THEMIS COMPETITION 2017

Semi-Final B - International cooperation in civil matters

Effective protection: towards harmonising rules in the guardianship of adults in the EU

Aurélien BROUILLET  Manon FAUVERNIER  Constance GRIVELET
SUMMARY

INTRODUCTION .................................................................................................................................................. 3

I. Steps towards effective protection of adults and their guardians in the EU .................. 4
   A. The growing importance of fundamental rights in guardianship rules .......................... 4
      1. The intention to lay down fundamental rights for people with disabilities ............... 5
      2. The lack of effectiveness of fundamental rights in guardianship rules ...................... 7
   B. From fundamental rights to judicial safety .............................................................................. 9
      1. French conundrums: clarifying case law for judicial safety .................................. 9
      2. Common solutions: seeking the most appropriate framework for judicial safety ....... 12

II. A step forward: implementing effective protection through harmonisation .......... 13
   A. The Hague Convention on the international protection of adults: an effective tool for
      transnational situations of protected adults ......................................................................... 14
      1. Field covered by the Hague Convention on the international protection of adults .... 14
      2. Rules laid down by the Hague Convention ................................................................. 15
   B. The final step: European Union intervention in the matter .............................................. 17
      1. Providing broader scope for the Hague Convention on the international protection of
         adults ......................................................................................................................................... 17
      2. The advantages for the EU in ratifying the Hague Convention .................................. 19

CONCLUSION ...................................................................................................................................................... 20

BIBLIOGRAPHY ............................................................................................................................................... 21
INTRODUCTION

Population ageing in European countries is an issue that has long been on the minds of European Union (EU) legislators. In fact, for several decades, populations in Europe – and in the world – have been ageing. This trend is not likely to stop during the next century, as population projections drawn up by Eurostat show1.

One of the consequences of population ageing is that the number of persons with disabilities2, and therefore adults protected per year, has constantly grown. In France for instance, there were 636,877 adults protected in 20043. This number reached 800,000 in 20164.

The increasing number of protected adults is difficult to deal with at national level, as the judge ordering protection has to take proportionate measures that respect the fundamental rights of the adult, thus implying, for instance, that the wishes of the person are taken into account. The problems are amplified in an international situation, e.g. when the adult who needs protection lives abroad. Yet, European mobility is more and more common, thanks to treaties such as the Schengen Agreement, which enables people to move easily across Member States by largely abolishing internal border checks. As many retirees opt to settle in another EU country for their golden years, the transnational management of their estates can become quite a burden for their guardians, who are often family members and have little legal counselling.

Therefore, international instruments have been implemented within the EU to protect the interests of incapacitated adults and help their guardians. The first is the United Nations (UN) Convention on the

---

2 Article 1 of the Convention on the Rights of Persons with Disabilities states that “Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”
rights of persons with disabilities (CRPD)\(^5\) drawn up in 2006, which the EU signed in 2007\(^6\) and ratified in 2010. The second is the Hague Convention of January 13th 2000 on the international protection of adults, signed by most EU Member States. These two international instruments provide a framework on fundamental rights, along with a certain number of harmonised rules regarding applicable law and international jurisdiction in the area of adult guardianship.

However, as some countries in the EU have not signed the Hague Convention, how can the rules regarding guardianship of adults in the EU effectively protect the interests of incapacitated adults?

Despite the fact that considerable effort has been made by countries to ensure effective protection of vulnerable adults (I), truly effective protection can only be achieved through harmonisation of guardianship rules within the EU (II).

I. Steps towards effective protection of adults and their guardians in the EU

Transnational situations in regard to the legal capacity of adults can be examined in the light of fundamental rights (A) and of judicial safety (B).

A. The growing importance of fundamental rights in guardianship rules

Guardianship rules are now guided by the intention of states to set up fundamental rights for people with disabilities (1). However, while these rights clearly exist on paper, in reality they lack effectiveness (2).

---


The Convention and its optional protocol were adopted by the General Assembly of the United Nations on December 13, 2006. The CRPD opened for signature and ratification on March 30, 2007. It entered into force in France in 2010. In 2016, 168 states and the EU ratified the Convention, which represents 87% of the UN member states:


I. The intention to lay down fundamental rights for people with disabilities

Over the past few years, the fundamental rights of persons with disabilities have become more and more important at international level. Today, these rights are guaranteed by a general treaty - The European Convention on Human Rights – and by a more specific one - the CRPD. These two instruments work hand in hand to protect the rights of people with disabilities, as the European Court of Human Rights (ECHR) often uses the European Convention on Human Rights in conjunction with articles of the CRPD to conclude there has been a violation of the rights of persons with disabilities.

Thanks to these treaties, all people, whether under guardianship or not, now have the same rights. This principle is provided for in Articles 1 (obligation to respect human rights) and 14 (prohibition of discrimination) of the ECHR and in Articles 1 (purpose) and 12 (equal recognition before the law) of the CRPD.

Thereby, persons under guardianship have been granted substantial rights. Among them, public rights enable them to be considered as equal citizens. They have the right to participate in political and public life. As a consequence, guardianship cannot automatically deprive a person of the rights to vote and to be elected. They also have the right to education, health, work and employment and to participate in cultural life, recreation, leisure and sport.

Private rights of protected adults are also guaranteed. They have the right to marry, to recognise a child, to have a private and family life, etc. Most important of all, the ECHR guarantees that, under

---

7 For example, ECHR, Alajos Kiss v. Hungary, May 20th, 2010, n° 38832/06 for a protected person deprived of his right to vote; ECHR Çam v. Turkey, February 23rd, 2016, n°51500/08, for a blind person who was refused access to an academy of music despite her having passed the competitive entrance examination.
8 Article 29 of the CRPD and Article 3 of Protocol n°1 to the European Convention on Human Rights
10 Article 24 of the CRPD and Article 2 of Protocol n°1 to the European Convention on Human Rights
11 Article 25 of the CRPD
12 Article 27 of the CRPD
13 Article 30 of the CRPD
14 Article 12 of the European Convention on Human Rights
15 ECHR, June 21st, 2011, Kruskovic a. Croatia, n° 46185/08
16 Article 8 of the European Convention on Human Rights ; Articles 22 and 23 of the CRPD
Article 8 of the European Convention on Human Rights, a person cannot be totally deprived of his or her legal capacity without appearing before a judge\textsuperscript{17}. In other words, he or she cannot be placed under guardianship only on the basis of psychiatric reports and testimonies\textsuperscript{18}. In its decisions, the ECHR always ensures that measures taken to protect adults with disabilities are appropriate and proportionate. Article 12 of the CRPD also states this principle\textsuperscript{19}.

In order to respect their international commitments, most European countries have put graded guardianship measures into place. In France, for example, there are three different measures, from the least prejudicial to a person’s legal capacity to the most: 1) judicial protective supervision\textsuperscript{20} 2) curatorship and 3) tutorship\textsuperscript{21}. The law reforming guardianship\textsuperscript{22} sets out the principles of proportionality and subsidiarity. This means that a guardianship measure should be taken only if other legal instruments such as rules of matrimonial regimes cannot effectively protect the adult. This also implies that, when the judge of tutorships chooses to place a person under guardianship, he or she has to choose the measure that is the least prejudicial to the legal capacity of the adult. This principle is implemented by Articles 415\textsuperscript{23} and 440 of the French Civil Code\textsuperscript{24}, which give a major place to

\textsuperscript{17} ECHR, Choukatorou v. Russia, March 27th, 2008, n° 44009/05  
\textsuperscript{18} ECHR, A.N. v. Lithuania, May 31st, 2016, n° 17280/08  
\textsuperscript{19} “States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.” \textsuperscript{20} Articles 433 and next of the French Civil Code, official English translation by David W. Gruning, professor of law, Loyola University, school of law, New Orleans (2013).  
\textsuperscript{21} Articles 440 and next of the French Civil Code, op. cit  
\textsuperscript{22} Law n°2007-308, March 5th, 2007, which entered into force on January 1st, 2009.  
\textsuperscript{23} “Adults receive the protection of their person and of their assets that their condition or situation renders necessary as laid down in the present title. This protection is established and assured with full respect for individual liberties, for fundamental rights and for the dignity of the person. This protection has as its goal the interest of the person protected. It favours, as much as possible, the autonomy of that person. This protection is a duty of the families and of the public community.” op. cit  
\textsuperscript{24} “The person who, without being unable to act himself, is in need, for one of the causes mentioned in Article 425, to be assisted or supervised in a continual manner in the important acts of his civil life may be placed under curatorship. Curatorship is ordered only if it is shown that judicial protection cannot assure sufficient protection. The person who, for one of the causes mentioned in Article 425, must be represented in a continual manner in the acts of
fundamental rights of protected adults and to the preservation of their autonomy in daily life. Other measures were also created by the 2007 law, such as the measure for judicial assistance, “whose purpose is to reestablish the autonomy of the person concerned in the management of his resources.”\(^{25}\). This measure does not lead to legal incapacity but consists in the judge’s naming a professional who will manage the social benefits of a person with social and financial difficulties. If this measure is sufficient to protect the adult, he or she will not be placed under guardianship.

In order to guarantee these substantial rights, people under guardianship also have **procedural rights.** Under Article 6 of the Convention, protected adults in fact have the right to a fair trial. This implies for example that a Member State has to take special measures to ensure that a vulnerable adult involved in a criminal trial appears before the court or is represented by his or her guardian or by a lawyer, so that he or she understands the issues at stake\(^{26}\). Following this decision, French law has evolved and now states that a judge shall inform the guardian and the judge of tutorships when a person under guardianship is prosecuted\(^{27}\). It also implies that an adult who needs protection shall take part in the protection proceedings and give his or her point of view on the matter\(^{28}\).

It is undeniable that real efforts have been made by states to protect vulnerable adults. However, fundamental rights provided for in treaties and laws still lack effectiveness.

2. **The lack of effectiveness of fundamental rights in guardianship rules**

In France, an independent administrative authority called the Defender of Rights “oversees the protection of [the] rights and freedoms [of citizens], promotes equality and ensures greater access to rights”\(^{29}\). The government put this administrative body in charge of making sure that France respects

\(^{25}\) Articles 495 and following of the French Civil Code, op. cit

\(^{26}\) ECHR, Vaudelle v. France, January 30, 2001, n° 35683/97

\(^{27}\) Article 706-113 of the French criminal procedure code, implemented in 2008.

\(^{28}\) ECHR, Chtoukatourov v. Russia, March 27, 2008, n° 44009/05. The French High Court has the same point of view (Civ. 1re, November 19, 2014, n°13-23.365). Article 432 of the French Civil Code states since 2007 that “The judge rules after the person has been heard or duly notified.”

\(^{29}\) [http://www.defenseurdesdroits.fr/en](http://www.defenseurdesdroits.fr/en)
the CRPD.

As a consequence, the Defender of Rights published a report on the legal protection of persons under guardianship in September 2016. This report highlights that the 2007 law made the situation of protected adults considerably better in France, but that their fundamental rights set out in texts are not always guaranteed in reality.

With regards substantial rights, the Defender of Rights points out that this reform did indeed reinforce the voting rights of people under guardianship, as the measure no longer automatically deprives the person of his or her right to vote. However, he considers that the fact that the judge has the possibility of depriving a person under guardianship of his or her right to vote is discriminatory and therefore violates the European Convention on Human Rights and the CRPD.

Moreover, the Defender of Rights criticises the rules governing marriage of protected adults, as Article 460 of the French Civil Code states that: “The marriage of a person under curatorship is permitted only with the authorization of the curator or, if need be, the authorization of the judge. The marriage of a person under tutorship is permitted only with the authorization of the judge or of the family council, if one has been constituted, and after a hearing of the future spouses and, if need be, with the opinion of his relatives and of his circle of friends.”

The Defender of Rights considers that the above rules violate France’s international commitments. The same analysis holds true for the right to divorce, as Article 249-4 of the French Civil Code prohibits divorce by mutual consent or on the ground of acceptance of the principle of the breakdown of the marriage when one of the spouses is under guardianship.

Worst of all, the Defender of Rights points out that the judge does not take the concrete situation sufficiently into account and too often places the adult under tutorship, while lesser measures could have been taken. He also denounces the fact that most judges of tutorships do not interview the adult.

---

30 Article L. 5 of the French Electoral Code
31 David W. Gruning, op. cit
before taking a measure, which violates their procedural rights.

Moreover, fundamental rights guaranteed at international level cannot be effective without judicial safety.

**B. From fundamental rights to judicial safety**

Spending one’s golden years in another country is a dream made possible by the European Union\(^{32}\), as is crossing borders in order to receive a higher quality of care in specialised institutions\(^{33}\). At the same time, the rules of international private law, as submitted to national courts, are extremely intricate and baffle not only the person in need of protection, but also his or her primary carers, in most cases non-professionals.

These rules are also very difficult to understand by the courts themselves; two French precedents will serve to underline the issues relating to the international protection of adults (1). Conflicting legislation within the EU is an obstacle to judicial safety and the rights of EU citizens. National legislators have taken steps to allow as much flexibility as possible (2).

1. **French conundrums: clarifying case law for judicial safety**

When confronted with any situation bearing transnational consequences, judges rely on classical rules of international private law in order to resolve conflicts of law and jurisdiction. In the case of a person’s capacity, the international custom for the judge is to choose the law of nationality of the applicant. Before implementing the Hague Convention on the international protection of adults, French judges based their decisions upon Article 3 of the French Civil Code, which designates French law in matters

---

32 For an assessment of questions related to pensions and healthcare, see the situation of British expats in Spain post-Brexit: Sam Jones, “Brits in Spain react to Brexit”, The Guardian, June 24 2016

33 Access to social rights, especially financial help from the country of origin, is a key element when choosing where to get treatment: French judges usually find themselves competent for people who moved to Belgium for treatment, as it will help the disabled person’s right to obtain French social security; to wit, see Cour d’Appel de Douai, Nov 25 2015, n°2015/279, seen in [http://www.creai-aquitaine.org/non-classe/protection-juridique-des-majeurs-francais-heberges-en-belgique/](http://www.creai-aquitaine.org/non-classe/protection-juridique-des-majeurs-francais-heberges-en-belgique/) - the French judge used art. 7.1 of the Hague Convention in order to keep the French national under French law – thus allowing for her right to social security checks.
relating to a French person’s capacity, even when the French national lives abroad\(^{34}\). As for jurisdiction, Article 1211 of the French Code of Civil Procedure states that the French judge is competent with regard to the residency of that person, or the residency of the guardian\(^{35}\). This involves persons of other nationalities with residency in France. These very broad applications of French law, also common in other European countries, such as Portugal\(^{36}\) or Greece\(^{37}\), can be contrary to other types of mechanisms, for instance the law of residency for both jurisdiction and applicable law as seen in the Netherlands\(^{38}\) or Spain\(^{39}\), or unilateral use of Irish law for any case brought before the courts\(^{40}\).

Before the implementation of the Hague Convention, France’s Cour de Cassation decided in 2006\(^{41}\) on the case of a French national living abroad and subject to a protection measure. In this case, the French national who had been living for decades in Germany sold a house to a French realtor while under a protection measure ordered by a German court. The realtor asked the French judge not to take the measure into account, arguing that only French protection measures could apply to French nationals, thus avoiding the annulment of the sale. This meant the German court ought to have applied French protection laws when dealing with this particular case. Wisely, the Court dismissed the claim, on the grounds of “equivalence”, stating that the German framework was equivalent to the French one.

This orientation of case law, originating in trust in another legal system, has bent the very strict rules of French law applicability and paved the way for reflexion on harmonisation. Indeed, several countries possess a “pick and choose” approach for judges, leaving the option for courts to decide among the laws of residency, the laws of nationality and the laws of the location of assets.

\(^{34}\) “Statutes concerning the status and capacity of persons govern French citizens even those residing in a foreign country.” David W. Gruning, op. cit.

\(^{35}\) But, Article 443 § 2 of the French Civil Code states that “Without prejudice to Articles 3 and 15, the judge may also put an end to it when the person protected resides outside the national territory, if that distance prevents to follow (sic) up and to control the measure.” op. cit

\(^{36}\) Article 25 of the Civil Code of Portugal

\(^{37}\) Article 5 and 7 of the Civil Code of Greece

\(^{38}\) http://ec.europa.eu/civiljustice/applicable_law/applicable_law_net_en.htm#III.3.

\(^{39}\) Article 9.6 of the Civil Code of Spain

\(^{40}\) Art 117, Assisted Decision-Making (Capacity) Act 2015 ; this section has not yet come into law. Under this section, the Irish judge can also choose to apply another law on grounds of proximity with the person’s interests.

\(^{41}\) Cour de Cassation, Première Chambre Civile, Nov 14, 2006 n° 05-12.353
Cases of a foreign national living in France have developed complicated challenges for the courts. One very arduous case was brought before the Cour de Cassation twice, once in 2007, and again in 2010. A Portuguese citizen who had spent most of her life in France was placed under French guardianship by a French court in 2004. Arguing for the repeal of the measure, the litigant brought forward the inapplicability of French law in her case, as the law of her nationality should have been applied, according to Article 3 of the French Civil Code.

In 2007, the Court heard the arguments and quashed the previous ruling. Its reasoning followed a constant in case law: Article 3 of the French Civil Code, used *a contrario*, states that when confronted with decisions concerning the legal capacity of persons, the French judge must choose the law of the applicant’s nationality, i.e. the law of Portugal in this case, while retaining the jurisdiction of French courts. Challenging this decision in the wake of the ratification of the Hague Convention, the applicant’s claim was rejected a second time in 2010, since the measure had been taken before its entry into French law.

As is the case in other countries, the French legal system tends to link jurisdiction and applicable law. This proximity of the legal instrument is a guarantee of judicial safety, because courts use rules they can grasp without the help of the parties or *amici curiae*. Indeed, when a French court applies a foreign law, the judge has to seek out the meaning of foreign law, "*with the help of the parties or personally if necessary*". But this solution requires expertise from all concerned; if not, legal research becomes expensive and technical, and is not in the litigants’ best interests.

Moreover, implementing foreign decisions in another legal system is not automatic, especially when dealing with rights relating to capacity. Usually the foreign legal decision goes through the process of *exequatur*, a second ruling where the first decision is examined in order to assess its compatibility in the new system, especially when relating to statutes concerning public policy and the principle of public order. This process is often very long and is not well adapted to a common system of laws and values.

---

42 Cour de Cassation, Première Chambre Civile, Jan 18, 2007 n° 05-20.52
43 Cour de Cassation, Première Chambre Civile Mar 3, 2010 n° 09-13.949
44 Cour de cassation, première chambre civile, June 28, 2005, civil bulletin n°289
45 A good example is the discrepancy between legal systems where people are placed under guardianship for “dissolute
such as in the European Union.

These examples show how important it is to offer the most suitable framework for a person’s protection.

2. **Common solutions: seeking the most appropriate framework for judicial safety**

In the two cases mentioned previously, the rules governing these measures were extremely arduous and difficult to follow by any professional guardian, let alone a family member taking care of a relative. Therefore, several common solutions have been put into place in an attempt to find the most appropriate framework for judicial safety.

*Most European countries have adopted legislation which guarantees fundamental rights for the disabled person.* National frameworks converge towards a three-pillared policy. 1) The gradation of measures, from a simple measure of overview of a person’s legal and financial interests by a professional or family member, to complete control of one’s estate. The choice is always supported by at least one or several medical documents and the legal solution is given in the best interest of the person rather that the estate he or she possesses⁴⁶;

2) The power to place someone under a protection order is left to a judge, although several countries opt for a dissociation between the court which will decide upon the measure and local government bodies which will be in charge of the guardian’s control of an estate and personal decisions⁴⁷;

3) There is a shift towards limited-term measures, which allows the reassessment of people under guardianship at regular intervals⁴⁸.

*Preventive measures, akin to powers of attorney,* have been implemented in most European countries. This helps the person to plan his or her rights in the case of a debilitating illness. Most of these private

---

⁴⁶ See the changes in the Republic of Ireland in the 2015 law, op cit.
⁴⁷ Such is the case in Bulgaria for example or in the election of “auditors” by local councils in Sweden (« överförmyndare »)
⁴⁸ To date, see the changes brought by the Family law (2010) in Estonia: an incapacitated person’s measures are assessed by a judge every three years.
conventions designate the person responsible for protection, decide how the measure can be put into place and thus delay the effects. The preventive measure sets out the scope of protection, from financial to estate-managing to personal or medical decisions. The contract can share out the duties between two guardians, usually a professional dealing with the estate, and a close relative when dealing with personal decisions. If recognised in the new country of residence, and implemented for each aspect of the person’s life (an international contract, the decision to be housed in assisted living, etc.), these instruments can alleviate the burden of individuals and their relatives. Being private, the contract does not go through the process of *exequatur*, but can still be discarded by a foreign judge when the latter assesses an act linked to the contract or decides on a new protection measure.

In a nutshell, international and domestic laws dealing with the protection of vulnerable adults have evolved, and persons under guardianship are now better protected than before. However, these rules are not sufficient. Effective protection can only be achieved through harmonisation.

**II. A step forward: implementing effective protection through harmonisation**

European legislation stands at a crossroads: although national rules have changed in order to take the newly recognised fundamental rights of people with disabilities into account, it is also true that there are, today, no harmonised rules covering these legal questions. Such a lack of harmonisation goes against the principle of legal certainty and can create situations in which implementation of fundamental rights will hardly be effective.

Among the international tools dealing with this issue, it is our view that the Hague Convention of 2000 offers the best solution for the courts to deal with transnational questions regarding legal capacity (A). While the Convention has greatly influenced national rules, the next and final step may be to transform the Convention into EU regulation, a process which can provide full safety for the persons concerned by these issues (B).
A. The Hague Convention on the international protection of adults: an effective tool for transnational situations of protected adults

The Hague Convention on the international protection of adults is an effective tool, as the field it covers is wide (1) and the rules it puts into place are practical and clear (2).

1. Field covered by the Hague Convention on the international protection of adults

There are many international conventions that deal with the international protection of adults. The CRPD for example was drafted in 2006 and signed by the EU in 2007, offering a common agreement for all EU Member States. However, the goal of such a convention is to implement a worldwide framework of fundamental rights. Despite proclaiming the right to mobility for disabled people\(^49\), it does not deal specifically with issues of the transnational mobility of vulnerable adults. But this is a growing concern inside a border-free space such as the European Union.

The main convention dealing with this issue is the Convention on the international protection of adults concluded on January 13th, 2000 within the framework of the Hague Conference on Private International Law. The goal of this Convention was “to avoid conflicts between their [the states signatory to the convention] legal systems”\(^50\). Conflicts between legal systems are highly diversified. For example, there could be two contradictory measures (positive conflict) or the impossibility to obtain a protection measure (negative conflict). There could also be difficulty in interpreting an already active protection measure unknown in the state of application.

In order to unify the scope of protection for adults, the Convention developed its own definition. The unified definition ensures legal certainty as to what constitutes an adult in need of protection and what does not. Those concerned by the Convention are “adults who, by reason of an impairment or insufficiency of their personal faculties, are not in a position to protect their interests”\(^51\). This definition

\(^{49}\) Article 20 of the UN Convention on the rights of persons with disabilities: States Parties shall take effective measures to ensure personal mobility with the greatest possible independence for persons with disabilities [...]

\(^{50}\) Preamble of the Convention on the international protection of adults

\(^{51}\) Article 1 of the Convention on the international protection of adults
is deliberately wide and concerns not only the elderly but also disabled people. The notion of insufficiency of one’s personal faculties is broad enough to encompass the various criteria of Member States.

The Convention aims at applying to most of the problems caused by the mobility of protected people. Therefore, all measures “directed to the protection of the person or property of the adult” are concerned, apart from for nine restrictive exceptions. The protection of both the property and the person of the adult are concerned, thus taking into account the progress made by international legal instruments and the oversight of the ECHR. The Convention applies a holistic approach to transnational cases: its aim is to resolve as many conflicts as possible in the areas of jurisdiction, law applicability and recognition of decisions.

2. **Rules laid down by the Hague Convention**

The Hague Convention sets out rules concerning jurisdiction, applicable law and recognition of decisions as is often the case with modern multilateral tools on international private law. As far as jurisdiction is concerned, the main criterion of the Convention is the state of “the habitual residence of the adult”, which again is the standard in international private law. It is a practical criterion that is now well known by judges and offers a close link to the situation. Besides this rule, other criteria can be found such as jurisdiction in cases of emergency or jurisdiction for goods located in the country and, most of all, jurisdiction over the nationality of the adult. These exceptions ensure flexibility in the Convention and can be a good response when all the property of the adult remains in the state of

---

52 Idem
53 Article 4 of the Convention on the international protection of adults
54 With the same structure for succession law: 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
55 Article 5 of the Convention on the international protection of adults
57 Article 10 of the Hague Convention on the international protection of adults
58 Article 9 of the Hague Convention on the international protection of adults
59 Article 7 of the Hague Convention on the international protection of adults
nationality, even though the person goes abroad for quite a time, for example on medical grounds. This is a subsidiary rule of jurisdiction that ensures a close link between the competent court and the adult.

The aforementioned explains why the applicable law is the national law of the court. The lex fori will be applied for all questions raised by protection, from conditions for ordering a protection measure to the implementation thereof. This solution radically simplifies situations. Local courts are more closely linked to the situation and will apply their own law which they know well. Apart from a general exception if the situation has “a substantial connection” to another state, the Convention takes into account agreements made by the future protected person. In this case, the law of the “State of the adult's habitual residence at the time of the agreement” must apply. Moreover, the Convention guarantees the fundamental rights of protected adults by opening up a choice of law within agreements. The rules created by the Hague Convention are guided by the desire to simplify, to identify the closest link between the law and the situation and to maximise preservation of autonomy of persons under guardianship. The simplicity of these rules added to their flexibility makes them really effective.

Another goal of the Convention is to ensure “recognition and enforcement of measures for the protection of adults”. Recognition is fundamental in this matter. Indeed, an act which seems valid in one state may be cancelled because of an unknown foreign protection measure. This issue creates considerable legal uncertainty. In order to ensure better legal certainty, the principle implemented by the Convention is recognition by operation of law, except in five restrictive cases, including “violation of fundamental principles of procedure” or “incompatibility with a later measure taken”. If the measures taken by a court in one Member State need to be enforced in another, the principle is a “simple and rapid procedure” for the declaration of enforceability. An entire system of cooperation is also created by the Convention. Through the creation of central authorities designated in each Member State, the goal of the Convention is to engender better collaboration between states. The Convention even

60 Article 13 (1) of the Hague Convention on the international protection of adults
61 Article 13 (2) of the Hague Convention on the international protection of adults
62 Article 15 of the Hague Convention on the international protection of adults
63 Article 22 of the Hague Convention on the international protection of adults
64 Article 25 of the Convention on the international protection of adults
creates mandatory consultation for authorities in the case of placement of the adult\textsuperscript{65}. Finally, and very practically, Articles 38 of the Convention and those following create a certificate which can be delivered to the person entrusted with protection, to help him or her prove the situation of the protected adult in all Member States.

For all these reasons, the Hague Convention is a practical tool, designed to resolve most transnational issues in the matter of adult protection in a simple and effective way, which is respectful of fundamental rights. The question of its implementation in the European Union is therefore raised.

B. \textit{The final step: European Union intervention in the matter}

In a certain way, international protection of adults is ensured by increasing application of the Hague Convention (1). Nevertheless, in order to achieve closer cooperation between EU Member States, ratifying the Convention would be appropriate for the EU (2).

1. \textit{Providing broader scope for the Hague Convention on the international protection of adults}

The Hague Convention on the international protection of adults has revealed itself to be very useful for all kinds of problems caused by the mobility of protected adults, which explains its popularity across Europe. Initially ratified by the UK, France and Germany\textsuperscript{66}, the three largest and most heavily populated countries in Europe, its influence has spread to others.

Nowadays, the Convention has been ratified by 9 countries and signed by 9 more. With the exception of Switzerland, Monaco and the specific case of the UK, all these countries are EU members. Many states seem to have waited for the effective application of the Convention before signing it. The success of the Convention is due to different factors. First of all, we can cite the multiplication of cases of protected adults in which a foreign-related factor appears. The ageing of the European population combined with the increase in mobility among European citizens has automatically increased such internationally-linked cases. The simplicity of the Convention, the choice of well-known criteria and

\begin{itemize}
  \item Article 33 of the Convention on the international protection of adults
  \item \url{https://www.hcch.net/en/instruments/conventions/status-table/?cid=71}
\end{itemize}
the effectiveness of collaboration between states has also helped to convince non-member states to ratify it.

The success of the Convention can also be seen in the influence it has had on the domestic laws of Member States. In France, for example, the Convention was ratified in 2008. In 2009, a modification of the law gave the adult the possibility to anticipate his or her future disability by a “mandate of future protection”\(^{67}\). This possibility had been foreseen by the Convention. The French legislator took it as a new measure which was more in accordance with the modern idea of taking into account not only the property of adults but also their person, in the spirit of maximum liberty and autonomy for the protected adult.

Finally, the Convention filled the gap left by European regulation. Indeed, the European Union has produced major regulations in the area of family law; the so-called “Brussels II \(^{68}\)”, “Rome III \(^{69}\)” and the European regulation on succession\(^{70}\). “Brussels II bis” does include the possibility of dealing with “guardianship, curatorship and similar institutions”\(^{71}\) but in the area of divorce and especially parental responsibility. Rome III clearly excludes the “legal capacity of natural persons”\(^{72}\)” and the European regulation on succession does the same\(^{73}\). Finally the “Brussels I”\(^{74}\) regulation was explicitly excluded

\(^{67}\) Articles 428 and following of the French Civil Code
\(^{69}\) COUNCIL REGULATION (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation
\(^{70}\) 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
\(^{72}\) Article 1; 2 (a) of COUNCIL REGULATION (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation
\(^{73}\) Article 1; 2 (a and b) of 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
\(^{74}\) Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and recognition and enforcement of judgments in civil and commercial matters
from the area of protection of adults by the CJEU\textsuperscript{75}. Therefore, national courts were obliged to apply their own international private rules, creating a diversity of solutions.

If the Hague Convention effectively filled the gap left by European instruments, it still needs to be implemented for all countries, in order to have similar decisions in a common market and ensure close cooperation in Europe on this growing issue.

2. \textit{The advantages for the EU in ratifying the Hague Convention}

Our proposal is for the European Union to take this question into account and either produce a European regulation on the matter, or sign and ratify the Convention on behalf of all Member States. The goal is not to ensure a process of unification concerning protected adults, because personal rights have a cultural link with the country from which they originate; but that does not mean that harmonisation cannot be achieved.

To intervene in an area, the EU, like any other international organisation, must have the jurisdiction to do so. Article 81 of the Treaty on the Functioning of the European Union (TFEU) creates a general competence for \textit{“judicial cooperation in civil matters having cross-border implications”}, which is the case for more and more measures dealing with the protection of adults. Therefore, the idea of creating an EU regulation is tempting, as it is a common crucible for previous regulations, such as divorce and successions; furthermore, its common application is protected by oversight from the Court of Justice of the EU.

However, the consequence would be that two tools - the Hague Convention and the new EU regulation – would apply with the same field and the same rules. This could be a problem if regulation diverged even slightly from the Convention.

Moreover, as non-EU members or future non-EU members are directly concerned by international questions linked to guardianship of adults, an open Hague Convention seems better than an EU regulation.

\textsuperscript{75} CJEU October 3rd, 2013, C-386/12
Nonetheless, the adhesion of the EU to the Hague Convention might have to overcome obstacles. The EU joined the Hague Conference in 2006\textsuperscript{76} and point 3 of the Declaration on jurisdiction upholds the principle of subsidiarity\textsuperscript{77} and of EU regulations as opposed to national laws, thus raising issues of EU competence in this matter. It will also be necessary to change the Convention in order to give the EU the possibility of signing it. If achieved, the Convention will become a common tool, harmonising national rules without suppressing the specificity of each country, thus greatly increasing legal safety.

\textbf{CONCLUSION}

For several years, most European countries have made a serious effort to improve the situation of incapacitated adults. The signature and ratification of Conventions such as the CRPD or the Hague Convention of 2000 shows their common intention to protect the interests of vulnerable adults.

However, there are still major differences between countries, and national rules of private international law are not sufficiently coordinated. The only solution to ensure effective protection of adults under guardianship is a ratification of the Hague Convention by the EU. Thereafter, a common framework will ensure transnational security for protected adults and their guardians. It will make fundamental rights, and especially the right to mobility for the most vulnerable persons, really effective within the EU.

\textsuperscript{76} COUNCIL DECISION of 5 October 2006 on the accession of the Community to the Hague Conference on Private International Law (2006/719/EC)

\textsuperscript{77} “In areas which do not fall within its exclusive competence, the European Community shall take action, in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the European Community. Any action by the European Community shall not go beyond what is necessary to achieve the objectives.” Consolidated version of the Treaty on the Functioning of the European Union (Treaty of Rome, 1957 ; Treaty of Lisbon, 2007).
BIBLIOGRAPHY

● **Statistics**
- Eurostat, population structure and ageing (existing data from June 2016)
  http://ec.europa.eu/eurostat/statistics-explained/index.php/People_in_the_EU_%E2%80%93_statistics_on_an_ageing_society#The_elderly_living_alone

● **Comparative studies**
- European Parliament, Comparative study on the legal systems of the protection of adults lacking legal capacity, 2008:
- French Senate, studies in comparative law - legal protection of adults, 2005:
  https://www.senat.fr/lc/lc148/lc148.html
  
  ● **The Hague Convention of January 13th 2000 on the internal protection of adults**
  - Report by Paul Lagarde, 2003:
    https://assets.hcch.net/docs/3d73f963-90df-4d7d-8d05-003a1c8051b5.pdf
  
  ● **Fundamental rights**
  - Report by the Defender of Rights, “Legal protection of vulnerable adults”, 2016 :
  - Persons with disabilities and the European Convention on Human Rights, ECHR, Factsheet, 2017:
    http://www.echr.coe.int/Documents/FS_Disabled_ENG.pdf
European Parliament