

2000 Hague Convention on the International Protection of Adults

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MY FUTURE – MY MOTHER



MY FUTURE – MY MOTHER (cont.)

- My mother habitually resides in **Canada**
- My mother has assets in **Canada**
- My mother has assets in **France**
- My son and I live in the **Netherlands**
- I have assets in the **Netherlands**
- I have assets in **Canada**
- My son wants to study in the **UK**

We live in a global world!

SOME CROSS-BORDER STATISTICS

- 3% of the world's population lives in another State than their State of origin (*i.e.*, 240 million persons)
- In 2016, 10% of the persons living in the EU were born in another State than the State where they were living (*i.e.*, 50 million persons)
- In 2015, marriages involving at least one foreigner accounted for 10.5 % of all marriages in the EU

These statistics, combined with, *e.g.*, the dementia statistics we know, call for the cross-border support of vulnerable persons.

CROSS-BORDER SUPPORT - EXAMPLE

Contracting State A

X habitually resides in State A where she has all her assets.



X moves from State A to State B



Contracting State B

X spends her winters in State B where her daughter Y and family habitually reside and where the climate is warmer.

Assets in State X will need to be sold in order to pay for the special 24/7 support in State B. Daughter Y will exercise the Power of Representation.

Power of representation

While in State B, X's dementia reaches a point where she needs special 24/7 support. She will remain in State B.



Power of representation



THE 2000 HCCH CONVENTION

“The 2000 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”. (Art. 1)

THE 2000 HCCH CONVENTION IN SHORT

- *2000 Convention* **gives effect to Article 12** of 2006 UNCRPD – “Equal recognition before the law”
- *2000 Convention* and 2006 UNCRPD are **complimentary**
- *2000 Convention* **supports** vulnerable adults in exercising their **legal capacity** across borders
- *2000 Convention* affirms that the **respect** for the adult **dignity** and **autonomy** are to be **primary considerations**
- *2000 Convention* affirms the **respect** for the **rights, will** and **preferences** of vulnerable adults

POLICY CONSIDERATIONS UNDERLYING THE 2000 HCCH CONVENTION

Once in a state of **incapacity** the adult will need:

- Measures to be taken and / or enforced **rapidly** and **effectively**
- Legal **certainty** and **predictability**

N.B. In the case of a legal dispute, the incapacitated adult **may not be in a position to explain** his / her legal choices or to argue before the courts

- ⇒ Choice of jurisdiction should not result in a **conflict of jurisdictions**
(*this would delay the ordering of measures to support / care for the incapacitated adult*)
- ⇒ Applicable law should have **real** and **substantive** connection
(*the applicable laws available under the 2000 Convention are presumed to be known to the adult. As a result, they should not be contested by third parties*)

FAMILY CONFLICT



THE 2000 HCCH CONVENTION A PRIVATE INTERNATIONAL LAW INSTRUMENT

- **Avoids conflicts** between legal systems of the Contracting Parties by providing:
 - **jurisdiction** rules – only one competent authority can have jurisdiction at a time on a specific subject matter
 - **applicable law** rules – applicable law will have a real and substantial connection to the incapacitated adult and / or his / her property (*i.e.*, limited possibilities to contest by 1/3 parties)
 - **powers of representation** granted in one Contracting Party will be given effect in another
 - **recognition & enforcement** rules - measures taken in one Contracting Party will be recognised and enforced in another
 - enhance **co-operation** between Contracting Parties
- Provides for **party autonomy** in relation to jurisdiction and applicable laws with a real and substantial connection (*i.e.*, presumed to be known to the adult)

SCOPE – BROAD RANGE OF PROTECTION MEASURES, BUT NOT LIMITED TO...

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

EVERYTHING... FLEXIBILITY...

- 2000 Convention **builds bridges** between different legal systems
- 2000 Convention **allows every State to come on board** now and **review** their legislation **later** to conform to 2006 UNCRDP (Art. 12).
- "Persons [...] **representing** or **assisting** the adult" (Art. 3(e)) or "**powers of representation**" (Art. 15) are clearly "**supported decision-making**" mechanisms.
- "**Guardianship, curatorship** and analogous institutions" (Art. 3(c)) can be "**supported decision-making**" mechanisms under the law of a number of States.
- If a measure is **unknown** or **not in conformity** with another State law it **can be adapted** in accordance with applicable law (**Arts 13 and 14**) to provide similar effects.

JURISDICTION RULES

- **Main jurisdiction => habitual residence (Art. 5)**
- **Subsidiary jurisdiction => refugee (presence (Art. 6)), nationality (Art. 7)**
- **Limited jurisdiction => urgent (Art. 10) and provisional (Art. 11) measures of protection (presence)**
- **Party autonomy & Transfer of jurisdiction (Art. 8)**

OTHER JURISDICTIONS FOR THE PURPOSE OF TRANSFER

Other *fora* for the purpose of transfer of jurisdiction (Art. 8):

- A State of which the adult is a **national** (Art. 8(2)(a))
- The State of the **preceding habitual residence** of the adult (Art. 8(2)(b))
- A State in which **property** of the adult is **located** (Art. 8(2)(c))
- The State whose authorities have been **chosen in writing** by the adult to take measures directed to his or her protection (Art. 8(2)(d))
- The State of the **habitual residence of a person close** to the adult prepared to undertake his or her protection (Art. 8(2)(e))
- The State in whose territory the adult is **present**, with regard to the protection of the person of the adult (Art. 8(2)(f))

APPLICABLE LAW RULES

Law applicable to measures of protection

- Authorities apply **own law** in exercising jurisdiction (**Art. 13(1)**)
- Exceptionally, the **law of another State** with a substantial connection to the case may be applied or considered (**Art. 13(2)**)

Conditions of application of the measure

- The **implementation** of a measure taken by one Contracting State but implemented in another is governed by the **law of that other State** (**Art. 14**)

POWERS OF REPRESENTATION & APPLICABLE LAW

Like a **contract** "**powers of representation**" are given effect through the **applicable law**

The law applicable to powers of representation (e.g., *mandat de protection future*, *mandat d'incapacité*, *Vorsorgevollmacht*) **granted by an adult**, either under an **agreement** or by a **unilateral act**, to be exercised **when such adult is not in a position to protect his or her interests**, is governed by the 2000 Convention (Art. 15(1))

POWERS OF REPRESENTATION & APPLICABLE LAW

The **existence, extent, modification** and **extinction** of powers of representation are governed by the:

- law of the State of the adult's **habitual residence** at the time of the agreement or act (Art. 15(1)), or
- by the **following laws** the following States if **designated expressly in writing (party autonomy)**:
 - A State of which the adult is a **national** (Art. 15(2)(a))
 - The State of a **former habitual residence** of the adult (Art. 15(2)(b))
 - A State in which **property** of the adult is **located**, with respect to that property (Art. 15(2)(c))

Powers of representation can be **withdrawn** or **modified**, under certain **conditions**, taking into consideration to the extent possible the law referred to in Article 15 (Art. 16)

GIVING EFFECT TO POWERS OF REPRESENTATION

- The authorities of the Contracting State where a measure of protection has been taken or a **power of representation confirmed** may **deliver** to the person entrusted with protection of the adult's person or property, on request, a **certificate** indicating the **capacity** in which that person is **entitled to act** and the **powers conferred** (Art. 38(1))
- 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 (Art. 38(1))
- Each Contracting State shall **designate** the **authorities competent** to draw up the certificate (Art. 38(1))

RULES ON RECOGNITION & ENFORCEMENT OF MEASURES

Measures taken in another Contracting State are to be **recognised by operation of law** (Art. 22(1))

An interested party may request a **declaration of enforceability** for a measure taken in another Contracting State (Art. 25(1))

Recognition (Art. 22(2)) or **enforcement** (25(3)) of a measure **may** be refused, if:

- The Convention grounds for jurisdiction were not complied with (Art. 22(2)(a))
- The adult was not provided the opportunity to be heard (Art. 22(2)(b))
- This would conflict with public policy or mandatory law (Art. 22(2)(c))
- The measure is incompatible with a later measure taken in a non-Contracting State which would have had jurisdiction (Art. 22(2)(d))
- A decision to place an adult in an establishment (where protection can be provided) in another Contracting State has not been made in consultation with that State (Art. 22(2)(e))

CENTRAL AUTHORITY COOPERATION FRAMEWORK

Contracting States each designate a **Central Authority** (Art. 28).

Functions of the Central Authorities

- **Co-operate** with each other (Art. 29(1))
- **Share information** on the national laws and services available in their State for the protection of adults (Art. 29(2))
- **Facilitate communication** amongst competent authorities (Art. 30)
- Discover the **whereabouts** of an adult (Art. 30)
- Encourage **mediation** to achieve agreed solutions (Art. 31)
- Assistance with the **cross-border placement** of an adult (Art. 33)

WHERE DO WE STAND?

Ratifications (EIF)	Signatures
Austria (2014)	Belgium (2017)
Cyprus (2018)	Greece (2008)
Czech Republic (2012)	Ireland (2008)
Estonia (2011)	Italy (2008)
Finland (2011)	Luxembourg (2008)
France (2009)	Netherlands (2000)
Germany (2009)	Poland (2008)
Latvia (2018)	
Monaco (2016)	
Portugal (2018)	
Switzerland (2009)	
UK – Scotland (2009)	



POSSIBLE WAYS FORWARD – C&Rs EC-HCCH December 2018 Joint Conference

Promoting the ratification of the 2000 Adults Convention

EC-HCCH JC C&R No 1. “States that are **not yet Contracting Parties** to the 2000 HCCH Adults Convention are invited to **assess** the possibility and benefits of **joining** the Convention.”

EC-HCCH JC C&R No 3. “**United Nations** institutions concerned with the 2006 UNCRPD, the **Council of Europe**, the **European Union**, as well as the **HCCH** are invited to **co-operate**, along with interested **non-governmental organisations** and **practitioners**, with a view to raising **awareness** of, and **promote**, the 2000 HCCH Adults Convention and their **respective work** to support the **implementation** and **operation** of that Convention.”

POSSIBLE WAYS FORWARD – C&Rs EC-HCCH December 2018 Joint Conference

First meeting of a Special Commission

EC-HCCH JC C&R No 16. "Support was expressed for the Permanent Bureau's (i.e., the Secretariat of the HCCH) plan to seek the approval of its governing body, the Council on General Affairs and Policy, to start planning and organising a **first meeting of a Special Commission** to review the practical operation of the 2000 HCCH Adults Convention, for example by developing a questionnaire addressed to both Contracting Parties and non-Contracting Parties."

CGAP C&R No 34. "Council mandated the Permanent Bureau to prepare for a **first meeting of the Special Commission** to review the practical operation of the 2000 Adults Convention in the **first half of 2022**. A short **questionnaire** to help **identify the topics to be discussed** at the meeting will be circulated by September 2019. The Permanent Bureau will report to Council at its 2020 meeting. The Permanent Bureau is invited to explore possible side-events to support implementation of the 2000 Adults Convention."

POSSIBLE WAYS FORWARD – C&Rs EC-HCCH December 2018 Joint Conference

Development of a Country Profile

EC-HCCH JC C&R No 9. "The cross-border **transportability of measures** under the 2000 HCCH Adults Convention would be improved by the development of a **public Country Profile** for each Contracting Party providing, for example, information on the **nature, substantive and formal requirements** of such measures as well as their **conditions for coming into effect**."

EC-HCCH JC C&R No 10. "The development of a public Country Profile under the 2000 HCCH Adults Convention would also contribute to the building of **mutual trust and confidence** between actors, including competent authorities from different Contracting Parties."

POSSIBLE WAYS FORWARD – C&Rs EC-HCCH December 2018 Joint Conference

Transportability of measures

EC-HCCH JC C&R No 11. “The cross-border **transportability** of measures and confirmed powers of representation under the 2000 HCCH Adults Convention can be facilitated by using the **recommended Certificate** under **Article 38** indicating the capacity in which the person entrusted by the vulnerable adult is entitled to act and the powers conferred.”

EC-HCCH JC C&R No 12. “The cross-border transportability of powers of representation could be enhanced, for example, by the development and use of **model forms** (or **model provisions**), **model certificates of powers of representation** and access to electronic **registries** to verify their **authenticity** and **integrity** as provided by competent authorities.”

EC-HCCH JC C&R No 13. “It was further noted that electronic registry systems have been developed with a view to **assisting third parties**, such as financial, insurance and medical institutions, with the verification of the **authenticity** and **integrity** of powers of representation as well as, in certain cases, their **coming into effect**.”

POSSIBLE WAYS FORWARD – C&Rs EC-HCCH December 2018 Joint Conference

Possible future normative work – **Not now - Later**

EC-HCCH JC C&R No 15. “The possibility to develop complementary legal norms, for example in relation to party autonomy, **was discussed** with the understanding that it should bring real added value and should support the operation of the 2000 HCCH Adults Convention.”

EC-HCCH JC C&R No 6. “[...] some Contracting Parties also mentioned that **further practical improvements**, in particular in relation to the **enforceability of measures**, would be welcome (e.g., guides to good practice, model forms and direct judicial communications).”

⇒ Very **clear needs** identified + don't **undermine** operation of 2000 HCCH Adults Convention (e.g., creating a conflict or making more difficult to operate).

⇒ **EU normative work not until all EU Member States are Parties to the 2000 HCCH Adults Convention.**

POSSIBLE WAYS FORWARD FOR THE EUROPEAN LAW INSTITUTE

Complementary work to assist with the implementation of the 2000 HCCH Convention in the domestic laws of States across Europe:

- ⇒ Model laws / rules to provide for Powers of Representation under domestic law
- ⇒ Model laws / rules to give effect / confirm / certify Powers of Representation under domestic law
- ⇒ Development of online national Powers of Representation Registries
n.b. This work could be based on the work of the Council of Europe
- ⇒ Model enforcement laws / rules
- ⇒ Model forms (or model provisions), model certificates of powers of representation

Better domestic law making in Europe for the protection of incapacitated adults would be of immediate practical utility to all European citizens

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