

Christa Jessel-Holst, PhD, PhD honoris causa (Sofia),
Affiliate, Max Planck Institute for Comparative and
International Private Law, Hamburg, Germany

HAGUE CONVENTION ON THE INTERNATIONAL PROTECTION OF ADULTS OF 13 JANUARY 2000 - THE GERMAN PERSPECTIVE

1. Introduction

The topic of “legal protection of adults” raises numerous issues, not only on the national level, but also in an international context. The focus here may be either on adults as such, or on disabled persons including the growing number of adults with some kind of handicap. For identifying proper remedies it is important and helpful to determine and implement basic international standards of protection. In recent years, several initiatives have been taken to this purpose. Thus, the United Nations have in 2006 adopted a Convention on the Rights of Persons with Disabilities which (as of February 2016) has entered into force for 161 states as well as for the European Union. The EU Charter of Fundamental Rights¹ addresses the integration of persons with disabilities in Art. 26. The European Disability Strategy 2010-2020² highlights certain priority areas in which actions shall be taken. The Council of Europe, within the framework of its “Action Plan to promote the rights and full participation of people with disabilities in society: improving the quality of life of people with disabilities in Europe 2006-2015” has on 9 December 2009 adopted Recommendation CM/Rec(2009)11 of the Committee of Ministers to the member states on principles concerning continuing powers of attorney and advance directives for incapacity.

The present contribution approaches the topic of adults’ protection from the point of view of private international law. Many national codifications in this field of law (instruments on level of the EU don’t exist insofar) contain provisions on the applicable law for legal incapacitation; practically all such acts determine the law applicable to guardianship. For example, the former Yugoslav Act Concerning the Resolution of Conflicts of Laws with the Provisions of Other Countries in Certain Matters of 1982 (ZRSZ) which has been taken over in Bosnia and Herzegovina submits the deprivation of capacity to act (*lišenje ili ograničenje sposobnosti fizičke osobe*, art. 14(3)) as well as guardianship (art. 15) to the *lex nationalis*. A complex regime of international jurisdiction in

¹ Official Journal 2012 No C 326, p. 391.

² European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe;
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0636:FIN:en:PDF>

matters of guardianship is established in articles 75 et sequ. ZRSZ, the main principle being exclusive jurisdiction of the domestic courts in matters concerning own nationals, independently of their domicile. However, authorities of Bosnia and Herzegovina won't interfere in case their nationals are already sufficiently protected by measures taken by the authorities at their domicile (art. 76 ZRSZ). Conversely, a Bosnian authority shall take measures for the protection of foreigners domiciled in Bosnia and Herzegovina only if protection has not been secured by the home-country authorities. Apart from that, Bosnian authorities will only take the necessary provisional measures for the protection of foreigners who are, or have property in Bosnia and Herzegovina (art. 77 ZRSZ).

However, national provisions such as these do not constitute optimal protection in cross-border cases. As regards the international jurisdiction for protective measures and the aspect of applicable law, there is an increasing awareness that the concept of habitual residence leads to better solutions in comparison to the nationality principle. In case a protective measure has been taken in one country, it is important to make sure that the measure is recognized and implemented abroad without undue delay or effort. The latter goal may best be secured through bilateral or multilateral agreements. Satisfactory adult protection requires in addition a close cooperation of the authorities in the countries concerned.

In order to provide for comprehensive and effective protection in cross-border situations, the Hague Conference on Private International Law has on 13 January 2000 adopted the Convention on the international protection of adults³. This convention had entered into force on 1 January 2009 for Germany, France and Scotland.⁴ Other contracting states are: Estonia, Finland, Austria, Switzerland and Czech Republic. The convention shall enter into force in Monaco on 1 July 2016. Seven more states (Cyprus, Greece, Ireland, Italy, Luxembourg, Netherlands and Poland) have at least signed the convention. It is true that today's status table lists mainly EU member states, and in addition only Switzerland and Monaco (both countries closely connected with the EU), but the convention is intended to attract signatories from anywhere in the world.

³ See also Lagarde, P, *Explanatory Report/Rapport explicative de la convention sur la protection internationale des adultes* (The Hague 2000); R. Frimston/A. Ruck Keene/C. van Overdijk/A. Ward (eds.), *The international protection of adults* (Oxford 2015); A. Ruck Keene/J. Anderson, *The 2000 Hague Convention on the international protection of adults five years on*, in: *International Family Law* (June 2014), p. 91; K. Siehr, *Das Haager Übereinkommen über den internationalen Schutz Erwachsener*, in: *Rabels Zeitschrift für ausländisches und internationales Privatrecht* (2000), p. 715; Ludwig, I, *Der Erwachsenenschutz im Internationalen Privatrecht nach Inkrafttreten des Haager Erwachsenenschutzübereinkommens*, in: *Deutsche Notar-Zeitschrift* (2009), p. 251; *Staudinger(von Hein)*, *Kommentar zum Bürgerlichen Gesetzbuch, EGBGB/IPR*, Art. 19-24 EGBGB; *ErwSÜ* (Berlin 2014); *Münchener Kommentar zum Bürgerlichen Gesetzbuch(-Lipp)*, Vol. 10, *Internationales Privatrecht* (6th ed. Munich 2015), *ErwSÜ*.

⁴ The United Kingdom has declared that the Convention shall extend to Scotland only.

Bosnia and Herzegovina so far is not among the signatories. In fact, Bosnia and Herzegovina today is bound by only nine Hague Conventions, only one of which has been ratified after 1991⁵. With this result, Bosnia and Herzegovina by the way finds itself on the last rank in comparison to other Yugoslav successor states.⁶

Neither has Bosnia and Herzegovina so far signed the counterpart to the Hague Adult Protection Convention, namely: the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children. The latter is in currently in force in no less than 43 States, including from the region: Albania, Croatia, Montenegro and Slovenia, and shall enter into force in Serbia on 1 November 2016.

The excellent results of the 1996 Hague Child Protection Convention should be beyond doubt. The Hague Adult Protection Convention may as yet have a lower number of contracting states but this might change; it certainly also has great advantages. It is therefore commendable for non-contracting states to take a closer look at these conventions.

In this paper, only adult protection will be discussed. The author shall first provide a short overview of the 2000 Hague Convention. After that, some effects of the convention with regard to Germany as a member state from the very beginnings shall be demonstrated. Germany has in 1990 carried out a fundamental reform⁷ of the law on legal protection of adults, by which legal incapacitation has been abolished and replaced by a two-tier system consisting of precautionary power of attorney ("*Vorsorgevollmacht*") and legal custodianship ("*rechtliche Betreuung*"). Before this background, in a second step effects of the convention for German adults who find themselves in need of protection in a cross-border situation shall be addressed (see *infra* IV).

2. Scope of the Adult Protection Convention

The declared goal of the convention is 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" (see Preamble).

To this purpose, the convention contains rules on international jurisdiction, applicable law, international recognition and enforcement of

⁵ Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance.

⁶ Apart from Kosovo which so far has not received the member status of the Hague Conference but, as a Connected State, has on 6 November 2015 signed the Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents, with entry into force on 14 July 2016.

⁷ Betreuungsgesetz of 12.9.1990, BGBl. 1990 I p. 2002.

protective measures as well as on co-operation between authorities of the contracting states.

Protective measures within the meaning of the convention may in particular be the following (art. 3):⁸

- a) the determination of incapacity and the institution of a protective regime;
- b) the placing of the adult under protection;
- c) guardianship, curatorship etc.;
- d) the designation and functions of any person/body having charge of the adult's person or property, representing or assisting the adult;
- e) the placement of the adult in an establishment or other place;
- f) the administration, conservation or disposal of the adult's property;
- g) the authorization of a specific intervention for the protection of the person or property of the adult

Certain matters enumerated in art. 4 are excluded expressly from the scope of the convention, such as maintenance obligations, marriage, matrimonial property, succession etc.

3. Basic characteristics of the Convention

As has already been mentioned, the convention consists of five main parts.

3. 1. International Jurisdiction

Articles 5-12 regulate jurisdiction for measures directed to the protection of the adult's person or property. On principle, it is the judicial or administrative authorities at the *habitual residence* of the adult who may take measures for the protection of the adult's person or property (art. 5). This is the main jurisdiction.

Concurrent jurisdictions are provided for in articles 7 and 9. The first is in favor of the home-country authorities of the adult, who are entitled to take protective measures if they consider that they are in a better position to assess the interests of the adult. However, they may do so only after advising the authorities at the adult's habitual residence.

⁸ Unless marked otherwise expressly, reference to legal provisions in this paper is to provisions of the 2000 Hague Convention.

The second concurrent jurisdiction empowers the authorities of the state where property of the adult is located to take protective measures concerning that property. They may do so only to the extent that such measures are compatible with those taken by the authorities at the adult's habitual residence.

Apart from that, jurisdiction may in the individual case be based on the request of the authorities at the habitual residence of the adult to the authorities of another contracting state (for details see art. 8). Immediate responsibility is provided for in art. 10. Last not least, art. 11 regulates jurisdiction for temporary measures.

3.2. The law applicable to protective measures

Art. 13 (1) makes direct reference to the *lex fori* by stating that “the authorities of the Contracting States shall apply their own law”. Art. 19 expressly excludes renvoi.

Again, certain exceptions are made. Thus, the competent authorities may “exceptionally apply or take into consideration the law of another State with which the situation has a substantial connection” (art. 13 (2)). Conditions of implementation are governed by the law of the state where the respective measure is implemented (art. 14). The exception provided for in art. 15 shall be discussed in the following paragraph. Art. 17 relates to the validity of transactions and third parties' protection.

The provisions of articles 13 et sequ. on the applicable law apply even if they refer to the law of a non-contracting state (art. 18).

3. 3. The law applicable to representation of adults

Within chapter III of the convention which deals with the applicable law, articles 15-16 contain special rules on powers of representation granted by an adult, “to be exercised when such adult is not in a position to protect his or her interests”. In this context, the convention emphasizes a new element, namely: party autonomy.

The power of representation granted by an adult (that is: existence, extent, modification and extinction) is on principle governed by the law of the state at the adult's habitual residence, more precisely: the habitual residence of the adult at the time the agreement or act is made. As in the case of articles 13 et sequ., renvoi is excluded (art. 19).

However, art. 15 not simply determines the applicable law but leaves to the adult the right to choose the applicable law himself. The choice must be made expressly and in writing and is limited to three possibilities:

- a) choice of the law of a state of which the adult is a national; of the
- b) law of the state of a former habitual residence of the adult, or of the
- c) law of a state in which property is located, with respect to that property.

As regards alternative c), several legal orders may be chosen in parallel, for property located in several states.⁹

An exception is made as regards the “manner of exercise” of the powers of representation: this issue is governed by the law of the state in which they are exercised (art. 15 (3)).

In case the person or property of the adult is not sufficiently protected, the powers of representation may be withdrawn or modified (for details see art. 16).

As mentioned previously, the applicable law may also be one of a non-contracting state (art. 18). Bosnia and Herzegovina belongs to those countries which have a large diaspora abroad. Thus, as of 31 December 2014, 163.519 persons domiciled in Germany had a passport from Bosnia and Herzegovina.¹⁰ It is therefore conceivable that in individual cases, the convention will lead to the applicability of the law of Bosnia and Herzegovina by the German authorities (or by the authorities of other contracting states). For example, a Bosnian national with habitual residence in Germany may in accordance with art. 15 (2) lit. a) for his legal representation choose the *lex patriae*. Bosnian law may also be designated by a former Bosnian national who has been nationalized in Germany, as the law of his previous habitual residence (art. 15 (2) lit. b)) or as the *lex rei sitae* of property located in Bosnia and Herzegovina. In such situations, the choice of law will be binding for the German authorities and in other contracting states.

3. 4. Recognition and enforcement of foreign decisions

Measures taken in one contracting state shall be recognized automatically in all other contracting states (art. 22 (1)). However, recognition may be refused in the situations enumerated in para. (2) of art. 22. For declaration of enforceability or registration of a measure in other contracting states see art. 25.

⁹ See Lagarde (*supra* N. 4), Report No. 103.

¹⁰ <https://www.destatis.de/DE/ZahlenFakten/GesellschaftStaat/Bevoelkerung/MigrationIntegration/AuslaendischeBevolkerung/Tabellen/Geschlecht.html>

3. 5. Co-operation between the authorities of the contracting states

Details of cooperation are regulated in articles 28-37. Primary considerations are interests of the adult and respect for his or her dignity and autonomy (See Preamble).

4. The German perspective

4. 1. Implementation of the Hague Adult Protection Convention

A German implementing act for the Convention has been adopted in the year of 2007.¹¹ The Bundesamt für Justiz in Bonn has been appointed as Central Authority within the meaning of art. 28. At this point it suffices to point out that only a limited number of German courts may act as adult guardian courts, since sections 6 and 7 of the Implementing Act provide for a concentration of jurisdiction.

4. 2. Application of the Hague Adult Protection Convention in the light of the

German reform of the Civil Code of 1990

a) Elimination of “Entmündigung” (legal incapacitation) in Germany

After the fundamental reform of the law concerning the legal protection of adults, the Civil Code (BGB)¹² no longer provides for legal incapacitation of adults. Similar reforms have e.g. been conducted in Austria (1984) and in Switzerland (2013) which also replaced legal incapacitation by more flexible instruments that are tailored to the needs of the individual adult.

At the same time, art. 8 of the Introductory Act to the Civil Code (EGBGB) concerning the law applicable to legal incapacitation was repealed. It deserves mentioning that the Hague Deprivation of Civil Rights Convention of 1905, which has later on been replaced by the 2000 Adult Protection Convention (see art. 48), has been renounced by Germany in 1992. The former art. 8 EGBGB provided for incapacitation of foreign nationals resident in Germany in accordance with the German substantive law. As a result of all these reforms, since 1 January 1992, whatever the nationality, no adult may be declared legally incapable by a German court.

¹¹ Erwachsenenschutzübereinkommens-Ausführungsgesetz, BGBl. 2007 I p. 314. For English translation see:

Act to Implement the Hague Convention of 13 January 2000 on the International Protection of Adults (Protection of Adults Convention Implementation Act – ErwSÜAG), http://www.gesetze-im-internet.de/englisch_erws_ag/englisch_erws_ag.pdf

¹² For English translation see http://www.gesetze-im-internet.de/englisch_bgb/index.html

The German private international law still contains a provision on the law applicable to “guardianship, protective care and curatorship”, but considering that the Hague Conventions on Child- and on Adult Protection of 1996 and 2000 take priority over the German national law, the scope of application of art. 24 EGBGB is reduced to almost zero.

b) Effects in Germany of incapacitation of a German adult in another contracting state of the Hague Adult Protection Convention

Under the regime of the convention, protective measures taken in one contracting state are recognized in all other contracting states by operation of law (art. 22). As a consequence, the effects which the decision has in the country of origin are *ex lege* extended to the state of recognition. Recognition may *inter alia* be refused if such recognition is “manifestly contrary to public policy of the requested State, or conflicts with a provision of the law of that State which is mandatory whatever law would otherwise be applicable” (art. 22 (2) lit. c)).

Full deprivation of the legal capacity of adults has in most contracting states been replaced by milder forms of limitation of capability of adults. In relation between such states, mutual recognition of protective measures which limit the capacity of an adult should not pose special problems. However, e.g. French law apparently still provides for *tutelle* by which the adult loses all legal capacity.¹³ In case a German national habitually resident in France has lost his capability to take care of his affairs, that person may be placed under *tutelle* by the French authorities (art. 5) in accordance with the French substantive law (art. 13). Recognition of the French measure in Germany will then be governed by art. 22.

At this point the problem arises that in Germany, abolition of incapacitation is considered a matter of fundamental human rights as protected in the German Constitution and in art. 8 of the European Human Rights Convention. In appropriate cases, German legal doctrine considers deprivation of legal capacity as a violation of the German *ordre public*. However, that does not mean total refusal of recognition of the foreign protective measure. Rather, recognition will in such cases be limited to the maximum effects which are provided for under the German concept of “Betreuung”.¹⁴

¹³ Delas, France, in: R. Frimston/A. Ruck Keene/C. Overdijk/A.D.Ward (*supra* N. 4), p. 367.

¹⁴ See Münchener Kommentar (-Lipp), *supra* N. 4, Art. 8 EGBGB recital 9.

4. 3. New German legal concepts concerning legal protection of adults and their effects in other contracting states

a) Rechtliche Betreuung

Sections 1896 et sequ. BGB have for persons of full age introduced the concept of legal custodianship (*rechtliche Betreuung*) as the statutory system. In case an adult can no longer take care of his affairs, the court appoints a custodian for him, who may be appointed only for groups of tasks in which the custodianship is necessary (sec. 1896 (1) and (3) BGB).

As a matter of precaution, a person of full age has the right to make in advance directives, for the possibility that at some future date, custodianship should become necessary. These Advance Directives are called “*Betreuungsverfügung*”. They may consist of suggestions concerning the person of the custodian, which have to be taken into account by the court which is competent for the appointment. A person of full age may also make Advance Directives containing wishes for the conduct of a potential future custodianship.

In case a custodian has been appointed by a German court, such protective measure will be automatically recognized in the other contracting states to the Hague Adult Protection Convention unless recognition can be refused on a ground determined in art. 22, such as lack of jurisdiction or denial of fair hearing etc.

b) Vorsorgevollmacht

Protection of adults who are unable to safeguard their own interests may also be provided by way of a precautionary power of attorney, the so-called *Vorsorgevollmacht*.¹⁵ This special type of power of attorney is not legally defined but has in Germany been developed in the practice. It may be interesting to know that the Austrian Civil Code regulates the matter in the new §§ 284 f-h ABGB.¹⁶

The aim of *Vorsorgevollmacht* is to avoid the ordering of “*Betreuung*”. To this purpose, a person of full age may in advance authorize a trustworthy person to act as representative at a future time, when the principal will be in need of help and will be unable to take care of his affairs himself.

¹⁵ For the cross-border effects of precautionary powers of attorney see C. Ramser, Grenzüberschreitende Vorsorgevollmachten in Europa im Licht des Haager Übereinkommens über den internationalen Schutz von Erwachsenen vom 13. Januar 2000 (Frankfurt/Main 2010).

¹⁶ For English translation see P.A. Eschig/E. Pircher Eschig, *Das österreichische ABGB – The Austrian Civil Code* (Vienna 2013).

German law of *Vorsorgevollmacht* will be applicable in other contracting states to the Hague Adult Protection Convention in accordance with art. 15 (1) if the adult was habitually resident in Germany at the time the power of representation was granted. German law may also be chosen as applicable a) by a German national; b) by a person formerly habitually resident in Germany or c) with respect to property located in Germany (art. 15 (2)).

In case the *Vorsorgevollmacht* is not exercised in a manner sufficient to protect the person or property of the adult, it may be withdrawn or modified by an authority having jurisdiction under articles 5 et sequ.

c) Patientenverfügung (“living will”)

In 2009, Germany has introduced the concept of “living will” in the new sections 1901a and b BGB. By this, a person of full age who is able to consent may determine in writing, for the event of his becoming unable to consent, whether he consents or prohibits specific tests, treatment or medical interventions not yet directly immanent. If the person is under custodianship, the custodian must see to it that the will of the person under custodianship is done. Similarly, when a *Vorsorgevollmacht* has been granted, the authorized representative must see to it that the will of the patient is done.

If the person has made a living will, but without granting precautionary powers of attorney, the applicable law will be determined in accordance with art. 14. The conditions of implementation will then be governed by the law of the state in which the measure is implemented.

In case a precautionary power of representation has been granted which includes instructions as to medical treatment, the applicable law will be determined in accordance with art. 15.¹⁷

5. Final remarks

It is not surprising that Germany has been among the first countries to ratify the Hague Adult Protection Convention. In 2015, the median age of the German population was 46,2 years¹⁸ which, compared with other industrial states, is a very high rate. An ageing society may be particularly sensitive to the needs of “adults who, by reason of an impairment or insufficiency of their faculties, are not in a position to protect their interests” (see Preamble). The challenge is even greater when questions of conflict-of-laws have to be resolved or when the authorities of more than one state are involved. Within its scope of

¹⁷ Staudinger(von Hein), supra N. 4, Vorbem zu Art 24 EGBGB recitals 178 and 179.

¹⁸ <http://de.statista.com/statistik/daten/studie/37220/umfrage/altersmedian-der-bevoelkerung-in-ausgewaehlten-laendern/>

application, the convention brings important benefits. It is to be hoped that more states will ratify this important convention.

Christa Jessel-Holst, PhD, PhD honoris causa (Sofia), Affiliate, Max Planck Institute for Comparative and International Private Law, Hamburg, Germany.

HAGUE CONVENTION ON THE INTERNATIONAL PROTECTION OF ADULTS OF 13 JANUARY 2000 - THE GERMAN PERSPECTIVE

Summary: The paper initially presents an outline of the Hague Adult Protection Convention of 2000 which has so far been ratified by nine states. This is followed by comments on the German regime of legal protection of adults as reformed namely by *Betreuungsgesetz* of 1990. Changes have in Germany been performed on level of private international law, but especially in the substantive law. Adults may no longer be declared legally incapable by a German court. Instead, a two-tier system has been introduced, consisting of *rechtliche Betreuung* und *Vorsorgevollmacht* (legal custodianship and precautionary power of attorney). Finally effects of the convention as seen from the German perspective are demonstrated.

Key words: Hague Adult Protection Convention, German perspective, *rechtliche Betreuung* (legal custodianship), *Vorsorgevollmacht* (precautionary power of attorney), living will