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<b>Annexes</b>	Annex I: Implementation Checklist of the 2000 Convention (Prel. Doc. No 3 of September 2020 – to be inserted later) Annex II: Text of the <a href="#">2000 Convention</a> (to be inserted later)
<b>Related Documents</b>	<a href="#">Explanatory Report on the 2000 Convention</a>

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

### 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. 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>2</sup> In the responses to the July 2019 Questionnaire,<sup>3</sup> there was strong support in favour of a practical handbook on the 2000 Convention.<sup>4</sup> At its March 2021 meeting, the Council on General Affairs and Policy of the HCCH (hereinafter, “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>5</sup>

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 States that were considering implementing the 2000 Convention into their national law. The “implementation checklist” was finalised in [\_\_\_\_\_] and now appears as Annex [\_\_\_\_\_] to this Handbook. A first draft of the Handbook was circulated to Members<sup>6</sup> for comments in [\_\_\_\_\_]. [*The draft Handbook was then further revised and submitted to the 2022 SC (??) for final approval.*]

This Handbook is the culmination of several consultations with the Working Group, comprised of experts from both Contracting Parties and States which are considering joining the 2000

<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” (hereinafter, “2018 EC-HCCH Joint Conference”), C&Rs Nos 1-3, 5 and 6. 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](#) (hereinafter, “UNCRPD”). The general practical usefulness of the 2000 Convention was stressed. In addition, the importance of cooperation among international / intergovernmental organisations, NGOs and practitioners in raising awareness and promoting the 2000 Convention was also highlighted. It was also noted that States having recently reformed their legislative frameworks in relation to vulnerable adults had carried out such reforms much of the legislative reform undertaken by States was carried out in parallel with the implementation of the Convention.

<sup>2</sup> *Ibid.*, C&R No 6.

<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 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, available on the HCCH website < [www.hcch.net](http://www.hcch.net) > under “Protection of Adults” then “Questionnaire and responses”.

<sup>4</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 < [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>5</sup> CGAP 2021, C&D No 26.

<sup>6</sup> [...]

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.

The Permanent Bureau is grateful for the comments received at various points of the drafting process, and for written comments from the following: [\_\_\_\_\_]. This Handbook would not have been possible without the concerted efforts of the Permanent Bureau, especially the following: [\_\_\_\_\_].

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## Glossary

### 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 directive

Instructions given or wishes made by a capable adult concerning issues that may arise in the event of their incapacity.

### Advance recognition or non-recognition

Advance recognition or non-recognition is to be understood as 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.

### Authorities

Where the general term “authorities” appears in the text of this Practical Handbook, it is to be understood to mean either competent authorities or Central Authorities. This is in contrast to instances where this Handbook refers specifically to “competent authorities” or “Central Authorities”.

### Central Authorities

Central Authorities are to be understood as (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.

### 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

	<u>concurrent bases of jurisdiction, with the understanding that only one competent authority may exercise jurisdiction to make a decision on a specific point.</u>
<u>Competent authorities</u>	<u>The term “competent authorities” refers to judicial and / or administrative authorities which are competent in accordance with domestic law to take measures and / or decisions (depending on the context) in individual cases in the field of the protection of adults (see para. 12 of the Explanatory Report).</u>
<u>Enforcement</u>	<u>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).</u>
<u>Enforceable measure</u>	<u>An enforceable measure is to be understood as 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.</u>
<u>General jurisdiction</u>	<u>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.</u>
<u>HCCH</u>	<u>The Hague Conference on Private International Law.</u>
<u>HCCH Conventions</u>	<u>Conventions adopted under the auspices of the Hague Conference on Private International Law (HCCH).</u>
<u>Incapacity</u>	<u>Incapacity refers to a condition whereby an adult who is living with mental, intellectual, physical or sensory impairments is not in a position to protect their own interests by reason of such an impairment or insufficiency of their personal faculties (see Art. 1(1) of the 2000 Convention).</u>

Judicial powers of representation

Powers of representation put in place by competent authorities, including the designation of a representative.

Measure

A measure is to be understood as a decision or act taken by a competent authority with regards to the protection of the person or property of an adult (see Art. 3 of the 2000 Convention).

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

Private international law is to be understood as 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 attorney

A power or authority granted by one person (the granter, donor, mandator or principal) to another (the attorney, donee, mandatary or agent) authorising the attorney to act on behalf of the granter.

Power of representation

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

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 State

The State where the measure is relied upon or where advance recognition or recognition and enforcement are sought.

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 Hague Conventions

1. The interpretation and application of Hague 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. In the context of the 1980 Child Abduction Convention, Contracting Parties to the Convention have concluded and recommended that the Convention should be “interpreted having regard to [their] autonomous nature and in the light of [their] objects”.<sup>7</sup> Furthermore, the 2007 Child Support Convention provides that “[i]n the interpretation of this Convention, regard shall be had to its international character and to the need to promote uniformity in its application”.<sup>8</sup> The interpretation of the 2000 Convention is supported by an Explanatory Report<sup>9</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 Diplomatic Session<sup>10</sup> at which the Convention was adopted are also publicly available, as are reports of meetings of the Special Commission,<sup>11</sup> and to some extent reports of Working Groups,<sup>12</sup> charged with the development of a preliminary draft Convention text for the purpose of the Diplomatic Session. These supplementary interpretation materials are part of the *Travaux Préparatoires*.<sup>13</sup>

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<sup>7</sup> See 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 Hague Conference website < [www.hcch.net](http://www.hcch.net) > under “Child Abduction Section” then “Special Commission Meetings”.

<sup>8</sup> Art. 53 of the *Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance*.

<sup>9</sup> P. Lagarde, *Explanatory Report on the Hague Convention of 13 January 2000 on the International Protection of Adults, New and Revised Edition, 2017*, (hereinafter referred to as *The Explanatory Report*).

<sup>10</sup> See Proceedings of the *Special Commission with a diplomatic character on the Protection of Adults*, which took place from 20 September to 2 October 1999.

<sup>11</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.

<sup>12</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.

<sup>13</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 with mental, intellectual, physical or sensory impairments.<sup>14</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 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 transfer 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>15</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<sup>16</sup> who, “by reason of an impairment or insufficiency of their personal faculties, are not in a position to protect their interests”.<sup>17</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>18</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 of Contracting Parties.
- 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

<sup>14</sup> Art. 1 of the UNCPRD refers to “physical, mental, intellectual or sensory impairments” in its definition of persons with disabilities.

<sup>15</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 seized of a dispute, the applicable law, and the recognition and enforcement of measures taken by such competent authorities.

<sup>16</sup> Reference to “adult” or “adults” in the present Practical Handbook refers to, unless otherwise specified or understood by the context, “adults who, by reason of an impairment or insufficiency of their personal faculties, are not in a position to protect their interests” (see Preamble and Art. 1(1) of the 2000 Convention).

<sup>17</sup> Art. 1(1). Unless indicated otherwise references to Articles are references to Articles of the 2000 Convention.

<sup>18</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.

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 create voluntary measures such as powers of representation, rather than be subject to, for example, involuntary measures created by a court or other competent authority.<sup>19</sup> Other arrangements 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>20</sup> On the question of the interplay of the 2000 Convention and the UNCRPD, a Conference organised jointly by the HCCH and the European Commission in 2018 acknowledged that both instruments are complementary.<sup>21</sup> Regardless of their distinct scope and objects, they both serve an equally important purpose and can usefully coexist.
- 1.5 The UNCRPD 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 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. An Appendix to this Handbook provides general and practical information on “powers of representation”<sup>22</sup> granted by an adult, either by virtue of an agreement or a unilateral act, to be exercised when said adult is not in a position to protect their interests.
- 1.7 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 case 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

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<sup>19</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>20</sup> UNCRPD, Preamble (a) and (n).

<sup>21</sup> [2018 EC-HCCH Joint Conference](#), C&R No 2.

<sup>22</sup> Unless otherwise specified, reference to “powers of representation” in this Handbook alludes to powers of representation within the meaning of Art. 15.

2000 Convention<sup>23</sup> 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.]

- 1.8 This Handbook is principally aimed at States' authorities implementing and operating the 2000 Convention, such as Central Authorities designated under the 2000 Convention, judges, judicial and administrative 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., banks). The Handbook is also relevant to anyone who has an interest in the protection of adults.
- 1.9 [This Handbook was approved at the First Meeting of the Special Commission on the practical operation of the 2000 Convention. Its publication comes more than 20 years after the finalisation of the Convention text and 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.]
- 1.10 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, in the interpretation of the Convention, regard shall be had to its international character and to the need to promote uniformity in its application.

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<sup>23</sup> P. Lagarde, "Explanatory Report on the Hague Convention of 13 January 2000 on the International Protection of Adults, New and Revised Edition", 2017. Hereinafter, referred to simply as "the Explanatory Report". This document is available on the HCCH website < [www.hcch.net](http://www.hcch.net) > under "Protection of Adults" then "Explanatory Documents".



## 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.<sup>24</sup> 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 authorities of Contracting Parties, as a means to enhance the protection of the adults concerned.<sup>25</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 ~~the appropriate~~ 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 State.<sup>26</sup>
- 2.3 In accordance with the rules of the 2000 Convention, only one competent authority will exercise jurisdiction at a given time over a specific measure. Similarly, if powers of representation were granted by the adult in question, in contemplation of their possible impairment, the Convention sets out uniform rules that determine 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.

### 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 provision is intended as a guide and a yardstick when defining the scope of application.<sup>27</sup> It is intentionally drafted as a broad, factual (rather than legal) description of the adult to whom the Convention applies.<sup>28</sup>

<sup>24</sup> ~~Reference to “adult” or “adults” in the present Practical Handbook refers to, unless otherwise specified or understood by the context, “adults who, by reason of an impairment or insufficiency of their personal faculties, are not in a position to protect their interests” (see Preamble and Art. 1(1) of the 2000 Convention). [Note to members of the Working Group: this explanation could be included in a Glossary if such Glossary was to be developed at a later stage of development of the Practical Handbook. This footnote should be moved to the first appearance of the term “adult” in Chapter 1 when that Chapter 1 is considered further by the working Group.]~~

<sup>25</sup> See Chapter V of the 2000 Convention.

<sup>26</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>27</sup> The Explanatory Report, para. 8.

<sup>28</sup> *Ibid.*, para. 9.



Impairment or insufficiency could be permanent or temporary and may affect any or all of the adult's personal faculties. Interests may include financial and property interests, or more general personal and health interests.<sup>29</sup> For a matter to be international and fall under the Convention, it must be a situation that involves more than one State.<sup>30</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 which State's 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>31</sup> The organisation of such issues is left to the domestic laws of each Contracting Party, ~~as long as the obligations arising from the Convention are fulfilled to the extent required by the Convention itself.~~ 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 related to determining the law applied by the authorities exercising their jurisdiction to take measures of protection, whether they are taking the measures themselves or implementing measures taken by another authority, and the law applicable to the representation of the adult arising from the powers granted by the adult themselves without the intervention of a competent authority. These matters are covered in Chapter III of the Convention – Applicable Law.

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 ~~This system~~ provides an excellent means to support their dignity and autonomy ~~of an adult~~, 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.

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<sup>29</sup> *Ibid.*, para. 10.

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*, para. 12.

- 2.12 An adult, using powers of representation, will be able 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 incapacity. 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 These powers of representation will be governed by the law of the habitual residence of the adult at the time of the drawing up of these powers, unless the adult designates 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 ~~measures-matters~~ related to that property).<sup>32</sup>
- 2.14 In cases where powers of representation are not exercised in a manner sufficiently 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 of the drawing up of the power of representation or another law designated by the adult) should be taken into account insofar as possible.<sup>33</sup>
- 2.15 Subject to a transfer of jurisdiction taking place in accordance with Article 8(1), the adult can also choose, in advance and in accordance with Article 8(2)(d), the competent authorities of a Contracting Party which could take measures directed to their protection. This choice of competent authorities must be provided for in writing, for example in the powers of representation.

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<sup>32</sup> Art. 15(2).

<sup>33</sup> Art. 16.

### 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 State<sup>34</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>35</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>36</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>37</sup> Therefore, measures taken in a Contracting Party prior to the Convention's entry into force in that State will not be invalidated but will continue to be subject to the rules of jurisdiction previously in force, even if the competent authorities which took those measures no longer have jurisdiction according to the Convention.<sup>38</sup>
- 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 State where the measures have been taken and the requested State.<sup>39</sup> That being said, nothing prevents the requested State from recognising measures taken previously, if its domestic non-Convention rules allow for such recognition.<sup>40</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>41</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 ~~so~~, in relation to jurisdiction and applicable law issues; ~~and~~

<sup>34</sup> ~~For the purposes of this Handbook, the term "requested State" is to be understood as the State where the measure is relied upon or where recognition and enforcement are sought.~~

<sup>35</sup> See, *infra*, para. 3.13 and **Chapter 9**.

<sup>36</sup> Art. 50(1). For example, following the entry into force of the Convention in State A, a competent authority takes additional measures regarding a guardianship order originally granted before the Convention entered into force in State A but subsequently, providing the guardian ~~is acting in accordance~~ with specific directions. The Convention will apply to such additional measures but not to any measures taken on behalf of the adult prior to the entry into force of the Convention given by a court or administrative authority after the entry into force of the Convention in that State. A list of Contracting Parties, including the date of entry into force, is available on the HCCH website at < [www.hcch.net](http://www.hcch.net) > under "Protection of Adults", then "Contracting Parties".

<sup>37</sup> The Explanatory Report, para. 166.

<sup>38</sup> Art. 50(1).

<sup>39</sup> Art. 50(2).

<sup>40</sup> The Explanatory Report, para. 167.

<sup>41</sup> Art. 50(3).

- 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 measures.
- whether the Convention ~~was-is~~ in force as between particular Contracting Parties ~~and upon which date it did so~~ 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 of the Convention is only open to those States which were Members of the HCCH at the time of its 1999 Special Commission of a diplomatic character,<sup>42</sup> i.e., States that were Members of the HCCH on or before 2 October 1999.<sup>43</sup>
- All other States may accede to the Convention.<sup>44</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, a State can raise an objection to the accession of any earlier acceding State.<sup>45</sup> The notification of ~~such~~ an objection ~~by the ratifying State~~ 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 ~~ratifying State and the acceding State, unless and until the objection of the ratifying State~~ is withdrawn.<sup>46</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>47</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>48</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>49</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

<sup>42</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>43</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>44</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>45</sup> Art. 54(3).

<sup>46</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>47</sup> Art. 57(2)(a).

<sup>48</sup> Art. 54(3).

<sup>49</sup> Art. 57(2)(b).

- 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.

3.9 A Contracting Party may denounce the Convention by notification to the depositary.<sup>50</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>51</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.com](http://www.hcch.com) > 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>52</sup> who, by reason of an impairment or insufficiency of their personal faculties, are not in a position to protect their own interests.<sup>53</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>54</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>55</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>56</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>57</sup>

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 ensure that post-mortem powers of representation or directives of the adult are given effect. However, after the death of the adult, some provisions of the Convention may be applicable the implementation of some measures taken prior to the death may fall within the scope of the Convention, insofar as they relate to acts or measures taken during the adult’s life (e.g., funeral arrangements or the validation or cancellation of ongoing contracts, such as a housing lease).<sup>58</sup> In addition, some provisions of the Convention may be applicable to powers of representation exercised at the time the adult was still alive.

<sup>50</sup> Art. 58(1).

<sup>51</sup> Art. 58(2).

<sup>52</sup> Art. 2(1).

<sup>53</sup> Art. 1(1).

<sup>54</sup> Art. 2(2).

<sup>55</sup> The Explanatory Report, para. 15.

<sup>56</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* (hereinafter, “1996 Convention”).

<sup>57</sup> See, *infra*, **Chapter 10**, para. 10.17.

<sup>58</sup> The Explanatory Report, para. 16.

**Example 3.A** 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 guardianship legislation. 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 to 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>59</sup>

#### 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 are different across domestic legal systems, this list is non-exhaustive and is intended to be broad in scope.<sup>60</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>61</sup>

**Example 3.BA** The German institution of “*Betreuung*” constitutes a measure of protection within the meaning of the 2000 Convention. Therefore, it may not be necessary to ask 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>62</sup>

3.16 Measures may, in particular, deal with the following:

<sup>59</sup> *Ibid.*, para. 17.

<sup>60</sup> *Ibid.*, para. 18.

<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.*, para. 28.



(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>63</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>64</sup>

3.18 ~~Article 3(a)~~~~This provision~~ also covers the ~~applies to a~~ determination that whether there is ~~has been~~ an impairment of capacity to an extent that necessitates ~~the~~ bringing into operation (or confirming the coming into operation of) a power of representation.<sup>65</sup> Powers of representation are covered by Article 1(2)(c) and do not, as such, fall under Article 3. However, measures taken by a competent authority in respect of powers of representation (e.g., a confirmation of such powers) do fall within the scope of Article 3.

3.19 This also applies to revocation of a specific protective regime<sup>66</sup> as well as to decisions that reject applications made in view of such a specific regime.<sup>67</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>68</sup>

(c) guardianship, curatorship and analogous institutions

3.21 This applies to protective regimes established when the adult, due to an impairment 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>69</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>70</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 increasingly departing from the framework of guardianship, curatorship and analogous institutions as a substituted decision-making regime which deprives adults of their capacity and have been amending their legislation to reflect the notion that such protective institutions are in place in order to support adults in

<sup>63</sup> *Ibid.*, para. 20.

<sup>64</sup> *Ibid.*

<sup>65</sup> The competent authority bringing into operation or confirming the coming into operation of the powers of representation will be the one having jurisdiction in accordance with the rules of the 2000 Convention, including the authority chosen in writing by the adult in accordance with Art. 8(2)(d), subject to a transfer of jurisdiction taking place in accordance with Art. 8(1).

<sup>66</sup> The Explanatory Report, para. 20.

<sup>67</sup> *Ibid.*, para. 28.

<sup>68</sup> *Ibid.*, para. 21.

<sup>69</sup> *Ibid.*, para. 22.

<sup>70</sup> ~~In some States, “guardianship” and / or “curatorship” regimes may have been reviewed and amended to provide additional measures that support the exercise of legal capacity.~~ See, 2018 EC-HCCH Joint Conference, C&R No 7.

exercising their capacity. This is an area that is changing 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 ~~For example, an adult, while on a skiing holiday abroad, may suffer a ski accident and fall into a coma. Another example could be that, while abroad, an adult may fall ill as a result of a pandemic or epidemic disease, resulting in irreversible brain damage. If these persons had granted powers of representation and their representatives were readily available, the “guardianship” and / or “curatorship” institutions would not be called upon and would not be an issue.~~

(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 an attorney representative acting under a judicial power of representation ~~established by a competent authority~~.<sup>74</sup> a supporter or co-decision-maker, a guardian, curator, or *Betreuer*, a managing guardian without full guardianship, or guardian *ad litem* for specific legal matters.<sup>72</sup> It also covers third parties who are 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>73</sup>

3.25 The confirmation of agreed or unilaterally declared powers of representation could also fall under Article 3(d) when a competent authority confirms the functions of a representative under the said powers of representation.<sup>74</sup>

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

3.26 This provision covers both voluntary and involuntary placements of the adult.<sup>75</sup> However, safeguards are in place, under Article 33, to ensure that the placement does not go ahead against the wishes of the authorities of the State of placement.<sup>76</sup>

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

3.27 This provision encompasses all matters and operations ordered by a competent authority for the protection of the adult and concerning their ~~adult's~~ property, including the sale of immovables, the management of securities, trusts,<sup>77</sup> investments, and the handling of successions devolving to the adult.<sup>78</sup>

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<sup>74</sup> ~~Also known, in some States, as judicial powers of representation.~~

<sup>72</sup> The Explanatory Report, para. 23.

<sup>73</sup> *Ibid.*

<sup>74</sup> The competent authority confirming the functions of a representative designated in accordance with the powers of representation will be the one having jurisdiction in accordance with the rules of the 2000 Convention, including the authority chosen in writing by the adult in accordance with Art. 8(2)(d), subject to a transfer of jurisdiction taking place in accordance with Art. 8(1). It is important to note that powers of representation are covered by Art. 1(2)(c) and do not, as such, fall under Art. 3. However, measures taken by a competent authority in respect of powers of representation (e.g., a confirmation of such powers) do fall within the scope of Art. 3. See, *supra*, para. 3.18.

<sup>75</sup> The Explanatory Report, para. 24.

<sup>76</sup> Art. 33(1).

<sup>77</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. 3.40-3.42.

<sup>78</sup> The Explanatory Report, para. 25.



3.28 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), and how and by whom disputes are handled and instructions in mediation, arbitration or litigation given.

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

3.29 This provision envisages situations where protection is limited to a specific intervention, for example, a surgical operation or the sale of an asset.<sup>79</sup>

(h) other measures

3.30 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 prepared, or to be developed in future.

3.31 In addition to guardian *ad litem*, curator, or *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>80</sup>

- Conservatorships.<sup>81</sup>
- *Ad hoc* guardian appointed by a court in the event of a conflict of interest.<sup>82</sup>
- Intervention order, which is analogous to a “one-off” guardianship order.<sup>83</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>84</sup> ~~and Chapter V on cooperation. This being said, competent authorities can put in place powers of representation by designating a representative<sup>85</sup> and giving them instructions and/or guidance which respects, as much as possible, the will and preferences of the adult.~~

### **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

<sup>79</sup> *Ibid.*, para. 26.

<sup>80</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 Special Commission on the practical operation of the 2000 Protection of Adults Convention, available on the HCCH website < [www.hcch.net](http://www.hcch.net) > under “Protection of Adults” then “Questionnaire and responses”. See responses to question 3.3.

<sup>81</sup> Hungary. This measure may fall under Art. 3(c) “analogous institutions”.

<sup>82</sup> Slovakia. This measure may fall under Art. 3(d).

<sup>83</sup> United Kingdom (Scotland). This measure may fall under Art. 3(g).

<sup>84</sup> See, *supra*, **Chapter 2, section C**. See also, *infra*, **Chapter 9, section C**.

<sup>85</sup> ~~See, *supra*, para. 3.23.~~

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>86</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>87</sup>

3.35 Article 4(2) ensures that these exclusions are limited to what is strictly necessary.<sup>88</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>89</sup> See paras. 3.41, 3.44 and 3.48 below.

(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>90</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 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>91</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>92</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>93</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>94</sup>

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<sup>86</sup> The Explanatory Report, para. 29.

<sup>87</sup> *Ibid.*, para. 30.

<sup>88</sup> *Ibid.*, para. 46.

<sup>89</sup> For more detailed explanations of this issue, please refer to the Explanatory Report, para. 46.

<sup>90</sup> *Ibid.*, para. 32. *Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations* and *HCCH Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations*.

<sup>91</sup> *Ibid.*, para. 33.

<sup>92</sup> *Ibid.*, para. 35.

<sup>93</sup> *Ibid.*

<sup>94</sup> *Ibid.*, para. 36.

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>95</sup>

(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>96</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>97</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>98</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>99</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>100</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 Parties being bound to recognise those decisions and, where appropriate, assume responsibility for implementing them.<sup>101</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>102</sup>

**Example 3.C** 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

<sup>95</sup> *Ibid.*

<sup>96</sup> *Ibid.*, para. 37.

<sup>97</sup> *Ibid.*

<sup>98</sup> *Ibid.*, para. 38.

<sup>99</sup> *Ibid.*, para. 39.

<sup>100</sup> *Ibid.*

<sup>101</sup> *Ibid.*

<sup>102</sup> *Ibid.*, para. 40.

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 general rules, without falling under the rules of exception.<sup>103</sup> Therefore, sSpecific decisions about the care of an particular adult will fall within the scope of the 2000 Convention.<sup>104</sup> For instance, decisions such as the placement of an adult in a particular specialised care institution (Art. 3(e)) or the decision to have the an adult undergo a specific 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. In fact, 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). Therefore, such decisions have to be subject to the general rules of the Convention.<sup>105</sup>

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>106</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 adult's protection 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.

**Example 3.B** — 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).

(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 measures which they deem appropriate, whether punitive or educational.<sup>107</sup> This is limited to consequences resulting from the offences committed by measures resulting from the person requiring protection and not offences committed by third parties.<sup>108</sup>

<sup>103</sup> Ibid., para. 42.

<sup>104</sup> Ibid.

<sup>105</sup> Ibid., para. 42.

<sup>106</sup> Ibid.

<sup>107</sup> Ibid., para. 43.

<sup>108</sup> Ibid.

- 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>109</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>110</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>111</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>112</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>113</sup> Such 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>114</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>115</sup> While there is no provision in the Convention that deals with *ex lege* representation *per se*, such representation, ~~whether or not it arises from a marriage~~ 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)). Additionally, *ex lege* representation may be, by analogy and where appropriate, subject to the applicable law which determines the representation of the adult (Art. 1(2)(c))<sup>116</sup> or the subject of co-operation between the authorities of Contracting Parties (Art. 1(2)(e)).<sup>117</sup> Competent authorities will give effect to it according to their own domestic legislation, mindful of the fact that, as a matter of general international law, the States parties to a treaty are expected to perform it and interpret it in good faith and should accordingly refrain from acts that would frustrate the object and purpose of the treaty.<sup>118</sup> It is, however, important to note that the

<sup>109</sup> *Ibid.*

<sup>110</sup> *Ibid.*

<sup>111</sup> *Ibid.*, para. 44.

<sup>112</sup> *Ibid.*

<sup>113</sup> *Ibid.*, para. 45.

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

<sup>115</sup> It is to be noted that, a person with *ex lege* representation may also be the representative of the adult, either under Art. 3 when the person with *ex lege* is designated as a representative by a competent authority or Art. 15 where the person with *ex lege* is appointed as a representative by the adult under a power of representation.

<sup>116</sup> More generally, nothing in the Convention excludes the application of Art. 15, for instance, by analogy to *ex lege* powers of representation, as it is already the case in some States.

<sup>117</sup> The Explanatory Report, paras 35 and 90.

<sup>118</sup> ~~More generally, nothing in the Convention excludes the application of Art. 15, for instance, by analogy to *ex lege* powers of representation, as it is already the case in some States. See, *supra*, note 116.~~

laws of a number of States include 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. These mandatory laws, which fall under Article 20 of the Convention, may cover *ex lege* representation issues.<sup>119</sup>

**Example 3.DG** An adult and their spouse, habitually resident in Contracting Party A, are visiting family in Contracting Party B. An accident plunges the adult into a coma. By virtue of the domestic laws ~~of in both~~ Contracting Party ~~A and~~ B, the spouse of the adult ~~is now~~would become their representative by operation of law and ~~is would be~~ responsible for taking medical decisions on behalf of the adult. ~~The law of Contracting Party B does not provide for such representation by operation of law. The question of the representation of the adult by their spouse by operation of law falls within the scope of the Convention as described in Article 1, despite there being no express provision in that regard is not regulated by the Convention, even though it falls within its scope as a consequence of the marriage. 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, which then, in the spirit of co-operation 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. If there are no mandatory laws that provide otherwise (Art. 20) or contra-indicative public policy issues (Art. 21), the competent authority in Contracting Party B will issue a decision which verifies that the spouse of the adult is their representative by operation of law (i.e., ex lege), in accordance with the law of Contracting Party A.~~

**Example 3.ED** A couple habitually resides in Contracting Party A. One of them falls seriously ill, resulting in a permanent impairment of their personal faculties. The other partner seises a competent authority in Contracting Party A in order to become the representative of their impaired partner. The authorisation this partner is requesting from a competent authority (*e.g.*, a ~~a~~ court) to represent their impaired partner who is not in a position to take care of their own interests is a protective measure within the meaning of the Convention, as it is directed towards the impaired partner.<sup>120</sup>

<sup>119</sup> [Insert reference to PD on *ex lege*]

<sup>120</sup> The Explanatory Report, para. 35.



#### 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<sup>121</sup> which applies as an integral whole to ~~the competent authorities of the~~ Contracting Parties ~~where the adult has their habitual residence (Art. 5). It is important to note that~~ Therefore, under the Convention, competent authorities are not authorised to exercise jurisdiction over an adult ~~who has their habitual residence in another Contracting Party or in a non-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>122</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 ~~could take jurisdiction in application of~~ their non-Convention domestic rules. In such cases, other Contracting Parties are not bound to recognise the measures of protection taken under these ~~broader~~ bases of jurisdiction, which are not provided for in ~~fall outside the scope of~~ the 2000 Convention.<sup>123</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 ~~Principal~~ Primary jurisdiction is attributed to the competent authorities of the State of the habitual residence of the adult<sup>124</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>125</sup>

4.6 Concurrent subsidiary jurisdiction is given to the competent authorities of the State of the nationality of the adult.<sup>126</sup> In addition, those Contracting Parties having primary jurisdiction under Article 5 or Article 6 may consent to another complementary jurisdiction taking measures. The request for a transfer of jurisdiction can take place on the motion of the competent authorities having primary jurisdiction under Article 5 or Article 6 or on an application by the competent authority of another Contracting Party.<sup>127</sup>

4.7 General jurisdiction refers to the extent to which the competent authorities of a State are entitled to take measures. General jurisdiction is given to competent authorities exercising jurisdiction under Articles 5, 6, 7 and 8.<sup>128</sup> Competent authorities with general jurisdiction

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<sup>121</sup> The 2000 Convention establishes a “complete and closed system” through its rules on jurisdiction and co-operation, which do not allow for conflicting jurisdictions and necessitate co-ordination between competent authorities when taking, assuming or transferring jurisdiction. Under the 2000 Convention, only one competent authority may take jurisdiction at a given time, over a specific matter. This way, the Convention avoids conflicting decisions being issued on matters falling under its scope. The Convention applies as an integral whole to Contracting Parties.

<sup>122</sup> *Ibid.*, para. 89.

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

<sup>124</sup> Art. 5.

<sup>125</sup> Art. 6(1) and 6(2).

<sup>126</sup> Art. 7.

<sup>127</sup> Art. 8.

<sup>128</sup> See, *infra*, Chapter 6

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 the person concerned, any matter and they will have effect in any territory, with no limitation as to their duration.

- 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>129</sup> It also provides for jurisdiction based on urgency,<sup>130</sup> whereby the competent authorities of the State where the adult or the property of the adult 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>131</sup>
- 4.9 The 1997 Special Commission discussed the applicability of a *lis pendens* rule but, ultimately, it was preferred to have a ground of ~~general~~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 ~~with~~concurrent subsidiary jurisdiction (*i.e.*, under Arts 7, 98, 10 and 119) could exercise that jurisdiction.<sup>132</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 ~~cooperate and~~ communicate regarding the most effective way to protect the interests of the adult.<sup>133</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>129</sup> Art. 9.

<sup>130</sup> Art. 10.

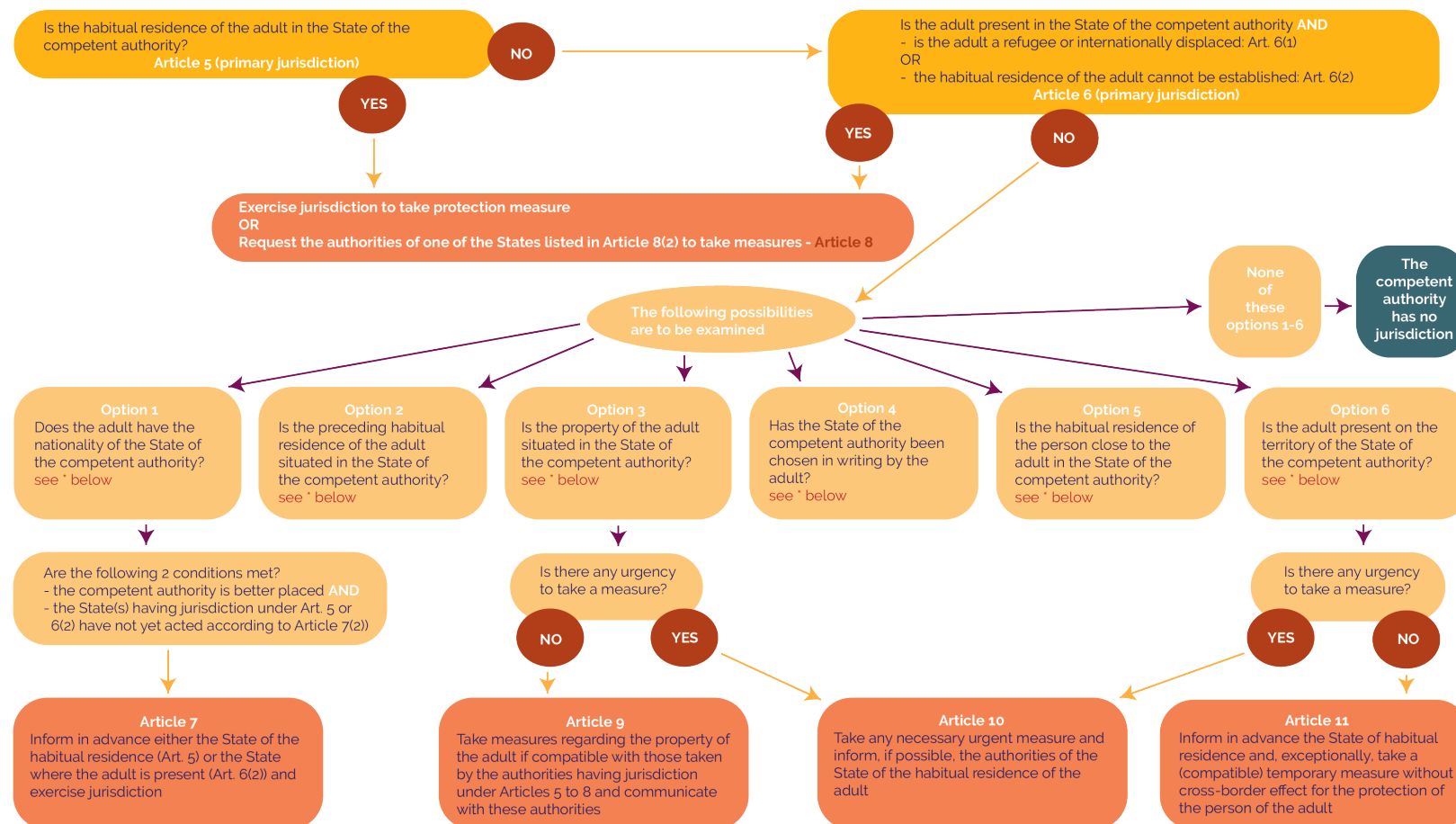
<sup>131</sup> Art. 11.

<sup>132</sup> The Explanatory Report, para. 47.

<sup>133</sup> Art. 10(4). See also **Chapter 6**, para. 6.3 and **Chapter 7**, para. 7.2.



#### 4.11



\* 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 (new) habitual residence of the adult
- Primary jurisdiction
- Scope of jurisdiction: General
- This jurisdiction can be transferred to competent authorities of a State listed under Article 8(2)
- 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
  - ✓ Cooperation required in case of use of the transfer mechanism of Article 8

4.12 The ~~primary-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>134</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. Habitual residence should be determined by the relevant competent authorities in each case on the basis of factual elements.

4.14 The concept and interpretation of habitual residence will be elaborated upon in further 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>135</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 acquisition of a new habitual residence may coincide with the relocation of the adult to another Contracting Party. Either way, this is a question of fact

<sup>134</sup> Art. 5(1).

<sup>135</sup> Art. 5(2).

which will be assessed by the competent authorities called upon to make a decision on this matter.<sup>136</sup> The competent authority seized is the only one that has to determine the habitual residence of the adult and whether it has jurisdiction under the Convention. This will be determined based on the facts presented by the parties. In case of a change of habitual residence, ~~a good practice would be for~~ the competent authority seized ~~to could~~ consult, if necessary, the competent authorities of the former State of habitual residence, to obtain information ~~relevant to determining whether they have jurisdiction under concerning the jurisdiction based on~~ Article 5(2) or ~~whether the former competent authority would continue to exercise jurisdiction under to determine~~ other jurisdiction grounds ~~under the Convention~~ (e.g., Art. 7) or ~~if it would be appropriate to request a evaluate the~~ transfer of jurisdiction under Article 8.

- 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>137</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>138</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>139</sup> As far as the competent authorities of the former habitual residence are concerned, a change of habitual residence obliges them to verify 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 decline its exercise. 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 ~~general primary~~ but ~~subordinatesubsidary~~. This entails an obligation ~~or recommendation~~ to inform the competent authority of the new habitual residence, ~~depending on the relevant rules and circumstances~~.<sup>140</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>141</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 ~~primary-general~~ jurisdiction under Articles 5 to 8. The jurisdiction of the previous State of habitual residence may also continue to apply by virtue of Article 8(2)(b) or where the competent authorities of that State were designated in writing by the adult, in accordance with Article 8(2)(d). In such cases, a request for transfer of jurisdiction from the new State of habitual residence to the former might be considered. 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>142</sup>, including during proceedings for a measure of protection, the 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 ~~found-base~~ their jurisdiction on their domestic non-Convention rules, assuming the

<sup>136</sup> The Explanatory Report, para. 50.

<sup>137</sup> Art. 12. For further discussion on the continuation of measures, see, *infra*, Chapter 8.

<sup>138</sup> The Explanatory Report, para. 51.

<sup>139</sup> *Ibid.*

<sup>140</sup> Art. 7(1).

<sup>141</sup> The Explanatory Report, para. 82.

<sup>142</sup> *Ibid.*, para. 52.

Contracting Party has different jurisdictional rules for Convention and non-Convention cases.  
<sup>143</sup> However, the 2000 Convention does not oblige other Contracting Parties to recognise any measures taken in accordance with grounds of jurisdiction that are not provided by the Convention.<sup>144</sup>

#### D. Additional grounds of jurisdiction

4.19 Articles 6, 7, 9, 10 and 11 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 ~~general~~primary jurisdiction (*i.e.*, Art. 6 which provides a level of jurisdiction tantamount to that envisioned in Art. 5) or provide concurrent and ~~subordinate~~subsidiary jurisdiction (*i.e.*, Arts 7, 9, 10 and 11).

4.20 It should be noted that the provisions in Articles 6, 9<sup>145</sup>, 10<sup>146</sup> and 11 will apply to adults even if their present State of habitual residence is not a Contracting Party to the 2000 Convention.

##### 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
- Scope of jurisdiction: General
- This jurisdiction can be transferred to competent authorities of a State listed under Article 8(2)
- 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
  - ✓ Cooperation required in case of use of the transfer mechanism of Article 8

#### (a) Refugees<sup>147</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>148</sup> The term “internationally displaced” is intended to be sufficiently broad to overcome limits that may be attached to the definition of “refugee”.

<sup>143</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>144</sup> The Explanatory Report, para. 52.

<sup>145</sup> *Ibid.*, para. 75.

<sup>146</sup> *Ibid.*, para. 81.

<sup>147</sup> This provision intends to cover refugees at any time during the process of their refugee status.

<sup>148</sup> Art. 6(1).

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>149</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 general-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 mother. 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 mother 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 she herself could get on board. 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>150</sup>

4.24 This ground of jurisdiction will cease whenever it has been established that the adult has a habitual residence somewhere.<sup>151</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 State where the adult is present will only retain jurisdiction

<sup>149</sup> The Explanatory Report, para. 54.

<sup>150</sup> Art. 6(2).

<sup>151</sup> The Explanatory Report, para. 55.

if it can be exercised in accordance to the conditions in Article 7, 9 10 or 11.<sup>152</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>153</sup> or fall back on grounds provided under their domestic non-Convention rules.<sup>154</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 that allows for the exercise of jurisdiction in cases of necessity, to ensure measures can be taken if required.<sup>155</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 competence to the competent authorities of the State in which the adult is present, immediately after arriving in that State. Therefore, a reasonable waiting time is appropriate before invoking Article 6(2). 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 State-Contracting Party A to State 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 by a guardian. Therefore, the competent authorities in Contracting Party B take jurisdiction on the basis of Article 6(2).

<sup>152</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 State-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>153</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>154</sup> The Explanatory Report, para. 55.

<sup>155</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
- Scope of jurisdiction: General
- Measures taken under Article 7 are subject to replacement, termination or modification by the competent authorities of a Contracting Party with jurisdiction under Articles 5, 6(2) or 8.
- 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 ~~have general~~ 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>156</sup> This may be more than one Contracting Party, if the adult has multiple nationalities.<sup>157</sup>

4.28 This ground of jurisdiction is concurrent yet subsidiary to the jurisdiction set out in Articles 5, 6(2) and 8.<sup>158</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 Article 6(2). Moreover, this jurisdiction shall not be exercised if the competent authorities having jurisdiction under Article 5, Article 6(2), or Article 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 by the situation or have decided that no measures are to be taken.<sup>159</sup> ~~If the competent authorities under Article 5, 6(2) or 8 have taken all the measures required by the situation or have decided that no measure should be taken, or proceedings are pending before them, the competent authorities based on nationality must decline any exercise of jurisdiction.~~<sup>160</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>161</sup> Otherwise, if an adult is

<sup>156</sup> Art. 7(1).

<sup>157</sup> The Explanatory Report, para. 57.

<sup>158</sup> *Ibid.*, paras 56 and 61. See also Art. 7(2).

<sup>159</sup> Art. 7(2). See also The Explanatory Report, 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 authorities of the State of nationality were seized.

<sup>160</sup> ~~The Explanatory Report, 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 authorities of the State of nationality were seized.~~

<sup>161</sup> The same would apply in relation to Art. 6(2), regarding the presence of the adult.

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 would not be bound to recognise measures taken by the State of nationality of the adult.<sup>162</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>163</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>164</sup>
- 4.30 The competent authorities of the State of nationality of the adult may only retain their jurisdiction “if they consider that they are in a better position to assess the interests of the adult”.<sup>165</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>166</sup>
- 4.31 Any measures taken by the competent authorities of the State of the nationality of the adult, under the concurrent subsidiary jurisdiction envisioned by Article 7, will cease to apply as soon as the competent authorities that have ~~general~~ jurisdiction under Article 5, 6(2) or 8 have taken measures or have subsequently decided that no measures are to be taken.<sup>167</sup> The 2000 Convention ~~gives primacy to~~ prioritises those decisions taken by ~~those~~ competent authorities with ~~general~~ jurisdiction under Articles 5, 6(2) and 8, in order to avoid disorderly or contradictory measures of protection. To that effect, after taking measures, t~~The competent authorities that have taken measures in accordance with exercising jurisdiction under Article 7 must could~~ inform the competent authorities with ~~primary~~ jurisdiction under Articles 5, 6(2) and 8 of the measures taken. The measures taken by those authorities under Article 7 will lapse as soon as the competent authorities with ~~primary~~ 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>168</sup>
- 4.32 By giving competent authorities which have ~~general~~ 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>169</sup>

<sup>162</sup> The Explanatory Report, para. 59.

<sup>163</sup> *Ibid.*, para. 58.

<sup>164</sup> *Ibid.*

<sup>165</sup> Art. 7(1); *Ibid.*, para. 60.

<sup>166</sup> *Ibid.*, paras 57 and 60.

<sup>167</sup> Art. 7(3).

<sup>168</sup> The Explanatory Report, para. 64.

<sup>169</sup> *Ibid.*, para. 63.



4.33 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) ~~or with the competent authorities to whom jurisdiction has been transferred under Article 8. This way, the competent authority of the State of nationality can verify that no measures have already been taken and notify the relevant competent authority that they are about to take a measure of protection.~~ 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>170</sup>

(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
- Scope of jurisdiction: limited to measures concerning the property of the adult located in that State which are compatible with those taken by the authorities having jurisdiction under Articles 5 to 8, potential unlimited extraterritorial effect, unlimited temporal effect
- Measures taken under Article 9 are subject to replacement, termination or modification by later measures taken by the competent authority of a Contracting Party with jurisdiction under Articles 5 to 8
- CO-OPERATION requirements:
  - ✓ Recommendation to communicate in order 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

4.34 The competent authorities of a Contracting Party have concurrent subsidiary jurisdiction in relation to measures of protection concerning property, when said property is situated in the territory of that Contracting Party.<sup>171</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>172</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

<sup>170</sup> The Model Form can be found on p. 30 of the Explanatory Report and on the HCCH website < [www.hcch.net](http://www.hcch.net) > under “Protection of Adults” then “Miscellaneous”.

<sup>171</sup> Art. 9.

<sup>172</sup> The Explanatory Report, para. 75.

located, as they would more likely be aware of property law regulations and formalities in that State.

- 4.35 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 ~~on~~ by competent authorities with general jurisdiction under Articles 5 to 8 or for the purpose of measures that can be superimposed on existing measures taken by ~~the latter~~ such competent authorities (e.g., an existing guardian 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.
- 4.36 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 the competent authorities who have general jurisdiction. If measures taken by the competent authorities of the State where the property is located precede any measures taken by competent authorities with general jurisdiction, then those measures will be invalidated to the extent of any incompatibility.<sup>173</sup>
- 4.37 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 general jurisdiction under Articles 5 to 8, to ascertain what measures have already been taken, in order to assure the necessity, the ~~opportunity-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 authorities of the Contracting Party of the habitual residence of the adult~~This coordination / cooperation should, insofar as possible, follow the procedure provided by Article 10(4).~~

**Example 4.D** The competent authority in Contracting Party A, where the property of the adult is situated, contemplates taking measures under Article 9 in relation to the property of the adult and wants to ascertain that 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 the measures that 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 taken, the competent authority in Contracting Party A asks their Central Authority to transmit that decision to the 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~~ is a national of Contracting Party A ~~and but still~~ owns immovable property there, ~~is has been~~ placed by their

<sup>173</sup> *Ibid.*, para. 76.

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 guardian for 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 will need to take 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 appointed guardian). Such an exchange of information prior to the taking of any measures in Contracting Party A ensures that there will be no conflicting decisions. The Central Authority in Contracting Party A informs the Central Authority in Contracting Party B that, under Article 9, courts in Contracting Party A have jurisdiction to take measures in relation to the property of the adult. The reason for Contracting Party A to communicate with Contracting Party B is because Contracting Party A has subsidiary jurisdiction (being the State of nationality) and needs to inform Contracting Party B of a measure they are contemplating to take and verify if they may do so.

## 5. Transfer of jurisdiction

### QUICK OVERVIEW of the jurisdiction under Article 8

- Connecting factor: one out 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 transferred from the competent authorities having jurisdiction under Article 5 or 6, in the interests of the adult
- Transferred 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
  - ✓ for all States concerned (a to f): potential unlimited extraterritorial effect, unlimited temporal effect
- 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 ~~It is conceivable that the e~~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>174</sup>) ~~which have primary and general jurisdiction by virtue of Article 5, or the competent authorities of the State in which the adult is simply present, which also have primary and general jurisdiction under Article 6, are may~~ not be the best placed to assess the interests of the adult.<sup>175</sup> In that case, Article 8 allows for the transfer of jurisdiction to Contracting Parties whose competent authorities might be better placed.<sup>176</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>177</sup> The competent authorities of the Contracting Parties listed in Article 8(2) may also ask the competent authorities that have primary jurisdiction under Article 5 or 6 to make a request for a transfer of jurisdiction to them. This request should always be based on whether the interests of the adult require a transfer of jurisdiction. In addition, such a transfer and can relate to all or specific aspects of protection, depending

<sup>174</sup> See, *supra*, paras 4.23 to 4.26.

<sup>175</sup> ~~The~~ The Explanatory Report, para. 66.

<sup>176</sup> Art. 8(2).

<sup>177</sup> Art. 8(1).

on what the competent authorities with primary jurisdiction deem necessary under the circumstances.

- 5.2 If the transfer only concerns one aspect, among others, 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.

**Example 5.A** An adult previously had their habitual residence in ~~has designated, in writing, the competent authorities of Contracting Party A, where they also own property (the State of their habitual residence at the time of the designation), in anticipation of their future incapacity.~~ The adult now habitually resides in ~~has since moved to~~ Contracting Party B ~~(the State of their current habitual residence)~~ and their personal faculties have been ~~are now~~ significantly 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 ~~owns property located~~ in Contracting Party A ~~which~~ 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** While habitually resident in Contracting Party A, the adult made a power of representation. The law of Contracting Party A governs this power of representation and provides that it will enter into force upon a decision by a competent authority confirming that the adult has lost decision-making capacity. In the same document, the adult chose, in writing, the authorities of Contracting Party A to make this determination of incapacity and to take any measure of protection regarding this power of representation. A few years later, the adult moved to Contracting Party B but maintained many connections to Contracting Party A. The adult now suffers from an impairment which prevents them from protecting their own interests, making it necessary for the power of representation to come into effect. In accordance with Article 8(2)(d), the authorities of Contracting Party B request the authorities of Contracting Party A to take jurisdiction and give effect to the power of representation.

**Example 5.C** An adult, who habitually resides in Contracting Party A but is a national of Contracting Party B, has been placed under Sstate-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 judged ~~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 State A contacts upon request of the competent authority of its State, the Central Authority in Contracting State B in order to request a transfer of jurisdiction under Article 8, based on the nationality of the adult. Through the Central Authorities, the competent authorities of both Contracting Parties ~~The Central Authorities~~ 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.

**Example 5.D** An elderly adult suffering from late-stage dementia is residing in an assisted living facility in Contracting Party A. Prior to the deterioration of their personal faculties, the adult ~~has~~ 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. ~~The facility in which the adult is intended to be placed does not agree with the placement, as the adult does not have health insurance in Contracting Party B. Upon request of the competent authority of its State.~~ ~~t~~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 ~~the an~~ assisted living facility in Contracting Party B.

5.3 The wording of Article 8 provides for the authorities of a Contracting State having jurisdiction under Article 5 or Article 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, but may only abstain if such is not the case.<sup>178</sup>

5.4 This provision relies on communication between Contracting Parties.<sup>179</sup> To that effect, 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 requests under Article 8.<sup>180</sup>

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

5.5 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.

5.6 ~~Article 8(2) provides an exhaustive list of the States the competent authorities of which may be requested to exercise jurisdiction by the competent authorities of the State of the habitual residence of the adult or their presence or vice versa, which may make a request to the competent authorities of the State of the habitual residence of the adult or their presence to exercise jurisdiction. Article 8(2) exhaustively lists the States whose authorities may be requested, or may request, to take measures of protection under the conditions provided for in Article 8(1).~~ These are:

<sup>178</sup> The Explanatory Report, para. 66; see also **Chapter 4**.

<sup>179</sup> See *Proceedings of the Special Commission of a diplomatic character (1999)*, p. 378

<sup>180</sup> The Explanatory Report, p. 28.



- *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>181</sup> This means that jurisdiction exercised under Article 7 will cease to have effect when the competent authorities which have ~~primary~~ jurisdiction under Articles 5, 6(2) or 8 decide to exercise their jurisdiction take the measures required by the situation or that no measures need to be taken or if there are pending proceedings before them.<sup>182</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 ~~delegated~~ competent authority has general jurisdiction ~~and free scope~~,<sup>183</sup> within the limits of the jurisdiction which they have been requested to exercise.<sup>184</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 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>185</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>186</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 ~~delegated~~ general jurisdiction, within the limits of the transfer, without any requirement for the compatibility of measures.<sup>187</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>188</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 and general jurisdiction under Articles 5 and 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

<sup>181</sup> Art. 7(3).

<sup>182</sup> The Explanatory Report, paras 64 and 68.

<sup>183</sup> ~~For the purposes of this Handbook, the term "free scope" (which appears at para. 68 of the Explanatory Report) means that the delegated competent authority is able to take any measures of protection it sees fit, within the confines of the extent of jurisdiction that has been transferred to them. For instance, if the Contracting Party of which the adult is a national is requested to take a measure of protection in relation to property the adult has within its territory, then the delegated competent authority may take any measure they deem necessary, but of course only in relation to that property.~~

<sup>184</sup> ~~The Explanatory Report~~*ibid.*, para. 68.

<sup>185</sup> *Ibid.*

<sup>186</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 a former habitual residence but not necessarily the last one.

<sup>187</sup> *Ibid.*, para. 70.

<sup>188</sup> *Ibid.*, para. 71.



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 Articles 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>189</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 ~~has-obtains~~ general jurisdiction ~~and free scope~~ with regard to the protection of the person, rather than the limited or temporary exercise of jurisdiction under Articles 10 and 11.<sup>190</sup> The protection of the property of the adult is not included within the scope of this transfer.

5.7 Under the 2000 Convention, competent authorities which request the competent authorities of another Contracting Party to exercise jurisdiction cannot compel those requested competent authorities to accept their invitation to transfer jurisdiction.<sup>191</sup> The transfer of jurisdiction is always subject to the control of the relevant competent authorities having general-primary jurisdiction under Articles 5 and 6. Additionally, the Convention does not provide any timeframes for the request or response under Article 8. Nevertheless, it is recommended that this is done as expeditiously as possible in order to protect the adult by avoiding parallel proceedings and delays arising from the transfer request.<sup>192</sup>

5.8 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.

5.9 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 final and enforceable. The previous transfer, however, does not preclude jurisdiction under Articles 5 and 6 for future proceedings, given the conditions for jurisdiction under the 2000 Convention are then provided.

5.10 To avoid any breaks in the continuity of the protection of the adult, the Contracting Party which has primary jurisdiction under Articles 5 and 6 will retain jurisdiction if the competent authority that is addressed does not accept the transfer.<sup>193</sup> Non-acceptance may occur by a formal refusal of jurisdiction or a prolonged failure to respond.<sup>194</sup>

## C. Procedure for transfer of jurisdiction

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

<sup>189</sup> *Ibid.*, para. 72.

<sup>190</sup> *Ibid.*, para. 73.

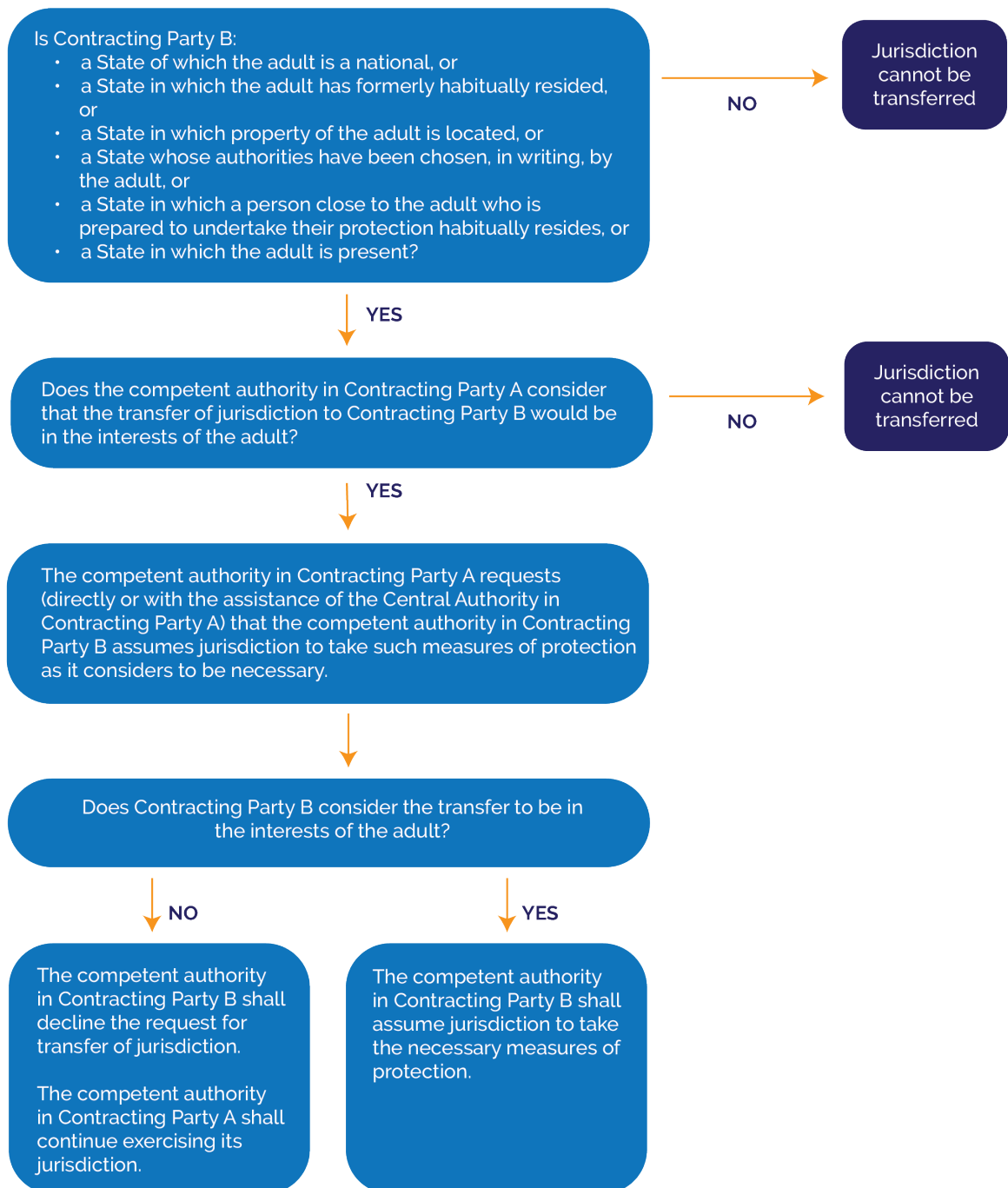
<sup>191</sup> *Ibid.*, para. 74.

<sup>192</sup> For example, the requesting State proceeds to exercise jurisdiction because no response was received within what it conceives as a reasonable timeframe. Subsequently, the requested State accepts and also exercises jurisdiction.

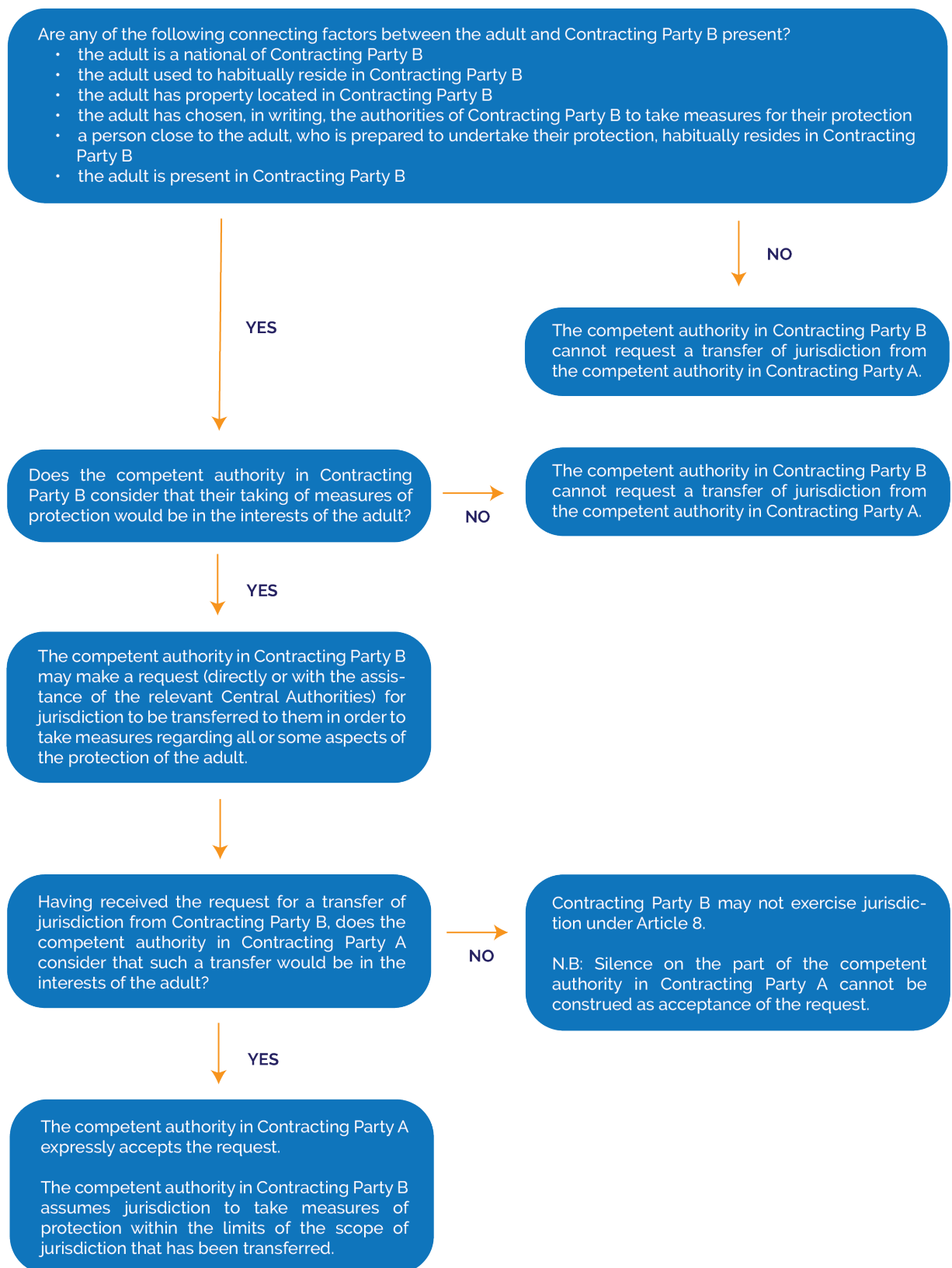
<sup>193</sup> Art. 8(3).

<sup>194</sup> The Explanatory Report, 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?

5.12 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.

5.13 Contracting Parties may designate authorities to which requests under Article 8 are to be addressed.<sup>195</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>196</sup> and any such designation must be communicated to the Permanent Bureau of the HCCH.<sup>197</sup>

5.14 If no designation has been made under the 2000 Convention, there are two other ways to contact authorities:

- Option 1: 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>198</sup> and these Central Authorities have obligations to facilitate communication.<sup>199</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 2: judicial authorities may connect 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>200</sup>

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

### (b) Manner and mode of communication between authorities

5.16 The 2000 Convention does not prescribe the manner in which authorities should communicate. To that effect, 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 requests under Article 8.<sup>201</sup> Alternatively, other modes of communication which may be utilised are e-mail, telephone, or videoconference facilities as long as any information exchanged is properly protected.

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<sup>195</sup> Art. 42.

<sup>196</sup> The Explanatory Report, para. 151.

<sup>197</sup> Art. 43(1).

<sup>198</sup> Art. 28; Art. 43(1).

<sup>199</sup> Art. 30(a).

<sup>200</sup> It is hoped that by the time the First Meeting of the Special Commission (tentatively scheduled during the fourth quarter of 2022) is held there will be an agreement in principle to the effect that Members of the IHNJ can also play a role in relation to the 2000 Convention when their States are Contracting Parties to the Convention.

<sup>201</sup> The Explanatory Report, para. 28

(c) Information and documents which should accompany the communication

5.17 Although the Convention does not prescribe a particular mode of communication, it is strongly advised that at least the initial communication requesting the transfer be in writing<sup>202</sup> and should particularly identify:<sup>203</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.

5.18 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, the factual elements and the considerations on which the request is founded should be detailed within the motivation of the decision that will be communicated. It is 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).

5.19 It should be noted that “all documents forwarded or delivered under the 2000 Convention shall be exempt from legalisation or any analogous formality”.<sup>204</sup> This extends to all written information provided, all decisions of competent authorities as well as certificates delivered in accordance with Article 38.<sup>205</sup>

5.20 In accordance with Article 51, aAll 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>206</sup>

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<sup>202</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” (hereinafter, “Emerging Guidance on Direct Judicial Communications”), available on the HCCH website < [www.hcch.net](http://www.hcch.net) > under “Child Abduction” then “Judicial Communications”.

<sup>203</sup> Emerging Guidance on Direct Judicial Communications, Principle 7.

<sup>204</sup> Art. 41

<sup>205</sup> The Explanatory Report, para. 150.

<sup>206</sup> Art. 51; *Ibid.*, para. 169.

(d) Communication safeguards for communications between competent authorities<sup>207</sup>

Overarching principles

- 5.21 Each authority engaging in direct communications must respect the law of its own jurisdiction.
- 5.22 When communicating, each authority seized should maintain its independence in reaching any decision on the matter at hand.
- 5.23 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

- 5.24 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.

(e) Ongoing Communication between authorities

- 5.25 As transfer of jurisdiction is **generally** 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.
- 5.26 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 other jurisdiction is in a better position to assess the interests of the adult in relation to the matters to be transferred.
- 5.27 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.

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<sup>207</sup> Emerging Guidance on Direct Judicial Communications, 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 < [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)".

## 6. Measures of protection in cases of urgency

### QUICK OVERVIEW of the jurisdiction under Article 10

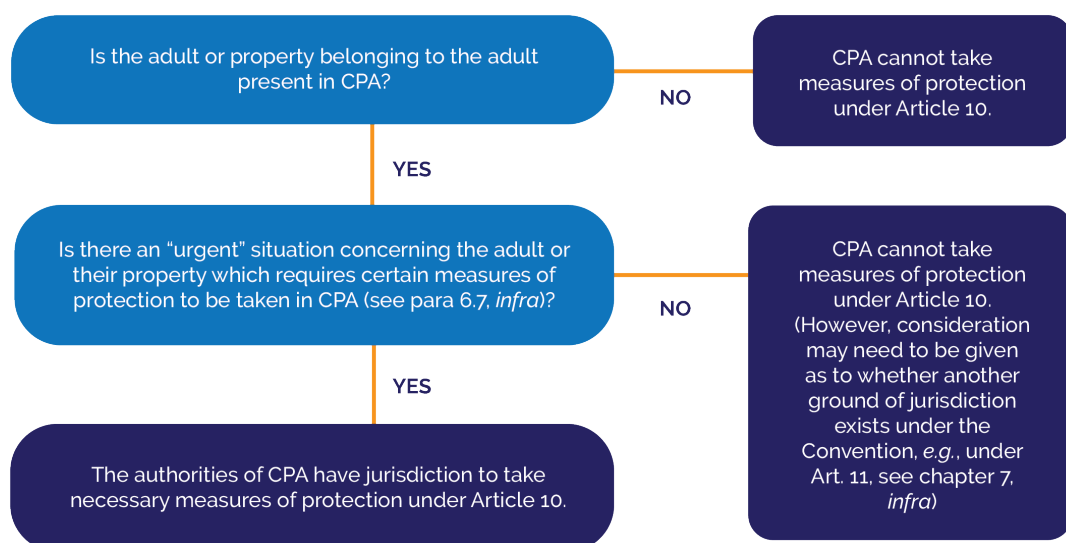
- Connecting factor: the presence of the adult or location of their property
- Condition: urgent situation
- Concurrent subsidiary jurisdiction:
- Scope of jurisdiction: limited to measures necessary to address the urgency of the situation
- Measures taken under Article 10 are subject to replacement, termination or modification by the competent authority of another Contracting Party having jurisdiction under Articles 5 to 9 that has taken the measures required by the situation or by the authorities of non-Contracting Parties that have taken measures required which are recognised
- CO-OPERATION requirements:
  - ✓ Communicate (if possible): Inform the authorities of the State of the habitual residence of the adults about the measures taken 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>208</sup>

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



<sup>208</sup> Art. 10(1).



- 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>209</sup> although it remains ~~subordinatesub~~subsidiary.<sup>210</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, property the adult owns in Contracting Party B needs to be sold rapidly. After assessing the nature and degree of the urgency, the competent authorities in Contracting Party B may take the necessary measures to proceed with the sale of the property.

- 6.3 The 1997 Special Commission discussed the applicability of a *lis pendens* rule but, ultimately, it was preferred to have a ground of ~~general-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 with ~~concurrent~~ subsidiary jurisdiction (i.e., under Arts 7, ~~98, 10~~ and ~~119~~) could exercise that jurisdiction.<sup>211</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 ~~cooperate and~~ communicate regarding the most effective way to protect the interests of the adult.<sup>212</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 ~~may~~ have general jurisdiction under Article 6, for the purposes of Article 10 the scope of jurisdiction is limited to cases of urgency.<sup>213</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** An adult who has their habitual residence in Contracting Party A, is visiting friends in Contracting Party B. While in Contracting Party B, the adult is involved in a serious motorcycle accident and suffers significant brain trauma which leaves the adult in a comatose state. While the adult is in a

<sup>209</sup> The Explanatory Report, para. 78.

<sup>210</sup> *Ibid.*, para. 80.

<sup>211</sup> *Ibid.*, para. 47.

<sup>212</sup> Art. 10(4).

<sup>213</sup> The Explanatory Report, para. 79.

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 sell the shares urgently. Before taking any measures, the competent authority of Contracting Party B contacts the competent authority of Contracting Party A to verify whether the measures they are contemplating are compatible with those taken by the competent authority in Contracting Party A.

(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>214</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 **general** 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>215</sup> ~~This means that Article 10 should not be used in a general way as a justification for the exercise of jurisdiction by the competent authorities of the State in which the adult is present and circumvent the competent authorities with general jurisdiction.~~

**Example 6.C** A couple habitually resident in Contracting Party A, ~~which is also their State of nationality,~~ were staying at their holiday home in Contracting Party B when one partner suddenly passed away. The other partner, who was already experiencing some age-related 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 by placing the surviving partner in an institution.

(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>216</sup> and 4.<sup>217</sup>

<sup>214</sup> *Ibid.*, para. 78.

<sup>215</sup> *Ibid.*

<sup>216</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>217</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.

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 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 ~~subordinate-subsidary~~ 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>218</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, are present, nor is there any need for all Contracting Parties to continue to recognise the measures taken under those urgent circumstances.<sup>219</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>220</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 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 urgency 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>221</sup> Communication ~~and/or cooperation~~ may take place directly between competent authorities<sup>222</sup> or, where appropriate, with the assistance of the relevant Central Authorities.<sup>223</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 that the competent authority of the State of habitual residence adequately look into the situation of the adult and take any necessary measures, in particular for the long-term protection of the adult.

<sup>218</sup> Art. 10(2).

<sup>219</sup> The Explanatory Report, para. 80. See also, *infra*, **Chapter 8**, para. 8.4.

<sup>220</sup> Art. 10(3).

<sup>221</sup> Art. 10(4). Such communication or cooperation is not limited to Contracting Parties and can take place between any States.

<sup>222</sup> For judicial authorities, this may involve direct judicial communications.

<sup>223</sup> See further **Chapter 11**.

6.16 A model form<sup>224</sup> for this communication was approved by the 1999 Special Commission of a diplomatic character.

**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 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>225</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.<sup>226</sup> 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.

6.19 Only in situations of urgency, can the competent authorities of the State where the adult is present or their property is located have the power to set aside any measures previously taken by the competent authorities under the Convention which have primary and general jurisdiction under Articles 5 and 6. In other words, the urgency measures taken under Article 10 may not be compatible with the other measures previously taken under the Convention general jurisdiction rule. 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. ~~Only in situations of urgency can the jurisdiction of the State where the adult is present set aside the measures previously taken by the competent authorities normally having jurisdiction.~~<sup>227</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>228</sup>

<sup>224</sup> See, *supra*, note 1567.

<sup>225</sup> The Explanatory Report, para. 82.

<sup>226</sup> For example, when the adult whose habitual residence cannot be determined is present in State A and the authorities that take an urgent measure for the person or the property of the adult are those of State B, where their property is located.

<sup>227</sup> The Explanatory Report, para. 84.

<sup>228</sup> Arts 22 et seq.

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>229</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 urgency measures.<sup>230</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 beforehand.<sup>231</sup> Even if the State of habitual residence of the adult is not a Contracting Party to the Convention, the authorities of Contracting Party B~~They~~ should, as a good practice~~if possible, endeavour to~~ inform those authorities afterwards, similarly to the practice under in accordance with 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 representation~~ 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

<sup>229</sup> The Explanatory Report, para. 81.

<sup>230</sup> *Ibid.*, para. 82.

<sup>231</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 9.33-9.34.

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.

## 7. Temporary measures

### QUICK OVERVIEW of the jurisdiction under Article 11

- Connecting factor: the presence of the adult
- Condition: exceptional situation
- Concurrent subsidiary jurisdiction
- Scope of jurisdiction: limited to measures of protection of the person of the adult which are compatible with those already taken by the authorities having jurisdiction under Articles 5 to 8, limited territorial effect, limited to temporary measures
- Measures taken are subject to replacement, termination or modification by the competent authority of another Contracting Party having jurisdiction under Articles 5 to 8
- 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 inform 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. ~~The jurisdiction provided for under Article 11 is conditional upon the competent authorities of the habitual residence of the adult being advised in advance.~~ 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>232</sup>
- temporary measures taken under Article 11 must only concern the person of the adult and not their property;<sup>233</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>234</sup>
- the jurisdiction provided for in Article 11 is concurrent and subsidiary to that of the competent authorities with primary and general jurisdiction under Articles 5 and 6(2);<sup>235</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>236</sup>

<sup>232</sup> Art. 11(1).

<sup>233</sup> The Explanatory Report, para. 84.

<sup>234</sup> Art. 11(1).

<sup>235</sup> The Explanatory Report, para. 83.

<sup>236</sup> Art. 11(1); Explanatory report, para. 84. This is in contrast with Art. 10, under which authorities in the State where the adult is present may set aside measures previously taken by the authorities that enjoy primary and general jurisdiction (see, *supra*, **Chapter 6**, para. 6.19).



7.2 The 1997 Special Commission discussed the applicability of a *lis pendens* rule but, ultimately, it was preferred to have a ground of ~~general-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, ~~98, 10~~ and ~~119~~) could exercise that jurisdiction.<sup>237</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>238</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 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 have charge of the person of the adult 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 ~~subordinate-subsidiary~~ ground of jurisdiction to the primary and general grounds of jurisdiction under Articles 5 and 6.

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 and 8 have taken the measures of protection required by the situation ~~in the Contracting Party where the adult is present~~.<sup>239</sup> It is possible that the competent authorities which have jurisdiction under the aforementioned Articles decide that no measures need to be taken. In this case, the temporary measures no longer have any reason to continue.<sup>240</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>241</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. 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

<sup>237</sup> The Explanatory Report, para. 47.

<sup>238</sup> *Ibid.*, para. 84.

<sup>239</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 both Arts 6 and 11 are present, this Article~~ confers ~~primary and general~~ jurisdiction on the State in which the adult is present.

<sup>240</sup> *Ibid.*, para. 85.

<sup>241</sup> See, *infra*, para. 7.137.13.

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>242</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>243</sup> ~~Given that any temporary measure taken will lapse as soon as the competent authorities with primary jurisdiction (in this case, the competent authorities of the State of habitual residence) make a decision, the competent authorities of both Contracting Parties must communicate and cooperate in order to avoid any duplication and determine the best way forward to ensure the protection of the adult.~~<sup>244</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>245</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 ~~Where temporary measures of protection are taken under Article 11 in a Contracting Party, the competent authority that took the measures may want to communicate and /- or 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 should 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 inform the competent authorities in the State of habitual residence of the adult about of the temporary measures taken. This would avoid any incompatibility or duplication of measures, as the competent authorities exercising with jurisdiction under Article 7 would have no other way of being informed of the measures taken by competent authorities under Article 11 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.~~

7.10 Such communication ~~and /- or cooperation~~ may be carried out directly between competent authorities<sup>246</sup> or, where appropriate, with the assistance of the Central Authorities.<sup>247</sup>

7.11 It is important to note that such communications could take place between Members of the IHNJ.<sup>248</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.

<sup>242</sup> The Explanatory Report, para. 85.

<sup>243</sup> Ibid., para. 84.

<sup>244</sup> See, *infra*, **Chapter 11**.

<sup>245</sup> See, *supra*, note 157.

<sup>246</sup> For judicial authorities, this may involve direct judicial communications.

<sup>247</sup> See, *infra*, **Chapter 11**.

<sup>248</sup> See Emerging Guidance on Direct Judicial Communications.

- 7.12 Specific cooperation provisions in the 2000 Convention may be relevant in such cases and must be carefully considered.<sup>249</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 recognisable and enforceable under the Convention, since such temporary measures are limited to the territory of the Contracting Party in which they were taken.<sup>250</sup>

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<sup>249</sup> See, *infra*, **Chapter 11**.

<sup>250</sup> The Explanatory Report, 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 ~~primary and general~~ 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>251</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>252</sup>
- 8.3 Article 12 is an important provision, as it ensures a certain continuity of protection for the adult and their property.<sup>253</sup> For example, a change of habitual residence will not, in and of itself, alter any arrangements made in the previous habitual residence.

**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 guardian for the adult in order to provide support in daily life tasks. After some time, the adult moves to Contracting State B, which becomes their new habitual residence. Article 12 enables the guardian 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 States 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>254</sup> ~~Article 12 reflects the stricter subsidiarity of measures under Articles 10 and 11 in comparison with those under Articles 6 to 9.~~

### 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

<sup>251</sup> Art. 12; the Explanatory Report, para. 86.

<sup>252</sup> *Ibid.*, para. 86.

<sup>253</sup> *Ibid.*

<sup>254</sup> *Ibid.*, para. 87.

decisions have been taken by competent authorities with jurisdiction under the Convention.<sup>255</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>256</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).

**Example 8.B** A guardian was designated by competent authorities in Contracting Party A, the former State of habitual residence of the adult. The adult has since moved to Contracting Party B, their new State of habitual residence. It is important that this guardian 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 State 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>257</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 primary and general 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>258</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.

**Example 8.D** 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 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. This is due to the fact that, in general, the

<sup>255</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>256</sup> *Ibid.*, para. 88.

<sup>257</sup> *Ibid.*, para. 88.

<sup>258</sup> *Ibid.*

statutory mission of a public body is limited to the jurisdiction where they are established.

**Example 8.E**

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 interest~~conferred for the protection of the adult and their property.~~

### 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>259</sup> i.e., their domestic law.<sup>260</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>261</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>262</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 this case, it could be that the adult would be better served if the law of the State where the property is located could be applied or be taken into consideration in order to meet the particular legal / administrative requirements of Contracting Party B (e.g., tax and registration 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 adult owns~~ property in non-Contracting Party B, ~~the State of their nationality~~. In Contracting Party A, the personal faculties of the adult become impaired and a competent authority in Contracting Party A appoints the oldest child

<sup>259</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>260</sup> The Explanatory Report, para. 90.

<sup>261</sup> *Ibid.*, para. 91.

<sup>262</sup> *Ibid.*, para. 92. See also, *infra*, Example 9.G.



of the adult as their guardian in accordance with domestic law. In non-Contracting Party B, where the property is located, established guardianship is limited under domestic law by a council consisting of relatives. Certain decisions by a guardian require approval of this council to be effective. Although the guardianship of the adult in Contracting Party A is established by court order, the adult files an appeal in order to have the guardianship established by the conditions as established in non-Contracting Party B. ~~The appeal court denies this since domestic international private law refers to the law of Contracting Party A for establishing the guardianship. Finally, after final appeal, t~~The competent authority in Contracting Party A ~~held that~~decides, in accordance with Articles 13(2) and 18 of the Convention, that a guardianship may be established under the domestic law of non-Contracting Party B. However, competent authorities in Contracting Party A must verify whether their guardianship 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~~Under the 2000 Convention, 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>263</sup> This will be the case in situations such as a change of habitual residence<sup>264</sup>, a temporary placement abroad for a specialised medical treatment or the sale of property in one Contracting Party ordered in another Contracting Party. ~~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.~~<sup>265</sup> ~~In the interim, the implementation of the measures already taken will be governed by the law of the new State of habitual residence.~~ Article 14 establishes that the "conditions of implementation" of protective measure taken in one Contracting Party will be governed by the law of the State in which the measure is to be implemented.<sup>266</sup> This provision aims to ensure the implementation of that measure, regardless of whether or not this situation stems from a change of law resulting from a change of the connecting factor.<sup>267</sup> ~~This provision~~ does not apply to the implementation of powers of representation conferred by the adult themselves, because powers of representation *per se* are not measures of protection *per se*, in accordance with Article 3.<sup>268</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

<sup>263</sup> The Explanatory Report, para. 94.

<sup>264</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.

<sup>265</sup> Art. 12; see, *supra*, Chapter 8.

<sup>266</sup> The Explanatory Report, para. 94.

<sup>267</sup> *Ibid.*

<sup>268</sup> See Art. 15.

~~adult by designating a guardian to assist them. -at the time a measure of protection is taken by the competent authorities of that State. 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 guardian, therefore, decides to lease the property owned by the adult on their behalf, 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 guardian obtains the authorisation of a judge in Contracting Party B, the State of the adult's new habitual residence. Under Article 14, This requirement is a condition of implementation under Article 14the conditions of the implementation of the measure will be governed by the law of Contracting Party B, the State of their new habitual residence.~~

- 9.5 The term “conditions of implementation”, which is not defined by the Convention, is to be understood in quite a broad sense.<sup>269</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>270</sup> ~~For instance, it could be that the implementation of a measure of protection (e.g., a guardian exercising the powers conferred to them by signing a contract regarding a property on behalf of the adult who they represent) is subject to authorisation by a judge in the new State of habitual residence. This is a condition of implementation which must be complied with.~~<sup>271</sup>

#### Example 9.D

An adult is habitually resident in Contracting Party A and a guardian is appointed there to represent them in financial and property matters. The adult and their siblings inherit a summer cottage which is situated in Contracting Party B. The guardian and the adult's siblings agree that the cottage should be sold to one of the guardian's children. 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:

- 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>272</sup>
- Conflict of interests. The guardian of the adult, appointed in Contracting Party A, contemplates selling immovable property owned by the adult in Contracting Party B. The intended buyer is the spouse of the guardian. 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 act on behalf of the adult instead of the

<sup>269</sup> Art. 15.

<sup>270</sup> ~~“Conditions of implementation” could be formalities regarding transactions (e.g., notarisaton). The monitoring of measures through, for instance, the requirement of the guardian to submit reports to their supervising authority, is also a “condition of implementation”.~~

<sup>271</sup> ~~Other “conditions of implementation” could be formalities regarding transactions (e.g., notarisaton). The monitoring of measures through, for instance, the requirement of the guardian to submit reports to their supervising authority, is also a “condition of implementation”.~~

<sup>272</sup> The Explanatory Report, para. 94.

guardian. 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 guardian from donating the property of the adult under their responsibility.

**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.

## 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<sup>273</sup> 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.<sup>274</sup>

- 9.8 The private acts that are concerned with this conflict of law rule can be constituted of powers of ~~representation attorney~~ and / or advance directives<sup>275</sup> ~~(e.g., regarding medical or health issues, or any other topic, such as personal preferences in relation to daily life)~~. Such advance directives contain the instructions and wishes made by the adult,<sup>276</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

<sup>273</sup> See Annex I, Chapter II, Part A, for further guidance on the interpretation of the term “powers of representation”.

<sup>274</sup> Powers of representation are like contracts or legal documents. They 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 decisions made by competent authorities or, in the context of the 2000 Convention, measures taken by competent authorities.

<sup>275</sup> ~~Council of Europe, “Principles concerning continuing powers of attorney and advance directives for incapacity (Recommendation CM/Rec(2009)11 and explanatory memorandum)” (hereinafter, “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>276</sup> Council of Europe, “Principles concerning continuing powers of attorney and advance directives for incapacity (Recommendation CM/Rec(2009)11 and explanatory memorandum)” (hereinafter, “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”.

~~to manage their property. Advance directives are subject to Article 15 if they are included in a power of attorney, are addressed at a representative designated under a power of attorney or contain a power of attorney designating one or more representatives [or a power of attorney addressed to the world] are expressed by the adult in these acts, for a specific designated representative to follow or generally towards any person who will be in charge of taking care of and assisting the adult.~~

9.9 [It is important to note that Article 15 does not say anything with regard to the designation of a 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.]

9.10 Some States have identified agreements or unilateral acts which can fall within the scope of Article 15:<sup>277</sup>

- 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, upon an impairment or incapacitation;<sup>278</sup>
- declarations in anticipation of incapacity, assisted decision-making, representation by a household member.<sup>279</sup>
- nomination of a guardian within the scope of an advance directive under the Council of Europe Recommendation (2009)11.<sup>280</sup>

(a) What law applies to powers of representation?

Article 15(1)

9.11 By virtue of Article 15, powers of representation conferred 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 conferred such powers.<sup>281</sup>

9.12 The adult may also designate the law of another State to govern the powers of representation they confer. However, at the 1999 Special Commission of a diplomatic character it was decided that such freedom of choice ought to be limited.<sup>282</sup>

9.13 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>283</sup> As powers of representation are to be exercised when the adult who conferred them is no longer able to look after their own interests, and may no longer be able to confer such powers, this is an

<sup>277</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 < [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”.

<sup>278</sup> Brazil.

<sup>279</sup> Czech Republic.

<sup>280</sup> See Council of Europe Recommendation (2009)11, Part III, Principle 14.

<sup>281</sup> The Explanatory Report, para. 98.

<sup>282</sup> Art.15(2); see [Proceedings of the Special Commission with-of a diplomatic character \(1999\)](#), p. 261.

<sup>283</sup> Art. 15(1).

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>284</sup>

9.14 Article 15(1) covers the existence, extent, modification and extinction of powers of representation.~~“extent” of the powers of representation, meaning the acts which the representative may carry out alone or with an authorisation or those acts which the representative may not carry out.~~<sup>285</sup> The term “extent” refers to the scope of the powers of ~~the a~~ [designated] representative of the adult and any limitations thereto, meaning the acts which a representative may carry out alone or with an authorisation or those acts which a representative may not carry out.<sup>286</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 virtue of the representative seeking to exercise using these powers of representation in a different jurisdiction.

**Example 9.F** ~~— 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.~~<sup>287</sup>

**Example 9.FG** An adult, habitually residing in Contracting Party A, has conferred 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.G** An adult establishes a power of representation 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 the State of their nationality, Contracting Party B. According to the law of Contracting Party B, a power of representation must be validated by a competent authority in order to come into force. In Contracting Party A, there is no such validation requirement, as powers of representation may enter into force upon the decision of a representative to that effect. When the

<sup>284</sup> The Explanatory Report, para. 101.

<sup>285</sup> ~~*Ibid.*, para. 99.~~

<sup>286</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.~~

<sup>287</sup> ~~This example was taken from the comments of the ULCC Uniform Recognition of Substitute Decision-making Documents Act (2016).~~

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 entry into force of the power of representation will need to be validated by a competent authority in Contracting Party A. The requirement that the power of representation be validated in order to enter into force forms 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. It should, however, be noted that the competent authority in Contracting Party A may apply its own law in dealing with the request of validation of the power of representation (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>288</sup> However, the law of Contracting Party B will have to be applied, as this relates to the existence of the power of representation (Art. 15(1)) and not to its manner of exercise (Art. 15(3)).

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

#### Article 15(2)

9.15 Article 15(2) provides an exhaustive list of the laws which may be designated by the adult.<sup>289</sup>

9.16 The laws which the adult may designate expressly in writing are the law of their State of nationality,<sup>290</sup> the law of a former habitual residence<sup>291</sup> and / or the law of the State in which their property is located (but only for matters which relate to that property).<sup>292</sup>

9.17 This provision implicitly enables the adult to designate several laws, altogether, to govern the powers of representation they confer. 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>293</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>294</sup>

#### Example 9.H

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 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.

<sup>288</sup> See, *supra*, para 9.3.

<sup>289</sup> The Explanatory Report., para. 102.

<sup>290</sup> Art. 15(2)(a).

<sup>291</sup> Art. 15(2)(b).

<sup>292</sup> Art. 15(2)(c).

<sup>293</sup> The Explanatory Report, para. 103.

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



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

Article 15(3)

- 9.18 The manner of exercise of the powers of representation conferred by an adult is subject to the law of the State in which they are to be exercised.<sup>295</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>296</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 conferred by the adult will be exercised should be limited to the “manner of exercise” and would not cover the “exercise” of those powers.<sup>297</sup>
- 9.19 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>298</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 conferred by the adult themselves than when those powers are derived from a measure of protection.<sup>299</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>300</sup>
- 9.20 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 verification of the existence and extent of the powers in accordance with domestic procedural law, the deposit of the act conferring the powers, or the authorisation procedure (i.e., registration requirements), where the law applicable to the powers of representation foresees such authorisation.<sup>301</sup>
- 9.21 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>302</sup>

~~**Example 9.1** — At the time the powers of representation were conferred, the adult had their habitual residence in Contracting Party A. Their habitual residence is now in Contracting Party B and the powers of representation are to be exercised there. If the law of both Contracting Parties prescribes a verification / authorisation procedure, but with some procedural differences, the verification / authorisation requirements will relate to the existence of the power of representation which is governed by the law of Contracting Party A, while the details of the day-to-day exercise of the~~

<sup>295</sup> Art. 15(3).

<sup>296</sup> The Explanatory Report, para. 106.

<sup>297</sup> This was a decision by formal vote – 11 votes to 7 with 4 abstentions [see *Proceedings of the Special Commission with of a diplomatic character* (1999), p. 265].

<sup>298</sup> The Explanatory Report, para. 106.

<sup>299</sup> *Ibid.* See also, *supra*, para 9.6.

<sup>300</sup> *Ibid.*, para. 94

<sup>301</sup> *Ibid.*, para. 107.

<sup>302</sup> *Ibid.*, para. 106.



powers of representation will be governed by the law of Contracting Party B.

**Example 9.I** 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 in accordance with the law of Contracting Party B, would like to waive this inheritance on behalf of the adult. In order to do so, the law of Contracting Party B necessitates an authorisation by a competent authority. The law of Contracting Party A provides for the possibility for the representatives of two or more persons whose personal faculties are impaired (minors or adults) to file a joint request before a competent authority for authorisation to waive inheritance of limited value. Although this is not a possibility under the law of Contracting Party B, the representative of the adult may file a joint request along with any other representatives of any other beneficiaries. For this purpose, the representative may choose to seize the competent authority of Contracting Party A under Article 9 of the Convention.

**Example 9.X** 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 that sales or gifts can be made to the representative. The representative intends to purchase a valuable painting belonging to the adult which is located in property of theirs in Contracting Party B. However, the law of Contracting Party B forbids representatives from exercising their powers in situations where a conflict of interest exists. As such, the representative of the adult will not be permitted to act in their capacity as representative in this sale and an *ad hoc* representative will have to be appointed for this transaction.

**Example 9.J** An adult has granted powers of representation in accordance with the law of Contracting Party A, the State of their habitual residence. In order to cover medical bills for treatment the adult has recently undergone, the representative would like to withdraw some funds from a bank account the adult holds in Contracting Party B. While the law of Contracting Party A allows the representative to withdraw funds without any restriction, the law of Contracting Party B requires authorisation by a competent authority, if the representative intends to withdraw funds over a certain amount. This regulation affects the manner of exercise of the representative's powers, as the representative must obtain such authorisation in order to be able to exercise their powers in Contracting Party B.

**Example 9.K** 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 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.

**Example 9.L** An adult, habitually resident in Contracting Party A, has established powers of representation, wherein they have designated a specific representative, in anticipation of a time when they will be unable to look after their own interests. Following the onset of a significant impairment to the personal faculties of the adult, a competent authority in Contracting Party A has declared the powers are now in force. The representative is tasked with managing the adult's personal and financial interests. The adult has some savings in a bank located in Contracting Party B. To streamline the management of the adult's finances, the representative would like to move those savings to the adult's savings account in Contracting Party A. Contracting Party B has recently passed a new law to protect vulnerable investors / account holders from financial exploitation. Under this new law, following a request by a client (or their representative) to carry out a transaction, the financial institution has the discretion to place the requested transaction on hold until they can determine whether the instructions given are the right course of action or if there is some level of financial abuse or exploitation. The representative of the adult will have to cooperate with the requirements of the financial institution in order to exercise their powers in Contracting Party B.

#### **D. Withdrawal or modification of powers of representation**

##### **Article 16**

**9.22** Article 16 allows the competent authorities that have jurisdiction under the Convention to withdraw or modify<sup>303</sup> the powers of representation conferred by the adult by virtue of Article 15.<sup>304</sup>

**9.23** This provision aims to reconcile the respect for the will, ~~and 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>305</sup>

**9.24** The application of Article 16 is limited to cases where powers conferred 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 to whom they were conferred is exercising them poorly or inadequately. In taking this decision, ~~the~~ 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>306</sup>

#### **E. Protection of third parties**

##### **Article 17**

<sup>303</sup> The modification might, for example, consist of introducing surveillance of the person to whom powers of representation were conferred.

<sup>304</sup> The Explanatory Report, para. 108.

<sup>305</sup> See *Proceedings of the Special Commission with-of a diplomatic character* (1999), p. 272.

<sup>306</sup> The Explanatory Report, para. 108.

9.25 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>307</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 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 responsibility.

9.26 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>308</sup> Therefore, good faith and due diligence are necessary in order for the third party to come under the protection of Article 17.<sup>309</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>310</sup>

**Example 9.M** The adult residing in Contracting Party A has conferred a power of representation to a friend in accordance with the law of Contracting Party A. In Contracting Party B, where property belonging to the adult is located, the law provides for *ex lege* representation of an adult by their spouse. The spouse of this adult signs, on behalf of the adult, a lease agreement regarding the property in Contracting Party B with a third person (a tenant). Under the law of Contracting Party A, the representation of the adult could not be exercised by the spouse, because a power of representation designating a friend of the adult as being their sole representative was in place. However, unless the tenant knew or ought to have known about this limitation, the lease agreement will be considered valid in order to protect the tenant.

9.27 Article 17 applies regardless of whether the power of representation has been conferred by a measure of protection or was the result of a voluntary act by the adult themselves.<sup>311</sup>

9.28 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>312</sup>

9.29 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>313</sup>

<sup>307</sup> Art. 17(1).

<sup>308</sup> *Ibid.*

<sup>309</sup> The Explanatory Report, para. 109.

<sup>310</sup> Art. 17(2).

<sup>311</sup> The Explanatory Report, para. 109.

<sup>312</sup> This point has been accepted by the Special Commission [see *Proceedings of the Special Commission with-of a diplomatic character* (1999), p. 267].

<sup>313</sup> For European 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* (hereinafter, “the Rome I Regulation”) applies, this scenario is covered by Art. 13 of the Regulation, which replaced Art. 11 of the *Rome Convention of 19 June 1980 on the Law Applicable to Contractual Obligations*. In order to avoid any conflicts between the 2000 Convention and the Rome I Regulation, this latter scenario will be covered by Art. 13 of the Rome I Regulation for those States to which it 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

9.30 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.

9.31 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>314</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

9.32 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

9.33 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.

9.34 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>315</sup>

**Example 9.NJ** 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 institution. 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), such authorisation is mandatory.<sup>316</sup>

**Example 9.O** An adult, habitually resident in Contracting Party A, has designated a representative to assist them in matters of their health. The adult is currently located in Contracting Party B, visiting their eldest child. While in Contracting Party B, the adult suffers a bad fall and requires urgent medical care. The representative of the adult, however, is not in Contracting Party B. The law of Contracting Party B provides that, where the representative of the adult is not present, only next of kin who are

<sup>314</sup> The Explanatory Report, para. 111.

<sup>315</sup> *Ibid.*, para. 113.

<sup>316</sup> *Ibid.*

present could make a decision on behalf of the adult in an emergency situation. The eldest child of the adult, therefore, is able to take the necessary medical / healthcare decisions for the adult.

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

#### Article 21

- 9.35 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.PK** An adult, while habitually resident in Contracting Party A, has established powers of representation and designated an attorney made advance arrangements, in signed writing, that they wish to die by euthanasia 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.

**[Example 9.Q]** An adult, while habitually resident in Contracting Party A, has made advance arrangements, in signed writing, that they wish to die by euthanasia in the event that their personal faculties become impaired to the extent where they can no longer look after their own interests. Such arrangements are possible under the domestic law of Contracting Party A. In that document, the adult also gave instructions to a guardian but does not name a particular individual. 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.]

#### G. Applicable law issues relating to enforcement

- 9.36 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>317</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>318</sup>

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<sup>317</sup> Art. 25(1).

<sup>318</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 appointing a guardian) 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 a measure may be refused recognition (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 State (Art. 27). Finally, Chapter IV includes provisions to the effect that the authority of the requested State is bound by the findings of fact upon which the authority of the State 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>319</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. However, recognition may be refused under strict and limited grounds.<sup>320</sup>

10.4 Article 22 applies to any measures taken by the 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 previous measure, are revoked. Article 22 also applies to a measure conferring or confirming powers of representation or to a measure confirming, modifying or withdrawing powers of representation granted by the adult themselves. Powers of representation conferred by a measure, or private powers which have been the object of a decision by a competent authority, for instance in the context of a

<sup>319</sup> The Explanatory Report, para. 115.

<sup>320</sup> See, *infra*, **Section B**.



~~supervision proceeding, including a proceeding under Article 16, are also included within the scope of Article 22.~~<sup>321</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>322</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>323</sup> ~~Where a measure is recognised by “operation of law”, competent authorities in the requested Contracting Party do not regularly need to rely on an ex officio review of the grounds for non-recognition found in Article 22.~~

**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>324</sup> The Convention also allows for the possibility of formal advance “recognition or non-recognition” of a measure of protection.<sup>325</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 most 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 of the measure with a view to its recognition *per se*.<sup>326</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 authorities of the Contracting Party which took the measure inform the authorities in the requested

<sup>321</sup> The Explanatory Report, para. 116.

<sup>322</sup> 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>323</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>324</sup> The Explanatory Report, para. 116.

<sup>325</sup> *Ibid.* See also Art. 23.

<sup>326</sup> *Ibid.*, para. 117.

Contracting Party of the measure by telephone or other means of communication<sup>327</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.

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.

~~**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.~~

10.10 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>328</sup> even if a change of circumstances has eliminated the basis upon which jurisdiction was founded.<sup>329</sup>

<sup>327</sup> *Ibid.* See also *Proceedings of the Special Commission with-of a diplomatic character* (1999), p. 278.

<sup>328</sup> The Explanatory Report, para. 86. The expression “according to their terms” found in Art. 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, or while the relevant circumstances subsist (see Explanatory Report, para. 88). This expression 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.

<sup>329</sup> So long as the authorities which have jurisdiction under the Convention have not modified, replaced or terminated such measures.

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>330</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>331</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>332</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>333</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>334</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 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.

10.17 As the 2000 Convention applies to measures taken when the adult had not yet reached the age of 18 years,<sup>335</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>336</sup>

### Example 10.B The authorities of Contracting Party A, having jurisdiction according to

<sup>330</sup> See, for example, Art. 21 of the 2007 Child Support Convention.

<sup>331</sup> The Explanatory Report, para. 116.

<sup>332</sup> *Ibid.*, para. 118.

<sup>333</sup> Art. 22(2)(a).

<sup>334</sup> The Explanatory Report, para. 119.

<sup>335</sup> Art. 2(2).

<sup>336</sup> The Explanatory Report, para. 119.

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 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>337</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>338</sup> contrary to the fundamental rules of procedure set out in the requested Contracting Party. This is a special clause of procedural public policy. It does not apply in cases of urgency, for which the requirements of procedural due process of law ought to be interpreted more flexibly.<sup>339</sup> ~~It is to be noted that an adult may have~~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 but this condition should for the purposes of recognition be supported by, for example, a medical assessment, in accordance with the applicable domestic laws.

**Example 10.C** The competent authority of Contracting Party A took a guardianship measure without providing the adult the opportunity to be heard. The guardian wants this measure 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 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 resident in Contracting Party A where a competent authority took a measure to appoint their son as their guardian, is visiting their nephew in Contracting Party B, whom the adult always wanted to have as a guardian. Following discussions with the adult, the nephew suspects that the adult was not given the opportunity to participate or be heard in the proceedings appointing the son as guardian. 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

<sup>337</sup> Art. 22(2)(b).

<sup>338</sup> With regard to incapacitated adults' equal recognition before the law and access to justice see Arts 12 and 13 of the UNCPRDP.

<sup>339</sup> The Explanatory Report, para. 120.

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 seize the competent authority in Contracting Party B on the basis of Article 10 to be appointed guardian to the adult while the adult is visiting him in Contracting Party B, if there is a need for such an urgent appointment. If not, the nephew could seize the competent authorities of Contracting Party A, the State of habitual residence of the adult or the competent authorities in Contracting Party B and request a transfer of jurisdiction on the basis of Article 8(2)(e).

#### 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 ~~was~~is competent, according to Article 5 of the Convention, to take a measure of protection of the adult, since they ~~were~~ 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>340</sup>

**10.19** 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>341</sup>

**10.20** It should be noted that the use of the public policy exception is rare in private international law generally and, particularly, in 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 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

<sup>340</sup> Art. 22(2)(c).

<sup>341</sup> The Explanatory Report, para. 121.

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. 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>342</sup>

**10.21** 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 an 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 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~~fulfils the requirements for recognition in the requested Contracting Party~~.<sup>343</sup>

~~To receive priority, this later measure of a non-Contracting Party must be capable of recognition in the requested Contracting Party in accordance with the domestic laws on recognition and enforcement.~~

**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 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>344</sup>

<sup>342</sup> Art. 22(2)(d).

<sup>343</sup> The Explanatory Report, para. 122.

<sup>344</sup> Art. 22(2)(e).



10.22 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>345</sup>

**C. Ensuring the recognition or non-recognition of a measure in another Contracting Party (“preventive recognition or non-recognition”)**

*Article 23*

10.23 Article 23 provides a “preventive” 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. Given that, under the Convention, the recognition of measures from other Contracting Parties occurs by operation of law, it is only at the 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>346</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~~any interested person may request the competent authority of a Contracting Party to decide in advance on the recognition or non-recognition of a measure taken in another Contracting Party.~~

10.24 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 the continuing power of attorney mandate in case of incapacity is valid or void.<sup>347</sup> ~~Through this provision, the 2000 Convention provides a legal basis for an 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 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, as it does with declarations of enforceability,<sup>348</sup> but to do so would be consistent with the object and purpose of the Convention. 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>349</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.

10.26 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 10.1** The habitual residence of an adult is in Contracting Party A. Their family disagrees on ~~Following a family disagreement as to~~ whether the adult should be receiving a daily specialised medical treatment in Contracting Party A or Contracting Party B, where most of the children of the adult are

<sup>345</sup> The Explanatory Report, para. 123.

<sup>346</sup> *Ibid.*, para. 124.

<sup>347</sup> *Ibid.*, para. 124.

<sup>348</sup> Art. 25(2).

<sup>349</sup> The Explanatory Report, para. 124.



living. ~~The~~ court in Contracting Party A, ~~after consulting~~ the Central Authority in Contracting Party B concerning the availability of these services (in accordance with Art. 33) ~~and~~, decides 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 transfer of the adult before it takes place. Hence, the family will seek a “preventive” recognition of the transfer of the adult under Article 23, in order to guarantee that the transfer of the adult will take place as smoothly and as expeditiously as possible and to avoid any interruption of their 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 the habitual residence of the adult, confers powers of representation regarding the property of the adult to their niece. 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 for 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 judicial powers of representation conferred upon her and may create difficulties regarding the sale of the property, such as not allowing potential buyers to visit. Normally, the judicial powers of representation taken in Contracting Party A would be recognised by operation of law (*i.e.*, automatically) in Contracting Party B in accordance with Article 22. Because the judicial powers of representation are a measure for which there is no enforcement mechanism, the niece may want to dispel in advance any doubt about the recognition of such powers conferred upon her by seeking a “preventive” recognition under Article 23. This would ensure that any interested party in Contracting Party B will respect the judicial powers of representation conferred upon the niece and abide by it, thus avoiding time-consuming and costly litigation as well as uncertainties and loss of time.

#### 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 of representation regarding the property of the adult are conferred on Y, the 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 needed. 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 judicial power of representation, he should seek a “preventive” recognition under Article 23.

#### D. Enforcement of a measure of protection

##### Articles 25 and 27

- 10.27 If a measure of protection taken by 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>350</sup>
- 10.28 The procedure set out by Article 25 of the Convention is that an interested party (e.g., the representative of the adult) must, in these circumstances, 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 in the law of that State.<sup>351</sup> Article 25 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>352</sup>
- 10.29 A simple and rapid procedure must be applied to the declaration of enforceability or registration for the purposes of enforcement.<sup>353</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>354</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.
- 10.30 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>355</sup>
- 10.31 Once the declaration or registration has been made, the measures are to be enforced in the requested Contracting Party as if they had been taken by the authorities of that State.
- 10.32 It is important to note that a measure whereby a court confers judicial powers of representation on the appointed representative of an adult is not, as such, a measure that requires enforcement. 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

<sup>350</sup> Art. 25; *Ibid.*, para. 126.

<sup>351</sup> *Ibid.*

<sup>352</sup> *Ibid.*, “For example, the powers conferred on a legal representative by a measure taken in a Contracting State will permit this representative, if there is no ground for non-recognition, to enter into transactions on behalf of the adult in another Contracting State, which transactions concern the protection of the adult's person or property. But if the measure requires enforcement by the public authority entitled to use coercion, for example the forced sale of property, the measure will have to be the subject in the second State of a declaration of enforceability or, according to the procedure applicable in certain States, of registration for the purpose of enforcement.”

<sup>353</sup> Art. 25(2); *Ibid.*

<sup>354</sup> *Ibid.*

<sup>355</sup> Art. 25(3).

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. If the party invoking such a measure were to know, in advance, that certain parties may not respect or abide by this judicial power of representation, the party relying on this measure could seek a “preventive” recognition under Article 23 in order to dispel any doubts as to its recognition and effect.

**Example 10.L** The competent authority in the State of habitual residence of the adult, Contracting Party A, takes a measure to sell, by an enforcement authority (*i.e.*, forced sale / judicial sale), the property of the adult which is located in Contracting Party B in order to pay medical expenses of the adult. 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.

**Example 10.M** An adult ~~who, due to mental health issues,~~ 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 Contracting Party A (the current habitual residence of the adult and the State in which the adult is to be cared for), in order to resolve the matter and make the arrangements the adult requires. The competent authority ~~puts in place a judicial power of representation (*i.e.*, 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 their measure 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.

**10.33** Once the declaration or registration has been made, the measures shall be enforced in the requested Contracting Party as if they had been taken by the authorities of that State.<sup>356</sup> This includes all the enforcement modalities available for similar domestic measures under the law of the requested Contracting Party.

**10.34** Enforcement should take place in accordance with, and to the extent of, the domestic law of the requested Contracting Party.<sup>357</sup> The Convention acknowledges that Contracting Parties

<sup>356</sup> Art. 27.

<sup>357</sup> Art. 27.

regulate enforcement differently and provides for the enforcement of measures to the extent permitted by the domestic law of each State.

**Example 10.N** 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>358</sup>

**Example 10.O** 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 becomes incapacitated and 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 visitors, and the museum would lose profit. The enforcement mechanisms available in Contracting Party A include taking the property by force while, in Contracting Party B, the only available enforcement mechanism is a fine.

**Example 10.P** 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 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 bailiff to carry out.

**10.35** At the 1999 Special Commission ~~with-of~~ a diplomatic character, concerns were raised regarding the application of this provision, 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>359</sup>

**Example 10.Q** 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. 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, forced sale of property of the adult located in Contracting Party B. 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

<sup>358</sup> The Explanatory Report, para. 128.

<sup>359</sup> *Ibid.*

(Art.27).

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

### Articles 24 and 26

10.36 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>360</sup> ~~For example, where the jurisdiction is grounded upon a preliminary assessment of the interests of the adult by the competent authority of origin,<sup>361</sup> this assessment binds the competent authority of the requested Contracting Party.<sup>362</sup>~~

**Example 10. R** Where the jurisdiction is grounded upon a preliminary assessment of the interests of the adult by the competent authority of origin,<sup>363</sup> this assessment binds the competent authority of the requested Contracting Party.<sup>364</sup>

**Example 10. SR** 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>365</sup>

**Example 10. IS** The requested competent authority shall not review the facts upon which the authorities of the State of origin identified as urgent a situation that enabled these authorities to take an urgent measure based on Article 10.

10.37 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 beyond what is necessary to determine the possible refusal grounds in the context of applying Articles 22 to 25.

10.38 The authorities of the requested State 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 State 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 State 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>360</sup> Art. 24.

<sup>361</sup> ~~Arts 7(1) and 8(1).~~

<sup>362</sup> ~~The Explanatory Report, para. 125.~~

<sup>363</sup> Arts 7(1) and 8(1).

<sup>364</sup> The Explanatory Report, para. 125.

<sup>365</sup> *Ibid.*

**Example 10.**~~UF~~ A competent authority in Contracting Party A appoints X as the representative of the adult. Upon recognition ~~and enforcement~~ of the measure in Contracting Party B, the requested State, the competent authorities of that State cannot inquire into whether it was appropriate to appoint X rather than Y.

## 11 Co-operation, 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 co-operation 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 co-operation of other Convention actors. Therefore, competent, cooperative and responsive Central Authorities are at the heart of this Convention.
- 11.2** One of the main functions of Central Authorities under the 2000 Convention is to facilitate communication and co-operation 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>366</sup>
- 11.3** The Convention also provides that, in principle, each Central Authority will bear its own costs.<sup>367</sup>

### B. Co-operation amongst competent authorities

- 11.4** 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>368</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.
- 11.5** It is important to note that co-operation amongst competent authorities takes place in the context of jurisdiction issues (Arts 7-11).<sup>369</sup> In certain cases, competent authorities have to advise<sup>370</sup> the competent authorities having 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 under Articles 5 and 6 and, on the other hand, competent authorities 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

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<sup>366</sup> *Ibid.*, para. 129.

<sup>367</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 co-operation. It is also possible, under Art. 37, for Contracting Parties to draw up agreements with one another, to facilitate and enhance their co-operation.

<sup>368</sup> The Explanatory Report, para. 129.

<sup>369</sup> Depending on the ground of jurisdiction, co-operation is either specifically required or recommended.

<sup>370</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”.



under Articles 5 to 9, as applicable, or by a competent authority from a non-Contracting Party.<sup>371</sup>

### C. The designation and establishment of a Central Authority

#### Article 28

11.6 Article 28 requires Contracting Parties to designate a Central Authority to carry out the obligations imposed on it by the Convention.<sup>372</sup>

11.7 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 designate a Central Authority to which any communication may be addressed for transmission to the appropriate Central Authority within that State.<sup>373</sup>

11.8 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>374</sup>

### D. What assistance must a Central Authority provide?

#### Articles 29-31

11.9 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 and promote co-operation among competent authorities in their States to achieve the purposes of the Convention;<sup>375</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>376</sup>

11.10 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>377</sup> between competent authorities in situations to which the Convention applies<sup>378</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 State and in need of protection.<sup>379</sup>

11.11 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>380</sup> This is to avoid unduly limiting the scope of the bodies which may be able to provide assistance. Where possible

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<sup>371</sup> The Model Forms for such communications can be found at pp. 28-31 of the Explanatory Report.

<sup>372</sup> Art. 28(1).

<sup>373</sup> Art. 28(2).

<sup>374</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”).

<sup>375</sup> Art. 29(1).

<sup>376</sup> Art. 29(2).

<sup>377</sup> The interpretation of this term should also include electronic means of communication.

<sup>378</sup> Art. 30(a).

<sup>379</sup> Art. 30(b).

<sup>380</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*.

and appropriate, such bodies should carry out, at the request of Central Authorities, searches in databases under their responsibilities to assist with the location of the adult.

- 11.12 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>381</sup>

#### E. Situations where it is obligatory for competent authorities to co-operate / communicate

##### Articles 33 and 34

- 11.13 The 2000 Convention sets out two situations wherein co-operation 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 which wish to take, or have taken (in the case of Art. 34), a certain measure of protection under the Convention.<sup>382</sup> However, it is anticipated that the communication and co-operation 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 competent authority in the requesting Contracting Party “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.

- (a) When a competent authority is contemplating the placement of an adult in an institution / facility

##### Article 33

- 11.14 Article 33, which has already been mentioned in the context of the ground for non-recognition under Article 22(2)(e),<sup>383</sup> sets out the only procedure for compulsory consultation in the Convention.
- 11.15 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>384</sup>
- 11.16 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. It must then transmit:
- a report on the adult; together with
  - the reasons for the proposed placement.<sup>385</sup>

**Example 11.A** An adult, who is suffering from drug addiction and living with a severe psychological impairment, is a national of Contracting Party A. The adult is present in Contracting Party B and placed in a healthcare facility following a court decision. The adult has a guardian 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

<sup>381</sup> The Explanatory Report, para. 132. See also Art. 32.

<sup>382</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.

<sup>383</sup> See, *supra*, **Chapter 10**.

<sup>384</sup> The Art. 33 consultation only applies to measures contemplated by competent authorities. It does not cover placements of a private nature.

<sup>385</sup> Art. 33(1).

consultation procedure under Article 33 by providing the reasons behind the initial decision to place the adult in the healthcare facility and attaches the relevant decision, which is supported by relevant medical reports. 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 steps to support the transfer of the adult to the appropriate healthcare institution in Contracting Party A~~intended measure of placement of the adult~~.

**11.17** This obligation to consult, under Article 33(1), gives the competent authority of the receiving State a power to review the intended placement.<sup>386</sup> It also allows the competent authority in the receiving State to ascertain and co-ordinate, 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>387</sup> and any other entry requirements).

**Example 11.B** During a pandemic, an adult becomes infected with a virus and becomes seriously ill. The adult is placed in a coma, at a hospital located in Contracting Party A, their State of habitual residence. The healthcare system of Contracting Party A is burdened, and it becomes questionable whether the hospital will be able to continue providing the adult with the necessary care. As more critical patients are being admitted and given that the condition of the adult is grave but rather stable, the hospital administrators in Contracting Party A consider transferring the adult to a hospital 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.

**11.18** Under Article 33(2), the Central Authority or competent authority of the requested State may oppose the placement of the adult, in which case the decision to place the adult cannot be finalised.<sup>388</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 State disagrees with the placement, they must indicate their opposition within a reasonable time. If the authority does not oppose within a reasonable time, the placement can go forward.<sup>389</sup> If this consultation procedure is not followed, the measure may be refused recognition under the Convention.<sup>390</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.

**11.19** Each Contracting Party may<sup>391</sup> designate the competent authority to which requests under Article 33 should be addressed.<sup>392</sup> If any such designation is made, it must be communicated to the Permanent Bureau of the HCCH. This information will be made available on the HCCH website (< [www.hcch.net](http://www.hcch.net) >, under “Protection of Adults” then “Authorities”).

<sup>386</sup> The Explanatory Report, para. 138.

<sup>387</sup> See, *infra*, paras 11.43-11.46.

<sup>388</sup> The Explanatory Report, para. 139.

<sup>389</sup> See *Proceedings of the Special Commission with-of a diplomatic character* (1999), pp. 332-335.

<sup>390</sup> Art. 22(2)(e). See also, *supra*, **Chapter 10**.

<sup>391</sup> This designation is not obligatory but may facilitate efficient communications.

<sup>392</sup> Art. 42.

- (b) Sharing of information in situations where an adult is in serious danger and changes residence / presence

#### Article 34

- 11.20 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>393</sup>
- 11.21 This provision also applies to cases where the adult has become resident or is present in a non-Contracting Party.<sup>394</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 diplomatic / consular channels.
- 11.22 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>395</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 is in a coma in intensive care at a hospital in Contracting Party A, where they habitually reside. Medical staff quickly realise that the adult urgently needs to be transferred to a hospital in Contracting Party B, in order to receive specialised treatment. The hospital in Contracting Party A arranges for the urgent transfer of the adult to the hospital in Contracting Party B. The hospital in Contracting Party A seises the competent authorities in Contracting Party A, who must inform the competent authorities in Contracting Party B of the urgency of the situation and of the measures taken (*i.e.*, the medical transfer of the adult). Once the adult receives their urgent treatment and is deemed fit to travel, they will return to their habitual residence Contracting Party A.

- 11.23 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 of 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>396</sup>

#### F. Situations where co-operation / communication is encouraged

#### Articles 31, 32 and 38

<sup>393</sup> The Explanatory Report, para. 140.

<sup>394</sup> *Ibid.*

<sup>395</sup> *Ibid.*

<sup>396</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.

11.24 In addition to the obligations set out above, the 2000 Convention provides for specific instances where co-operation between competent authorities<sup>397</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 co-operation in other circumstances.<sup>398</sup>

(a) Encouraging the use of alternative dispute resolution

Article 31

11.25 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 bring 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 made between the guardian (or analogous representative) and other persons regarding the fate of the adult or their property, or between the adult and those responsible for them, in an endeavor to get the adult to accept a measure which seems beneficial.

(b) Requesting information relevant to the protection of the adult when contemplating taking a measure of protection

Article 32

11.26 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, which are the only ones that are able to take measures of protection under the Convention, and not associations or non-governmental organisations.<sup>399</sup>

11.27 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>400</sup>

11.28 The phrase “if the situation of the adult so requires”<sup>401</sup> serves as a precaution in order to avoid the dangers of uncontrolled 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.

11.29 Although the text of Article 32(1) does not say so explicitly, it is to be understood that the requested competent authority is not bound to furnish the requesting competent authority with the information requested. Rather, the requested competent 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

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<sup>397</sup> See, *infra*, para. 11.30.

<sup>398</sup> See the general duty to cooperate placed upon Central Authorities – Art. 29.

<sup>399</sup> The Explanatory Report, para. 134.

<sup>400</sup> *Ibid.*

<sup>401</sup> Art. 32(1).

information.<sup>402</sup> This being said, cooperation, insofar as possible, is encouraged in order to promote the protection of the adult concerned.

**11.30** 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 co-operation if the requested authority cannot conveniently identify the requesting authority and cannot assess its authority to send such a request. Such communication may be facilitated by the IHNJ.<sup>403</sup> ~~or by the Central Authorities. 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. In the event that the flexibility afforded by Article 32(1) does prove burdensome to the functioning of the co-operation envisaged by the Convention (e.g., the requested authority cannot conveniently identify the requesting authority in order to assess whether or not to transmit information),~~ 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>404</sup> This declaration should be made to the depositary of the Convention<sup>405</sup> which will notify Contracting Parties of the declaration.<sup>406</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”).

**11.31** 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>407</sup>

**11.32** 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>408</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 seize 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

<sup>402</sup> Art. 32(1). It could be that the domestic law of the requested State 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).

<sup>403</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 < [www.hcch.net](http://www.hcch.net) > under “Child Abduction” then “Judicial Communications”.

<sup>404</sup> The Explanatory Report, para. 136.

<sup>405</sup> Art. 43(2). The depositary of the Convention is the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

<sup>406</sup> Art. 59(d).

<sup>407</sup> The Explanatory Report, para. 137.

<sup>408</sup> See further, paras 11.37-11.38.



competent authority in Contracting Party A, with the assistance of the Central Authority, informs the competent authority in ~~would like the assistance of Contracting Party B of all the measures that are currently in place for the protection of the adult in Contracting Party A, along with the latest medical records of the adult, in order to make sure there is no gap in the protection of the adult. Based on the information given, the competent authority in Contracting Party B takes the appropriate measures of protection. The competent authorities of Contracting Party B co-operate with the competent authorities of Contracting Party A, in order to ensur~~inge the smooth relocation of the adult.

## G. Certificate stating the powers of a person with powers of representation

### Article 38

- 11.33 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>409</sup> Article 38 also covers powers of representation in the sense of Article 15, but only when confirmed by competent authorities ~~in the State of origin~~. Such a certificate is highly useful to practitioners as it provides security, whether the protection measure concerns the adult themselves or their property. In addition, a certificate having probative force in all Contracting Parties could reduce costs and disputes.<sup>410</sup>
- 11.34 The certificate mentions the capacity and the powers of the person(s) entrusted with the protection of the adult or their property, ~~without distinguishing~~ whether they have been designated through a measure of protection or by the adult themselves.<sup>411</sup>
- 11.35 If relevant, the certificate may also indicate what powers the designated representative(s) 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 the property that this adult possesses in another Contracting Party.<sup>412</sup>
- 11.36 It should be noted that the certificate may only be delivered by an competent authority designated by the Contracting Party<sup>413</sup> where a measure of protection has been taken or a power of representation confirmed.<sup>414</sup> Therefore, if the competent authorities of the habitual residence of the adult have not taken any measure of protection or confirmed any powers of representation, they certificate cannot be issued~~d the certificate~~.<sup>415</sup> It is important to note, however, that this certificate may be delivered by an competent authority other than the ~~one competent authority~~ which has taken the measure or confirmed the power of representation but that is within the same Contracting Party.

**Example 11.E** A competent authority in the State of habitual residence of the adult, Contracting Party A, confers powers of representation regarding the property of the adult to 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 sell assets belonging to the adult and to transfer ~~half of the savings of the adult proceeds~~ to a

<sup>409</sup> Art. 38(1).

<sup>410</sup> The Explanatory Report, para. 144.

<sup>411</sup> *Ibid.*

<sup>412</sup> *Ibid.*

<sup>413</sup> Art. 38(3).

<sup>414</sup> The Explanatory Report, para. 145.

<sup>415</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 with-of a diplomatic character* (1999), pp. 294-296.



bank located in Contracting Party A, in order to cover medical costs 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, the measure could be accompanied by a certificate issued under Article 38 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).

- 11.37 Although processes may differ from jurisdiction to jurisdiction, tThe concept of the confirmation of powers of representation must guarantee reliability. A confirmation could constitute a measure of protection within the meaning of Article 3, and in this case, it can only be made by a competent authority under the Convention. Some and be seen in the light of legal systems which may provide for this a specific confirmation procedure and place it in the hands of a particular competent authority. Such a confirmation could constitute a measure of protection within the meaning of Article 3, and for this reason, it can only be made by a competent authority under the Convention.

**Example 11.F** An adult habitually residing in Contracting Party A has granted powers of representation to be exercised in the event of their incapacity. Since granting 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 accordance with Article 15(2), the adult has designated the law of their nationality (Contracting Party C) as the applicable law. In this case, the competent authorities of Contracting Party B will apply the law of Contracting Party C to confirm the powers of representation. Once confirmed, it will be possible to obtain a certificate in accordance with Article 38 for these powers of representation.<sup>416</sup>

- 11.38 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>417</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

<sup>416</sup> ~~Since~~A confirmation of a power of representation could constitute a measure of protection within the meaning of Art. 3 and, in such a case, could only be given-made by a competent authority under the Convention. In this context, if the adult has submitted the conferred power to an other applicable law ~~other~~ than that which the competent authorities have jurisdiction under the Convention at the moment of confirmation, the representative risks being deprived of the possibility of having their powers confirmed, for instance, by the competent authority of the State whose law is applicable to the power of representation. Where possible, and in order to avoid such legal difficulties, the representative could seize a competent authority which has jurisdiction under the Convention and ~~the law of which is applicable to the powers of representation~~ invite the authority to apply the law of another State namely the law which has been chosen by the adult to govern the powers of representation or, if possible under Art. 8(2) to request the authority to transfer the jurisdiction to the State which law is applicable. See the Explanatory Report, para. 146; *Proceedings of the Special Commission with-of a diplomatic character* (1999), pp. 294-296.

<sup>417</sup> The Explanatory Report, para. 147.

new certificate will replace an older one.<sup>418</sup> It is, therefore, recommended to always use certificates that are as recent as possible.

#### H. Transmission of information under the Convention that could create a risk

##### Article 35

11.39 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>419</sup> In light of such danger, Article 35 forbids both the transmission of such a request (by the requesting competent authority) as well as the transmission of information (by the requested competent authority).<sup>420</sup>

#### I. Transmission of personal data and information

##### Articles 39 and 40

11.40 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>421</sup>

11.41 In any case, the requested competent 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 co-operation.

11.42 Further, competent authorities to which information is transmitted are to ensure its confidentiality in accordance with the domestic law of their State.<sup>422</sup> The obligation of confidentiality is also imposed on the authority transmitting the information.<sup>423</sup>

#### J. Central Authority and public authority costs

##### Article 36

11.43 Generally, Central Authorities and other public authorities are to bear their own costs in carrying out their tasks under the 2000 Convention.<sup>424</sup> In this context, the term “public authorities” refers to the administrative authorities of the Contracting Parties and not to the courts.<sup>425</sup> Therefore, court costs and, more generally, the costs of proceedings and lawyers’ fees are excluded from the scope of Article 36.

11.44 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;

<sup>418</sup> See *Proceedings of the Special Commission with-of a diplomatic character* (1999), p. 294. The Model Form of the certificate can be found at p. 25 of the Explanatory Report and on the HCCH website.

<sup>419</sup> Art. 35.

<sup>420</sup> The Explanatory Report, para. 135

<sup>421</sup> Art. 39.

<sup>422</sup> Art. 40.

<sup>423</sup> The Explanatory Report, para. 149.

<sup>424</sup> Art. 36(1).

<sup>425</sup> The Explanatory Report, para. 142.

- the costs of implementation of the measures taken in another State.<sup>426</sup>

11.45 It should be noted that the Central Authorities and other public competent authorities of Contracting Parties retain the “possibility of imposing reasonable charges for the provision of services”.<sup>427</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 the imposition of charges is seeking reimbursement for costs already incurred or requesting the provision of funds before the service is provided, the charges should be formulated “with a certain amount of moderation”.<sup>428</sup> In addition, competent authorities should provide clear information about such charges in advance.

11.46 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>429</sup>

## K. Legalisation

### Article 41

11.47 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>430</sup> This extends to all written information provided, all decisions of competent authorities as well as certificates delivered in accordance with Article 38.<sup>431</sup>

## L. Language requirements for communications

### Article 51

11.48 Article 51 addresses language issues which may arise in the drafting or translation of communications (including documents) between competent 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>432</sup>

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<sup>426</sup> *Ibid.*

<sup>427</sup> Art. 36(1).

<sup>428</sup> The Explanatory Report, para. 142.

<sup>429</sup> *Ibid.*

<sup>430</sup> Art. 41.

<sup>431</sup> The Explanatory Report, para. 150.

<sup>432</sup> Art. 51; *Ibid.*, para. 169.

## 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>433</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 now seems to be hardly applied. If that were not the case, the transition from one Convention to the other could give rise to difficulties.<sup>434</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 both 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>435</sup>

### 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>436</sup>

12.4 The 2000 Convention also applies to measures taken by competent authorities under the 1996 Convention for the protection of an impaired child, 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.

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<sup>433</sup> Convention du 17 Juillet 1905 concernant l'interdiction et les mesures de protection analogues (hereinafter, the « 1905 Convention »).

<sup>434</sup> The Explanatory Report, para. 159.

<sup>435</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).

<sup>436</sup> The Explanatory Report, para. 15.

12.5 As stated earlier on 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>437</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. The 2000 Convention furthers some important objectives of the UNCRDP. For example, the Convention supports the implementation of Article 12 on the right to equal recognition everywhere before the law.<sup>438</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>439</sup>

12.7 By establishing a system of Central Authorities, the 2000 Convention also gives effect to Article 32 on international co-operation and its promotion.<sup>440</sup>

### 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>441</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>442</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>443</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>444</sup>

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<sup>437</sup> See Chapter 3, paras 3.10 – 3.13.

<sup>438</sup> UNCRPD, Art. 12(1).

<sup>439</sup> UNCRPD, Art. 12(3).

<sup>440</sup> UNCRPD, Art. 32(1).

<sup>441</sup> Art. 49(1).

<sup>442</sup> Art. 49(2).

<sup>443</sup> Art. 49(3).

<sup>444</sup> The Explanatory Report, 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 only State B is party to a separate agreement with State C which contains provisions on matters that also 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 to 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>445</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>446</sup> This also applies to adults whose habitual residence cannot be established.<sup>447</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, under the 2000 Convention, to the operation of Articles 10 and 11.<sup>448</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 co-operate, if possible, in order to find out as much information as possible about the adult.<sup>449</sup> While such enquiries are ongoing, Contracting Party B may take the measures of protection it considers appropriate to ensure the ~~interim~~-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 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 (e.g., placement in a specialised institution). 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 State 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

<sup>445</sup> This provision intends to cover refugees at any time during the process of their refugee status.

<sup>446</sup> Art. 6(1).

<sup>447</sup> Art. 6(2).

<sup>448</sup> The Explanatory Report, para. 55.

<sup>449</sup> Arts. 29 and 32(1).



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>450</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 authorities of the State of habitual residence of the adult are ultimately responsible for 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.~~determine the most appropriate long-term 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, under Article 10 or 11, longer-term solutions for the adult. This would be the case~~it should be noted that~~ 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 relating to the adult for this person (e.g., the competent authority in the State of habitual residence is not reachable or cannot be identified), a longer-term solution will have to be designed by the Contracting Party on whose territory the adult is present. Until measures of protection are taken by the State of habitual residence of the adult, jurisdiction to protect ~~these~~ adults rests, on an urgent or provisional basis<sup>451</sup>, with the competent authorities of the Contracting Party where the adult is present. Additionally,

<sup>450</sup> Art. 12.

<sup>451</sup> i.e., under Art. 10 or 11 of the 2000 Convention.

depending on the situation, the competent authorities of the ~~Ce~~contracting Party where the adult is present may consider the possibility of requesting a transfer of general 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>452</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~~may establish a new habitual residence in the State where they are present.~~

13.7 The 2000 Convention also provides for co-operation between competent authorities of Contracting Parties in locating adults in need of protection.<sup>453</sup>

**Example 13.C** A 20-year-old suffering from 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~~determine what arrangements will be made for the long term care of the adult.~~

**Example 13.D** An adult suffering from 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 collect them. Before this occurs, the competent authorities of Contracting Parties A and B should closely co-operate in order to ensure that this is the safest and most appropriate option for the adult. 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~~depending on the circumstances of the case, it may be held that the adult should return only if the competent authorities in Contracting Party A take the necessary protective~~

<sup>452</sup> See, *supra*, Chapter 5.

<sup>453</sup> Art. 30.

~~measures in order to ensure that the adult will be safe upon their return.~~<sup>454</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>455</sup> and will be recognised<sup>456</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 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>457</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>458</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

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<sup>454</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 co-operation 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>455</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 primary jurisdiction take measures required by the situation (see Art. 10(2)).

<sup>456</sup> In accordance with Art. 22.

<sup>457</sup> The Explanatory Report, para. 12. See also, *supra*, Chapter 4.

<sup>458</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.” See also 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.

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>459</sup>

**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 of capacity to act (in accordance with Art. 38 of the Convention), it may be useful in this situation for the representative to obtain such a certificate.

### C. Representation of adults

- 13.13** The representation of an adult is often required due to a lack or insufficiency of their personal faculties, which may amount to a legal incapacity. 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>460</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>461</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.
- 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

<sup>459</sup> See, *supra*, paras. 3.36 – 3.37.

<sup>460</sup> Art. 8. See also, *supra*, Chapter 5.

<sup>461</sup> Art. 8(1).

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>462</sup> Article 16 allows the competent authorities that have jurisdiction under the Convention to terminate or modify<sup>463</sup> the powers of representation conferred 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>464</sup> The certificate provided under Article 38 is an important instrument for the free circulation of confirmed powers of representation.

## D. Connecting factors

### (a) Habitual residence

**13.18** Much like all the modern Hague Conventions dealing with private and family matters, habitual residence is the main connecting factor and basis of jurisdiction used in the 2000 Convention.<sup>465</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 Hague 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 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. 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>466</sup>

**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 with 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,

<sup>462</sup> See also, *supra*, **Chapter 9**. See also the Appendix to this Practical Handbook, where the subject of powers of representation is covered in much greater detail.

<sup>463</sup> The modification might, for example, consist of introducing surveillance of the person to whom powers of representation were conferred.

<sup>464</sup> The Explanatory Report, para. 108.

<sup>465</sup> Art. 5.

<sup>466</sup> Art. 45(a).

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 on the 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

**13.21** There are a number of occasions where the presence of an adult (or their property) is used as a connecting factor in the 2000 Convention.<sup>467</sup> The concept of “presence” denotes a physical presence in the territory or territorial unit<sup>468</sup> of the Contracting Party concerned. The concept does not require proof of residence 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 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>469</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. 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>470</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

<sup>467</sup> Arts 6, 9, 10, 11, discussed, *supra*, in **Chapters 4, 6 and 7**.

<sup>468</sup> Art. 45(b) and (c).

<sup>469</sup> See, *supra*, **Chapter 4** at paras 4.27 – 4.34.

<sup>470</sup> Art. 45(d).

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>471</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. In the latter example, if an authorisation is requested from the competent authorities of the habitual residence (and not those of the State of location of the property as would be permitted by Art. 9) to sell the said property of the adult situated abroad, it is preferable that the competent authority exercising jurisdiction should be able to apply or take into consideration the law of the State in which the property is located and grant the authorisation under this law, even if the law of the competent authority exercising jurisdiction requires no authorisation in such a case.<sup>472</sup>

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<sup>471</sup> Art. 45(f).

<sup>472</sup> The Explanatory Report, para 92.



## **ANNEXES**

## **Annex I**

**Implementation Checklist of the 2000 Convention  
(Prel. Doc. No 3 of September 2020 – to be inserted later)**

## Annex II

**Text of the 2000 Convention  
(to be inserted later)**

