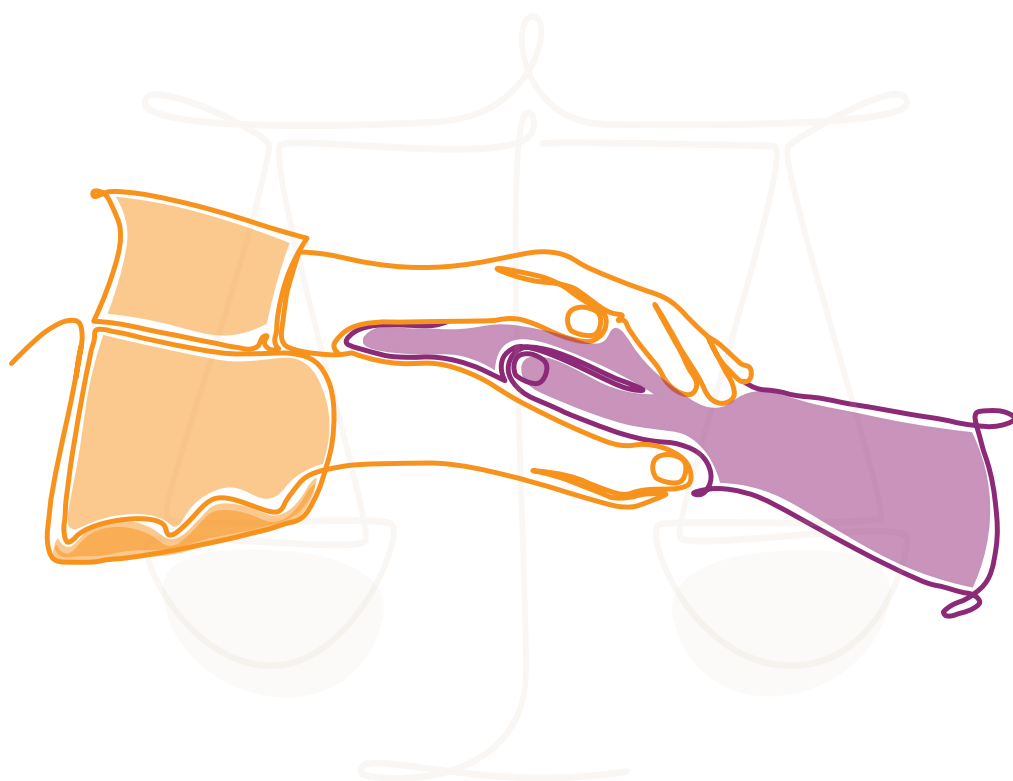
<sup>525</sup> The Explanatory Report (*op. cit.* note 12), para. 162.

**Example 12.C**

An adult is habitually resident in State A but is currently present in State B. Both States are Contracting Parties to the 2000 Convention but State B is also party to a separate agreement with State C which contains provisions on matters that fall under the scope of the 2000 Convention. By virtue of the 2000 Convention, the authorities in State A have jurisdiction to take a measure of protection in relation to the person and / or property of the adult. In accordance with Article 49(3), State B should recognise that the measures taken by the authorities in State A, on the basis of the aforementioned jurisdiction, have been taken by competent authorities even if such jurisdiction is excluded by the separate agreement with State C.

# 13

## Special Topics





## A. Special categories of adults

### (a) Adults who are refugees,<sup>526</sup> internationally displaced or without a habitual residence

- 13.1 For adults who are refugees or who, due to disturbances in their State, are internationally displaced, the Contracting Party on whose territory the adult is present will have jurisdiction to take measures directed to the person or property of the adult.<sup>527</sup> This also applies to adults whose habitual residence cannot be established.<sup>528</sup> In such situations, the competent authorities of the Contracting Party on whose territory the adult is present have general jurisdiction to take measures of protection of the person of the adult and / or their property whether urgent, provisional, short-term, mid-term or long-term.
- 13.2 The term “internationally displaced” found in Article 6 is intended to ensure a broad application of this Article in order to protect individuals who may not fall within the definition of “refugee” but that have nevertheless been displaced from their State of origin (e.g., due to a natural disaster or civil war).
- 13.3 In the case of adults without a habitual residence (Art. 6(2)), if it is later established that the adult does have a habitual residence somewhere, the jurisdiction of the Contracting Party where the adult is present will become limited to the operation of Articles 10 and 11 under the 2000 Convention.<sup>529</sup>

#### Example 13.A

Following a natural disaster in Contracting Party A, thousands of people are displaced, among whom an adult who has suffered a severe head injury. The adult is transferred to Contracting Party B to seek immediate treatment and refuge. Article 6 allows Contracting Party B to exercise jurisdiction and take long-term measures of protection for the adult. However, before any measures are taken, the competent authorities in both Contracting Parties shall cooperate, if possible, in order to find out as much information as possible about the adult.<sup>530</sup> While such enquiries are ongoing, Contracting Party B may take the measures of protection it considers appropriate to ensure the protection of the adult (in this case, not only the authorisation of the urgent medical intervention to treat the head injury but also the designation of an assistant to the adult for them to

<sup>526</sup> This provision intends to cover refugees at any time during the process of their refugee status.

<sup>527</sup> Art. 6(1).

<sup>528</sup> Art. 6(2).

<sup>529</sup> The Explanatory Report (*op. cit.* note 12), para. 55.

<sup>530</sup> Arts 29 and 32(1).

settle in this State). Upon the conclusion of the enquiries into the background of the adult and depending on their outcome, Contracting Party B may take the appropriate long-term measures of protection. Under the 2000 Convention, the measures taken must be recognised and, if necessary, enforced in all other Contracting Parties.

### Example 13.B

An adult arrives in Contracting Party A. The State of their habitual residence cannot be determined. Under Article 6(2), the competent authorities in Contracting Party A take measures of protection providing for the care of the adult. A month later, it is established that the habitual residence of the adult is in non-Contracting Party B and that their departure from that State was not the result of an international displacement. Despite this discovery, the measures of protection previously taken under Article 6 will remain in effect even though a change of circumstances has eliminated the basis upon which the jurisdiction was exercised.<sup>531</sup> If the authorities of non-Contracting Party B take a decision in respect of the adult, the non-Convention rules of Contracting Party A concerning the recognition and enforcement of foreign decisions will apply to determine the effect of the foreign decision.

## (b) Adults who have fled or have been taken from a legal protection regime, care facilities, have been abandoned or have been trafficked

- 13.4 It may be that the habitual residence of the adult can be established for the purposes of Article 5 of the 2000 Convention but it may still be necessary for the Contracting Party on whose territory the adult is present to take measures of protection under Articles 10 and 11. This may be the case, for example, when an adult has fled or was taken from the assisted living facility where they (temporarily or permanently) reside or the legal protection regime under which they have been placed. The adult may have been abandoned (*e.g.*, when their partner who has been their primary caregiver passes away and the adult is left with nobody to care for them) or may have been trafficked across borders (*e.g.*, an adult who, due to the insufficiency of their personal faculties, is easily manipulated and has been coerced into labour to which they were unable to give free and informed consent).
- 13.5 Jurisdiction envisioned in Article 10 or 11 implies that the measures will be usually in force for a limited time, based on the presence of the adult, and that the competent authorities of the State of habitual residence of the adult are ultimately responsible for

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<sup>531</sup> Art. 12.

ensuring the protection of the adult. However, the competent authorities of the Contracting Party where the adult is present should cooperate with the authorities of the State of habitual residence of the adult to ensure continuation in the protection of the adult and provide information that may be relevant in determining long-term care arrangements for the adult. When an adult finds themselves in a situation such as those mentioned above, existing measures which are in force in their State of habitual residence may need to be enforced under Article 25, in addition to any urgent or temporary measures which may need to be taken in the State where the adult is present. Under these circumstances, it is paramount that such enforcement proceedings be simple and rapid, as envisioned in Article 25(2).

- 13.6 In some circumstances, the competent authorities of the Contracting Party where the adult is present may also need to design longer-term solutions for the adult under Articles 10 or 11. This would be the case if, for example, the competent authorities of the State of habitual residence of the adult are not in a position to take measures of protection for this person (e.g., the competent authority in the State of habitual residence is not reachable or cannot be identified). Until measures of protection are taken by the State of habitual residence of the adult, jurisdiction to protect the adult rests, on an urgent or temporary basis,<sup>532</sup> with the competent authorities of the Contracting Party where the adult is present. Additionally, depending on the situation, the competent authorities of the Contracting Party where the adult is present may consider the possibility of requesting a transfer of jurisdiction, in accordance with Article 8 of the 2000 Convention. This will only be possible where the State of habitual residence of the adult is another Contracting Party and the other conditions for a transfer of jurisdiction are fulfilled.<sup>533</sup> Over time, the competent authority of the State where the adult has been present over a long period, could consider that a new habitual residence has been established for this adult.
- 13.7 The 2000 Convention also provides for cooperation between competent authorities of Contracting Parties in locating adults in need of protection.<sup>534</sup>

### Example 13.C

A 20-year-old with schizophrenia habitually resides in Contracting Party A but is found in Contracting Party B, after having been trafficked into the State. The competent authorities in Contracting Party B have jurisdiction under Articles 10 or 11 to take protective measures in respect of the 20-year-old, such as appointing a temporary guardian or representative and arranging for their immediate care. The competent authorities in Contracting Party B should make contact, and cooperate with, the competent authorities in Contracting Party A, in order to ensure compatibility with any measures taken in the State of habitual residence.

<sup>532</sup> *i.e.*, under Art. 10 or 11 of the 2000 Convention.

<sup>533</sup> See, *supra*, **Chapter 5**.

<sup>534</sup> Art. 30.



### Example 13.D

An adult with dementia runs away from the assisted living facility in which they are staying in Contracting Party A, their State of habitual residence, and arrives in Contracting Party B. The family of the adult in Contracting Party A suspects that the adult has fled to Contracting Party B, as the adult has close friends living there and may try to find them. The family approaches a competent authority of Contracting Party A to take measures of protection, which then contacts the Central Authority of Contracting Party B for assistance in discovering the whereabouts of the adult in accordance with Article 30(b).

Once the adult is located, Contracting Party B takes a necessary measure of protection by placing the adult in temporary State care. The family of the adult wish to travel to Contracting Party B to bring them back to Contracting Party A. Before this occurs, the competent authorities of Contracting Parties A and B should closely cooperate in order to ensure that this is the safest and most appropriate option for the adult. If ascertainable, the views and wishes of the adult must play a significant role in this assessment. Indeed, the urgent decision taken in Contracting Party B is to be acted upon by the family and will remain in effect until the competent authorities of Contracting Party A have taken other measures required by the situation.<sup>535</sup>

## (c) Adults moving from one State to another when competent authorities have been involved

- 13.8 When an adult relocates from one Contracting Party to another, or is placed abroad in accordance with Article 33, any measure taken in the Contracting Party where the adult was formerly located (either on a short or long-term basis) will remain in force<sup>536</sup> and will be recognised<sup>537</sup> in the Contracting Party to which the adult relocates. The conditions of the implementation of measures taken by the competent authorities of the State where the adult was formerly located will be governed by the law of the State to which the adult has relocated. If the relocation of the adult results in a change of habitual residence, the jurisdiction to take new and / or additional measures will shift

<sup>535</sup> Where possible, it is important to ascertain why the adult has chosen to run away from the care being provided to them, in order to ensure that the adult is not being subjected to any neglect or abuse. Close cooperation between the competent authorities of both Contracting Parties will be extremely important in discovering, for example, whether any concerns have been previously raised or whether public authorities in the Contracting Party where the adult habitually resides have been previously involved with the adult, their caretakers and / or their family.

<sup>536</sup> Art. 12, for measures taken in application of Arts 5 to 9. However, where urgent measures have been taken for the protection of the adult, those measures shall lapse as soon as the competent authorities having jurisdiction under Arts 5 – 9 take measures required by the situation (see Art. 10(2)).

<sup>537</sup> In accordance with Art. 22.

to the new State of habitual residence. In such cases, when taking these new and / or additional measures, the competent authorities of the new State of habitual residence may require relevant information from the competent authorities of the former State of habitual residence and may request such information by virtue of Article 32(1). If it is determined that the former State of habitual residence is better placed to address a particular protection issue in relation to the adult, a transfer of jurisdiction may be arranged under Article 8(2)(b).

## B. Property of the adult

- 13.9 Article 1 of the 2000 Convention provides that measures directed to the protection of the property of the adult are within the scope of the Convention. This is an essential component of the Convention, as an adult may have property at their disposal located in a foreign State which cannot be left unmanaged.<sup>538</sup>
- 13.10 Article 3(f) provides that the measures of protection directed to the property of the adult may, in particular, deal with "the administration, conservation or disposal of the adult's property". This broad formulation encompasses all operations concerning property, in particular the sale of immovables, the management of securities, investments, as well as the representation of the adult in the handling of successions devolving to the adult.<sup>539</sup> For instance, measures of protection directed to the protection of the property of the adult may cover the required authorisation or approvals for the sale or purchase of the property of the adult.
- 13.11 It is important to note that the 2000 Convention does not encroach on national systems of property law and does not cover the substantive law relating to the content of rights over property, such as disputes in relation to ownership of / title to property. For example, if there are general requirements relating to the sale or purchase of immovable property that are imposed by a Contracting Party (e.g., special authorisation or approval for the sale or purchase of immovable property with special status due to its cultural or historical importance, or which is part of indigenous land or for the sale or purchase of immovable property by a foreigner) and have nothing to do with the fact that property is being bought or sold by the representative of an adult, granting these authorisations will not fall within the scope of the 2000 Convention.
- 13.12 Property regimes in respect of marriage and other similar relationships are also excluded from the scope of the 2000 Convention.<sup>540</sup>

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<sup>538</sup> The Explanatory Report (*op. cit.* note 12), para. 12. See also, *supra*, **Chapter 4**.

<sup>539</sup> *Ibid.*, para. 25. See also, para. 38: "The complete exclusion of successions is...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." and Art. 4(2), in respect of successions – this does not affect the entitlement of a person to represent the adult in matters relating to successions.

<sup>540</sup> See, *supra*, paras 3.36 – 3.37.

### Example 13.E

An adult is habitually resident in Contracting Party A and owns property in Contracting Party B. A representative is appointed in Contracting Party A to deal with the property of the adult and is made responsible for managing some land in Contracting Party B on behalf of the adult. The order appointing the representative is recognised by operation of law in all Contracting Parties. If Contracting Party A delivers certificates under Article 38 of the Convention, it may be useful in this situation for the representative to obtain such a certificate.<sup>541</sup>

## C. Representation of adults

- 13.13 The representation of an adult is often required due to an impairment or insufficiency of their personal faculties, which may amount to a diminished or limited legal capacity under the applicable law. The representation of an adult generally involves assisting, acting on behalf of, or in the name of, the adult vis-à-vis third parties. Situations in which this may occur include court proceedings involving the adult, as well as property or financial transactions or consent to medical treatments.
- 13.14 Decisions regarding the representation of the adult are clearly within the scope of the 2000 Convention. Article 3(d) provides that measures of protection may, in particular, deal with the designation and functions of any person or body representing or assisting the adult.
- 13.15 If the competent authorities of a Contracting Party are taking a decision regarding the representation of the adult, they must ensure that they have jurisdiction to do so under the 2000 Convention. However, where the competent authorities do not have jurisdiction under the Convention, if they consider it is in the interests of the adult, they may consider requesting a transfer of jurisdiction, where the requirements under Article 8 are fulfilled.<sup>542</sup> There may also be situations where it will be appropriate for a Contracting Party with jurisdiction to consider the possibility of transferring jurisdiction to another Contracting Party. An example of this could be where a legal representative has to be appointed for the adult in legal proceedings in another Contracting Party.<sup>543</sup>
- 13.16 Once taken, these measures of protection must be recognised and enforced in all other Contracting Parties, subject to the rules of the Convention. The certificate provided under Article 38 is an important instrument for the free circulation of measures of protection.<sup>544</sup>

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<sup>541</sup> See, *supra*, Chapter 11, Section G.

<sup>542</sup> Art. 8. See also, *supra*, Chapter 5.

<sup>543</sup> Art. 8(1).

<sup>544</sup> See, *supra*, Chapter 11, Section G.

- 13.17 The 2000 Convention also contains provisions for when the adult themselves grants powers of representation prior to their impairment, via agreement or unilateral act, which are to come into effect at the time the adult finds themselves unable to protect their own interests. Article 15 deals with the law applicable to the existence, extent, modification and extinction of such powers of representation.<sup>545</sup> Article 16 allows the competent authorities that have jurisdiction under the Convention to terminate or modify<sup>546</sup> the powers of representation granted by the adult by virtue of Article 15, where they are not exercised in a manner sufficient to guarantee the protection of the person or property of the adult.<sup>547</sup> The certificate provided under Article 38 is an important instrument for the free circulation of confirmed powers of representation.<sup>548</sup>

## D. Connecting factors

### (a) Habitual residence

- 13.18 Much like all the modern HCCH Conventions dealing with private and family matters, habitual residence is the main connecting factor and basis of jurisdiction used in the 2000 Convention.<sup>549</sup> The role of habitual residence in the 2000 Convention is, generally, to assess which Contracting Party's competent authorities have jurisdiction to take measures of protection for their decisions to be recognised and enforced in other Contracting Parties.
- 13.19 None of the HCCH Conventions contain a definition of "habitual residence". It is understood as an autonomous concept that should be interpreted in light of the objectives of the relevant Convention rather than under domestic law constraints. The issue of habitual residence is one of factual interpretation, to be determined by the relevant competent authorities on a case-by-case basis. The factual circumstances considered vary in each case, but they generally denote a sufficient connection to the State in question, such as a stability of residence.<sup>550</sup> The 2000 Convention has yet to generate international jurisprudence in relation to this concept.
- 13.20 Article 45, which deals with those Contracting Parties which have a number of territorial units that apply different laws, explains that any reference to the State of habitual residence of the adult shall be construed as referring to habitual residence in a territorial unit.<sup>551</sup>

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<sup>545</sup> See also, *supra*, **Chapter 9**.

<sup>546</sup> The modification might, for example, consist of an order by the competent authority authorising that the person to whom powers of representation were conferred be monitored or supervised.

<sup>547</sup> The Explanatory Report (*op. cit.* note 12), para. 108.

<sup>548</sup> See, *supra*, **Chapter 11, Section G**.

<sup>549</sup> Art. 5.

<sup>550</sup> See C&R Nos 5 - 7 of the First Meeting of SC (see path indicated in note 7).

<sup>551</sup> Art. 45(a).

### Example 13.F

An adult, who is a national of Contracting Party A, resides in Contracting Party A for half the year and spends the other half in Contracting Party B. The adult maintains personal, social, family and property ties in both States. While in Contracting Party B, the adult suffers an impairment of their personal faculties and is now in need of protection. The question arises as to which of the two States is the adult's State of habitual residence and, by extension, which State has primary jurisdiction to take measures of protection for the adult. A competent authority in Contracting Party B is seised to resolve the matter. In determining their habitual residence, the competent authority must assess and weigh all the factual elements connecting the adult to both States (e.g., the personal ties they have in each State, any property owned in each State, from which State they receive their pension, in which State they pay their income tax, in which State they are insured, in which State they keep their savings and / or investments, etc.). The competent authority concludes that, since the adult receives their pension, pays their income tax and has their savings, life and medical insurance in Contracting Party B, in addition to owning property and having family there, Contracting Party B is the adult's State of habitual residence and, therefore, has primary jurisdiction under Article 5. However, competent authorities in Contracting Party A may still exercise concurrent, subsidiary jurisdiction under Article 7, based on the connecting factor of nationality.

## (b) Presence / location

- 13.21 There are a number of occasions where the presence of an adult or the location of their property is used as a connecting factor in the 2000 Convention.<sup>552</sup> The concept of "presence" / "location" denotes a physical presence of the adult or the location of their property in the territory or territorial unit<sup>553</sup> of the Contracting Party concerned. The connecting factor of presence does not require proof of residence of the adult of any sort, as the mere presence of the adult in the territory is sufficient.

## (c) Nationality

- 13.22 Article 7 allows the competent authorities of the State of which the adult is a national to take protective measures for the person or property of the adult, if they consider that they are better placed to assess the interests of the adult. As previously mentioned in this Handbook, this ground of jurisdiction is subsidiary to the grounds of jurisdiction found in Articles 5 and 6(2). This means that the competent authorities of the State of nationality must act within certain limitations; they must give advance notice to the

<sup>552</sup> Arts 6, 8(2)(c), 8(2)(f), 9, 10, 11, discussed, *supra*, in **Chapters 4, 5, 6 and 7**.

<sup>553</sup> Art. 45(b) and (c).

competent authorities with primary jurisdiction and refrain from exercising jurisdiction if the competent authorities with primary jurisdiction inform them 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.<sup>554</sup>

- 13.23 Nationality is also a connecting factor in the transfer of jurisdiction mechanism found in Article 8. The competent authorities of a Contracting Party of which the adult is a national can request that jurisdiction be transferred to them and can also be requested to accept a transfer of jurisdiction.<sup>555</sup> However, the nationality of the adult alone is not sufficient. It must be shown that the transfer is in the interests of the adult. Many adults have more than one nationality and any of those States may come within the conditions set out by Article 8.
- 13.24 Article 45 explains that 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.<sup>556</sup>

#### (d) Substantial connection

- 13.25 The "substantial connection" connecting factor may be used in the context of the 2000 Convention to apply a law that differs from that of the forum. Article 13(2) provides an exception to the general rule that, in exercising their jurisdiction, competent authorities shall apply their own law by allowing competent authorities to apply or take into account, on an exceptional basis and if the protection of the adult or their property so requires, the law of another State with which the situation has a substantial connection.
- 13.26 Article 45 provides that any reference to the State with which the situation has a substantial connection shall be construed as referring to the territorial unit with which the situation has a substantial connection.<sup>557</sup>
- 13.27 Whether a situation has a substantial connection with a State must be assessed on a case-by-case basis. Examples of States with which the situation may have a "substantial connection" could be the State of former habitual residence of the adult, the State in which family members or close friends of the adult live who are willing to look after them or the State in which the adult owns property.

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<sup>554</sup> See, *supra*, **Chapter 4** at paras 4.27 – 4.34.

<sup>555</sup> Art. 8(2)(a). See, *supra*, **Chapter 5**.

<sup>556</sup> Art. 45(d). See, also, C&R No 12 of the First Meeting of the SC (see path indicated in note 7).

<sup>557</sup> Art. 45(f).

### Example 13.G

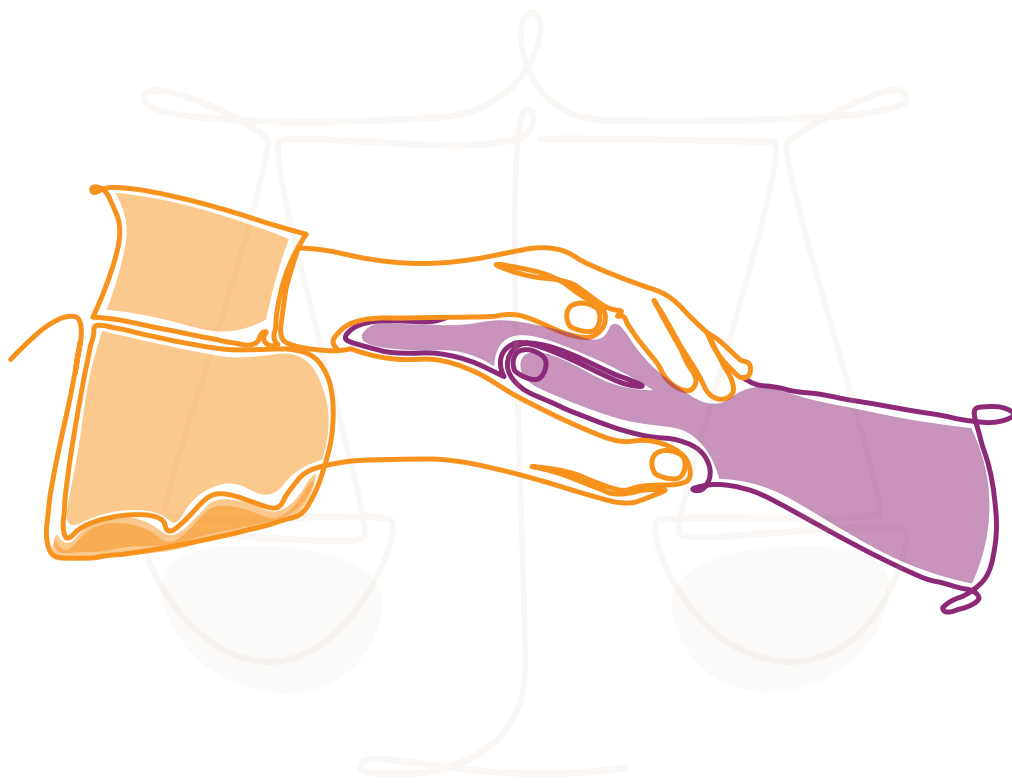
An adult has their habitual residence in Contracting Party A and owns a property in Contracting Party B. Since the personal faculties of the adult have become impaired, the adult's only child has been caring for the adult and managing their finances and property. Managing the adult's property in Contracting Party B has become far too cumbersome and a strain on the family's finances. The adult's child, therefore, wishes to sell the property on behalf of the adult. They seise the competent authorities in Contracting Party A in order to be designated as the adult's representative and obtain the authorisation to sell the property in Contracting Party B, even though obtaining such authorisation is not a prerequisite under the law of Contracting Party A. In granting such an authorisation, it would be preferable that the competent authority in Contracting Party A applies or takes into consideration the law of Contracting Party B, as the State where the adult's property is located, and is to be sold, has a substantial connection to the situation.<sup>558</sup>

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<sup>558</sup>

The Explanatory Report (*op. cit.* note 12), para 92. See, also, Art. 13(2).

# Annexes

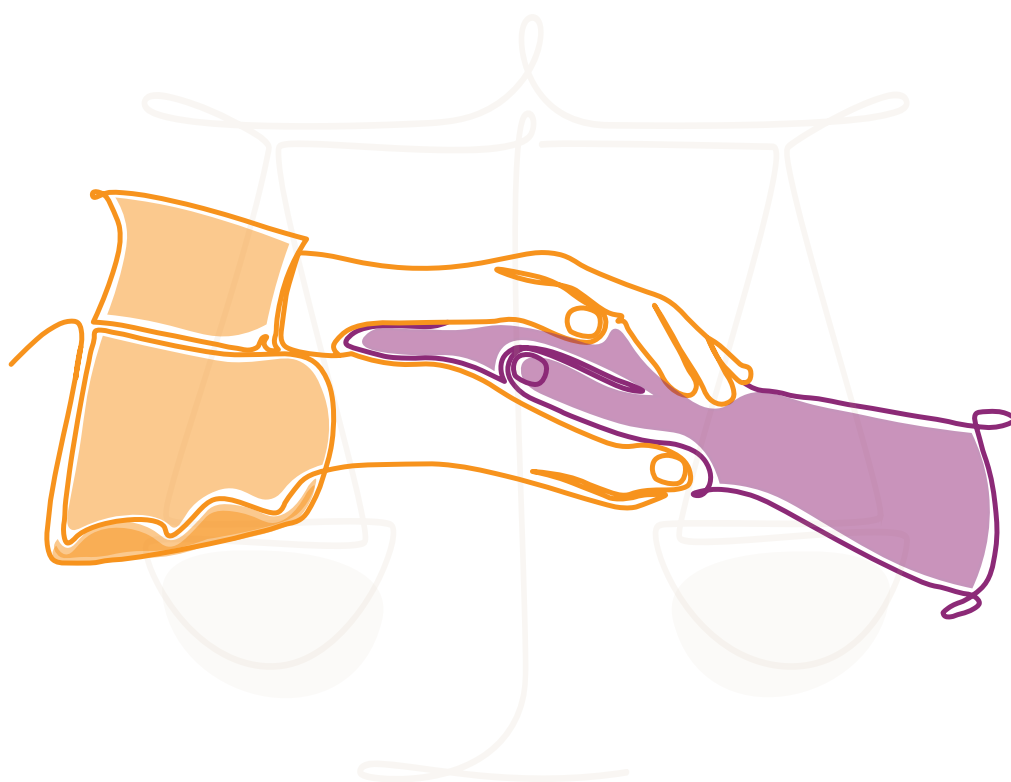






# Annex I

## Implementation Checklist of the 2000 Convention





## Introduction

### A “Checklist” of matters that may need to be examined in implementing the Convention

The purpose of this Checklist is to highlight issues which may need to be considered by current and prospective Contracting Parties when implementing the Convention. The Checklist is intended as a guide and is not binding.

The Checklist does not seek to prescribe the method by which the Convention should be implemented in Contracting Parties. Rather, it indicates some questions that may arise prior to, or upon implementation of, the Convention. The list is not exhaustive and there will, undoubtedly, be other issues specific to States that will require consideration.

The Checklist includes “Preliminary Matters” for consideration that relate to the Convention generally, while “Specific Measures of Implementation” and the annexes to the Checklist may assist a State when considering particular aspects of the Convention. The annexes cover the following matters:

#### ***Annex I***

A checklist of provisions in the Convention that may require implementing measures, *e.g.*, changes to domestic legislation, with regards to the Convention entering into force in a particular State.

#### ***Annex II***

Information to be communicated to the depositary (the Ministry of Foreign Affairs of the Kingdom of the Netherlands), and the Permanent Bureau of the HCCH.

#### ***Annex III***

Functions performed by Central Authorities, competent authorities and other authorities under the Convention.

#### ***Annex IV***

List of available resources from States that may be of assistance to other States.

## Preliminary Matters

### Contemplating Becoming a Contracting Party

- Consult with the Permanent Bureau of the HCCH and other Contracting Parties about the benefits of the Convention.
- Identify and consult stakeholders and experts in your State, *e.g.*, government and non-government agencies, judiciary, welfare services and the legal profession, to:
  - determine the implications of becoming a Contracting Party;
  - decide whether to become a Contracting Party;
  - identify the best methods to implement the Convention; and
  - develop a plan for the implementation and operation of the Convention.

### Methods of Implementation

- Consider the method by which the Convention will be implemented in your State.
  - In your State's legal system, is the Convention automatically incorporated in domestic law once the Convention enters into force?
  - or
  - In your State's legal system, is it necessary to incorporate or transform the Convention into domestic law? If so, by what means will this be achieved?

Regardless of whether incorporation or transformation is required under the domestic legal system of your State, some implementing measures may be needed to assist with the effective implementation and operation of the Convention.

- Conduct a comprehensive review of domestic laws, rules, regulations, orders, policies and practices in your State to ensure that existing provisions are not contrary to the Convention.
- If there are any existing provisions, policies and practices that create obstacles or impediments to the effective implementation and operation of the Convention, identify the course of action to be taken at the domestic level to overcome such obstacles or impediments.
- Consider the appropriate form to handle matters:
  - Legislation, *e.g.*:
    - i. rules of jurisdiction to take measures of protection, including provisions to transfer or assume jurisdiction;<sup>1</sup>
    - ii. recognition and enforcement of measures of protection taken in other Contracting Parties;<sup>2</sup>

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<sup>1</sup> Arts 5 to 11.

<sup>2</sup> Arts 22 and 25.

- iii. providing powers for the Central Authority and competent authorities to perform their functions.<sup>3</sup>
- Rules, regulations and orders, *e.g.*:
  - i. rules of Court on findings of fact in recognition proceedings;<sup>4</sup>
  - ii. providing information to other States to assist in proceedings;<sup>5</sup>
  - iii. exemption on legalisation of documents forwarded or delivered under the Convention.<sup>6</sup>
- Administrative acts, *e.g.*:
  - i. appointment of a Central Authority;<sup>7</sup>
  - ii. non-disclosure of sensitive information.<sup>8</sup>

### Becoming a Contracting Party – Signature and Ratification, or Accession

*Any State may become a Party to the Convention. The following describe the different ways in which a State may do this.*

- **Signature followed by ratification**
  - A State which was a Member of the HCCH on 2 October 1999 may sign and ratify the Convention.<sup>9</sup>
  - By signing the Convention, a State expresses its intention to become a Party. *It does not oblige a State to ratify the Convention.*<sup>10</sup> The State will need to ratify the Convention for it to enter into force.
  - The Convention enters into force three months after ratification.<sup>11</sup>

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<sup>3</sup> Chapter V of the 2000 Convention, in particular Art. 29.

<sup>4</sup> Art. 24.

<sup>5</sup> Art. 32.

<sup>6</sup> Art. 41.

<sup>7</sup> Art. 28.

<sup>8</sup> Art. 35.

<sup>9</sup> Art. 53.

<sup>10</sup> However, Art. 18 of the *Vienna Convention on the Law of Treaties*, obliges States, once an expression of consent to be bound by the treaty has been made, not to defeat the object and purpose of the treaty prior to its entry into force.

<sup>11</sup> Art. 57(2)(a).

- **Accession**
  - Other States wishing to become a Party may accede to the Convention.<sup>12</sup>
  - For an acceding State, the Convention will enter into force nine months after the date of accession.<sup>13</sup>
  - Within the first six months of this nine-month period, any other Contracting Party may raise an objection to the accession.<sup>14</sup> The Convention will not enter into force between the acceding State and any State which raised an objection, until such an objection is withdrawn.
  - The Convention, nevertheless, will enter into force between the acceding State and all other Contracting Parties which have not raised an objection.
- Ratification or accession requires the deposit by a State of the appropriate instrument with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, as depositary of the Convention.<sup>15</sup>

### Developing a Timetable

*Determine the date on which the Convention should come into force in your State. The following should be completed in line with that date.*

- Ensure the appropriate implementing measures are put in place, or enacted and in force, before the Convention enters into force in your State.
- Ensure the necessary instrument and information are deposited with the depositary and communicated to the Permanent Bureau (see **Annex II**).
- Ensure all key stakeholders (e.g., government departments, welfare agencies, courts, the legal profession) are informed of when the Convention will come into force, any changes to current law and procedure, and their respective roles under the Convention.
- Ensure that adequate training is provided to individuals involved in the application of the Convention (e.g., government departments, welfare agencies, courts, the legal profession).
- Disseminate information on the Convention to the public.

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<sup>12</sup> Art. 54(1).

<sup>13</sup> Art. 57(2)(b).

<sup>14</sup> Art. 54(3).

<sup>15</sup> Arts 53(2) and 54(2).

## Designations, Declarations and Reservations

*The following are some obligatory designations to be made under the Convention, as well as optional declarations and reservations that States may consider necessary.*

- Ensure that the designation of a Central Authority or Authorities is made at the time of ratification / accession (or at least before the Convention enters into force).<sup>16</sup>
- Ensure that the contact details of each Central Authority, and the language(s) of communication, are communicated to the Permanent Bureau and are kept up to date.
- Ensure that the designation of an authority competent to draw up an international certificate under Article 38 is made at the time of ratification / accession (or at least before the Convention enters into force or as soon as possible thereafter).<sup>17</sup>
- Consider designating an authority under Article 42 to receive requests under Articles 8 and 33.<sup>18</sup>
- Consider whether a declaration under Article 32(2) is necessary.<sup>19</sup>
- Consider whether a reservation under Article 51 is necessary.<sup>20</sup>
- Consider whether a declaration under Article 55 is necessary.<sup>21</sup>

## Ongoing Processes of Implementation

- Develop and implement mechanisms to monitor and evaluate the application and function of the Convention, e.g., consultation with courts and other responsible authorities. Regular evaluation will assist in identifying and responding to any implementation difficulties that may arise and could eventually inform discussions at a meeting of the Special Commission to review the practical operation of the Convention.<sup>22</sup>

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<sup>16</sup> Arts 28 and 43.

<sup>17</sup> This certificate indicates the capacity and powers of a person who is entrusted with protection of the adult's person or property. "Conclusions and Recommendations (C&R) adopted at the First meeting of the Special Commission (SC) on the practical operation of the 2000 Protection of Adults Convention (9-11 November 2022)", C&R No 48 (C&R of the First Meeting of the SC) (available on the HCCH website at [www.hcch.net](http://www.hcch.net) under "Protection of Adults" then "Special Commission meetings").

<sup>18</sup> This applies to situations when a transfer of jurisdiction to a more appropriate forum (Art. 8) or a placement abroad (Art. 33) is contemplated.

<sup>19</sup> A Contracting Party may declare that all incoming requests for information from competent authorities of other Contracting Parties must be communicated through its Central Authority.

<sup>20</sup> If your State objects to the use of French or English.

<sup>21</sup> If your State has two or more territorial units in which different systems of law are applicable, you can declare to which the Convention applies. If no declaration is made, the Convention will extend to all territorial units.

<sup>22</sup> Art. 52.



- Ensure that any changes to contact details of Central Authorities and other designated authorities are provided to the Permanent Bureau.
- Use the following resources for assistance:
  - Website of the HCCH ([www.hcch.net](http://www.hcch.net)).
  - P. Lagarde, "Explanatory Report on the Hague Convention of 13 January 2000 on the International Protection of Adults" available at [www.hcch.net](http://www.hcch.net) then "Publications" then "Explanatory Reports".
  - [Prel. Doc. No 4 of July 2022 – Revised draft Practical Handbook on the Operation of the 2000 Protection of Adults Convention]
  - [Prel. Doc. No 7 of October 2022 – 2000 Protection of Adults Convention Draft Country Profile]
  - List of available resources from States that may be of assistance to other States (see **Annex IV**).

## Specific Measures of Implementation

*The Convention accommodates States of different legal traditions and systems, allowing the implementation of the Convention to be adapted to specific needs. This Checklist identifies a number of issues that may arise before, or upon, implementation of the Convention, including responses offered by the Convention.*

### Chapter I | Scope of the Convention

- Verify what legal institutions within your law fall under the scope of the Convention, in that they provide for the protection for persons over the age of 18 years<sup>23</sup> who, by reason of an impairment or insufficiency of their personal faculties, are not in a position to protect their own interests (e.g., measures of protection, powers of representation, *ex lege* representation, instructions given and wishes made by an adult).<sup>24</sup>
- Identify what measures of protection are already available in domestic law and how they relate to the Convention. The measures listed in Article 3 are not exhaustive and there may be other measures of protection available in your State. By contrast, the list in Article 4, of matters to which the Convention does not apply, is exhaustive.<sup>25</sup>

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<sup>23</sup> Art. 2.

<sup>24</sup> Arts 1(1) and 3.

<sup>25</sup> See Explanatory Report, paras 29 to 46.

- Consider whether current legislation adequately enables the implementation of foreign powers of representation in your State. If not, consider whether changes to the law would be necessary.
- Consider whether powers of representation (Arts 15 and 16) are available under the domestic law of your State, with a view to facilitate the implementation of the Convention. If not, consider whether changes to the law would be desirable.<sup>26</sup>
- Identify any other legal institutions that are available under the laws of your State which would fall within the scope of the Convention, such as *ex lege* representation<sup>27</sup> or instructions given and wishes made by an adult in anticipation of an impairment or insufficiency of their personal faculties.<sup>28</sup> Gathering information on such legal institutions will facilitate the exchange of information under Chapter V of the Convention and will be useful for the purpose of completing the Country Profile.

## Chapter II | Jurisdiction

- Consider whether changes to legislation are required for judicial or administrative authorities in your State to have jurisdiction to take measures of protection based on the adult's *habitual residence*.<sup>29</sup>
- Consider whether changes to legislation are required for judicial or administrative authorities in your State to have jurisdiction to take measures of protection based on an adult being *present* in the State.<sup>30</sup>
- Consider whether changes to legislation are required for judicial or administrative authorities in your State to have jurisdiction to take measures of protection, if the adult is a national of your State and if the authorities of your State are better placed to assess the interests of the adult (and there are no proceedings pending elsewhere).<sup>31</sup>
- Consider whether changes to legislation are required for judicial or administrative authorities in your State to have jurisdiction to take measures of protection based only on the location of the property in your State.<sup>32</sup>
- Consider whether existing procedures in place are adequate, or whether procedures need to be put in place, to facilitate the communication between the competent authorities of a Contracting Party of which the adult is a national and authorities having jurisdiction under Articles 5, 6(2) or 8 with regard to measures taken or decisions made that no measures need to be taken.

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<sup>26</sup> See, *supra*, Glossary: "Power of representation".

<sup>27</sup> See C&R Nos 21 and 22 of the First Meeting of the SC and, *supra*, paras 3.56 – 3.58 of the Practical Handbook.  
<sup>28</sup> C&R Nos 23 – 26 of the First Meeting of the SC and, *supra*, paras 3.59 – 3.64 of the Practical Handbook.

<sup>29</sup> Art. 5.

<sup>30</sup> Arts 6, 10 and 11.

<sup>31</sup> Art. 7.

<sup>32</sup> Art. 9 and 10.

- Consider what implementing measures may be required in your State to facilitate the transfer of jurisdiction,<sup>33</sup> such as:
  - Changes to legislation or rules to enable competent authorities to transfer or assume jurisdiction in the most efficient way. Authorities should be aware of the conditions under which transfer may occur, in particular, that it is in the interests of the adult.<sup>34</sup>
  - Procedures for the transmittal and receipt of requests for the transfer of jurisdiction and the role, if any, of the Central Authority. States should consider how their authorities will communicate with authorities in other Contracting Parties, *e.g.*, by a direct exchange between the competent authorities concerned with the proceedings or communication through the Central Authority. Consider whether a declaration under Article 42 is needed.
  - Implementation of internal procedures, including mechanisms for transferring or assuming jurisdiction and the ability for authorities to agree to requests to transfer or assume jurisdiction.
  - Procedures for parties to a matter to request the transfer of jurisdiction, including where one or more parties may be located in another State.
  - Consider how applications for measures of protection will come before an authority where jurisdiction has been assumed.
  - Consider how to ensure the case is no longer dealt with by the authorities of the State after jurisdiction has been transferred.

### Chapter III | Applicable Law

- Consider whether changes to legislation are required to enable:
  - authorities to exceptionally apply or take into account the law of another State with which the situation has a "substantial connection";<sup>35</sup>
  - the implementation of a measure taken in another Contracting Party governed by the law of that State;<sup>36</sup>
  - giving effect to 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 their interests, specifically the existence, extent, exercise, modification, and extinction of such powers;<sup>37</sup> and

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<sup>33</sup> Art. 8.

<sup>34</sup> C&R Nos 13 and 14 of the First Meeting of the SC.

<sup>35</sup> Art. 13(2); C&R No 20 of the First Meeting of the SC.

<sup>36</sup> Art. 14; C&Rs No 19 and 20 of the First Meeting of the SC.

<sup>37</sup> Art. 15. See, also, para 98 of the ER.

- authorities to take into consideration the law applicable to powers of representation when withdrawing or modifying them, where they are not exercised in a manner sufficient to guarantee the protection of the person or property of the adult.<sup>38</sup>

#### Chapter IV | Recognition and Enforcement

- Consider whether any implementing measures are needed to amend existing legislation or procedures that are contrary to the following:
  - measures of protection taken by the authorities of a Contracting Party must be recognised "by operation of law";<sup>39</sup>
  - recognition of measures of protection taken in another Contracting Party may only be refused on the grounds provided in Article 22(2);
  - any "interested person" may request a decision on the recognition or non-recognition of a measure taken in another Contracting Party,<sup>40</sup> even if the interested person is located outside the requested State;
  - the procedure for the declaration of enforceability or registration of measures of protection must be "simple and rapid", for instance by providing stipulated time frames, appointing specialised judges or registrars and concentrating jurisdiction for procedures in certain courts;<sup>41</sup>
  - enforcement of a measure takes place in accordance with the law of the requested State to the extent provided by such law.<sup>42</sup>
- With a view to facilitate recognition and enforcement under Article 22(2)(b), consider whether any implementing measures (including court practice), is necessary to incorporate, in measures of protection taken by competent authorities in your State, a record of whether or not the adult was heard.<sup>43</sup>
- Examine any existing laws outside the Convention that apply to the recognition, declaration of enforceability or registration for enforcement of foreign measures of protection taken by another State and consider how these laws relate to the Convention.

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<sup>38</sup> Art. 16.

<sup>39</sup> Art. 22(1).

<sup>40</sup> Art. 23.

<sup>41</sup> Art. 25; C&R No 32 of the First Meeting of the SC.

<sup>42</sup> Art. 27.

<sup>43</sup> C&R No 30 of the First Meeting of the SC.

## Chapter V | Co-operation

### a) Central Authorities

*Central Authorities play an important role in the effective operation of the Convention. They should be established and managed to provide a point of contact between Contracting Parties and provide and facilitate services related to the Convention. Central Authorities have a general obligation, under Article 29, to cooperate with each other and promote co-operation among competent authorities in their States to achieve the purposes of the Convention.<sup>44</sup>*

- When planning to establish a Central Authority, consider:
  - Which authority is best placed to perform the functions of a Central Authority. This could be an authority with responsibilities that are related to the subject matter of the Convention. The Central Authority should also be in a position to promote co-operation amongst the national authorities responsible for the different aspects of protection of adults, as well as to co-operate with other Contracting Parties. It might be, e.g., a government authority such as a ministry of justice.
  - Whether it is necessary for your State, if a multi-unit State, to appoint more than one Central Authority.<sup>45</sup>
  - The functions that Central Authorities will perform, and the functions that other authorities will perform (See **Annex III**).
  - The measures needed to ensure each Central Authority has a sufficiently broad mandate, the necessary qualified personnel and resources, including modern means of communication, to effectively perform their functions under the Convention.<sup>46</sup>
  - Whether specific internal procedures are needed to ensure that requests are transmitted and processed efficiently and rapidly, bearing in mind the need for confidentiality,<sup>47</sup> e.g.;
    - i. communication between Central Authorities, competent authorities and other authorities *within* the State;
    - ii. communication with authorities in other States (including joint meetings to solve a common problem),<sup>48</sup> and

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<sup>44</sup> C&R Nos 39 – 41 of the First Meeting of the SC.

<sup>45</sup> Art. 28(2).

<sup>46</sup> C&R Nos 36 and 38 of the First Meeting of the SC.

<sup>47</sup> C&R No 39 of the First Meeting of the SC.

<sup>48</sup> C&R No 40 of the First Meeting of the SC.

iii. communication with the PB, with a view to relaying Central Authority contact details and other relevant information as well as any changes thereto.<sup>49</sup>

- Consider what means will be used to provide assistance in discovering the whereabouts of an adult, where it appears that they may be present and in need of protection within the territory of your State. Ensure that the authorities within your State will be able to share information to that effect.
- Consider describing the laws and services of your State pertaining to the protection of adults in the Country Profile, including but not limited to measures of protection, powers of representation, *ex lege* representation and voluntary anticipatory acts containing the instructions given and wishes made by an adult.<sup>50</sup>
- Consider how mediation, conciliation or similar means can be used to achieve agreed solutions in situations where the Convention applies,<sup>51</sup> including identifying what services are available to enable and support parties to achieve this.
- Consider whether “reasonable charges” will be imposed for the provision of services, noting the general obligation on Contracting Parties to bear their own costs in applying the co-operation provisions of the Convention.<sup>52</sup>

**b) Cross-border Placement of Adults**

- Consider whether implementing measures or amendments to existing legislation are necessary in respect of the cross-border placement of an adult in an establishment or other place where protection can be provided including in another Contracting Party.<sup>53</sup>
- Consider which authorities are best placed to:
  - consult on proposed placements;
  - provide reports on the adult; and
  - receive and transmit requests.
- Consider what safeguards and standards should apply before the Central Authority or other competent authority gives consent to a cross-border placement.
- A designation under Article 42 may be desirable (Contracting Parties may designate the authorities to which requests under Art. 33 are directed).

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<sup>49</sup> C&R No 37 of the First Meeting of the SC.

<sup>50</sup> Art. 29(2).

<sup>51</sup> Art. 31.

<sup>52</sup> Art. 36.

<sup>53</sup> Art. 33.

- Ensure that communication procedures are implemented within the State and with other Contracting Parties, to avoid placements being made without the consent of the receiving State.

## Chapter VI | General Provisions

- Consider whether existing domestic laws allow judicial or administrative authorities, public bodies or professionals to confirm powers of representation<sup>54</sup> through a process which gives "every guarantee of reliability".<sup>55</sup>
- Consider whether existing domestic laws provide for the delivery of certificates under Article 38.<sup>56</sup>
- Consider whether existing domestic laws are sufficient to protect the confidentiality of information that is gathered or transmitted under the Convention.<sup>57</sup>
- Consider whether there are sufficient resources allocated for the translation of any communications sent to the Central Authority or other authority of another Contracting Party in accordance with Article 51.<sup>58</sup>
- Consider designating one or more members of the judiciary (*e.g.*, sitting judges, members of the judiciary bound by the same standards of independence and impartiality as a sitting judge, with authority and, ideally, experience in the area of protection of adults) for the purpose of direct judicial communications under the Convention.<sup>59</sup>
- If there are existing limitations in your State on the type of information that can be released to third parties, consider whether exceptions could be made for an exchange of information where it would be consistent with the objects of the Convention, *e.g.*, where an adult is in need of urgent protection.
- Identify any other international instruments to which your State is a Party which deal with the protection of adults, in particular the United Nations Convention on the Rights of Persons with Disabilities and consider how they will relate to the Convention. If appropriate, consider, together with other Parties to the instruments, whether any declaration is needed to ensure compatibility with the Convention.<sup>60</sup>

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<sup>54</sup> C&R No 44 of the First Meeting of the SC.

<sup>55</sup> C&R Nos 42 - 45 of the First Meeting of the SC.

<sup>56</sup> C&R Nos 42 - 45 of the First Meeting of the SC.

<sup>57</sup> Arts 39 and 40.

<sup>58</sup> C&R No 36 of the First Meeting of the SC.

<sup>59</sup> C&R No 57 of the First Meeting of the SC.

<sup>60</sup> Art. 49.

## Annexes



## Annex I

*Checklist of provisions in the Convention of 13 January 2000 on the International Protection of Adults that may require changes in domestic laws or procedures.*

Article	Provision	Issue
Article 5	The State of the adult's "habitual residence" has jurisdiction to take measures of protection.	Do competent authorities have jurisdiction to take measures based on an adult's "habitual residence"?
Articles 6, 10, 11	Competent authorities may take measures of protection in certain circumstances, in respect of an adult that is not habitually resident but is present in the State.	<p>Do competent authorities have jurisdiction to take measures of protection in certain circumstances when an adult is present in the State but not habitually resident there?</p> <p>Can competent authorities take measures of protection under Article 11 that are provisional and limited in territorial effect?</p>
Article 7	Competent authorities may take measures of protection in certain circumstances in respect of an adult who is a national.	<p>Do competent authorities have jurisdiction to take measures of protection, in certain circumstances, when an adult is a national of that State?</p> <p>Are procedures in place to facilitate the communication between the competent authorities of a Contracting Party of which the adult is a national and authorities having jurisdiction under Articles 5, 6(2) or 8 with regard to measures taken or decisions that no measures be taken?</p>
Article 8	Jurisdiction may be transferred from the competent authorities of one Contracting Party to another once certain conditions are fulfilled.	<p>Can competent authorities assume or transfer jurisdiction in accordance with the Convention?</p> <p>Are procedures in place to facilitate the transfer of jurisdiction?</p>

Article 15	The Convention provides for the law applicable to powers of representation.	Can powers of representation which have been issued by an adult, either under an agreement or by a unilateral act, be given force of law in your State in accordance with domestic law or foreign law?
Article 22	Measures of protection shall be recognised in all Contracting Parties "by operation of law" ( <i>i.e.</i> , automatically).	Are measures of protection taken in another Contracting Party recognised in your State by operation of law,?
Article 23	Any "interested person" may request a decision on the recognition or non-recognition of a measure taken in another Contracting Party ( <i>i.e.</i> , the advance recognition or non-recognition of measures).	Can an interested person seek the advance recognition or non-recognition of a measure of protection?
Article 25	The declaration of enforceability or registration of measures of protection for the purpose of enforcement shall be "a simple and rapid procedure".	Are procedures for registration of measure of protection "simple and rapid" in your State?
Articles 28 – 37	Co-operation under the Convention.	Does each authority in your State have the necessary resources to effectively perform their functions under the Convention?

## Annex II

*Information to be communicated to the depositary or the Permanent Bureau by States party to the Convention of 13 January 2000 on the International Protection of Adults.*

Information which Contracting parties must provide directly to the Permanent Bureau of the HCCH <sup>1</sup>	
Article 28	<p>Contracting Parties shall designate a Central Authority to discharge the duties which are imposed by the Convention on such authorities. As a matter of priority, contact details of Central Authorities and the language(s) of communication should be communicated to the Permanent Bureau.</p> <p>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.</p> <p>Where a State has appointed more than one Central Authority, the State shall designate the Central Authority to which any communication may be addressed for transmission to the appropriate Central Authority within that State.</p>
Article 42	<p>Contracting Parties may designate authorities to which requests under Articles 8 and 33 are to be addressed.</p>

It is recommended that the following information be communicated to the Permanent Bureau	
Article 38	<p>Each Contracting Party shall designate authorities to issue certificates under Article 38. The contact details and language(s) of communication of the designated authorities should be communicated to the Permanent Bureau.</p>

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<sup>1</sup> Art. 43.

Notifications to be communicated to the Depositary <sup>2</sup>	
Article 53(2)	Instruments of ratification, acceptance and approval.
Article 54(2)	Instrument of accession.
Article 54(3)	Objections to accession, to be made within six months after the receipt of the notification of accession.
Article 58(2)	A Contracting Party may denounce the Convention by notification to the depositary.

Declarations which may be made and must be communicated to the Depositary	
Article 43(2)	A Contracting Party may declare that requests under Article 32(2) are to be addressed only to its Central Authority.
Article 49(1)	The Convention does not affect any other international instrument to which Contracting Parties are bound and which contain provisions on matters governed by this Convention, unless a contrary declaration is made by the States party to such instrument.
Article 55	Where a State has two or more territorial units in which different systems of law are applicable, it may declare that the Convention shall extend to all its territorial units or only to one or more of them.  The declaration may be modified at any time.

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<sup>2</sup> Ministry of Foreign Affairs of the Kingdom of the Netherlands (Art. 53(2)).

### Information to be provided to the Depositary regarding agreements between Contracting Parties

Article 37	Any Contracting Party may enter into agreements with one or more other Contracting Parties with a view to improving the operation of the Convention. A copy of any such agreement shall be transmitted to the depositary of the Convention.
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### Reservations which may be made and must be communicated to the Depositary<sup>3</sup>

Article 51(2)	Contracting Parties may make a reservation objecting to the use of either French or English, but not both.
Article 56(2)	Any State may at any time withdraw the reservation it has made. The withdrawal shall be notified to the depositary.

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<sup>3</sup> Art. 56(1).

### Annex III

*Functions of Central Authorities and other authorities under the Convention of 13 January 2000 on the International Protection of Adults.*

Direct Obligations of Central Authorities	
Article 29(1)	Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their State.
Article 29(2)	Central Authorities shall take appropriate steps to provide information as to the laws of, and services available in, their State relating to the protection of adults.

Functions where Contracting parties may designate specific authorities to whom requests be directed <sup>1</sup>	
Article 8	An authority for requests to transfer jurisdiction: the authorities of a Contracting Party can, on their own motion or on application by the authority of another Contracting Party, request the authorities of a Contracting Party to assume jurisdiction in a particular case.
Article 33	An authority for requests regarding cross-border placement: the authorities of a Contracting Party contemplating the placement of the adult in another Contracting Party shall first consult with the Central Authority or other competent authority of the latter State. The requesting State shall transmit a report on the adult together with the reasons for the proposed placement.

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<sup>1</sup> Art. 42.

Other functions which may be performed by Central Authorities, competent authorities or other public authorities <sup>2</sup>	
Articles 22, 23	Receipt and transmittal of requests related to the recognition or non-recognition of measures.
Article 25	Declaration of enforceability or registration for enforcement of measures of protection taken in another Contracting Party.
Article 27	Enforcement of measures of protection.
Article 29(2)	Completion of the Country Profile under the 2000 Convention
Article 30 a)	Facilitation of communications between competent authorities.
Article 30 b)	Assistance, on request, 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	Facilitation of the use of mediation, conciliation or similar means to achieve agreed solutions in situations to which the Convention applies.
Article 32(1)	Receipt and transmittal of requests for information relevant to the protection of the adult. Contracting Parties may declare requests under Article 32(1) are communicated only through the Central Authority. <sup>3</sup>
Article 32(3)	Assistance in the implementation of measures of protection taken in another State.
Article 34	Communication, in cases where the adult is exposed to a serious danger, with the authorities of that other State about the danger involved and the measures taken or under consideration.
Article 38	Drawing up of a certificate under Article 38(3) for measures of protection and confirmed powers of representation

<sup>2</sup> *E.g.*, government agencies, courts, administrative authorities / tribunals, social welfare services, health professionals, counselling services, police services, mediation professionals. States should ensure that each authority has the necessary powers and resources to effectively perform their functions under the Convention. Procedures may also be necessary to ensure that authorities are aware of the responsibilities and functions performed by different authorities in the State.

<sup>3</sup> Art. 32(2).

## Annex IV

*Available resources from States that may be of assistance to other States.*

### HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

[www.hcch.net](http://www.hcch.net)

### GERMANY (in English and German only)

Central Authority of Germany (*Bundesamt für Justiz*)

[https://www.bundesjustizamt.de/EN/Topics/FamilyMattersInternational/AdultProtection/AdultProtection\\_node.html](https://www.bundesjustizamt.de/EN/Topics/FamilyMattersInternational/AdultProtection/AdultProtection_node.html)

Act to Implement the Hague Convention of 13 January 2000 on the International Protection of Adults (in English and German)

English: [https://www.gesetze-im-internet.de/englisch\\_erws\\_ag/](https://www.gesetze-im-internet.de/englisch_erws_ag/)

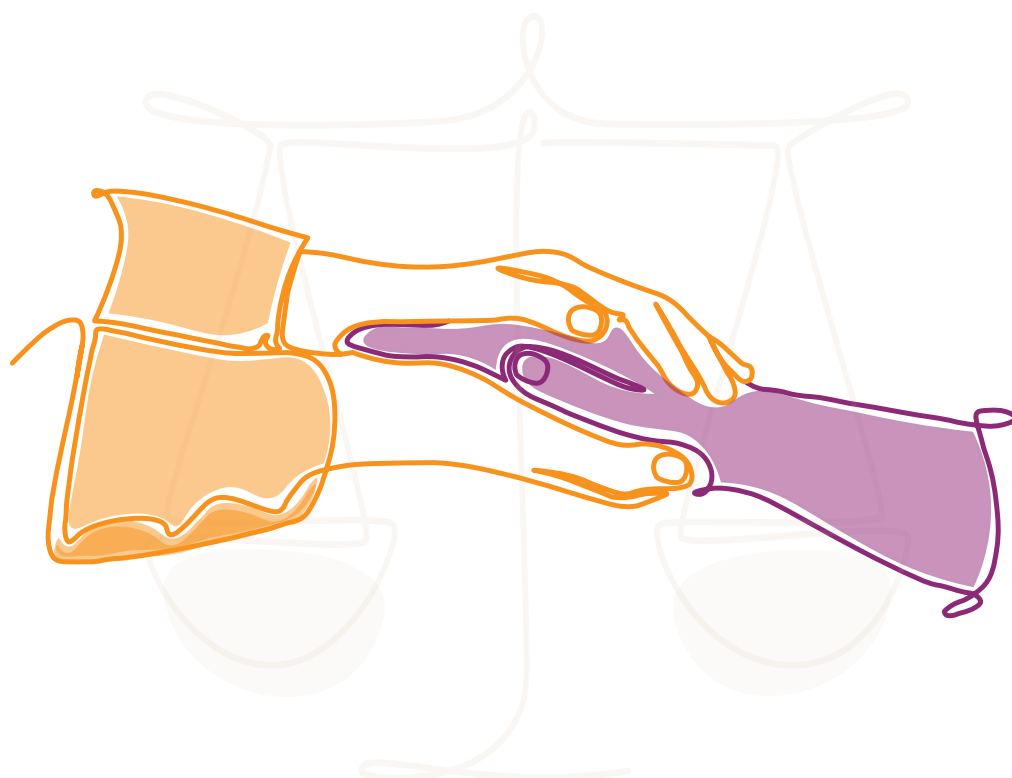
German: [https://www.gesetze-im-internet.de/erws\\_ag/index.html](https://www.gesetze-im-internet.de/erws_ag/index.html)





# Annex II

## Conclusions and Recommendations adopted at the First Meeting of the Special Commission on the practical operation of the 2000 Protection of Adults Convention (9 – 11 November 2022)





## Conclusions & Recommendations

The First Meeting of the Special Commission (SC) on the practical operation of the Convention of 13 January 2000 on the International Protection of Adults (the 2000 Protection of Adults Convention or the 2000 Convention) was held in The Hague from 9 to 11 November 2022. It was attended by a total of 112 delegates, with 44 delegates attending in person, at the Sound & Vision Museum in The Hague, and 68 delegates attending remotely, via videoconference. Delegations represented Contracting Parties, HCCH Members, and Observers from intergovernmental and international non-governmental organisations, as well as members of the Permanent Bureau (PB).<sup>1</sup>

The SC witnessed the signature of the 2000 Convention by Malta. Delegates welcomed the signature and congratulated Malta on this occasion.

The SC adopted the following Conclusions and Recommendations (C&R):

### I. Contracting Parties to the 2000 Convention

1. Endeavours should continue to be made to encourage ratifications of, and accessions to, the 2000 Convention by States willing and able to undertake the Convention obligations. Contracting Parties are encouraged to arrange meetings at the regional level for this purpose.

### II. General operation of the 2000 Protection of Adults Convention

#### 1. General assessment of the operation of the 2000 Convention

2. The SC recalled the core purpose of the 2000 Convention which is to promote, through rules of private international law, the dignity, autonomy and protection of adults in cross-border situations who, by reason of an impairment or insufficiency of their personal faculties, are not in a position to protect their interests.
3. The SC acknowledged the responses to the Questionnaire of September 2020 on the practical operation of the 2000 Protection of Adults Convention<sup>2</sup> which confirm that, in general, the Convention is operating smoothly and that it is fit for purpose.

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<sup>1</sup> The following Members of the HCCH were represented: Argentina, Armenia, Austria, Belgium, Canada, Cyprus, Czech Republic, El Salvador, Estonia, European Union, Finland, France, Germany, Ireland, Israel, Italy, Japan, Latvia, Lithuania, Luxembourg, Malta, Mexico, Monaco, Netherlands, Paraguay, Poland, Portugal, Republic of Korea, Slovakia, Slovenia, Sweden, Switzerland, Ukraine and United Kingdom, in addition to the following intergovernmental organisations: CARICOM (Caribbean Community and Common Market) and CIEC (*Commission internationale de l'état civil*) and the following international non-governmental organisations: CNUE (*Conseil des Notariats de l'Union Européenne*), DAI (Dementia Alliance International), EAPIL (European Association of Private International Law), EGPIIL (European Group for Private International Law), ELI (European Law Institute), FL-eur (Family Law in Europe), IAFL (International Academy of Family Lawyers), ICFLPP (International Centre for Family Law, Policy and Practice), STEP (Society for Trust and Estate Planning) and UINL (International Union of Notaries).

<sup>2</sup> "Questionnaire on the practical operation of the HCCH 2000 Protection of Adults Convention", Prel. Doc. No 2 of September 2020, available on the HCCH website at [www.hcch.net](http://www.hcch.net) under "Protection of Adults Section" then "Questionnaires & Responses".

4. The SC recalled C&R No 2 of the [December 2018 EC-HCCH Joint Conference on the Cross-Border Protection of Vulnerable Adults](#) that the 2000 Protection of Adults Convention and the *Convention of 13 December 2006 on the Rights of Persons with Disabilities* (UNCRPD) are complementary instruments.
  2. **Interpretation issues, including the interpretation of the term "habitual residence" (Arts 5, 6, 8, 10, 11, 15(a) and 49(2))**
5. The SC highlighted that the 2000 Convention should be interpreted having regard to its autonomous nature and in the light of its objects.
6. The SC noted that habitual residence is an autonomous concept that should be interpreted in light of the objectives of the Convention rather than under domestic law constraints. The issue of habitual residence is factual in nature and is to be determined by the relevant competent authorities on a case-by-case basis.
7. The SC reminded Contracting Parties that, in the interpretation of the 2000 Convention, regard shall be had to its international character and to the need to promote uniformity in its application.

### III. Jurisdiction issues

1. **The rules on jurisdiction form a complete and closed system which applies as an integral whole to Contracting Parties**
8. The SC noted that the rules on jurisdiction contained in Chapter II of the 2000 Protection of Adults Convention form a complete and closed system, which applies as an integral whole to Contracting Parties. This "complete and closed system" does not allow for conflicting jurisdictions among Contracting Parties and, as an "integral whole", may necessitate coordination between competent authorities when taking, assuming or transferring jurisdiction under the Convention.
9. The SC recalled that, under the 2000 Convention, through coordination, only one competent authority may take jurisdiction at a given time, over a specific matter, thus avoiding conflicting decisions being issued on matters falling under its scope.
  2. **Change of habitual residence (Arts 5(2), 32(1) and 34)**
10. The SC recalled that the change of habitual residence is a question of fact which will be assessed by the competent authorities called upon to make a decision on this matter. The competent authority seised is the only one that has to determine the habitual residence of the adult and whether it has jurisdiction under the 2000 Convention. In this regard, the competent authority seised could consult, if necessary, the competent authorities of the former State of habitual residence, to obtain relevant information. For example, the competent authority seised can request information relevant to assess whether the habitual residence has changed, in order to determine if it can take jurisdiction under Article 5(2), or whether the former competent authority would continue to exercise jurisdiction under other grounds (e.g., Art. 7) or if it would be appropriate to request a transfer of jurisdiction under Article 8. Recalling Articles 32 and 34, the SC noted that cooperation can take place with a view to sharing information regarding the adult's change of habitual residence. The SC further noted that this process should be conducted diligently and without delay. The SC reminded Contracting Parties that Article 29 generally provides Central Authorities with an

opportunity to exchange information, including such information as may be relevant for the purposes of Article 5(2).

11. The SC noted that, where the habitual residence of the adult changes to another Contracting Party, the competent authorities of the new habitual residence will have primary jurisdiction. Through the exchange of information under Articles 29 and 34, a competent authority may be alerted to the change of residence of an adult, in order for this authority to determine whether it has jurisdiction to take measures of protection.

### **3. Jurisdiction based on nationality in the case of multi-unit States where the Convention is not in force in every unit (Arts 7 and 45(d))**

12. The SC recalled Article 45(d) of the 2000 Convention which provides that "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 [...] 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".

### **4. Party autonomy – choice of forum / jurisdiction (Art. 8(2)(d))**

13. The SC underlined that the 2000 Convention promotes party autonomy, while ensuring the protection of the adult. In particular, Article 8(2)(d) allows the adult to choose in writing the State the competent authorities of which are to take measures of protection in the context of a possible transfer.
14. The SC recalled the clarification in paragraph 66 of the Explanatory Report that Article 8 of the 2000 Convention combines two procedures for the transfer of jurisdiction to Contracting Parties the competent authorities of which might be better placed. On the one hand, competent authorities that have primary jurisdiction under Article 5 or 6 may request the competent authorities of one of the Contracting Parties listed in Article 8(2) to take measures of protection. On the other hand, the competent authorities of the Contracting Parties listed in Article 8(2) may ask the competent authorities that have primary jurisdiction under Article 5 or 6 to make a request for a transfer of jurisdiction to them.

### **5. Coordination of jurisdiction issues & direct judicial communications (Arts 5-11)**

15. To facilitate communications relating to jurisdiction issues, the SC strongly encouraged competent authorities to make use of the Model Form regarding "Measures of protection concerning the adult" and the Model Form regarding "Information relating to measures of protection concerning the adult".
16. The SC recalled C&R No 14 of the December 2018 EC-HCCH Joint Conference on the Cross-Border Protection of Vulnerable Adults which underlines the potential of direct judicial communications in this area.
17. The SC recalled the General Principles for Judicial Communications within the context of the International Hague Network of Judges (IHNJ) and noted that, for the purposes of the 2000 Convention, these principles would be equally applicable to both judicial and administrative authorities:

"In Contracting Parties where direct judicial communications are practised, the following are commonly accepted overarching principles (Principles 6.1-6.3):

- Every judge engaging in direct judicial communications must respect the law of his or her own jurisdiction.
- When communicating, each judge seised should maintain his or her independence in reaching his or her own decision on the matter at issue.
- Communications must not compromise the independence of the judge seised in reaching his or her own decision on the matter at issue.

In Contracting Parties where direct judicial communications are practised, the following are commonly accepted procedural safeguards (Principle 6.4):

- Except in special circumstances, parties are to be notified of the nature of the proposed communication.
- A record is to be kept of communications and it is to be made available to the parties.
- Any conclusions reached should be in writing.
- Parties or their representatives should have the opportunity to be present in certain cases, for example via conference call facilities.

In Contracting Parties where direct judicial communications are practised, the following information is usually included in the initial communication (Principle 7.5):

- The name and contact details of the initiating authority;
- The reference number of the case;
- The nature of the case (with due regard to confidentiality concerns);
- The issue on which the communication is sought;
- Whether the parties concerned have consented to the communication taking place;
- When the communication may occur (with due regard to any time differences);
- Any specific questions which the initiating authority would like answered;
- Any other pertinent matters."

#### IV. Applicable law issues

##### 1. Impact of changed circumstances on existing measures (Arts 13 and 14)

18. The SC noted that the domestic laws of Contracting Parties to the 2000 Convention do not have to provide for all types of measures of protection that fall under the scope of the Convention and acknowledged that some measures, taken in one State, may be unknown in another.

19. The SC recalled Article 12 of the 2000 Convention which provides that a measure taken under Articles 5 to 9 remains in force even when the ground of jurisdiction upon which the measure was taken has subsequently ceased to exist due to a change of circumstances (*e.g.*, a change of habitual residence). The SC also recalled Article 14 of the 2000 Convention which provides that, when a measure of protection ordered in one Contracting Party is to be implemented in another, the conditions of its implementation are governed by the law of that other Contracting Party.
20. In this regard, the SC noted that, in the case of a change of habitual residence, the measures already taken in the former State of habitual residence will remain in force unless and until the competent authorities of the new State of habitual residence modify, replace or terminate them (Art. 12). In the interim, the conditions of implementation of the measures already taken and implemented in the new State of habitual residence will be governed by the law of that State (Art. 14). The competent authorities of the new State of habitual residence may modify or replace any existing measures (Art. 5(2)). This may occur, *inter alia*, where the measures taken in the former State of habitual residence prove difficult to implement, for example, because they are unknown in the State of the new habitual residence. Doing so, they would apply their own law (Art. 13(1)) or they could apply or take into consideration the law of another State with which the situation has a substantial connection (Art. 13(2)).

## 2. *Ex lege* representation (Art. 1 and Chapter V)

21. The SC welcomed the work completed by the PB, with the assistance of the Working Group (WG) on the development of a draft Practical Handbook under the 2000 Protection of Adults Convention, on the application of the 2000 Protection of Adults Convention to *ex lege* representation.
22. The SC adopted the following version of paragraph 3.56 of the draft revised Practical Handbook, which provides additional information regarding the application of the 2000 Convention to *ex lege* representation, to supplement what is already provided for in paragraph 90 of the Explanatory Report:

"3.56 *Ex lege* representation is not, as such, a measure of protection under Article 3 because it is not put in place by a competent authority, nor is it a power of representation under Article 15 because it has not been granted by the adult. *Ex lege* representation is a representation that arises by operation of law, for which there is no specific conflict rule in the Convention. While there is no provision in the Convention that deals with *ex lege* representation *per se*, such representation falls under the scope and object of the Convention by virtue of Article 1 when it is aimed at the protection of adults who, by reason of an impairment or insufficiency of their personal faculties, are not in a position to protect their interests (Art. 1(1)). Thus, *ex lege* representation may be the subject of cooperation between the authorities of Contracting Parties (Art. 1(2)(e) and Chapter V). In general, competent authorities will give effect to *ex lege* representation in accordance with their own law, including, where appropriate, their rules of private international law.

Moreover, it is important to note that a number of States may provide mandatory laws that require the authorisation of the spouse (*i.e.*, a spouse covered by the marital *ex lege* representation) or next of kin for certain medical treatments for the adult or their placement in a health institution."



### **3. Instructions given and wishes made by the adult, e.g., advance directives (Arts 15 and 16)**

23. The SC noted that instructions given and wishes made by an adult, in anticipation of a future impairment of their personal faculties, fall within the general scope of the 2000 Convention under Article 1 and are subject to the cooperation provisions in Chapter V.
24. The SC also noted that instructions given and wishes made by an adult can be found in various types of voluntary, anticipatory acts such as advance directives, advance arrangements, advance healthcare decisions or (continuing) powers of attorney. The SC agreed that unilateral acts containing instructions and wishes without necessarily designating an individual to carry them out are important tools in ensuring the exercise of the adult's autonomy.
25. The appreciation of whether or not a particular voluntary anticipatory act constitutes a power of representation under Articles 15 and 16 could be undertaken by competent authorities on a case-by-case basis.
26. The SC further noted that the Country Profile (Prel. Doc. No 7 of October 2022 (first revised version)) will be extremely helpful in bringing to the attention of competent authorities and other interested parties the various types and forms of voluntary, anticipatory acts containing the instructions and wishes of the adult in different jurisdictions.

### **4. Choice of law in the case of powers of representation (Art. 15(2))**

27. The SC recalled the choice of law provision under Article 15(2) and highlighted the utility of aligning the choice of forum under Article 8(2)(d) with the choice of law.

## **V. Recognition and enforcement issues**

### **1. Measure shall be recognised by operation of law (Art. 22(1))**

28. The SC recalled that the provision under Article 22(1) entails that the effects of a measure, as they exist in the domestic legal system of the Contracting Party where the measure was taken, may be relied upon in another Contracting Party without the need for any further action or special processes (*i.e.*, automatically). Such a measure could include the designation of an individual to represent or assist the adult.
29. The SC noted that the use of the certificate under Article 38 will facilitate the recognition of measures by operation of law under Article 22(1).

### **2. Opportunity of the adult to be heard (Art. 22(2)(b))**

30. To facilitate the recognition and enforcement of measures, the SC encouraged competent authorities to incorporate a record of whether the adult was heard into their orders for measures. If a decision is made not to hear the adult, the SC encouraged competent authorities to indicate that consideration was given to doing so and the reasons for the decision not to hear the adult.

### **3. Preventive action for recognition or non-recognition (advance recognition) (Art. 23)**

31. The SC recalled that Article 23 provides a legal basis for any interested party to seek, in advance, the recognition or non-recognition of a measure, before it is invoked or relied upon in another State. To this end, the SC highlighted the utility of Article 23 in ensuring the advance recognition of measures to guarantee their cross-border recognition.

### **4. Simple and rapid procedure for declaration of enforceability or registration (Art. 25)**

32. The SC recognised the great importance of simple and rapid procedures to be employed for the recognition and / or declaration of enforceability or registration for the purposes of enforcement of measures from other Contracting Parties, as required by Article 25(2). To this end, the SC encouraged States to consider implementing legislation providing for stipulated time frames, the use of specialised judges or registrars and the concentration of jurisdiction for procedures in certain courts, among others.

### **5. Enforcement in accordance with the law of the requested State to the extent provided by such law (Art. 27)**

33. The SC recalled Article 25(1) of the 2000 Convention which provides that, where measures taken in one Contracting Party require enforcement in another Contracting Party, such measures shall, upon request of an interested party, be declared enforceable or registered for the purpose of enforcement in that other Contracting Party, in accordance with the procedures foreseen by its domestic law. The SC noted that measures for the protection of an adult only exceptionally require enforcement under Article 25. This may occur, for instance, where a decision is taken by a competent authority to place the adult in an establishment or to authorise a specific intervention by health care practitioners or medical staff (e.g., tests or treatments).
34. In the context of requests for declarations of enforceability or registrations for the purpose of enforcement, the SC invited Contracting Parties (in relation to their laws) and competent authorities (in relation to their procedures) to differentiate between those measures that require enforcement and those that do not.
35. The SC also recalled Article 27 of the 2000 Convention which provides that, once a measure taken in one Contracting Party has been declared enforceable or has been registered for the purpose of enforcement in another Contracting Party, the measure shall be enforced in the other State as if it had been originally taken there, in accordance with its domestic law.

## **VI. Cooperation & general provisions issues**

### **1. Central Authority resources, contact details and general information**

36. The SC noted that Central Authorities play an important role in making the 2000 Convention function. To this end, they should be given a mandate which is sufficiently broad, qualified personnel and resources, including modern means of communication, all of which are necessary to carry out their functions effectively. Central Authorities should have a regular staff, able to develop expertise in the operation of the 2000 Convention.

37. Contracting Parties should inform the PB promptly of the contact details of their Central Authority(ies), and Central Authorities should inform the PB promptly of the names of contact persons, of the means by which they may be contacted and of their language(s) of communication. Central Authorities should promptly inform the PB of any changes in these details.
38. Each Central Authority is encouraged, where feasible, to establish and regularly update their website, details of which should be furnished to the PB for the purpose of establishing a link with the HCCH website.

**2. General obligation of Central Authorities to cooperate with each other (Art. 29)**

39. The SC strongly encouraged Central Authorities to cooperate closely and respond promptly to requests for cooperation. To this end, the SC recommended that they should, as far as possible, use rapid means of communication, bearing in mind the need for confidentiality.
40. In addressing any practical problems concerning the proper functioning of the 2000 Convention, the SC strongly encouraged Central Authorities to engage in dialogue and noted that, where a group of Central Authorities share a common problem, consideration should be given to having joint meetings which might, in some cases, be facilitated by the PB.
41. The SC noted that in addition to cooperating in relation to matters provided for under Articles 30 to 34, Central Authorities are also strongly encouraged to cooperate regarding other matters, under Article 29, to achieve the purposes of the 2000 Convention.

**3. Confirmation of powers of representation (Art. 38(1))**

42. 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".
43. 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.
44. The SC noted that it is for each Contracting Party to entrust the task of confirmation to a judicial or administrative authority, a public body or an appropriate professional, and stressed that, in any case, safeguards should be in place to avoid conflicts of interest.
45. 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.

**4. Promoting the use of the model certificate (Art. 38)**

46. 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.
47. The SC recommended the use of the model form certificate (Art. 38) adopted by the 1999 Special Commission of a Diplomatic Character.

### **5. Designation of the authorities competent to draw up the certificate (Art. 38(3))**

48. The SC further encouraged Contracting Parties that have not yet done so to designate the authorities competent to draw up the certificate in accordance with Article 38(3) of the 2000 Convention.

### **6. Communications to be accompanied by a translation (Art. 51)**

49. The SC recalled Article 30 which provides that, either directly or through public authorities or other bodies, Central Authorities shall facilitate communications, by every means, between the competent authorities in situations to which the 2000 Convention applies.
50. The SC recalled Article 51 of the 2000 Convention which provides that any communications, including attachments, between authorities must be in their original language and accompanied by a translation into the official language or one of the official languages of the other Contracting Party. Where that is not feasible, the communication must be translated into either French or English, keeping in mind that a Contracting Party may make a reservation, under Article 56, to the use of either French or English, but not both.

## **VII. Tools to assist with the implementation of the 2000 Convention**

51. The SC recalled C&R Nos 6, 9 and 10 of the December 2018 EC-HCCH Joint Conference on the Cross-Border Protection of Vulnerable Adults, which highlighted the utility of developing and promoting practical tools to further facilitate the implementation of the 2000 Convention.
52. The SC also acknowledged the responses to the Questionnaire of July 2019<sup>3</sup> wherein States expressed an interest in the development of tools to assist in the operation of the 2000 Convention.

### **1. Improving access to the existing Model Forms**

53. The SC noted the benefits of using the existing recommended Model Forms adopted by the 1999 Special Commission of a diplomatic character and acknowledged the views expressed by some States that the recommended Model Forms could be more easily available on the HCCH website. The SC invited the PB to place the Model Forms available under the Convention in a more prominent area of the Protection of Adults specialised section on the HCCH website.
54. To this end, the SC recommended that the PB, subject to available resources, begins working on improving the user-friendliness of the recommended Model Forms under the 2000 Convention, for example by making them fillable.

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<sup>3</sup> "Questionnaire to assess the need to convene a possible meeting of the Special Commission in 2022 to review the practical operation of the 2000 Protection of Adults Convention", Prel. Doc. No 1 of July 2019, available on the HCCH website at [www.hcch.net](http://www.hcch.net) under "Protection of Adults Section" then "Questionnaires & Responses".

55. The SC invited the Council on General Affairs and Policy (CGAP) to consider the issue of accessibility to HCCH documents by individuals with impairments, in particular to documentation pertaining to the 2000 Convention.

**2. Direct judicial communications and a possible network of judges under the 2000 Protection of Adults Convention**

56. The SC recalled C&R No 14 of the December 2018 EC-HCCH Joint Conference on the Cross-Border Protection of Vulnerable Adults which underlines the potential of direct judicial communications in this area.
57. The SC invited Contracting Parties to consider designating one or more members of the judiciary for the purpose of judicial communications under the 2000 Convention, with a view to, in the future, organise such members of the judiciary into a network. Designated members of the judiciary should be sitting judges, or members of the judiciary bound by the same standards of independence and impartiality as a sitting judge, with authority and, ideally, with experience in the area of protection of adults.
58. The SC recommended that the 2023 meeting of CGAP give consideration to extending, with the necessary adaptations, the Emerging Guidance on Direct Judicial Communications to the 2000 Protection of Adults Convention.
59. The SC recommended that the meeting of CGAP in 2023 give consideration to extending the scope of the IHNJ to matters relating to the 2000 Protection of Adults Convention. To this end, the SC invited the PB to prepare a document outlining the practical considerations pertaining to such an extension.
60. The SC welcomed the work completed by the PB and the WG in finalising Prel. Doc. No 8 of July 2022 on Direct Judicial Communications and a possible network of judges under the 2000 Protection of Adults Convention.

**3. Finalisation and adoption of the Practical Handbook on the Operation of the 2000 Protection of Adults Convention**

61. Recalling the strong support by States for developing a Practical Handbook on the 2000 Convention, as well as the mandate from CGAP in March 2021 (C&D No 26), the SC welcomed the work completed by the PB and the WG in finalising the draft Practical Handbook.
62. The SC thanked the PB and the WG for the progress achieved on the draft Practical Handbook and approved, in principle, Prel. Doc. No 4 of July 2022 (revised version). The SC invited the PB and the WG to review the draft in light of the latest comments received from HCCH Members (Prel. Doc. No 13 of October 2022), the discussions that took place at the SC and their outcome, with a view to circulate the second revised version to HCCH Members for comments on the amendments. HCCH Members and Observers present at the SC will be invited, on that occasion, to provide comments on existing examples and suggestions for additional examples. The SC invited the PB, in consultation with the WG, to finalise the draft Practical Handbook accordingly, before submitting the final draft for endorsement by CGAP. The SC noted that, for publication purposes, the draft Implementation Checklist will appear as an Annex to the draft Practical Handbook.

#### **4. Finalisation and adoption of the Implementation Checklist under the 2000 Protection of Adults Convention**

63. The SC acknowledged the role that an Implementation Checklist is likely to play as a tool to provide guidance to States prior to, or upon, their implementation of the 2000 Convention.
64. The SC recognised the efforts made by the PB and the WG, thanked them for their work on the draft Implementation Checklist under the 2000 Protection of Adults Convention and approved, in principle, Prel. Doc. No 3 of September 2020. The SC invited the PB and the WG to review the draft Implementation Checklist, in the light of the discussions that took place at the SC and their outcome, with a view to circulate it to HCCH Members for comments before submitting the final draft for endorsement by CGAP.

#### **5. Finalisation and adoption of the 2000 Protection of Adults Convention Country Profile**

65. The SC acknowledged the role that a Country Profile is likely to play as a tool for Contracting Parties to provide information regarding their implementation of the 2000 Convention.
66. The SC recognised the effort made by the PB and the WG, thanked them for the progress achieved on the draft Country Profile under the 2000 Protection of Adults Convention and approved, in principle, Prel. Doc. No 7 of October 2022 (first revised version). The SC invited the PB and the WG to review the draft Country Profile in light of the latest comments received from HCCH Members, the discussions that took place at the SC and their outcome, with a view to circulating it to HCCH Members for comments on the amendments before submitting the final draft for endorsement by CGAP.

### **VIII. Possible amendments to the 2000 Convention**

67. The SC welcomed the work completed by the PB, with the assistance of the WG, on Prel. Doc. No 12 of October 2022 (revised version) on the possible amendments to the 2000 Protection of Adults Convention.
68. The SC acknowledged the views of several delegations that there was insufficient time to review Prel. Doc. No 12 of October 2022 (revised version). In this regard, the SC noted that the discussions on the possible amendments to the 2000 Convention are preliminary and simply intended to assess, in the first instance, whether there is a need and an interest to amend the 2000 Convention and whether that is feasible. The Secretary General confirmed that the decision whether or not to amend the 2000 Convention is for CGAP to make. The PB indicated that a report will be prepared before the end of the year on the possible amendments to the 2000 Convention for the purpose of the meeting of CGAP in 2023 and will reflect the discussions that took place at the SC. HCCH Members were invited to share any additional developments pertaining to this issue with the PB, with a view to circulate them before the meeting of CGAP in 2023.

### **1. Interest in deleting the terms “guardianship” and “curatorship” (Art. 3(c))**

69. The SC recalled that the 2000 Convention does not, in and of itself, regulate or establish any protective regime. Noting that, in some States, the institutions of guardianship and curatorship are now based on supported decision-making regimes, the SC recommended keeping the terms “guardianship” and “curatorship” in the text of the Convention.

### **2. Interest in adding a new conflict rule for “*ex lege* representation”**

70. Recalling the past lack of consensus regarding the inclusion of a conflict rule on *ex lege* representation in the text of the 2000 Convention and taking into consideration that States have not reported any practical issues in this area, the SC noted that the absence of such a conflict rule from the Convention would not create insurmountable difficulties.
71. The SC acknowledged the views expressed by delegations that there is currently no need or interest in adding a new conflict rule for *ex lege* representation.

### **3. Interest in adding a provision on “instructions given and wishes made by the adult, e.g., advance directives”**

72. Considering the outcome of the discussions (see, *supra*, paras 23 – 26), the SC acknowledged that the absence of a specific conflict rule that covers instructions given and wishes made where no powers of representation have been conferred does not appear to create practical difficulties.
73. The SC took note of the views expressed by delegations that there is currently no need or interest in adding a provision regarding instructions given and wishes made by the adult.

### **4. Interest in adding final clauses allowing Regional Economic Integration Organisations (REIOs) to join the 2000 Convention**

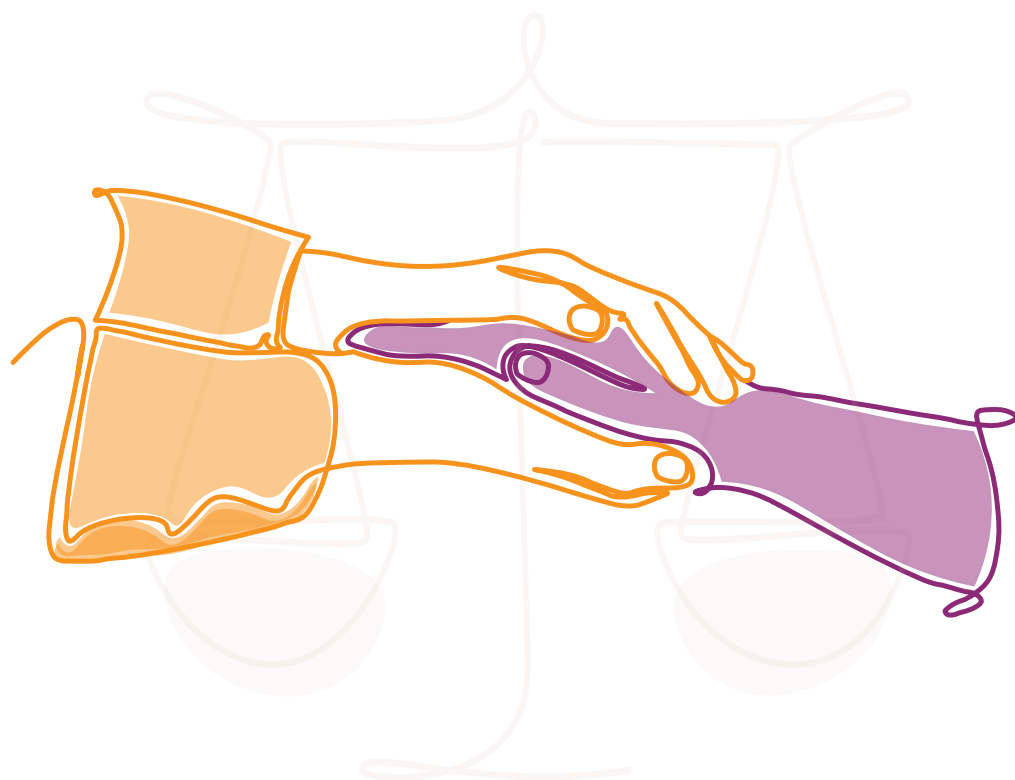
74. During the course of discussions on this matter, the SC recalled that the 2000 Convention functions well and is fit for purpose. As such, it acknowledged the desirability and practical necessity for more States to be bound by the 2000 Convention as soon as possible and in the most efficient manner. The SC noted that there are several ways in which EU Member States can be bound by the 2000 Convention, which is a matter to be determined by the EU at the regional level.
75. The SC took note of the wish expressed by several delegations to have more time to discuss the inclusion of an REIO clause and that discussions on this matter are better suited to take place at the meeting of CGAP in 2023.

### **5. Possible mechanisms to amend the 2000 Convention**

76. The SC noted that the mechanism concerning a possible amendment to the 2000 Convention is to be discussed and decided by CGAP.

# Annex III

## Text of the 2000 Convention







## CONVENTION ON THE INTERNATIONAL PROTECTION OF ADULTS

*(Concluded 13 January 2000)*

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.

### 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.

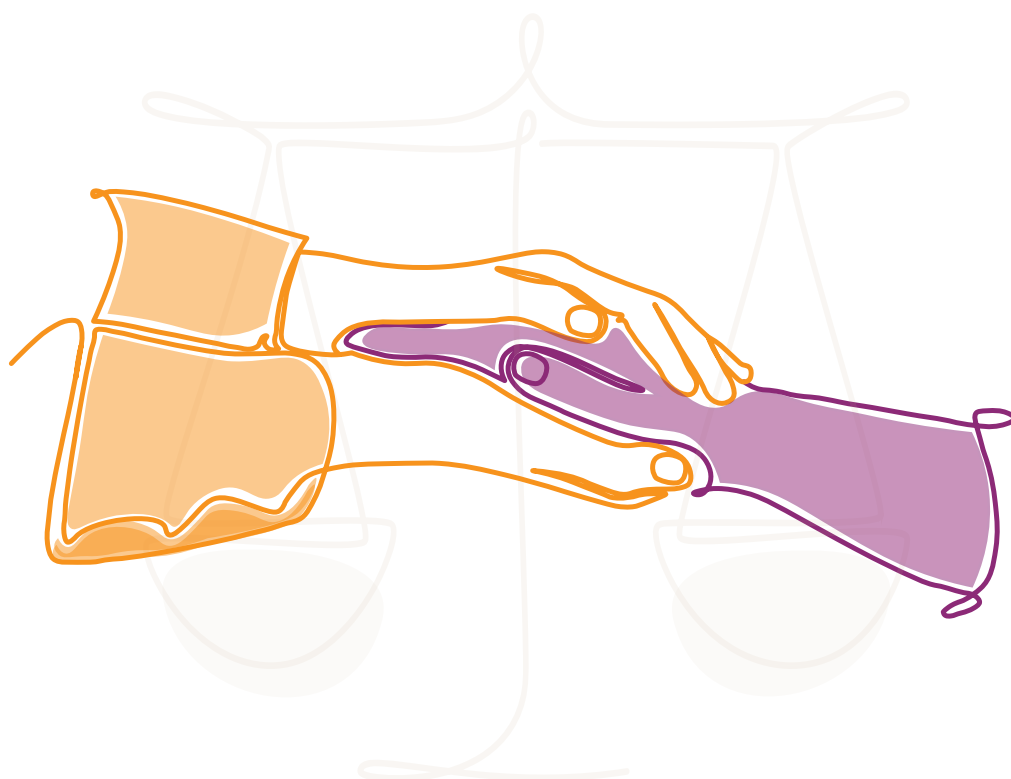
Done at The Hague, on the 13th day of January, 2000, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the States Members of the Hague Conference on Private International Law.





# Annex IV

## Recommended Model Forms under the 2000 Convention





**CERTIFICAT / CERTIFICATE**

Article 38 de la Convention sur la protection internationale des adultes  
signée 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* \_\_\_\_\_ le / *on* \_\_\_\_\_

Signature / *Signature*

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* \_\_\_\_\_

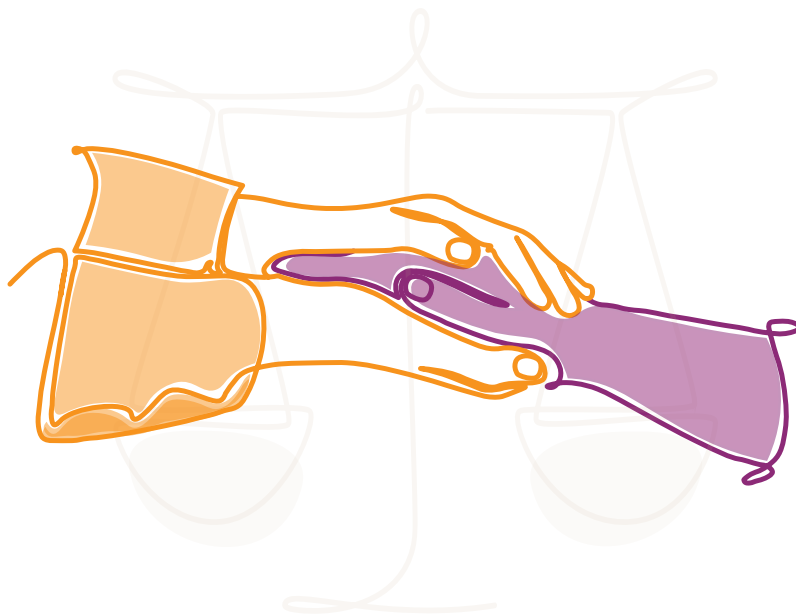
Signature / *Signature*

Cachet / *Stamp*

## Hague Conference on Private International Law - HCCH Permanent Bureau

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Hague Conference on Private International Law  
Conférence de La Haye de droit internationa privé  
Conferencia de La Haya de Derecho Internacional Privado