

# CURRENT ISSUES IN THE PROTECTION OF ADULTS FROM THE PERSPECTIVE OF PRIVATE INTERNATIONAL LAW

## *CUESTIONES ACTUALES EN MATERIA DE PROTECCIÓN DE ADULTOS DESDE LA PERSPECTIVA DEL DERECHO INTERNACIONAL PRIVADO*

Maria Álvarez Torné\*

Summary: I. BACKGROUND: THE SOCIOLOGICAL AND LEGAL REALITY – FROM THE PERSPECTIVE OF PRIVATE INTERNATIONAL LAW FOCUSED ON CHILDREN TO THE PRIVATE INTERNATIONAL LAW PROTECTIVE OF ADULTS. II. THE IMPACT OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES OF 2006. III. REGULATION AND SCOPE OF THE HAGUE CONVENTION OF 2000 ON THE INTERNATIONAL PROTECTION OF ADULTS AND ITS COMPATIBILITY WITH OTHER INTERNATIONAL LEGAL INSTRUMENTS. IV. THE ROLE OF SPANISH NATIONAL RULES ON PRIVATE INTERNATIONAL LAW IN THE PRESENT SITUATION. V. FINAL CONSIDERATIONS AND FUTURE PERSPECTIVES.

ABSTRACT: This paper aims to analyze the current situation on the international protection of adults from the perspective of Private International Law (hereinafter PIL) in the particular context of the EU territory. In this regard, it highlights some particularly controversial points and future prospects. For this purpose it examines in particular the lack of a specific EU Regulation to address this matter, and also the existence of certain international conventions dealing with some aspects in this area. Adopting the perspective of the Member States, in particular that of Spain, the delicate question of the interaction between legal sources and the need to improve the legal situation of vulnerable adults in international cases is analyzed. In this respect, a set of *lege ferenda* measures is proposed, which are aimed at building a framework that effectively enables the appropriate treatment of all the aspects regarding PIL in this area.

*RESUMEN: El presente trabajo pretende analizar cuál es la situación actual desde la óptica del Derecho internacional privado en materia de protección internacional de adultos en el contexto particular del territorio de la UE, y destacar en tal sentido algunos puntos especialmente controvertidos y las perspectivas de futuro. Se examina en particular a tal efecto la falta de un Reglamento específico de la UE que aborde la materia, y también la existencia de ciertos convenios internacionales que se ocupan de algunos aspectos en este ámbito. Adoptando la perspectiva de los Estados miembros, y en particular la*

---

Fecha de recepción del original: 20 de octubre de 2016. Fecha de aceptación de la versión final: 2 de diciembre de 2016.

\* Dr. Maria Álvarez Torné, LL.M., tenure-track lecturer (profesora lectora) of Private International Law at the University of Barcelona (*accredited as tenured assistant professor, profesora agregada*). Former guest lecturer (*DAAD-Gastdozentin*) at the Humboldt-Universität zu Berlin. E-mail: [mariaalvarez@ub.edu](mailto:mariaalvarez@ub.edu)

*de España, se analiza la delicada cuestión de la interacción de las fuentes legales y la necesidad de mejorar la situación jurídica de los adultos vulnerables en supuestos internacionales. Se proponen al respecto una serie de medidas de lege ferenda enfocadas a construir un marco que posibilite efectivamente un tratamiento adecuado de todos los aspectos de DIPr en este terreno.*

KEY WORDS: International protection of adults, Private International Law in the EU, Human rights, United Nations Convention on the Rights of Persons with Disabilities of 2006, Hague Convention of 2000 on the International Protection of Adults, powers of representation.

PALABRAS CLAVE: *Protección internacional de adultos, Derecho internacional privado en la UE, Derechos humanos, Convención de las Naciones Unidas sobre los derechos de las personas con discapacidad de 2006, Convenio de La Haya de 2000 sobre Protección Internacional de los Adultos, poderes de representación.*

## **I. BACKGROUND: THE SOCIOLOGICAL AND LEGAL REALITY – FROM THE PERSPECTIVE OF PRIVATE INTERNATIONAL LAW FOCUSED ON CHILDREN TO THE PRIVATE INTERNATIONAL LAW PROTECTIVE OF ADULTS**

The Working document on the protection of vulnerable adults of the EU of November 2015,<sup>1</sup> notes that there are 50 million people aged over 80 years worldwide, a figure that UN studies raise up to an estimate of 137 million by 2025. The analyses of these institutions regarding the international protection of adults stress that the vulnerability of these people is not only associated with age, but also with other limiting factors, mental or physical, linked to restrictions on the management of certain aspects of their life or their assets.<sup>2</sup> One factor that should be noted in this context is the geographical mobility of citizens, so that it is increasingly common that people live in a country other than that of their nationality. This phenomenon does not mean that the needs of adults remain always covered, and the severe and lengthy economic crisis has meant that all risk groups in society, including vulnerable adults, can more easily find themselves in a situation of helplessness which require urgent and appropriate responses.<sup>3</sup>

Some authors have described PIL in the twentieth century as mainly focused on children, and in this regard it should be emphasized that measures for the international protection of vulnerable adults have not received the same attention as those adopted on minors, despite their undeniable importance. In this sense, the aforementioned Working document underlines that although freedom of movement of persons is a key element in the functioning of the EU, the fact that there is no uniformity in the responses from EU

---

<sup>1</sup> See the Working document on the protection of vulnerable adults, 24.11.2015 (available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-571.769+01+DOC+PDF+V0//EN&language=EN>).

<sup>2</sup> On the problems identified in the notarial practice in this area and the need to adopt uniform solutions to facilitate their resolution see REVILLARD, M., “La convention de La Haye sur la protection internationale des adultes et la pratique du mandat d’inaptitude”, in: *Le droit international privé: esprit et méthodes. Mélanges en l’honneur de Paul Lagarde*, Dalloz, Paris, 2005, p. 727 et seq.

<sup>3</sup> See on this aspect, in the Spanish case, the report commissioned by the European Parliament and drawn up by LLADÓS VILA, J. / FREIXES, T., “The impact of the crisis on fundamental rights across Member States of the EU. Country Report on Spain”, 2015, which can be found at: [http://www.europarl.europa.eu/thinktank/es/document.html?reference=IPOL\\_STU\(2015\)510019](http://www.europarl.europa.eu/thinktank/es/document.html?reference=IPOL_STU(2015)510019).

PIL means a lack of protection in cross-border cases, given the unilateral remedies provided by the domestic systems of PIL of the Member States. In this respect, there may be, for example, areas of vulnerability in relation to identifying which specific authority of a State should take certain actions, or to determining the applicable law or the subsequent effectiveness of the adopted measures. There is also a serious risk that poorly coordinated responses are generated in order to try to protect vulnerable adults, which are sometimes contradictory, as these are offered by the national systems of PIL.

On the other hand, the Stockholm Programme for the period 2010-2014<sup>4</sup> had already stressed the desirability - in line with other orientations provided from the EU - of the Member States joining the Hague Convention of 13 January 2000 on the international protection of adults, bearing in mind the lack of an instrument at an EU level in this field. In this regard, in a Resolution adopted in December 2008<sup>5</sup> the European Parliament had pointed out the need for all Member States to participate in the UN Convention on the Rights of Persons with Disabilities of 13 December 2006 as well as in the Hague Convention on the international protection of adults. It also asked the Commission to prepare a legislative proposal on the matter. It should be noted in this context that the Charter of Fundamental Rights of the European Union itself provides for the protection of persons with disabilities.<sup>6</sup> In September 2016 a study on the protection of vulnerable adults has been published by the European Parliamentary Research Service,<sup>7</sup> and it is aimed to support a legislative initiative report of the European Parliament,<sup>8</sup> which has a right to request the European Commission to submit certain proposals according to Article 225 of the Treaty on the Functioning of the European Union. In fact, the study recommends the ratification of the Hague Convention of 2000 by all EU Member States together with the adoption of specific legal measures by the EU in this field.

As it will be indicated below, from the Spanish perspective there has been some controversy on the appropriateness and feasibility of participating in this instrument of the Hague Conference. It should be noted that under Article 81 of the Treaty on the Functioning of the European Union and Article 67.4 of the same text, it can be understood that there is enough legal basis regarding judicial cooperation in civil matters to articulate a text on this subject comprising the different aspects of PIL. This could lead to the chance of adopting a binding instrument in the intra-EU field,

---

<sup>4</sup> See “The Stockholm Programme - An open and secure Europe serving and protecting citizens”, which is accessible at: [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52010XG0504\(01\)](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52010XG0504(01)).

<sup>5</sup> European Parliament Resolution of 18 December 2008 with recommendations to the Commission on cross-border implications of the legal protection of adults (2008/2123(INI)), which can be found at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2008-0638+0+DOC+XML+V0//EN#BKMD-35>.

<sup>6</sup> See in particular Article 26 of the Charter (OJ C 326/391, of 26.10.2012).

<sup>7</sup> The study “Protection of Vulnerable Adults”: *European Added Value Assessment* (September 2016), authored by Christian Salm, is based on the research conducted by Dr. Ian Curry-Sumner, Prof. Dr. Pietro Franzina and Dr. Joëlle Long. It is available at: [http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS\\_STU\(2016\)581388](http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_STU(2016)581388).

<sup>8</sup> You can follow the Legislative initiative procedure at: [http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=&reference=2015/2085\(INL\)](http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=&reference=2015/2085(INL)).

introducing improvements or adaptations with respect to the Hague Convention of 2000.<sup>9</sup> All these issues, considering the current situation and the future prospects in this area, are discussed in more detail in the following sections of this paper.

## II. THE IMPACT OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES OF 2006

This UN instrument, which entered into force on May 3, 2008,<sup>10</sup> intends to enable the absolute enjoyment of human rights and fundamental freedoms by people who should receive special protection because of a situation of disability. In this sense, it provides a series of mechanisms which are focused as guidelines to ensure that States Parties guarantee the full exercise of the wide range of rights and freedoms for these groups of people avoiding discriminatory obstacles. In this context, for example, Article 4.4 indicates that the content of the Convention shall not affect the obligations undertaken by States in international instruments that can facilitate such an exercise. At this point it should be underlined that the rules of PIL contained in the Hague Convention of 2000, which will be discussed in the next section, do not collide with the provisions of the UN Convention of 2006, but actually address issues that may contribute to their effectiveness. This is a key element established in Article 32 of the UN Convention, given that it determines the need for States Parties to undertake the specific measures to assist people with disabilities as part of a promotion of international cooperation. As pointed out by Ana Fernández- Tresguerres,<sup>11</sup> both instruments are not incompatible, but actually pursue a common goal: to realize the commitment of institutions with the real protection of adults in situations of particular vulnerability.

Article 4 of the UN Convention requires participating States to adapt their domestic law, with a broad scope, to the requests foreseen to provide effective and comprehensive protection for vulnerable adults. Previously, another document issued in the same line, Recommendation No R (99) 4 of 23 February 1999 of the Committee of Ministers of the Member States of the Council of Europe,<sup>12</sup> invited states to legislate in this field according to the principles of proportionality and subsidiarity. From the specific Spanish perspective, extremely transversal reforms have been adopted, like, by way of prominent example, Law 26/2011, of 1<sup>st</sup> October, for the legal adaptation to the Convention on the Rights of Persons with Disabilities.<sup>13</sup> These reforms have covered

<sup>9</sup> This was already suggested in the Working document on the protection of vulnerable adults, *op. cit.*, p. 3 *et seq.* The recent study “Protection of Vulnerable Adults”: *European Added Value Assessment* also confirms this view.

<sup>10</sup> Specifically Spain ratified this Convention on November 23, 2007 (*BOE* of April 21, 2008). Nowadays it reaches a total of 168 States Parties. Detailed information on this instrument can be found at: <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html> (last time consulted: November 2016).

<sup>11</sup> See on this point FERNÁNDEZ-TRESGUERRES, A., “Protección internacional de adultos”, *El Economista*, 22/07/2014, accesible en: <http://www.eleconomista.es/opinion-legal/noticias/5958267/07/14/Proteccion-internacional-de-adultos.html>.

<sup>12</sup> It can be found at: [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=09000016805e302a](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805e302a).

<sup>13</sup> *BOE* n. 184, of August, 2 2011.

very different subjects, like, among others, evictions, assisted reproduction techniques, the situation of victims of crime and the assessment of damages in traffic accidents. All this has focused on matching the text of the UN Convention of 2006, and various modifications of particular importance are still pending approval. In this sense, the First Section of the General Law Commission is currently concerned with the aim of reforming the Spanish Civil Code from a point of view of giving preference to forms of protection of vulnerable adults other than guardianship, and focusing on enabling enough flexibility, preferring an assistance model rather than one of global incapacitation, also giving the necessary impetus to legal figures like *de facto* guardianship.<sup>14</sup> In addition, it is intended to give greater importance to the already existing possibilities of self-regulation in Spanish Law, by being based, for example, on the figures of the mandate for future protection or the self-governance of the adult, and also the need to permit the review of the adequacy of the measures whenever necessary. It is important to note at this point that in some recent reforms, the Spanish legislator refers to the notion "people with their capacity judicially modified" in order to fit with the terminology preferred by the UN Convention of 2006 (see, in this sense, for instance, Section III of the Preamble of the recent Law 15/2015, of 2nd July, on Voluntary Jurisdiction,<sup>15</sup> a regulation which in turn includes new interesting features in the field we are examining, like the modification of Article 681 of the Spanish Civil Code in order to stop excluding blind, deaf or dumb people as possible witnesses when making a will).

From the perspective of the Civil Law systems which coexist in Spain, in a way inspired by Comparative Law, it was intended also to strengthen the autonomy of the vulnerable adult, minimizing interventionism and displacing the primacy of figures such as guardianship in favor of more flexible schemes which are always suitable for practice *ad casum*. As an advanced model in the European arena, Switzerland, which is a State Party of the UN Convention of 2006 and also of the Hague Convention of 2000, offers in its Civil Code detailed provisions<sup>16</sup> which allow people stipulating their future wishes in a broad sense in the framework of the so-called "Patient Decree", including the type

---

<sup>14</sup> Regarding the need to make changes to the solutions provided by Spanish legal system in the area we are dealing with, see the report drawn up by ROIG SALAS, A. *et al.*, "Sobre la reforma de la legislación civil en materia de protección de personas con discapacidad", *Comisión de Ética y Legislación. Asociación Española de Neuropsiquiatría (AEN)*, mayo 2016, available at: <https://amsm.es/2016/07/06/sobre-la-reforma-de-la-legislacion-civil-en-materia-de-proteccion-de-personas-con-discapacidad/>. The authors of this document criticize, among other drastic provisions of the Spanish legal system considered to be obsolete and which should be reformed, the wording of Article 757.3 of the Spanish Code of Civil Procedure (*Ley de Enjuiciamiento Civil*) of 2000: "Anyone is entitled to apprise the public prosecutor of the facts that may be determinants of incapacitation. Authorities and public officials who, on account of their public office, knew about the possible cause of disability of a person shall inform the Public Prosecutor". Also analyzing the future reforms to be introduced into the Spanish Civil Code and the Spanish Code of Civil Procedure to allow the real exercise of the rights contained in the UN Convention of 2006 you can see PEREÑA VICENTE, M., "Derechos fundamentales y capacidad jurídica. Claves para una propuesta de reforma legislativa", *Revista de Derecho Privado*, n. 4, Julio-Agosto 2016, p. 3 *et seq.*

<sup>15</sup> *BOE* n. 158, of July, 3 2015.

<sup>16</sup> See, on this point, FRIMSTON, R. *et al.*, *The international protection of adults*, Oxford University Press, 2015, p. 391 *et seq.*

of assistance and care they would like to receive for an eventual disability status. In this context, the Swiss Civil Code provides several levels of protection that must stick very strictly to the type of disability that arises. Also from a Comparative Law perspective, which could inspire pending reforms of Civil Law in Spain, the case of Austria can be mentioned,<sup>17</sup> which also participates in the UN Convention of 2006 and the Hague Convention of 2000. Specifically, the figure called "Sachwalter" (*guardian*) is regulated in Articles 268 *et seq.* of the *Allgemeines Bürgerliches Gesetzbuch* (ABGB, Austrian Code of Civil Law) and provided for in cases where it is not feasible to offer a less restrictive regime, given that the Austrian civil system aims to ensure the greatest possible freedom for the adult. In this sense and making progress to meet the standards set by the UN Convention of 2006, the Catalan Civil Code determines, referring to the principles of "*proportionality and adaptation to the circumstances*" that "*references contained in the Second Book to incapacity and to a disabled person have to be interpreted according to this Convention, in the less restrictive sense of the personal autonomy*".

It should be borne in mind that the UN Convention of 2006 provides a comprehensive and demanding regime regarding the obligations acquired by states accepting the text in respect of people with disabilities, which should lead Spain and other participants to deepen the objectives set out at a *lege ferenda* level. Specifically, some provisions address issues in the field of Civil Law when dealing with legal forms of protection of persons. In this sense, Article 19 of the UN Convention can be mentioned, which sets out the need for States Parties to ensure the development of the full life of people with disabilities, so that they have the option to choose their place of residence and access the assistance they need. Other articles of this UN Convention deal with the obligation of the participating States to facilitate the exercise of rights of persons with disabilities to the maximum extent possible and on different vital levels, both in the personal and family sphere and also in the public and financial area.

### **III. REGULATION AND SCOPE OF THE HAGUE CONVENTION OF 2000 ON THE INTERNATIONAL PROTECTION OF ADULTS AND ITS COMPATIBILITY WITH OTHER INTERNATIONAL LEGAL INSTRUMENTS**

Consulting the current status table of this Hague Convention gives negative results, as it has only entered into force for 9 States, with only 7 of them being EU Member States.<sup>18</sup> There are various reasons which have been put forward as possible explanations for this situation: for example, the reluctance to participate in such measures by the potential States is referred, given the sensitivity of the issue and its economic consequences, and the distrust of the effectiveness of the system given its limited success to date has been

<sup>17</sup> Information on this issue can be found at FRIMSTON, R. *et al.*, *op. cit.*, p. 325 *et seq.*

<sup>18</sup> See the actual information on it at: <https://www.hcch.net/es/instruments/conventions/status-table/?cid=71> (last time consulted: November 2016). This Hague Convention of 2000 entered into force on 1st January 2009 for Germany, France and United Kingdom. Note that under the process already known as *Brexit* and after the referendum held on 23 June 2016, it seems that the UK will quit the EU in the coming months.

also pointed out.<sup>19</sup> However, one of the arguments that had been supported regarding doubts about joining the Hague Convention of 2000 is refuted in the legal literature: it is the argument which consists of asserting the incompatibility of the Convention on the international protection of adults with the UN Convention on the Rights of Persons with Disabilities of 13 December 2006. In fact, as it has been noted in the preceding section, this UN Convention has a different purpose than the Hague Convention of 2000, given that the first instrument is limited to substantive aspects related to the need to ensure the fulfillment in the enjoyment of human rights by persons subject to some form of disability in their very different expressions. The Permanent Bureau of the Hague Conference consulted the Department of Economic and Social Affairs, Division for Social and Policy and Development of United Nations, where it was confirmed that no interference between the two instruments was given, which is also borne out by the fact that there are currently some States participating in the two Conventions.<sup>20</sup> As we will examine below, the Hague Convention of 2000 provides distinct and specific tools to effectively protect the vulnerable adult, responding to particular interests of international judicial cooperation in civil matters.

This instrument of the Hague Conference is a global or all-encompassing convention, which addresses the full range of aspects of PIL for the adoption of measures to protect adults in cross-border cases. In the legal doctrine it has been emphasized that one of the main achievements of this convention is to not automatically assimilate the need to protect the vulnerable adult to a limitation of capacity.<sup>21</sup> On the other hand, Article 2 states that a person is considered to be an adult for the purposes of the Convention if she/he is aged 18 or over, as a limitative element in relation to the Hague Convention on the international protection of children of 1996.<sup>22</sup> The Explanatory Report on the Hague Convention of 2000 drawn up by Prof. Dr. Paul Lagarde<sup>23</sup> points out that the main aim is to give continuity to both instruments, ensuring full protection of the person.<sup>24</sup> However, and as a remarkable difference, it should be noted that the Hague Convention on the international protection of adults does not contain a similar provision to that of the "best interests of the child", which chairs the text of the Hague Convention on the

---

<sup>19</sup> See, on this point, the Working document on the protection of vulnerable adults, *op. cit.*, p. 2 *et seq.*

<sup>20</sup> On this aspect, and justifying the compatibility of both instruments as well as the desirability of Spain signing the Hague Convention on the Protection of Adults of 2000, see BORRÁS, A., "¿Qué ha significado 2014 para la Conferencia de La Haya de Derecho internacional privado", *AEDIPr*, t. XIV-XV, 2014-2015, p. 716.

<sup>21</sup> This is emphasized by LONG, J., "Rethinking Vulnerable Adults' Protection in the Light of the 2000 Hague Convention", *International Journal of Law, Policy and the Family*, Vol. 27, n. 1, 2013, p. 64.

<sup>22</sup> 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.

<sup>23</sup> This Explanatory Report can be found at: <https://www.hcch.net/es/publications-and-studies/details4/?pid=2951&dtid=3>.

<sup>24</sup> However, as stated in the legal literature, the specificity of the protection of adults and the need for appropriate solutions in this particular area has to be borne in mind, as noted at the time by GONZÁLEZ BEILFUSS, C., "La protección de adultos en Derecho internacional privado", in: CALVO CARAVACA, A. L. / IRIARTE ÁNGEL, J. L., *Estatuto personal y multiculturalidad de la familia*, Colex, Madrid, 2000, p. 91.

international protection of children of 1996. In this sense, Prof. Dr. Alegría Borrás<sup>25</sup> has underlined that the reason for this is that it is not a principle which has achieved equal universal recognition and which can be defined easily. The instrument in question refers, therefore, to act "in the interests of the adult". It should also be clarified that, although the use of the notion of "habitual residence of the adult" is constant throughout the different sections of the Hague Convention of 2000, this instrument does not contain a precise definition on it, and no guidelines in this regard are provided by the Explanatory report by Prof. Dr. Lagarde. Consequently, it is necessary to look to the case law of the Contracting States to obtain some guidance in the identification of such a criterion.<sup>26</sup> It should be noted that the Hague Convention on the international protection of adults is not based on the possible coexistence of various habitual residences, but focused on identifying the "centre of main interests" of the adult needing protection.<sup>27</sup>

On the other hand, Article 3 of the Hague Convention of 2000 includes, as way of example, some of the protective measures to be undertaken within the framework of its operability, such as guardianship, curatorship or similar institutions, as well as the possibility of placing an adult under the protection of an authority or in a specialized center. As pointed out by Prof. Dr. Alegría Borrás,<sup>28</sup> the debate about the inclusion or exclusion of medical care in the Convention generated great tension between delegations negotiating this Hague Convention, given the substantial differences in the various states in sensitive areas – which are currently very present in the public debate – such as the answers given on cases of abortion, sterilization, euthanasia or clinical trials. Finally it was agreed to remove any direct references to the notion of "medical treatment" in the articles, while the interventions by authorities falling outside of public measures of a general nature in matters of health (cfr. Art. 4.1 f) are allowed, for example, regarding the decision to have a person undergo surgery or to place him/her in a specialized institution, as detailed in the Explanatory Report.<sup>29</sup> The articles of the Convention aim to be confined to legal issues that must be resolved by competent authorities, which are non-medical, like for example the grant of authorizations, and the rules dealing with the mandatory laws of the State in which the adult is to be protected (Article 20) or those dealing with the non-recognition causes of foreign measures

<sup>25</sup> See on that BORRÁS, A., "Una nueva etapa en la protección internacional de adultos", *Geriatrionet (Revista Electrónica de Geriatría y Gerontología)*, Vol. 2, n. 1, 2000, p. 3.

<sup>26</sup> This has been pointed out, referring in particular to the case law of the United Kingdom, in cases in which there could be some doubts regarding the identification of the habitual residence of the adult who needs protection, when she or he moves between different locations to receive a certain care, by ANDERSON, J. / RUCK KEANE, A., "The 2000 Hague Convention on the International Protection of Adults Five Years on", *International Family Law*, 2014, p. 7 *et seq.*

<sup>27</sup> Set out in BUCHER, A. (ed.), *Commentaire romand: Loi sur le droit international privé. Convention de Lugano*, Helbing Lichtenhahn, Bâle, 2011, p. 759.

<sup>28</sup> See, in this regard, BORRÁS, A., "Una nueva etapa en la protección internacional de adultos", *op. cit.*, p. 10.

<sup>29</sup> See here the Explanatory Report by Prof. Dr. Lagarde, *op. cit.*, p. 35. On the delimitation of measures of protection included under the material scope of the Hague Convention of 2000 see SIEHR, K., "Das Haager Übereinkommen über den internationalen Schutz Erwachsener", *RabelsZ*, 2000, p. 728.

(Article 22) should be considered to solve sensitive cases in which differences in certain medical issues between Contracting States are very pronounced.<sup>30</sup>

Moreover, Article 4 of the Hague Convention of 2000 introduces a closed list - unlike the illustrative character of Article 3 - of issues which are not covered by the Convention, chasing a delimitation with regard to related fields. In relation to the matters excluded from the scope of the Convention such as “decisions on the right of asylum and on immigration” (sub-paragraph h of Article 4.1) one has to bear in mind that they may themselves involve measures to protect adults which are subject to the regulation foreseen by the Hague Convention of 2000.<sup>31</sup> In this regard, it is especially important for the purposes of PIL that Article 4 states that trusts and succession are excluded from the scope of the Convention. The Explanatory Report drafted by Prof. Dr. Lagarde indicates that this exclusion should be understood restrictively,<sup>32</sup> comprising, among others, the measures of protection which an adult could need to accept or renounce a succession. Specifically, and at the very most, according to the Explanatory Report it might be admitted that if the law governing the succession sets the intervention of the legal representative of the adult heir, then he or she would be determined through the application of the Convention rules.

From the perspective of the interaction of the Convention with other legal instruments, I consider it relevant to point out that the EU Regulation 650/2012 on international successions,<sup>33</sup> which is applicable from 17th August 2015 in the Member States, with the exception of Denmark, Ireland and United Kingdom<sup>34</sup>, sets out in Articles 23.2 c) and 26.1 that the applicable law according to the rules of the Regulation covers issues concerning the capacity to inherit and the capacity of the person making the disposition of property upon death to make such a disposition. Regarding other aspects in relation to the legal capacity of natural persons, Article 1.2 of the Regulation 650/2012 specifies: “*The following shall be excluded from the scope of this Regulation: b) the legal capacity of natural persons, without prejudice to point (c) of Article 23(2) and to Article 26*”. In the legal doctrine it has been underlined that this exclusion comprises aspects such as the measures of protection which an adult with disabilities could need.<sup>35</sup>

---

<sup>30</sup> This is specified by the Explanatory Report drawn up by Prof. Dr. Lagarde, *op. cit.*, p. 36.

<sup>31</sup> This was pointed out by CLIVE, E., “The New Hague Convention on the Protection of Adults”, *YPIL*, Vol. II, 2000, p. 6.

<sup>32</sup> See, on this point, the Explanatory Report by Prof. Dr. Lagarde, *op. cit.*, p. 34.

<sup>33</sup> Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession.

<sup>34</sup> On the possible consequences of the so-called *Brexit* for the EU PIL, see DICKINSON, A., “Back to the future: the UK’s EU exit and the conflict of laws”, *Journal of Private International Law*, Vol. 12, n. 2, 2016, p. 195 *et seq.*

<sup>35</sup> See, on this aspect, BONOMI, A. / WAUTELET, P. / ÁLVAREZ GONZÁLEZ, S. / ÁLVAREZ TORNÉ, M. / FONT i SEGURA, A. / GÓMEZ-RIESCO TABERNERO DE PAZ, J. M. / GÓMEZ-RIESCO TABERNERO DE PAZ, J. / REQUEJO ISIDRO, M., *El Derecho europeo de sucesiones: Comentario al Reglamento (UE) núm. 650/2012, de 4 de julio de 2012*, Thomson Reuters Aranzadi. Cizur Menor (Navarra), 2015, p. 66 *et seq.* and also MANKOWSKI, P., “EuErbVO Art. 1”, in: DEIXKLER-

Article 3 of the Hague Convention of 2000 includes in its material scope "*the determination of incapacity and the institution of a protective regime*", but the aforementioned exclusion under Article 4 of this convention ought to be considered. Combining the respective aforementioned parameters is important to solve characterization problems in cases where the Hague Convention of 2000 and the Regulation in succession matters, or this Regulation and the national rules of PIL, interact. This is relevant because there are a number of differences regarding the criteria chosen to determine the international jurisdiction or the applicable law under the Hague Convention of 2000 or under Regulation 650/2012. The Explanatory Report by Prof. Dr. Lagarde sets forth that, at that point in time, it was intended to avoid conflicts with the Hague Convention on the law applicable to succession of 1989;<sup>36</sup> therefore, the exclusion under Article 4.1 d) in trusts or succession has to be understood restrictively, which is linked to the fact that the applicable law according to the rules of the EU Regulation 650/2012 regulates the aforementioned aspects regarding the capacity to inherit and the capacity of the person making the disposition of property upon death to make such a disposition. Let us remember that the Explanatory Report on the Hague Convention of 2000 specifies in this framework that its rules do cover, nevertheless, the issue of determining the legal representative of the adult, although it is hard to know to what extent. The fact that the respective exclusions in Regulation 650/2012 and in the Hague Convention of 2000 should be interpreted restrictively raises doubts about the delimitation of which rules of PIL have to regulate exactly which issues, such as the capacity to accept or renounce a succession and its consequences in a succession case, so that the national rules of PIL could come into play. A future EU Regulation on the international protection of adults could contribute to correcting or mitigating the different aforementioned incoherences and to bringing the necessary adjustments into place with respect to the intra-UE area.<sup>37</sup>

As regards the rules allocating international jurisdiction, which are foreseen in Articles 5 *et seq.* of the Hague Convention of 2000, they start from the identification of the Contracting State where the habitual residence of the adult who needs measures of protection of his/her persons or property is located. It is of particular interest in the current social context that when it comes to refugees or adults who are internationally displaced, or adults whose habitual residence can not be established, the international

---

HÜBNER, A. / SCHAUER, M., *Kommentar zur EU-Erbrechtsverordnung (EuErbVO)*, MANZ'sche Verlags- und Universitätsbuchhandlung, Vienna, 2015, p. 25.

<sup>36</sup> This is the Hague Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons, which never came into force, but served as a valuable precedent for the EU Regulation 650/2012, specially regarding the so-called *professio iuris*.

<sup>37</sup> In this line, the Court of Justice of the EU has recognized the necessity of interpreting the legal instruments in a consistent manner, as stated in its judgment of 6th October 2015 in the case C-404/14 (*Matoušková*), where it was established that "*the approval of an agreement for the sharing-out of an estate concluded by a guardian ad litem on behalf of minor children constitutes a measure relating to the exercise of parental responsibility*" covered by the Regulation 2201/2003 (Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (known as "Brussels IIa"). A similar delineation could be contemplated in a future EU Regulation on the international protection of adults.

jurisdiction will be determined according to the territory where these adults are present under Article 6. In addition, the competent authorities on the basis of these criteria may request the authorities of certain Contracting States, among which are those designated in writing by the adult to be protected, to take measures of protection of the person or property of an adult. This is foreseen by virtue of a notion of proximity in the exercise of an attenuated *forum non conveniens* in Article 8. This kind of transfer of jurisdiction, as an expression of flexibility, can not be considered to infringe legal certainty and effective legal protection as guaranteed by the different constitutional systems, for example, in the Spanish one. In fact, it is a possibility that now seems less peculiar to continental legal systems due to its formulation in various international EU legal instruments which are applicable in the Member States.<sup>38</sup> However, it would have improved the practical functioning of this provision to add more details about its operability, such as which deadlines should be set to determine the international jurisdiction of an authority among those available. Additionally, Article 7 of the Hague Convention of 2000 allows the authorities of the Contracting State of which the adult is a national to have jurisdiction to take measures for his/her protection, if they consider that they are in a better position to adopt them, except for adults who are refugees or who are internationally displaced. This option should be articulated in a framework of communication with the authorities that would be competent under the criteria described above, which have priority in taking measures. In addition to all of this, under Article 9 it is possible that the authorities of a Contracting State where the property of the adult is located are competent to take measures of protection concerning this property, provided that they are compatible with the measures agreed by the competent authorities according to all the criteria described above. A forum for cases of urgency is also set up under Article 10 of the Convention, exceptionally and with a restricted duration, in order to permit that the authorities of any Contracting State where the adult or property belonging to him or her are present are competent to take any necessary measures of protection. Finally, Article 11 envisages a forum based on the presence of the adult in a Contracting State, with a limited territorial scope and timeframe.

The rules to determine the applicable law to these kinds of measures are foreseen in Articles 13 *et seq.*, and they are based on an *erga omnes* character according to Article 18, which implies that if Spain joins this convention, Article 9.6 II of the Spanish Civil Code<sup>39</sup> will be displaced by the regulation contained in the Hague Convention of 2000. However, this does not resolve all doubts as to which conflict of law rules should resolve internal conflicts of laws in the absence of a specific Law on Spanish interregional law, as has been argued in the legal doctrine.<sup>40</sup> On this point, note that

---

<sup>38</sup> Such as the aforementioned EU Regulation in succession matters or also the Brussels Iia Regulation or the aforementioned Hague Convention on the international protection of children of 1996.

<sup>39</sup> This precept provides, nowadays and after the modification implemented by Law 26/2015, of 28th July, on the reform of the system of child and adolescence protection (*BOE* n. 180, of 29th July 2015): “*The law applicable to the protection of an adult will be determined by the law of her/his habitual residence. In the case of change of residence to another State, the law of the new habitual residence will apply, without prejudice to the recognition in Spain of the measures of protection adopted in other States. However, Spanish law shall apply to take any urgent or provisional measures of protection*”.

<sup>40</sup> Stressing repeatedly this issue and proposing possible solutions, see BORRÁS, “*Quin hauria de ser el paper del veinatge civil en el Dret interregional del futur?*”, *RJC*, n. 4, 2010, p. 61.

Article 44 states that: “A Contracting State in which different systems of law or sets of rules of law apply to the protection of the person or property of the adult shall not be bound to apply the rules of the Convention to conflicts solely between such different systems or sets of rules of law”. It follows that plurilegislative States can choose which legal instrument or regulation they wish to apply in cases of internal conflict of laws; though, in case of other international instruments applicable in Spain, there have been no statements clarifying that point. Prof. Dr. Borrás has proposed, in the context of this type of difficulties and taking into account the wording of Article 16 of the Spanish Civil Code, the so-called "theory of the dynamic referral", by which one might interpret that once Spain formed part of the the Hague Convention on the international protection of adults, Article 9.6 II of the Spanish Civil Code would be effectively inoperative, given the aforementioned *erga omnes* character of this instrument. This would enable the incorporation of more uniform solutions and would resolve both international and internal conflict of laws on protection of adults with the same conflict of law rules, as it seemed to be the spirit of the Spanish PIL system when it was originally designed. Doubts remain about how a legal operator should act due to the absence of a specific Law on interregional law in Spain. We must take into account that despite the fact that the reform brought about by Law 26/2015, of 28th July, on the reform of the system of child and adolescence protection, replaces the connecting factor of nationality with habitual residence, applying either Article 9.6 II or the rules contained in the Hague Convention of 2000 to internal conflicts of laws is not a trivial matter, insofar as they both contain substantial differences when it comes to determining the applicable law, and this may lead to different material results in relation to the various systems of Civil Law that coexist in Spain as a plurilegislative State.

On the other hand, it should be noted that the formulation of the rules to determine the applicable law under the Hague Convention of 2000 comply with the principle of coordination between *forum* and *ius*, by providing that first, the competent authority makes use of its own law. Note that this can avoid problems associated with the allegation and proof of foreign law. Exceptionally, the law of another State with which the situation has a substantial connection can be applied or taken into consideration under Article 13.2. Article 14 of the Hague Convention of 2000 stipulates the need to take into account the rules of the Contracting State where the measures of protection that are adopted should be implemented.

Such provisions on applicable law are tempered by rules on the exclusion of *renvoi* according to Article 19, the possibility of excluding the application of foreign law due to the manifest incompatibility with the public policy (*ordre public*) of the forum according to Article 21 and the need of compliance with the mandatory laws of the State in which the adult is to be protected under Article 20 (even if another law would be applicable to the case). Besides this, Article 17 provides for an exception focused on protecting a third party acting in good faith, insofar as it is not possible to contest the validity of a transaction entered into between a third party and another person who would be entitled to act as the adult's representative under the law of the State where the transaction was concluded, and the third party cannot be held liable, only because the person acting as representative was not entitled to act as such under the applicable law

designated by the rules of the Hague Convention of 2000. This is always the case when the third party did not know or could not have known that such a capacity was governed by these rules. On this point, it is important to note that the protection of third parties in their relations with the adult is not covered by the Hague Convention of 2000, in which case it is necessary to turn to the respective applicable legislation, such as, in the case of contractual matters in the Member States of the EU, to Article 13 of the Rome I Regulation<sup>41</sup> - with the exception of Denmark, in which the Rome Convention is still applied<sup>42</sup> -. Along with these aspects, Articles 45 *et seq.* describe how to deal with the different aspects which are regulated by the Hague Convention of 2000 in cases related to plurilegislative States.

In this framework of determination of the applicable law, Prof. Dr. Alegría Borrás has underlined<sup>43</sup> that the inclusion in the text of the Convention of the vulnerable adult's will is particularly interesting. It is one vital aspect to try to respect his or her wishes at a time when he or she can still express them in full possession of all his or her faculties. As already indicated, a first consideration of the will of the adult is reflected in the context of the allocation of international jurisdiction in connection with a possible transfer via *forum non conveniens*. And, as a wide manifestation of this principle, it is admitted that, under Article 15, an adult can turn to a limited *optio iuris*<sup>44</sup> to grant powers of representation to be exercised when the adult is not able to protect his or her own interests. This choice must be designated in writing, to choose the law of the State of his or her nationality,<sup>45</sup> or the law of the State of his or her former habitual residence, or the law of the State in which property is located (only with respect to it). Article 15.1 stipulates the applicability of the law of the habitual residence of the adult if no choice of law has been made. Powers of representation granted not only refer to aspects of management and administration of assets, but also to decisions concerning medical treatments, like the refusal to be subject to therapeutic obstinacy or the decision to donate organs.<sup>46</sup> For the purposes of delimitation, it should be made clear that the material scope by virtue of Article 15 does not comprise, according to most legal scholars, general powers, and nor does it cover the powers granted to spouses or *postmortem* powers.<sup>47</sup> The powers referred to in Article 15 may later be withdrawn or

---

<sup>41</sup> Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

<sup>42</sup> Rome Convention of 19 June 1980 on the Law Applicable to Contractual Obligations, which also contains a similar provision in its Article 11 to the one contained in the Rome I Regulation.

<sup>43</sup> See, in this regard, BORRÁS, A., “Una nueva etapa en la protección internacional de adultos”, *op. cit.*, p. 8 *et seq.*

<sup>44</sup> This limitation reflects the difficult balance which implied, in the context of the negotiation of this instrument, the acceptance for some reluctant delegations of the introduction of the autonomy of will in this field, as stated by BORRÁS, A., “La protección internacional del niño y del adulto como expresión de la materialización del Derecho internacional privado: similitudes y contrastes”, en: *Pacis Artes. Obra homenaje al profesor Julio D. González Campos*, Madrid, 2005, t. II, p. 1306.

<sup>45</sup> In the case of plurinationals, the law of one of the existing nationalities may be chosen by the adult, as pointed out by DUTOIT, B., “La Convention de La Haye du 13 janvier 2000 sur la protection internationale des adultes”, *Fiches juridiques suisses*, 2011, p. 15.

<sup>46</sup> This emphasized by BUCHER, A., *op. cit.*, p. 763.

<sup>47</sup> This aspect is underlined by SCHAUB, R., “Kollisionsrechtliche Probleme bei Vorsorgevollmachten”, *IPRax*, n. 3, 2016, p. 209.

modified by virtue of Article 16 in accordance with the interests of the adult which must be protected, but taking into account the chosen law under Article 15 in order to respect the role of the autonomy of will as far as possible.<sup>48</sup>

Together with this, the Hague Convention of 2000 establishes in Articles 22 *et seq.* various aspects regarding the recognition and enforcement of decisions, which cover some specific grounds for refusal of recognition of the measures of protection adopted in Contracting States and also stipulate that a simple and rapid procedure shall be applied by each Contracting State as regards the declaration of enforceability or registration.<sup>49</sup>

Moreover, the Convention provides for a system of cooperation of authorities in Articles 28 *et seq.*, similar to the provisions contained in the legal instruments dedicated to the protection of children. In particular, channels of cooperation between Central Authorities designated by Contracting States are foreseen, and they shall perform different supporting functions; in addition, cooperation between competent authorities is also established, and it is mainly focused on enabling communication, for instance in cases involving a great risk for vulnerable adults.<sup>50</sup> In this area, as stressed by Prof. Dr. Borrás,<sup>51</sup> Article 33 provides for a special treatment of the case where an adult should be placed in an establishment in a Contracting State different from the one of the authority having jurisdiction, given that the Central Authority or the competent authority of the State where the establishment is located shall be first consulted. Another point of interest from the viewpoint of a plurilegislative State like Spain which chooses to join the instrument, refers to Article 36 of the Convention, because it does not completely clarify how the system of reimbursement works, which can lead to significant friction.<sup>52</sup> The Hague Convention of 2000 also contains certain aspects of particular practical interest, like those provided to facilitate communication between authorities, or like the annex relating to art. 38, which provides for the standardized accreditation certificate indicating the person who has been entitled to protect an adult.<sup>53</sup>

---

<sup>48</sup> On the limits and the control over the autonomy of the will in this context, see VICENTE BLASCO, D. – J., “La protección de los adultos en el Derecho internacional privado codificado por la Conferencia de La Haya: el Convenio de 13 de enero de 2000 y sus soluciones”, Oñati Socio-Legal Series, n. 8, 2011, p. 16.

<sup>49</sup> The study “Protection of Vulnerable Adults”: *European Added Value Assessment, op. cit.*, states that the enforcement of this kind of measures should be made easier, p. 160.

<sup>50</sup> Regarding the important issue of cooperation, the study “Protection of Vulnerable Adults”: *European Added Value Assessment, op. cit.*, also considers that its design and operation could be improved, p. 160.

<sup>51</sup> See, in this regard, BORRÁS, A., “Una nueva etapa en la protección internacional de adultos”, *op. cit.*, p. 7.

<sup>52</sup> Emphasized by FERNÁNDEZ-TRESGUERRES, A., *op. cit.*, p. 2.

<sup>53</sup> The study “Protection of Vulnerable Adults”: *European Added Value Assessment, op. cit.*, stresses that despite the usefulness of this certificate, it is almost never issued in practice, p. 161.

#### IV. THE ROLE OF SPANISH NATIONAL RULES ON PRIVATE INTERNATIONAL LAW IN THE PRESENT SITUATION

From the point of view of Spanish PIL, in the absence of an EU instrument on the matter and given the lack of participation, for the moment, of this state in the Hague Convention of 2000, national PIL rules should be applied in order to allocate the competent authority and to determine the applicable law to international cases of determination of incapacity and measures for the protection of adults, and also, in many cases, to give effect to foreign decisions on the matter. Concerning the criteria for allocating international jurisdiction, Article 22 quáter b) of the Spanish Organic Law on the Judiciary (Ley Orgánica del Poder Judicial, hereinafter: LOPJ) indicates - after the modification implemented by the Organic Law 7/2015<sup>54</sup> - that Spanish courts will be competent: "*In matters related to the capacity of adults and measures of protection of them or their property, when they had their habitual residence in Spain*". Besides, Article 22 sexies of the LOPJ stipulates that "*Spanish courts have jurisdiction to adopt provisional or protective measures with regard to persons or property located in Spanish territory which must be fulfilled in Spain. They also have jurisdiction to take such measures if they are (not)*<sup>55</sup> *competent to hear the main proceedings.*" It should be stressed that there are marked differences as to the determination of the competent authority to hear this matter, given that, as already examined, the Hague Convention of 2000 introduces, along with the general ground of jurisdiction based on the habitual residence of the adult, various possibilities, among which the role of the autonomy of the will and of *forum non conveniens* are outstanding. On the other hand, as a novelty for the Spanish PIL system, Article 22 octies 3 of the LOPJ provides for a *forum necessitatis*, stipulating that: "*Spanish courts may not abstain from exercising jurisdiction or decline jurisdiction when the dispute is linked with Spain and the courts of the different States related to the case have declined jurisdiction*". The Hague Convention of 2000 does not contain this specific ground of jurisdiction, despite the sensitivity of the subject matter, which would justify foreseeing it, in order to offer the maximum protection for vulnerable adults.

Note that in the field of international civil procedures, the solution offered for cases of parallel proceedings is also important in order to prevent inconsistent decisions. Until recently, the Spanish domestic PIL lacked effective solutions to respond to cases of international *lis pendens*, unlike the case of the regulations contained in various international legal instruments. The possibility that the Spanish courts could take into account the existence of a process initiated abroad, thereby valuing the *lis pendens* or the pendency of related actions, is currently regulated in a new way in the field of Spanish national PIL in Article 22 nonies of the LOPJ and also in Articles 37 *et seq.* of

---

<sup>54</sup> BOE n. 174, of 22 July 2015. See on this point VAQUERO LÓPEZ, C., "Nuevas normas de Derecho internacional privado estatal en materia de protección de adultos y de menores", *AEDIPr*, t. XVI, 2016, pp. 397 *et seq.* There is some controversy in the Spanish legal literature on the suitability of accepting the role and the consequences of prorogation of jurisdiction under Article 22 ter of the LOPJ in these cases.

<sup>55</sup> The original wording of the provision does not incorporate this "no", which should appear in the article so that it makes logical sense.

the Law 29/2015, of 30 July, on international legal cooperation in civil matters.<sup>56</sup> The inclusion of a regulation on these issues would have been convenient in the text of the Hague Convention on the international protection of adults.

It could be argued that, despite recent reforms implemented at the level of Spanish national PIL, participating in the Hague Convention of 2000 would mean for Spain - and for the other EU Member States which still wait to join it - the possibility of incorporating uniformized solutions which are more accurate for identifying the competent authority in this field. Moreover and despite its weaknesses, the implementation of this multilateral convention would lead to further facilitate, from the point of view of the effectiveness, the circulation of decisions in this area between the Contracting States, based on the principle of mutual trust. We should bear in mind that this issue depends, for the time being, from the Spanish perspective, on the new regulation of national PIL contained in Law 29/2015, of 30 July, on international legal cooperation in civil matters, and also on the possible existence of bilateral conventions which would apply in preference.

With regard to the applicable law, and given that the Spanish Civil Code lacks a specific rule on incapacitation, we must turn to its Article 9.1, which refers to the connecting factor of the nationality of a person. As regards the applicable law to the measures of protection needed by an adult, Article 9.6 II of the Spanish Civil Code should apply, in the new wording introduced by the Law 26/2015, of 28th July, on the reform of the system of child and adolescence protection. Specifically, Article 9.6 II states, as described above: *“The law applicable to the protection of an adult will be determined by the law of his/her habitual residence. In the case of change of residence to another State, the law of the new habitual residence will apply, without prejudice to the recognition in Spain of the measures of protection adopted in other States. However, Spanish law shall apply to take any urgent or provisional measures of protection”*. As already mentioned above, this reform has replaced the connecting factor of nationality with habitual residence, which is more flexible.

It should be noted that the solutions currently articulated in the Spanish domestic PIL are, to a greater extent, closer to the ones provided for in the Hague Convention of 2000, at least given that the habitual residence of the adult is preferred over nationality, both in the sphere of international jurisdiction and in terms of the determination of applicable law. However, there is still not enough room for the autonomy of the will of an individual, which does play a role, as we have seen, though with some limitations, in the framework of the Hague Convention, specially when granting powers of representation under Article 15. This is an approach which should be considered, given that it is more appropriate, as demonstrated by an analysis of Comparative Law, in order to allow adults to plan their future according to their desires and circumstances.

---

<sup>56</sup> BOE n. 182, of 31 July of 2015.

## V. FINAL CONSIDERATIONS AND FUTURE PERSPECTIVES

Together with the adaptations at the level of substantive law, I think that it would be advisable, for the time being, that Spain - and also the respective Member States - decides to join the Hague Convention of 2000 on the international protection of adults, as has been advised by the EU. As a State which is a potentially receiving country of elderly people, who move to it, sometimes under difficult circumstances or just for work reasons or to enjoy long holiday periods, it seems advisable for Spain to participate in a legal instrument which not only introduces reasonable formulas in the field of PIL, like respecting the will of the adult, but also allows access to a cooperation system between authorities which simplifies the protection of vulnerable adults. It is worth stressing that as a result of the global economic crisis of enormous and long-term impact, the range of people eligible for such measures in cases with cross-border elements has expanded, and is not limited to cases of ageing.

Furthermore, the Working document of the EU of November 2015 and the recent study "Protection of Vulnerable Adults": *European Added Value Assessment* of September 2016 recommend, as has been underlined, adopting a Regulation drawn up by the EU legislator, which would certainly ease dealing with these issues on the part of Member States. This goal should take into account, as detailed in the Working paper,<sup>57</sup> addressing the existing divergences regarding the notion of "measures of protection of the adult" in the legal systems of the different Member States, or the lack of a common and uniform concept of "habitual residence" - as is already the case in other EU Regulations, where an interpretative framework has been provided by the case law of the Court of Justice of the EU, for instance regarding the aforementioned Regulation Brussels IIa -. The said Working document of the European Parliament and also the study "Protection of Vulnerable Adults" place particular emphasis on the need to regulate the powers of representation in a future EU Regulation on the international protection of adults, an issue which is already covered by Articles 15 and 16 of the Hague Convention of 2000, as has been analyzed. I consider that it is, in fact, of great importance to address such a mandate for future protection or in anticipation of incapacity, and to this end it could be envisaged to contain the necessary adjustments with the EU Regulation 650/2012 in matters of succession, which itself already provides for a limited possibility of choice of the applicable law by the deceased. In addition, the formulation of a similar certificate as the one set in the terms of Article 38 of the the Hague Convention of 2000 would facilitate its recognition between Member States and the acting of a legal representative of the adult. Together with the role of the autonomy of will in the field of applicable law, and unlike the EU Regulation in succession matters,<sup>58</sup> a future Regulation of the EU on the protection of adults could provide some margin for the will of an adult in order to determine the competent authority to take

---

<sup>57</sup> See the Working document on the protection of vulnerable adults, *op. cit.*, p. 4.

<sup>58</sup> The so-called *professio fori* has not been foreseen in this EU Regulation, given that the deceased is not interested in the allocation of international jurisdiction for the time when problems arise, such as those regarding the distribution of the inheritance or a dispute in matters of succession between his or her heirs. In this regard you can see ÁLVAREZ TORNÉ, M., "Key Points on the Determination of International Jurisdiction in the New EU Regulation on Succession and Wills", *YPIL*, Vol. XIV, 2012/2013, p. 417.

measures which affect him or her – by exploring options beyond its limited role in the context of the *forum non conveniens* under Article 8 of the Hague Convention of 2000-<sup>59</sup>

For the time being, and awaiting a possible - and desirable – Proposal drawn up by the EU legislator,<sup>60</sup> which could introduce the already commented enhancements or the necessary adaptations with respect to the Hague Convention of 2000, one way forward in this field would consist of progressive participation in this instrument until all the Member States of the UE are Contracting parties to it.<sup>61</sup> This would facilitate, to some extent, the standardization of solutions in this field and the free movement of the decisions taken. In this regard, it is – and will be - therefore essential to identify properly which legal instrument or rules will be applicable in each case, taking into account the characterization problems discussed in the lines above and the parameters of the hierarchy of norms and compatibility in the field of the interaction of legal sources.

---

<sup>59</sup> See the study “Protection of Vulnerable Adults”: *European Added Value Assessment, op. cit.*, underlines the importance of this aspect, p. 168.

<sup>60</sup> The study “Protection of Vulnerable Adults”: *European Added Value Assessment, op. cit.*, contains a number of proposals regarding the possible configuration of future EU legislation in this field, specially considering the existence of the Hague Convention of 2000, p. 92 *et seq.* and 163 *et seq.*

<sup>61</sup> In this sense, the recent study “Protection of Vulnerable Adults”: *European Added Value Assessment, op. cit.*, also refers to the suitability of the EU authorising and requesting the Member States to ratify or accede to the Hague Convention of 2000, p. 165. Also supporting the need to make substantial progress towards these goals in the EU area, see FRANZINA, P., “La protección internacional de adultos vulnerables: un llamamiento a la acción a nivel de la Unión Europea”, *AEDIPr*, t. XVI, 2016, pp. 127 *et seq.*