

OUTLINE

HAGUE PROTECTION OF ADULTS CONVENTION



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

Introduction

The aging of the world's population, combined with greater international mobility, has created the need for improved international protection for vulnerable adults by means of legal regulation and international co-operation. The increased lifespan in many countries is accompanied by a corresponding increase in the incidence of illnesses linked to old age. As international travel becomes easier, many people reaching the age of retirement decide to spend the last part of their lives abroad.

Private international law issues concerning, for example, the management or sale of goods belonging to persons suffering from an impairment in their personal faculties are arising with ever greater frequency. Where adults themselves have organised in advance their protection for the time when they will not be in a position to look after their own interests, such as appointing a representative, it is important that such arrangements will be respected abroad. Questions arise such as which law applies and who may represent the adult, and with what powers. In these circumstances, it is important to have clear rules concerning the authorities which are competent to take any necessary measures to protect the person or property of the adult.

The *Hague Convention of 13 January 2000 on the International Protection of Adults* addresses many of these issues by providing rules on jurisdiction, applicable law and international recognition and enforcement of protective measures. The Convention also establishes a mechanism for co-operation between the authorities of Contracting States. The Convention furthers some important objectives of the United Nations *Convention of 13 December 2006 on the Rights of Persons with Disabilities* (New York), which entered into force on 3 May 2008, in particular those of Article 12 on equal recognition before the law, Article 18 on liberty of movement and nationality, and Article 32 on international co-operation.

The 2000 Protection of Adults Convention

The Convention is similar in its structure to 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* but has been adapted to meet the specific needs of vulnerable adults.

The Convention applies to “the protection in international situations of adults who, by reason of an impairment or insufficiency of their personal faculties, are not in a position to protect their interests.”¹ An adult is defined as a person who has reached the age of 18 years; however, the Convention also applies to measures of protection taken in respect of an adult who had not reached the age of 18 years at the time the measures were taken.² Article 3 details the types of measures of protection contemplated by the Convention, but it does not purport to be exhaustive. The measures include, for example, the institution of a protective regime for the adult, the designation and functions of a person representing the adult or having charge of the adult’s property, and the administration of the adult’s property.

The Convention provides uniform rules determining which country’s authorities are competent to take the necessary measures of protection. The Convention attributes jurisdiction primarily to the authorities of the adult’s habitual residence³ but also recognised are the concurrent, albeit subsidiary, jurisdiction of the authorities of the State of which the adult is a national.⁴ Also accepted are the jurisdiction of the authorities of the State where property of the adult is situated to take measures of protection concerning that property⁵ and the jurisdiction of the State in whose territory the adult⁶ or property belonging to the adult⁷ are present to take emergency measures⁸ or temporary measures with limited territorial effect for the protection of the person.⁹ Further flexibility is provided by allowing the authorities with primary jurisdiction to request the authorities in certain other States to take measures of protection where this is in the interests of the adult.¹⁰

Generally, in exercising jurisdiction under the Convention authorities in Contracting States shall apply their own law.¹¹ An exception to the general rule on applicable law relates to powers of representation. Where an adult has made advance arrangements for his or her care and / or representation in the event of incapacity, the question of the validity of these arrangements in the new country of residence has to be resolved. Under the Convention, the adult may designate the law to be applied to the existence, extent, modification and extinction of the powers exercised by a person representing the adult.¹² The adult may choose to designate the laws of: a) a State of which the adult is a national; b) the State of former habitual residence; or, c) a State where there adult’s property is located.¹³ In this way, the Convention ensures that a “power of attorney”, “*mandat de protection future*” or similar institution has force of law in another Contracting State, even where that State does not have an analogous institution in its domestic law. This provides the adult with the assurance that arrangements previously made for the management of his or her affairs will be respected in other Contracting States.

¹ Art. 1.

² Art. 2.

³ Art. 5.

⁴ See Art. 7 and P. Lagarde, “Explanatory Report on the 2000 Hague Protection of Adults Convention”, in *Proceedings of the Special Commission with a diplomatic character (1999), Protection of Adults*, The Hague, SDU, 2003, pp. 391-451 (revised edition published in 2017) [hereinafter, “Explanatory Report”].

⁵ Art. 9 and Explanatory Report.

⁶ Arts. 10 and 11 and Explanatory Report.

⁷ Art. 10 and Explanatory Report.

⁸ *Ibid.*

⁹ Art. 11 and Explanatory Report.

¹⁰ Art. 8.

¹¹ Art. 13.

¹² Art. 15.

¹³ *Ibid.*

Under the Convention, measures of protection directed toward the person or property of an adult that are taken in one Contracting State will be recognised by operation of law in all other Contracting States. It is important to note that the act of a competent authority which confirms a power of representation can constitute a measure of protection within the meaning of the Convention.¹⁴ As a result, such confirmation is subject to the rules on recognition as a measure of protection. There are only limited grounds on which recognition may be refused.¹⁵ The Convention also provides for the enforcement of measures of protection.

As with several other recent Hague Conventions, the *2000 Protection of Adults Convention* contains provisions concerning co-operation between States designed to enhance the protection of incapacitated adults. The system of co-operation, which is flexible and enables use of existing channels encompasses, among other things, information exchange, the facilitation of agreed solutions in contested cases, and the location of missing adults. Contracting States must designate a Central Authority to discharge the duties which are imposed by the Convention,¹⁶ which primarily relate to facilitating effective communication between Contracting States and mutual assistance.

Examples of the potential application of the Convention

The following scenarios are examples of how the Convention might be applied to situations that require the protection of an adult's interests.

1. A Scotsman has been living in Argentina since his retirement 10 years ago. He owns property in Scotland and Argentina. He now suffers from age-related dementia and is not capable of managing his affairs. The property needs to be sold to provide funds for the care of the man living in Argentina. He has a son living in Scotland. Some years ago, the man granted his son extensive powers of attorney to be exercised in the event of any incapacitating illness certified by a Scottish medical practitioner. If the Convention were in force between the countries, the powers of attorney would have force of law in Argentina and the son could act on the man's behalf to make the necessary arrangements to manage his father's affairs. The powers of representation would be exercised in accordance with the law in Argentina.

2. A man with Japanese nationality dies in Japan. He is survived by a 40 year old daughter who is living in Canada, and who has both Canadian and Japanese nationality. She suffers from schizophrenia and has been placed under a protective regime in Canada. If the Convention were in force in between the countries, the jurisdiction lies with the Canadian courts to make decisions related to the protection of her interests, as she is habitually resident in Canada. The Convention would ensure that the powers of her guardian in Canada would also be recognised in Japan and other Convention States. The guardian in Canada would be issued with a certificate¹⁷¹⁶ outlining his or her powers of representation and would be able to act in Japan on the daughter's behalf in relation to the succession of her father's estate.

The text (including translations) and status of the Convention, and the Explanatory Report prepared by Paul Lagarde are available on the website of the Hague Conference < www.hcch.net > under "Protection of Adults".

¹⁴ Explanatory Report.

¹⁵ Art. 22.

¹⁶ Art. 28.

¹⁷ Article 38 provides that the authorities of the Contracting State where a measure of protection has been taken or a power of representation confirmed may issue a certificate indicating the capacity in which that person is entitled to act and the powers conferred to the person entrusted with protection of the adult's person or property. A model certificate has been adopted for this purpose, and is available on the HCCH website < www.hcch.net > under "Protection of Adults" and "Miscellaneous".