Support in cross-border transactions by Adults: Contract law vs capacity law

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This piece is based on a paper that I presented at the World Congress on Adults Protection, held in Amsterdam from 8 to 10 July 2026. It is still work in progress.

The World Conference focused on capacity rather than vulnerability and incapacity of Adults. This choice of theme resulted in much discussion on support for the exercise of capacity. Supported decision-making rather than replaced decision-making for an incapacitated person poses challenges for Private International Law, especially of the Von Savigny tradition. Our approach is to first characterise and then find which laws we can apply. But it is exactly this characterisation that is becoming blurry: to be fully in compliance with the UN Convention on the Rights of Persons with Disabilities people should be allowed to make decisions, i.e. conclude contracts with the help of others. There should be no boxes of capacitated and incapacitated persons. No longer can only the former conclude contracts, while the latter have to be represented by guardians or other persons with a representation function. In Adult law some concepts are phasing out, while others are being reinterpreted by legislators and courts.

Below, after briefly explaining the move towards supported decision-making in substantive family law and human rights law, I turn to the available legal framework for cross-border cases, then to the difficult question of characterisation, and lastly to cross-border recognition.

The move towards supported decision-making

The civil laws of various countries are adapting to be in conformity with the UN Convention on the Rights of Persons with Disabilities (UNCRPD), which

recognises the legal capacity of persons with disabilities on an equal basis with others (Art. 12,2). It also imposes an obligation on States to take appropriate measures to support persons with disabilities to exercise their legal capacity. The Convention was ratified by all EU Member States, and confirmed by the European Union. It further states the full and effective participation and inclusion in society as a general principle (Art. 3), and calls on States to ensure effective access to justice for persons with disabilities, equal to other (Art. 13). And importantly from a private international law perspective, the Convention requires States to recognise the rights of persons with disabilities to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others (Art. 18).

Germany and Ireland have strongly amended their civil laws to adapt to this. Other EU Member States are still in the process of doing so. It was clear at the conference that the law needs to make a paradigm shift. It is not easy for legislators and even legal scholars, to let go of the concept of "incapacity" and to accept that people may need support without being represented in their legal acts. This reality requires different thinking about personal law as well as contract law, and the intersection of both.

Legal framework for cross-border cases

In private international law, the main international source for Adult law is the Hague Adults Convention of 2000. This Convention was avant-garde when it was concluded. It dealt with the issue of Adults even before the UNCRPD came about. It provided a framework to ensure cross-border continuity of protection of adults, as well as for the legal acts they and/or their representatives performed. The Convention uses open-ended and respectful terminology. Yet, the Convention also suffers from its stagnant nature (as Conventions do – set in stone the moment they are adopted). The Convention was inspired by the Hague Child Protection Convention 1996, which is also a good Convention, ensuring the continuity of child protection and parental responsibility. This has the unfortunate result that the Convention uses concepts like incapacity, protection, guardianship, curatorship, placement, and representation. Yet, as explained in the previous section, the UNCRPD is requiring a shift away from such ideas.

To my mind the Convention, as a living instrument, can still stand in the emerging

legal landscape. This requires a purpose-driven and context-sensitive interpretation of its provisions. Such reinterpretation will no-doubt soon reach domestic courts, and is already being discussed. The first Special Commission on this Convention held by the Hague Conference in November 2022, acknowledged that the terms ‘guardianship’ and ‘curatorship’ no longer exist in some legal systems, that have moved to supported decision-making. However, they concluded to keep the terms in the Convention, and not amend the Convention at that time (para 69). They also discussed the possible reinterpretation of ‘powers of representation’ (in Arts 15 to 17) to include advance unilateral acts or expressions of decisions, for instance on health care (paras 23 to 26). They concluded that courts could undertake such appreciation on a case-by-case basis. Thus, the door remains open for an interpretation fit for new legal and societal contexts.

The Hague Adults Convention is currently in force in sixteen States (thirteen EU Member States, the other three neighbouring States to the EU). In addition, five States (all of them EU States) signed the Convention without following up by a ratification yet.

After two resolutions by the European Parliament (in 2008 and in 2017), the European Commission in 2023 published two proposals on Adults. One proposal is for a Council Decision to authorise Member States that have not already done so to ratify the 2000 Hague Convention. The other is to complement the Convention in the EU by a Regulation, which enhances or slightly adapt some rules. The Commission’s approach can thus be described as a ‘Hague+’ one, similar to the approaches taken in parental responsibility and maintenance. Under the latest agreement between the Council and the Parliament (May 2026) the Regulation would place emphasis on ‘support’. The legislators do not seem to modify the Hague Convention’s private international law rules, but would include ‘support’ when reference is made to representation.

How should we then characterise?

The shift is monumental. For us to rethink private international law in this sphere, it is helpful to think in terms of two different scenarios that can arise when an Adult in need of assistance concludes a contract. The first is representation of the adult by another person. This other person is the one negotiating, deciding and

contracting. The Adult involved stays in the shadow . The other is where the Adult is involved in the preparation, negotiation and conclusion of the contract. The Adult is the one signing, but with the help of a support person. This construction is different from current (traditional) contract law. Some argue that it does not comply with the standards of legal certainty.

The characterisation would be contract law to check the validity of the contract, i.e. to verify whether there was really a meeting of the minds (consensus) between the persons involved. If legal systems recognise the capacity of every person (or like the German system reduces capacity in only a very limited number of situations), then the characterisation stays within contract law. Thus it stops at the question of validity and consensus. In legal systems that still have the notion of incapacity, the characterisation for this question switches to the appropriate connecting factor under the law of persons (often the law of the nationality).

The Hague Adults Convention refers to ‘measures’ to protect an adult. These measures would however, in an ideal world, only involve the appointment of support persons for the Adult. Such appointment can happen under the jurisdiction bases and applicable law rules of the Convention. The Convention also foresees the possibility for Adults to appoint the representative(s) of their choice (Arts 15 to 17). The same private international law would apply for the appointment by Adults of support persons.

Recognition across borders

Getting to recognition, a court order or authentic instrument appointing a support person for an Adult would benefit from the recognition regime of the Hague Convention and the proposed Regulation. If a support person was appointed in an informal way, their role would not be up for recognition (in the private international law sense), but would turn on the law applicable to the legal relation. As explained above, that will to a large extent by contract law, in the absence of incapacity.

There is still much to think through. Private international law will probably be in flux for some time still, while domestic laws are being amended.