



Northern Ireland
Assembly

Research and Information Service Briefing Paper

Paper 000/00

18 November 2015

NIAR 656-15

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The Convention on the International Protection of Adults and the Mental Capacity Bill

1 Introduction

Clause 272 of the Mental Capacity Bill 2015¹ states the following:

International protection of adults

272.Schedule 9—

(a) gives effect in Northern Ireland to the Convention on the International Protection of Adults signed at the Hague on 13 January 2000 (in so far as this Act does not otherwise do so); and

(b) makes related provision as to the private international law of Northern Ireland.

¹ Mental Capacity Bill 2015: <http://www.niassembly.gov.uk/assembly-business/legislation/primary-legislation-current-bills/mental-capacity-bill/>.

Schedule 9 contains provisions for the international protection of adults. This Schedule is reproduced at Appendix 1.

The Explanatory and Financial Memorandum to the Bill explains Clause 272 as follows²:

This clause provides that Schedule 9 gives effect in Northern Ireland to the Convention on the International Protection of Adults 2000.

This Briefing Paper:

- Summarises the content and background to the Convention on the International Protection of Adults 2000
- Discusses the relevance of the Convention to the Mental Capacity Bill

The Convention on the International Protection of Adults 2000³ is reproduced at Appendix 2.

² Mental Capacity Bill Explanatory and Financial Memorandum, p.79.

³ Convention on the International Protection of Adults 2000: http://www.hcch.net/index_en.php?act=conventions.text&cid=71.

2 Convention on the International Protection of Adults 2000

This section summarises the background and purpose of the Convention on the International Protection of Adults 2000.

Background

The Hague Conference on Private International Law has 80 members (79 states and the European Union) including the UK. There are also non-members who can sign up to Conventions. The purpose of the Conference is "to work for the progressive unification of the rules of private international law"⁴. The principal method used to achieve the purpose of the Conference consists in the negotiation and drafting of multilateral treaties or Conventions in the different fields of private international law.

The Convention on the International Protection of Adults was conceived to extend the protections of a similar Convention designed for the protection of children, the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*⁵.

Scope

Article 1 of the Convention outlines the scope of the treaty.

- (1) This Convention applies to the protection in international situations of adults who, by reason of an impairment or insufficiency of their personal faculties, are not in a position to protect their interests.
- (2) Its objects are -
- a) to determine the State whose authorities have jurisdiction to take measures directed to the protection of the person or property of the adult;
 - b) to determine which law is to be applied by such authorities in exercising their jurisdiction;
 - c) to determine the law applicable to representation of the adult;
 - d) to provide for the recognition and enforcement of such measures of protection in all Contracting States;
 - e) to establish such co-operation between the authorities of the Contracting States as may be necessary in order to achieve the purposes of this Convention.

In broad terms, the Convention is intended to protect the interests of an individual who is deemed to lack capacity in one contracting state where those interests are situated in another contacting state. The rationale for this has been described as follows⁶:

⁴ Overview, Hague Conference on Private International Law, accessed 11 November 2015: http://www.hcch.net/index_en.php?act=text.display&tid=26.

⁵ Paul Lagarde (2000), *Convention of 13 January 2000 on the International Protection of Adults, Explanatory Report*, The Hague: Hague Conference on private international law, p.22: <http://www.hcch.net/upload/exp135e.pdf>.

⁶ Catherine Fairbairn and Kate Haire (2004), *The Mental Capacity Bill*, House of Commons Research Paper 04/73 5 October 2004, p.55: <http://researchbriefings.files.parliament.uk/documents/RP04-73/RP04-73.pdf>.

The Convention was drawn up in response to the increasing number of incapacitated adults who are involved in situations where the jurisdiction of more than one country may apply. An example of this is someone who retires to another country, so may then have financial affairs and perhaps property in both countries. If this person then loses capacity due to dementia, there may be problems deciding which legal jurisdiction should be responsible for the protection of the person and their affairs.

It is important to understand that the Convention is not about establishing uniform international law for the protection of adults⁷, but a means by which states can interact to protect the interests of people who lack capacity. As such, the Convention affects two main areas of law:

- Permission for a private mandate (such as power of attorney) to be exercised in more than one jurisdiction
- Exercise of measures (such as detention on grounds of incapacity) authorised in one state to be carried out in another

Examples of how the Convention might be applied are as follows⁸:

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

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

⁷ Alex Ruck Keene (2015), 'Hague 35: Overview and Measures of Protection', in Richard Frimston et al (eds.), *The International Protection of Adults*, Oxford: Oxford University Press, p.97.

⁸ Hague Conference (2008), *The Hague Convention of 13 January 2000 on the International Protection of Adults: Outline of the Convention*, Vienna: HCCH, p.3: <http://www.hcch.net/upload/outline35e.pdf>.

Eight states have ratified the Convention⁹ and seven more have signed but not ratified¹⁰.

The Convention and the UK

The UK signed the Convention on the International Protection of Adults on 1 April 2003 and ratified on 5 November 2003 in relation to Scotland only, with entry into force on 1 January 2009¹¹.

At the time of ratification, only Scotland had incapacity legislation, in the form of the Adults with Incapacity (Scotland) Act 2000¹². However, before the Convention came into force, the Mental Capacity Act 2005¹³ was passed for England and Wales. Section 63 of the 2005 Act states:

63 International protection of adults

Schedule 3—

- (a) gives effect in England and Wales to the Convention on the International Protection of Adults signed at the Hague on 13th January 2000 (Cm. 5881) (in so far as this Act does not otherwise do so), and
- (b) makes related provision as to the private international law of England and Wales.

The Explanatory and Financial Memorandum to the Mental Capacity Bill (leading to the 2005 Act) states the following¹⁴:

It should be noted that for the purposes of the Hague Convention, (1) England and Wales, (2) Scotland and (3) Northern Ireland are treated separately because they constitute separate jurisdictions. The provisions of Schedule 3 are intended to be compatible with the provisions of Schedule 3 to the Adults with Incapacity (Scotland) Act 2000 (2000 asp 4) which provided for the private international law of Scotland in this field and implemented the Hague Convention for Scotland.

Hague Convention went largely unremarked upon during the passage of the Bill, with the exception of a discussion in the House of Lords as to whether giving effect to the Convention should be subject to a positive or negative procedure in Parliament¹⁵.

It is not clear why the UK has not ratified the Convention in relation to England and Wales. Paragraph 35 of Schedule 3 of the 2005 Act withholds the effect of certain paragraphs of that Schedule until ratification.

⁹ Austria, Czech Republic, Estonia, Finland, France, Germany, Switzerland and UK (Scotland only).

¹⁰ Cyprus, Greece, Ireland, Italy, Luxembourg, Netherlands and Poland.

¹¹ Status Table, Convention of 13 January 2000 on the International Protection of Adults, accessed 11 November 2015: http://www.hcch.net/index_en.php?act=conventions.status&cid=71.

¹² Adults with Incapacity (Scotland) Act 2000: <http://www.legislation.gov.uk/asp/2000/4/contents>.

¹³ Mental Capacity Act 2005: <http://www.legislation.gov.uk/ukpga/2005/9/contents>.

¹⁴ Mental Capacity Bill Explanatory and Financial Memorandum, paragraph 147: <http://www.publications.parliament.uk/pa/cm/200304/cmbills/120/en/04120x-c.htm>.

¹⁵ Mental Capacity Bill, HL Deb 08 February 2005 vol 669 c781: http://hansard.millbanksystems.com/lords/2005/feb/08/mental-capacity-bill#S5LV0669P0_20050208_HOL_393.

Article 28 of the Convention requires contracting states to designate a Central Authority to discharge the duties imposed by the Convention. In the case of Scotland, this is the EU and International Law Branch of the Scottish Government¹⁶. Paragraph 6 of Schedule 3 of the 2005 Act designates the Lord Chancellor as the Central Authority for England and Wales, but this is not recorded as such on the Convention web pages.

Schedule 3 of the 2005 Act also provides international law rules to govern jurisdictional issues between Scotland, England and Wales and Northern Ireland¹⁷.

The Convention and the Mental Capacity Bill in Northern Ireland

Schedule 9 of the Mental Capacity Bill for the most part follows the form and detail of Schedule 3 of the 2005 Act and serves the same purpose. Concerns were raised with regard to this Schedule in the Committee Stage, as follows¹⁸:

I will just mention a couple of points where I would like to caveat. This is not to detract from my enthusiasm. First, you might just want to think — if I can put it that way — about schedule 9, which I am sure you have spent lots of time poring over. Schedule 9 is the equivalent of our schedule 3 to the Mental Capacity Act, which is about recognising and enforcing foreign protective measures. It would appear from Hansard that our schedule 3 was the subject of very little analysis as it went through Westminster. I have been involved in several cases — in fact, ironically, most of the reported cases — and what has become very clear is that, possibly inadvertently, a piece of legislation was passed requiring the Court of Protection in England and Wales to recognise and enforce a measure taken in respect of any adult anywhere in the world by either a court or an administrative authority, if the adult has an "impairment or insufficiency of his personal faculties" preventing him from protecting himself.

This is a lot wider than a provision that he lacks capacity to take the decision. There is also the question of whether or not a decision to impose the measure is taken on what in England and Wales would be recognised as a best interests basis. For instance, I had a case recently where the court said that the fact that someone could be considered to have decision-making capacity in England as to whether or not to be detained in a psychiatric facility and receive treatment there and is objecting, does not count as a ground for not recognising and enforcing the measure. So, there is very limited ground to stop a foreign order from placing someone in an English psychiatric institution and, by extension, a Northern Irish psychiatric institution. You have the opportunity to pause and think that you do not necessarily need to do that except in

¹⁶ Authorities, Scotland – Central Authority, HCCH website, accessed 13 November 2015: http://www.hcch.net/index_en.php?act=authorities_details&aid=250.

¹⁷ Gordon Ashton et al (2015), *Mental Capacity Law and Practice*, Bristol: Jordan, p.466.

¹⁸ Alex Ruck Keene, Official Report: Minutes of Evidence Report, Ad Hoc Joint Committee on the Mental Capacity Bill, meeting on Monday, 29 June 2015: <http://aims.niassembly.gov.uk/officialreport/minutesofevidencereport.aspx?AgendaId=14404&evidID=7803>.

relation to other countries that have signed the underlying Hague convention, which is what we are trying to give effect to. So, please, just pause and think.

In this respect, a state may ask of another state to implement measures relating to the detention of a person on the grounds of incapacity, for example (under Article 27 of the Convention). This raises concerns in relation to Article 5 of the European Convention on Human Rights¹⁹, by which individuals have the right to challenge the basis of their detention, although it is not clear whether the challenge is to the detaining state or to the state that authorised the detention²⁰. Added to this might be a concern regarding the differences standards under which individuals can be detained.

¹⁹ European Convention on Human Rights: http://www.echr.coe.int/Documents/Convention_ENG.pdf.

²⁰ Alex Ruck Keene (2015), 'Hague 35: Overview and Measures of Protection', in Richard Frimston et al (eds.), *The International Protection of Adults*, Oxford: Oxford University Press, pp.140-1.

3 Outstanding Questions

There remains a degree of ambiguity with regard to the impact of implementation of the Convention in Northern Ireland. Questions with regard to this include the following:

- What are reasons behind the non-ratification of the Convention in relation to England and Wales?
- How frequently has the Convention been invoked in respect of Scotland and England and Wales?
- What has been the nature of these incidences?
- How are these matters currently handled in cross-jurisdictional cases involving Northern Ireland and Scotland, England and Wales and the Republic of Ireland?
- It has been claimed that²¹:

the material provisions of the 2000 Hague Convention are, in effect, in force in England and Wales and apply to any case with a cross-border element falling within the scope of the Convention, regardless of whether or not the foreign country involved is a Contracting State to the Convention.

Will Northern Ireland be implementing measures from states that are not parties to the Convention?

- Would the authorities in Northern Ireland be required to detain individuals based on the standards in another state?
- What rights to challenge such detention would the detainee have?

²¹ Alex Ruck Keene (2014), *The 2000 Hague Convention on the International Protection of Adults Five Years On*, 39 Essex Chambers, p.1: http://www.39essex.com/docs/articles/the_2000_convention_-_five_years_on.pdf.

Appendix 1: Schedule 9 to the Mental Capacity Bill

SCHEDULE 9

INTERNATIONAL PROTECTION OF ADULTS

PART 1

PRELIMINARY

Introduction

1. Paragraphs 2 to 5 apply for the purposes of this Schedule.

The Convention

2.—(1) “Convention” means the Convention on the International Protection of Adults signed at the Hague on 13th January 2000.

(2) “Convention country” means a country in which the Convention is in force.

(3) A reference to an Article or Chapter is to an Article or Chapter of the Convention.

(4) Subject to paragraph 4, an expression which appears in this Schedule and in the Convention is to be construed in accordance with the Convention.

Countries, territories and nationals

3.—(1) “Country” includes a territory which has its own system of law.

(2) Where a country has more than one territory with its own system of law, a reference to the country, in relation to one of its nationals, is to the territory with which the national has the closer, or the closest, connection.

Adults with incapacity

4. “Adult” means a person who—

(a) as a result of an impairment or insufficiency of the person’s personal faculties, cannot protect his or her interests; and

(b) is 16 or over.

Protective measures

5.—(1) “Protective measure” means a measure directed to the protection of the person or property of an adult; and it may deal in particular with any of the following—

(a) the determination of incapacity and the institution of a protective regime;

(b) placing the adult under the protection of an appropriate authority;

- (c) guardianship, curatorship or any corresponding system;
- (d) the designation and functions of a person having charge of the adult's person or property, or representing or otherwise helping the adult;
- (e) placing the adult in a place where protection can be provided;
- (f) administering, conserving or disposing of the adult's property;
- (g) authorising a specific intervention for the protection of the person or property of the adult.

(2) Where a measure of like effect to a protective measure has been taken in relation to a person while the person is under 16, this Schedule applies to the measure in so far as it has effect in relation to the person once the person is 16 or over.

Application of this Schedule

6.—(1) This Schedule does not apply to a relevant person where either of the following applies—

- (a) the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in respect of Parental Responsibility and Measures for the Protection of Children that was signed at the Hague on 19 October 1996;
- (b) Council Regulation (EC) No. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility.

(2) In this paragraph “relevant person” means a person who is 16 or over but under 18.

Central Authority

7.—(1) Any function under the Convention of a Central Authority is exercisable in Northern Ireland by the Department of Justice.

(2) A communication may be sent to the Central Authority in relation to Northern Ireland by sending it to the Department of Justice.

PART 2

JURISDICTION

Scope of jurisdiction

8.—(1) The court may exercise its functions under this Act (in so far as it cannot otherwise do so) in relation to—

- (a) an adult habitually resident in Northern Ireland;
- (b) an adult's property in Northern Ireland;

(c) an adult present in Northern Ireland or who has property there, if the matter is urgent; or

(d) an adult present in Northern Ireland, if a protective measure which is temporary and limited in its effect to Northern Ireland is proposed in relation to the adult.

(2) An adult present in Northern Ireland is to be treated for the purposes of this paragraph as habitually resident there if—

(a) the habitual residence of the adult cannot be ascertained;

(b) the adult is a refugee; or

(c) the adult has been internationally displaced as a result of disturbance in the country of the adult's habitual residence.

9.—(1) The court may also exercise its functions under this Act (in so far as it cannot otherwise do so) in relation to an adult if sub-paragraph (2) or (3) applies in relation to that adult.

(2) This sub-paragraph applies in relation to an adult if—

(a) the adult is a British citizen;

(b) the adult has a closer connection with Northern Ireland than with any other part of the United Kingdom; and

(c) Article 7 has, in relation to the matter concerned, been complied with.

(3) This sub-paragraph applies in relation to an adult if the Department of Justice, having consulted such persons as it considers appropriate, agrees to a request under Article 8 in relation to the adult.

Exercise of jurisdiction

10.—(1) This paragraph applies where jurisdiction is exercisable under this Schedule in connection with a matter which involves a Convention country other than Northern Ireland.

(2) Any Article on which the jurisdiction is based applies in relation to the matter in so far as it involves the other country (and the court must, accordingly, comply with any duty conferred on it as a result).

(3) Article 12 also applies, so far as its provisions allow, in relation to the matter in so far as it involves the other country.

11. A reference in this Schedule to the exercise of jurisdiction under this Schedule is to the exercise of functions under this Act as a result of this Part.

PART 3

APPLICABLE LAW

Applicable law

12. In exercising jurisdiction under this Schedule, the court may, if it considers that the matter has a substantial connection with a country other than Northern Ireland and having regard to the interests of the adult, apply the law of that other country.

13. Where a protective measure is taken in one country but implemented in another, the conditions of implementation are governed by the law of the other country.

Lasting powers of attorney, etc.

14.—(1) If the donor of a lasting power is habitually resident in Northern Ireland at the time of granting the power, the law applicable to the existence, extent, modification or extinction of the power is—

(a) the law of Northern Ireland; or

(b) if the donor specifies in writing the law of a connected country for the purpose, that law.

(2) If the donor is habitually resident in another country at that time, but Northern Ireland is a connected country, the law applicable in that respect is—

(a) the law of the other country; or

(b) if the donor specifies in writing the law of Northern Ireland for the purpose, that law.

(3) A country is connected, in relation to the donor, if it is a country—

(a) of which the donor is a national;

(b) in which the donor was habitually resident before the grant of the power;

or

(c) in which the donor has property.

(4) Where this paragraph applies as a result of sub-paragraph (3)(c), it applies only in relation to the property which the donor has in the connected country.

(5) The law applicable to the manner of the exercise of a lasting power is the law of the country where it is exercised.

(6) In this Part, “lasting power” means—

(a) a lasting power of attorney (see section 95);

- (b) an enduring power of attorney within the meaning of Schedule 5; or
- (c) any other power of like effect.

15.—(1) Where a lasting power is not exercised in a manner sufficient to guarantee the protection of the person or property of the donor, the court, in exercising jurisdiction under this Schedule, may disapply or modify the power.

(2) Where, in accordance with this Part, the law applicable to the power is, in one or more respects, that of a country other than Northern Ireland, the court must, so far as possible, have regard to the law of the other country in that respect (or those respects).

16. Regulations may provide for Schedule 4 (lasting powers of attorney: formalities) to apply with modifications in relation to a lasting power which comes within paragraph 14(6)(c).

Protection of third parties

17.—(1) This paragraph applies where a person (a “representative”) in purported exercise of an authority to act on behalf of an adult enters into a transaction with a third party.

(2) The validity of the transaction may not be questioned in proceedings, nor may the third party be held liable, merely because—

- (a) where the representative and third party are in Northern Ireland when entering into the transaction, sub-paragraph (3) applies;
- (b) where they are in another country at that time, sub-paragraph (4) applies.

(3) This sub-paragraph applies if—

- (a) the law applicable to the authority in one or more respects is, as a result of this Schedule, the law of a country other than Northern Ireland; and
- (b) the representative is not entitled to exercise the authority in that respect (or those respects) under the law of that other country.

(4) This sub-paragraph applies if—

- (a) the law applicable to the authority in one or more respects is, as a result of this Part, the law of Northern Ireland; and
- (b) the representative is not entitled to exercise the authority in that respect (or those respects) under that law.

(5) This paragraph does not apply if the third party knew or ought to have known that the applicable law was—

- (a) in a case within sub-paragraph (3), the law of the other country;

(b) in a case within sub-paragraph (4), the law of Northern Ireland.

Mandatory rules

18. Where the court is entitled to exercise jurisdiction under this Schedule, the mandatory provisions of the law of Northern Ireland apply, regardless of any system of law which would otherwise apply in relation to the matter.

Public policy

19. Nothing in this Part requires or enables the application in Northern Ireland of a provision of the law of another country if its application would be manifestly contrary to public policy.

PART 4

RECOGNITION AND ENFORCEMENT

Recognition

20.—(1) A protective measure taken in relation to an adult under the law of a country other than Northern Ireland is to be recognised in Northern Ireland if it was taken on the ground that the adult is habitually resident in the other country.

(2) A protective measure taken in relation to an adult under the law of a Convention country other than Northern Ireland is to be recognised in Northern Ireland if it was taken on a ground mentioned in Chapter 2 (jurisdiction).

(3) But the court may disapply this paragraph in relation to a measure if it considers that—

- (a) the case in which the measure was taken was not urgent;
- (b) the adult was not given an opportunity to be heard; and
- (c) that omission amounted to a breach of natural justice.

(4) The court may also disapply this paragraph in relation to a measure if it considers that—

- (a) recognition of the measure would be manifestly contrary to public policy;
- (b) the measure would be inconsistent with a mandatory provision of the law of Northern Ireland; or
- (c) the measure is inconsistent with one subsequently taken, or recognised, in Northern Ireland in relation to the adult.

(5) The court may also disapply this paragraph in relation to a measure taken under the law of a Convention country in a matter to which Article 33 applies, if the court considers that that Article has not been complied with in connection with that matter.

21.—(1) An interested person may apply to the court for a declaration as to whether a protective measure taken under the law of a country other than Northern Ireland is to be recognised in Northern Ireland.

(2) No permission is required for an application to the court under this paragraph.

22. For the purposes of paragraphs 20 and 21, any finding of fact in relation to jurisdiction relied on when the measure was taken is conclusive.

Enforcement

23.—(1) An interested person may apply to the court for a declaration as to whether a protective measure taken under the law of, and enforceable in, a country other than Northern Ireland is enforceable, or to be registered, in Northern Ireland.

(2) The court must make the declaration if—

- (a) the measure comes within sub-paragraph (1) or (2) of paragraph 20; and
- (b) the paragraph is not disapplied in relation to it as a result of sub-paragraph (3), (4) or (5) of that paragraph.

(3) A measure to which a declaration under this paragraph relates is enforceable in Northern Ireland as if it were a measure of like effect taken by the court.

Measures taken in relation to under 16s

24.—(1) This paragraph applies where—

- (a) provision giving effect to, or otherwise deriving from, the Convention in a country other than Northern Ireland applies in relation to a person who is under 16; and
- (b) a measure is taken in relation to that person in reliance on that provision.

(2) This Part applies in relation to that measure as it applies in relation to a protective measure taken in relation to an adult under the law of a Convention country other than Northern Ireland.

Supplementary

25. The court may not review the merits of a measure taken outside Northern Ireland except to establish whether the measure complies with this Schedule in so far as it is, as a result of this Schedule, required to do so.

PART 5
CO-OPERATION

Proposal for cross-border placement

26.—(1) This paragraph applies where a public authority proposes to place an adult in an establishment in a Convention country other than Northern Ireland.

(2) The public authority must consult an appropriate authority in that other country about the proposed placement and, for that purpose, must send it—

- (a) a report on the adult; and
- (b) a statement of its reasons for the proposed placement.

(3) If the appropriate authority in the other country opposes the proposed placement within a reasonable time, the public authority may not proceed with it.

27. A proposal received by a public authority under Article 33 in relation to an adult is to proceed unless the authority opposes it within a reasonable time.

Adult in danger etc

28.—(1) This paragraph applies if a public authority is told that an adult—

- (a) who is in serious danger, and
- (b) in relation to whom the public authority has taken, or is considering taking, protective measures, is, or has become resident, in a country other than Northern Ireland.

(2) The public authority must tell an appropriate authority in that other country about—

- (a) the danger; and
- (b) the measures taken or under consideration.

29. A public authority may not request from, or send to, an appropriate authority in a country other than Northern Ireland information in accordance with Chapter 5 (co-operation) in relation to an adult if it considers that doing so—

- (a) would be likely to endanger the adult or the adult's property; or
- (b) would amount to a serious threat to the liberty or life of a member of the adult's family.

PART 6

GENERAL

Certificate

30. A certificate given under Article 38 by an authority in a Convention country other than Northern Ireland is, unless the contrary is shown, proof of the matters contained in it.

Powers to make further provision as to private international law

31.—(1) Regulations may make provision—

(a) giving further effect to the Convention; or

(b) otherwise about the private international law of Northern Ireland in relation to the protection of adults.

(2) The regulations may—

(a) confer functions on the Department of Justice, the court or another public authority;

(b) amend this Schedule;

(c) provide for this Schedule to apply with specified modifications;

(d) make provision relating to countries other than Convention countries.

Exceptions

32. Nothing in this Schedule applies, and no provision made under paragraph 31 is to apply, to any matter to which the Convention, as a result of Article 4, does not apply.

Appendix 2: Convention on the International Protection of Adults

CONVENTION ON THE INTERNATIONAL PROTECTION OF ADULTS

(Concluded 13 January 2000)

The States signatory to the present Convention,

Considering the need to provide for the protection in international situations of adults who, by reason of an impairment or insufficiency of their personal faculties, are not in a position to protect their interests,

Wishing to avoid conflicts between their legal systems in respect of jurisdiction, applicable law, recognition and enforcement of measures for the protection of adults,

Recalling the importance of international co-operation for the protection of adults,

Affirming that the interests of the adult and respect for his or her dignity and autonomy are to be primary considerations,

Have agreed on the following provisions -

CHAPTER I – SCOPE OF THE CONVENTION

Article 1

(1) This Convention applies to the protection in international situations of adults who, by reason of an impairment or insufficiency of their personal faculties, are not in a position to protect their interests.

(2) Its objects are -

- a) to determine the State whose authorities have jurisdiction to take measures directed to the protection of the person or property of the adult;
- b) to determine which law is to be applied by such authorities in exercising their jurisdiction;
- c) to determine the law applicable to representation of the adult;
- d) to provide for the recognition and enforcement of such measures of protection in all Contracting States;
- e) to establish such co-operation between the authorities of the Contracting States as may be necessary in order to achieve the purposes of this Convention.

Article 2

(1) For the purposes of this Convention, an adult is a person who has reached the age of 18 years.

(2) The Convention applies also to measures in respect of an adult who had not reached the age of 18 years at the time the measures were taken.

Article 3

The measures referred to in Article 1 may deal in particular with -

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

Article 4

(1) The Convention does not apply to -

- a) maintenance obligations;
- b) the formation, annulment and dissolution of marriage or any similar relationship, as well as legal separation;
- c) property regimes in respect of marriage or any similar relationship;
- d) trusts or succession;
- e) social security;
- f) public measures of a general nature in matters of health;
- g) measures taken in respect of a person as a result of penal offences committed by that person;
- h) decisions on the right of asylum and on immigration;
- i) measures directed solely to public safety.

(2) Paragraph 1 does not affect, in respect of the matters referred to therein, the entitlement of a person to act as the representative of the adult.

CHAPTER II – JURISDICTION

Article 5

(1) The judicial or administrative authorities of the Contracting State of the habitual residence of the adult have jurisdiction to take measures directed to the protection of the adult's person or property.

(2) In case of a change of the adult's habitual residence to another Contracting State, the authorities of the State of the new habitual residence have jurisdiction.

Article 6

(1) For adults who are refugees and those who, due to disturbances occurring in their country, are internationally displaced, the authorities of the Contracting State on the

territory of which these adults are present as a result of their displacement have the jurisdiction provided for in Article 5, paragraph 1.

(2) The provisions of the preceding paragraph also apply to adults whose habitual residence cannot be established.

Article 7

(1) Except for adults who are refugees or who, due to disturbances occurring in their State of nationality, are internationally displaced, the authorities of a Contracting State of which the adult is a national have jurisdiction to take measures for the protection of the person or property of the adult if they consider that they are in a better position to assess the interests of the adult, and after advising the authorities having jurisdiction under Article 5 or Article 6, paragraph 2.

(2) This jurisdiction shall not be exercised if the authorities having jurisdiction under Article 5, Article 6, paragraph 2, or Article 8 have informed the authorities of the State of which the adult is a national that they have taken the measures required by the situation or have decided that no measures should be taken or that proceedings are pending before them.

(3) The measures taken under paragraph 1 shall lapse as soon as the authorities having jurisdiction under Article 5, Article 6, paragraph 2, or Article 8 have taken measures required by the situation or have decided that no measures are to be taken. These authorities shall inform accordingly the authorities which have taken measures in accordance with paragraph 1.

Article 8

(1) The authorities of a Contracting State having jurisdiction under Article 5 or Article 6, if they consider that such is in the interests of the adult, may, on their own motion or on an application by the authority of another Contracting State, request the authorities of one of the States mentioned in paragraph 2 to take measures for the protection of the person or property of the adult. The request may relate to all or some aspects of such protection.

(2) The Contracting States whose authorities may be addressed as provided in the preceding paragraph are -

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

(3) In case the authority designated pursuant to the preceding paragraphs does not accept its jurisdiction, the authorities of the Contracting State having jurisdiction under Article 5 or Article 6 retain jurisdiction.

Article 9

The authorities of a Contracting State where property of the adult is situated have jurisdiction to take measures of protection concerning that property, to the extent that such measures are compatible with those taken by the authorities having jurisdiction under Articles 5 to 8.

Article 10

(1) In all cases of urgency, the authorities of any Contracting State in whose territory the adult or property belonging to the adult is present have jurisdiction to take any necessary measures of protection.

(2) The measures taken under the preceding paragraph with regard to an adult habitually resident in a Contracting State shall lapse as soon as the authorities which have jurisdiction under Articles 5 to 9 have taken the measures required by the situation.

(3) The measures taken under paragraph 1 with regard to an adult who is habitually resident in a non-Contracting State shall lapse in each Contracting State as soon as measures required by the situation and taken by the authorities of another State are recognised in the Contracting State in question.

(4) The authorities which have taken measures under paragraph 1 shall, if possible, inform the authorities of the Contracting State of the habitual residence of the adult of the measures taken.

Article 11

(1) By way of exception, the authorities of a Contracting State in whose territory the adult is present have jurisdiction to take measures of a temporary character for the protection of the person of the adult which have a territorial effect limited to the State in question, in so far as such measures are compatible with those already taken by the authorities which have jurisdiction under Articles 5 to 8, and after advising the authorities having jurisdiction under Article 5.

(2) The measures taken under the preceding paragraph with regard to an adult habitually resident in a Contracting State shall lapse as soon as the authorities which have jurisdiction under Articles 5 to 8 have taken a decision in respect of the measures of protection which may be required by the situation.

Article 12

Subject to Article 7, paragraph 3, the measures taken in application of Articles 5 to 9 remain in force according to their terms, even if a change of circumstances has eliminated the basis upon which jurisdiction was founded, so long as the authorities

which have jurisdiction under the Convention have not modified, replaced or terminated such measures.

CHAPTER III – APPLICABLE LAW

Article 13

(1) In exercising their jurisdiction under the provisions of Chapter II, the authorities of the Contracting States shall apply their own law.

(2) However, in so far as the protection of the person or the property of the adult requires, they may exceptionally apply or take into consideration the law of another State with which the situation has a substantial connection.

Article 14

Where a measure taken in one Contracting State is implemented in another Contracting State, the conditions of its implementation are governed by the law of that other State.

Article 15

(1) The existence, extent, modification and extinction of powers of representation granted by an adult, either under an agreement or by a unilateral act, to be exercised when such adult is not in a position to protect his or her interests, are governed by the law of the State of the adult's habitual residence at the time of the agreement or act, unless one of the laws mentioned in paragraph 2 has been designated expressly in writing.

(2) The States whose laws may be designated are -

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

(3) The manner of exercise of such powers of representation is governed by the law of the State in which they are exercised.

Article 16

Where powers of representation referred to in Article 15 are not exercised in a manner sufficient to guarantee the protection of the person or property of the adult, they may be withdrawn or modified by measures taken by an authority having jurisdiction under the Convention. Where such powers of representation are withdrawn or modified, the law referred to in Article 15 should be taken into consideration to the extent possible.

Article 17

(1) 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 cannot be contested, and the third party cannot

be held liable, on the sole ground that the other person was not entitled to act as the adult's representative under the law designated by the provisions of this Chapter, unless the third party knew or should have known that such capacity was governed by the latter law.

(2) The preceding paragraph applies only if the transaction was entered into between persons present on the territory of the same State.

Article 18

The provisions of this Chapter apply even if the law designated by them is the law of a non-Contracting State.

Article 19

In this Chapter the term 'law' means the law in force in a State other than its choice of law rules.

Article 20

This Chapter does not prevent the application of those provisions of the law of the State in which the adult is to be protected where the application of such provisions is mandatory whatever law would otherwise be applicable.

Article 21

The application of the law designated by the provisions of this Chapter can be refused only if this application would be manifestly contrary to public policy.

CHAPTER IV – RECOGNITION AND ENFORCEMENT

Article 22

(1) The measures taken by the authorities of a Contracting State shall be recognised by operation of law in all other Contracting States.

(2) Recognition may however be refused -

- a) if the measure was taken by an authority whose jurisdiction was not based on, or was not in accordance with, one of the grounds provided for by the provisions of Chapter II;
- b) if the measure was taken, except in a case of urgency, in the context of a judicial or administrative proceeding, without the adult having been provided the opportunity to be heard, in violation of fundamental principles of procedure of the requested State;
- c) if such recognition is manifestly contrary to public policy of the requested State, or conflicts with a provision of the law of that State which is mandatory whatever law would otherwise be applicable;
- d) if the measure is incompatible with a later measure taken in a non-Contracting State which would have had jurisdiction under Articles 5 to 9, where this later

measure fulfils the requirements for recognition in the requested State;
e) if the procedure provided in Article 33 has not been complied with.

Article 23

Without prejudice to Article 22, paragraph 1, any interested person may request from the competent authorities of a Contracting State that they decide on the recognition or non-recognition of a measure taken in another Contracting State. The procedure is governed by the law of the requested State.

Article 24

The authority of the requested State is bound by the findings of fact on which the authority of the State where the measure was taken based its jurisdiction.

Article 25

- (1) If measures taken in one Contracting State and enforceable there require enforcement in another Contracting State, they shall, upon request by an interested party, be declared enforceable or registered for the purpose of enforcement in that other State according to the procedure provided in the law of the latter State.
- (2) Each Contracting State shall apply to the declaration of enforceability or registration a simple and rapid procedure.
- (3) The declaration of enforceability or registration may be refused only for one of the reasons set out in Article 22, paragraph 2.

Article 26

Without prejudice to such review as is necessary in the application of the preceding Articles, there shall be no review of the merits of the measure taken.

Article 27

Measures taken in one Contracting State and declared enforceable, or registered for the purpose of enforcement, in another Contracting State shall be enforced in the latter State as if they had been taken by the authorities of that State. Enforcement takes place in accordance with the law of the requested State to the extent provided by such law.

CHAPTER V – CO-OPERATION

Article 28

- (1) A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention on such authorities.
- (2) Federal States, States with more than one system of law or States having autonomous territorial units shall be free to appoint more than one Central Authority and to specify the territorial or personal extent of their functions. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to

which any communication may be addressed for transmission to the appropriate Central Authority within that State.

Article 29

(1) Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their States to achieve the purposes of the Convention.

(2) They shall, in connection with the application of the Convention, take appropriate steps to provide information as to the laws of, and services available in, their States relating to the protection of adults.

Article 30

The Central Authority of a Contracting State, either directly or through public authorities or other bodies, shall take all appropriate steps to -

- a) facilitate communications, by every means, between the competent authorities in situations to which the Convention applies;
- b) provide, on the request of a competent authority of another Contracting State, assistance in discovering the whereabouts of an adult where it appears that the adult may be present and in need of protection within the territory of the requested State.

Article 31

The competent authorities of a Contracting State may encourage, either directly or through other bodies, the use of mediation, conciliation or similar means to achieve agreed solutions for the protection of the person or property of the adult in situations to which the Convention applies.

Article 32

(1) Where a measure of protection is contemplated, the competent authorities under the Convention, if the situation of the adult so requires, may request any authority of another Contracting State which has information relevant to the protection of the adult to communicate such information.

(2) A Contracting State may declare that requests under paragraph 1 shall be communicated to its authorities only through its Central Authority.

(3) The competent authorities of a Contracting State may request the authorities of another Contracting State to assist in the implementation of measures of protection taken under this Convention.

Article 33

(1) If an authority having jurisdiction under Articles 5 to 8 contemplates the placement of the adult in an establishment or other place where protection can be provided, and if such placement is to take place in another Contracting State, it shall first consult with the Central Authority or other competent authority of the latter State. To that effect it

shall transmit a report on the adult together with the reasons for the proposed placement.

(2) The decision on the placement may not be made in the requesting State if the Central Authority or other competent authority of the requested State indicates its opposition within a reasonable time.

Article 34

In any case where the adult is exposed to a serious danger, the competent authorities of the Contracting State where measures for the protection of the adult have been taken or are under consideration, if they are informed that the adult's residence has changed to, or that the adult is present in, another State, shall inform the authorities of that other State about the danger involved and the measures taken or under consideration.

Article 35

An authority shall not request or transmit any information under this Chapter if to do so would, in its opinion, be likely to place the adult's person or property in danger, or constitute a serious threat to the liberty or life of a member of the adult's family.

Article 36

(1) Without prejudice to the possibility of imposing reasonable charges for the provision of services, Central Authorities and other public authorities of Contracting States shall bear their own costs in applying the provisions of this Chapter.

(2) Any Contracting State may enter into agreements with one or more other Contracting States concerning the allocation of charges.

Article 37

Any Contracting State may enter into agreements with one or more other Contracting States with a view to improving the application of this Chapter in their mutual relations. The States which have concluded such an agreement shall transmit a copy to the depositary of the Convention.

CHAPTER VI – GENERAL PROVISIONS

Article 38

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

(2) The capacity and powers indicated in the certificate are presumed to be vested in that person as of the date of the certificate, in the absence of proof to the contrary.

(3) Each Contracting State shall designate the authorities competent to draw up the certificate.

Article 39

Personal data gathered or transmitted under the Convention shall be used only for the purposes for which they were gathered or transmitted.

Article 40

The authorities to whom information is transmitted shall ensure its confidentiality, in accordance with the law of their State.

Article 41

All documents forwarded or delivered under this Convention shall be exempt from legalisation or any analogous formality.

Article 42

Each Contracting State may designate the authorities to which requests under Article 8 and Article 33 are to be addressed.

Article 43

(1) The designations referred to in Article 28 and Article 42 shall be communicated to the Permanent Bureau of the Hague Conference on Private International Law not later than the date of the deposit of the instrument of ratification, acceptance or approval of the Convention or of accession thereto. Any modifications thereof shall also be communicated to the Permanent Bureau.

(2) The declaration referred to in Article 32, paragraph 2, shall be made to the depositary of the Convention.

Article 44

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.

Article 45

In relation to a State in which two or more systems of law or sets of rules of law with regard to any matter dealt with in this Convention apply in different territorial units -

- a) any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit;
- b) any reference to the presence of the adult in that State shall be construed as referring to presence in a territorial unit;
- c) any reference to the location of property of the adult in that State shall be construed as referring to location of property of the adult in a territorial unit;
- d) any reference to the State of which the adult is a national shall be construed as

referring to the territorial unit designated by the law of that State or, in the absence of relevant rules, to the territorial unit with which the adult has the closest connection;

e) any reference to the State whose authorities have been chosen by the adult shall be construed

- as referring to the territorial unit if the adult has chosen the authorities of this territorial unit;

- as referring to the territorial unit with which the adult has the closest connection if the adult has chosen the authorities of the State without specifying a particular territorial unit within the State;

f) any reference to the law of a State with which the situation has a substantial connection shall be construed as referring to the law of a territorial unit with which the situation has a substantial connection;

g) any reference to the law or procedure or authority of the State in which a measure has been taken shall be construed as referring to the law or procedure in force in such territorial unit or authority of the territorial unit in which such measure was taken;

h) any reference to the law or procedure or authority of the requested State shall be construed as referring to the law or procedure in force in such territorial unit or authority of the territorial unit in which recognition or enforcement is sought;

i) any reference to the State where a measure of protection is to be implemented shall be construed as referring to the territorial unit where the measure is to be implemented;

j) any reference to bodies or authorities of that State, other than Central Authorities, shall be construed as referring to those authorised to act in the relevant territorial unit.

Article 46

For the purpose of identifying the applicable law under Chapter III, in relation to a State which comprises two or more territorial units each of which has its own system of law or set of rules of law in respect of matters covered by this Convention, the following rules apply -

a) if there are rules in force in such a State identifying which territorial unit's law is applicable, the law of that unit applies;

b) in the absence of such rules, the law of the relevant territorial unit as defined in Article 45 applies.

Article 47

For the purpose of identifying the applicable law under Chapter III, in relation to a State which has two or more systems of law or sets of rules of law applicable to different categories of persons in respect of matters covered by this Convention, the following rules apply -

a) if there are rules in force in such a State identifying which among such laws applies, that law applies;

b) in the absence of such rules, the law of the system or the set of rules of law with which the adult has the closest connection applies.

Article 48

In relations between the Contracting States this Convention replaces the *Convention concernant l'interdiction et les mesures de protection analogues*, signed at The Hague 17 July 1905.

Article 49

- (1) The Convention does not affect any other international instrument to which Contracting States are Parties and which contains provisions on matters governed by this Convention, unless a contrary declaration is made by the States Parties to such instrument.
- (2) This Convention does not affect the possibility for one or more Contracting States to conclude agreements which contain, in respect of adults habitually resident in any of the States Parties to such agreements, provisions on matters governed by this Convention.
- (3) Agreements to be concluded by one or more Contracting States on matters within the scope of this Convention do not affect, in the relationship of such States with other Contracting States, the application of the provisions of this Convention.
- (4) The preceding paragraphs also apply to uniform laws based on special ties of a regional or other nature between the States concerned.

Article 50

- (1) The Convention shall apply to measures only if they are taken in a State after the Convention has entered into force for that State.
- (2) The Convention shall apply to the recognition and enforcement of measures taken after its entry into force as between the State where the measures have been taken and the requested State.
- (3) The Convention shall apply from the time of its entry into force in a Contracting State to powers of representation previously granted under conditions corresponding to those set out in Article 15.

Article 51

- (1) Any communication sent to the Central Authority or to another authority of a Contracting State shall be in the original language, and shall be accompanied by a translation into the official language or one of the official languages of the other State or, where that is not feasible, a translation into French or English.
- (2) However, a Contracting State may, by making a reservation in accordance with Article 56, object to the use of either French or English, but not both.

Article 52

The Secretary General of the Hague Conference on Private International Law shall at regular intervals convoke a Special Commission in order to review the practical operation of the Convention.

CHAPTER VII – FINAL CLAUSES

Article 53

(1) The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law on 2 October 1999.

(2) It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention.

Article 54

(1) Any other State may accede to the Convention after it has entered into force in accordance with Article 57, paragraph 1.

(2) The instrument of accession shall be deposited with the depositary.

(3) Such accession shall have effect only as regards the relations between the acceding State and those Contracting States which have not raised an objection to its accession in the six months after the receipt of the notification referred to in subparagraph *b*) of Article 59. Such an objection may also be raised by States at the time when they ratify, accept or approve the Convention after an accession. Any such objection shall be notified to the depositary.

Article 55

(1) If a State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that the Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.

(2) Any such declaration shall be notified to the depositary and shall state expressly the territorial units to which the Convention applies.

(3) If a State makes no declaration under this Article, the Convention is to extend to all territorial units of that State.

Article 56

(1) Any State may, not later than the time of ratification, acceptance, approval or accession, or at the time of making a declaration in terms of Article 55, make the reservation provided for in Article 51, paragraph 2. No other reservation shall be permitted.

(2) Any State may at any time withdraw the reservation it has made. The withdrawal shall be notified to the depositary.

(3) The reservation shall cease to have effect on the first day of the third calendar month after the notification referred to in the preceding paragraph.

Article 57

(1) The Convention shall enter into force on the first day of the month following the expiration of three months after the deposit of the third instrument of ratification, acceptance or approval referred to in Article 53.

(2) Thereafter the Convention shall enter into force -

a) for each State ratifying, accepting or approving it subsequently, on the first day of the month following the expiration of three months after the deposit of its instrument of ratification, acceptance, approval or accession;

b) for each State acceding, on the first day of the month following the expiration of three months after the expiration of the period of six months provided in Article 54, paragraph 3;

c) for a territorial unit to which the Convention has been extended in conformity with Article 55, on the first day of the month following the expiration of three months after the notification referred to in that Article.

Article 58

(1) A State Party to the Convention may denounce it by a notification in writing addressed to the depositary. The denunciation may be limited to certain territorial units to which the Convention applies.

(2) The denunciation takes effect on the first day of the month following the expiration of twelve months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation takes effect upon the expiration of such longer period.

Article 59

The depositary shall notify the States Members of the Hague Conference on Private International Law and the States which have acceded in accordance with Article 54 of the following -

a) the signatures, ratifications, acceptances and approvals referred to in Article 53;

b) the accessions and objections raised to accessions referred to in Article 54;

c) the date on which the Convention enters into force in accordance with Article 57;

d) the declarations referred to in Article 32, paragraph 2, and Article 55;

e) the agreements referred to in Article 37;

f) the reservation referred to in Article 51, paragraph 2, and the withdrawal referred to in Article 56, paragraph 2;

g) the denunciations referred to in Article 58.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at The Hague, on the 13th day of January, 2000, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the States Members of the Hague Conference on Private International Law.