AIC
Associazione Italiana dei Costituzionalisti
Osservatorio costituzionale

**OSSERVATORIO COSTITUZIONALE**
Codice ISSN: 2283-7515
Fasc. 6/2022
Data: 1 novembre 2022

# *The Cross-Border Protection of Vulnerable Adults in the EU from the Italian Perspective*[*]

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ABSTRACT: Il contributo è la versione rivista e corredata di note di una relazione tenuta all'interno di un *workshop* sul tema della *Cross-Border Protection of Vulnerable Adults* tenuto alla *Prague House* di Bruxelles il 20 settembre 2022, organizzato dalla Presidenza Ceca del Consiglio dell'Unione europea insieme alla Commissione europea e volto a discutere i possibili contenuti di un futuro Regolamento dell'Unione europea sulla protezione degli adulti vulnerabili in casi transnazionali. Il contributo illustra il punto di vista dell'ordinamento italiano, tenendo conto che l'Italia è uno degli Stati membri dell'Unione europea che non hanno ancora ratificato la Convenzione dell'Aja sulla protezione internazionale degli adulti del 13 gennaio 2000.

The paper presents the point of view of the Italian legal system in a workshop aimed at discussing the possible contents of a future EU Regulation on the cross-border protection of vulnerable adults. Firstly, the contribution briefly describes the measures provided for under the Italian law for protecting "adults who, by reason of an impairment or insufficiency of their personal faculties, are not in a position to protect their interests". Secondly, it shortly illustrates the current domestic Italian rules of private international law that now apply to vulnerable adults in cross-border situations. Lastly, it tries to explain why things would improve if Italy ratified The Hague Adults Convention.

[*] Lavoro sottoposto a referaggio secondo le linee guida della Rivista.

KEYWORDS: protezione degli adulti vulnerabili; Unione europea; amministrazione di sostegno; disabilità; autodeterminazione; protection of vulnerable adults; European Union; support administration; disabilities; self-determination

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## 1. Foreword

Perhaps not everyone knows that the topic of protection of vulnerable adults in the European Union has garnered more and more attention in recent months and a legislative proposal is expected during the following Swedish Presidency of the Council of the EU[1].

In view of this step, the current Czech Presidency has taken the opportunity to focus on how the European Union can support and complement The Hague Convention of 13 January 2000 on the International Protection of Vulnerable Adults.

In order to reach this aim, the Czech Presidency hosted a Workshop on Cross-Border Protection of Vulnerable Adults. The Workshop, co-organised with the European Commission, was held at the Prague House in Brussels on 20 September 2022.

This paper is an amended and integrated version, keeping a colloquial tone, of my contribution, as the expert designated by the Ministry of Justice to represent Italy, to the first panel of this Workshop, regarding "Experience of State Parties, acceding State Parties and non-State Parties to the 2000 Hague Convention with cross-border protection of vulnerable adults"[2].

[1] As a follow-up of the Council Conclusions on the Protection of Vulnerable Adults across the European Union (2021/C 330 1/01) and of the European Parliament resolution of 1 June 2017 with recommendations to the Commission on the protection of vulnerable adults (2015/2085(INL)).

[2] See https://www.gnewsonline.it/adulti-vulnerabili-il-consiglio-ue-plaude-alle-iniziative-del-ministero/.

I would like to thanks Ms. Federica Fiorillo, judge seconded to the Ministry of Justice (Cabinet of the Minister – International Affairs Unit), for her precious help and valuable assistance.

In fact, as more than half of EU Member States are not parties to The Hague Adults Convention[3], the Czech Presidency decided to cover a wide variety of approaches and to broaden the discussion. A representative of Italy was invited precisely to present the point of view of a non-contracting State.

## 2. Italy and The Hague Adults Convention

To present the point of view of Italy as a non-State party of The Hague Adults Convention is not exactly easy. I shall try to be as clear as I can.

First of all, I should recall that Italy has not yet ratified the 2000 Convention, but signed it in 2008. The Italian Constitution provides in relation to important international treaties (Article 80 It. Const.) that, after the Government has signed a treaty – and our Government did indeed sign this Convention – Parliament enacts legislation to authorise ratification, and the President of the Republic then ratifies the treaty.

Parliament has still not enacted a ratification act. Two attempts have been made, but neither of them was successful. A bill concerning the ratification of the Convention was submitted to the Italian Parliament for the first time in 2014, on the initiative of the Government itself[4]. A second attempt was made during the current legislature on the initiative of some members of the Senate[5]. In addition, ratification of The Hague Adults Convention was one of the main issues discussed by the Ministerial Consultative Committee on the Rights of Vulnerable Persons – a Committee, of which I am a member, set up by the Minister of Justice and the Minister of Disability and chaired by a leading scholar, Paolo Cendon[6] – within the ambit of a special working group coordinated by Professor Pietro Franzina, who is here today at the invitation of the Czech Presidency.

[3] https://e-justice.europa.eu/38579/EN/protection_of_vulnerable_adults

[4] Chamber of Deputies, Act no. 2797, XVII legislature, 23 December 2014.

[5] Senate of the Republic, Act no. 2331, XVIII legislature, 15 July 2021. The debate on the bill in the re-united Parliamentary Committees Justice and Foreign Affairs had begun on 4 May 2022.

[6] The "Tavolo nazionale sui diritti delle persone fragili" was set up on 19 December 2019. After a work suspension caused by the health emergency, it has resumed its activity, in a different composition, on 9 March 2022.

But the days of the current legislature are numbered, because we Italians will elect a new Parliament on 25 September. All draft legislation lapses at the end of each legislature and the fate of the Ministerial Consultative Committee itself will depend on the next Government.

Personally, I cannot understand why Parliament has still not authorised ratification.

As far as I am aware, no serious objections were raised on either occasion by politicians, the general public or scholars. This is rare indeed, and there is a general agreement on the need to ratify it.

Italy's failure to ratify the Convention is even more inexplicable, in my opinion, if we consider that Italy ratified the 2006 Convention of the United Nations on the Rights of Persons with Disabilities in 2009[7], and hence within a reasonable timeframe.

We must in fact recall that the Hague Conference on Private International Law defines the United Nations Convention as being "complementary" to The Hague Adults Convention[8], and that the Council of the European Union last year stated that: "The implementation of these two instruments shares the objective of promoting and protecting the rights of persons with disabilities"[9].

However, there is more. I should add that the United Nations Convention was not only promptly ratified, but is now also firmly established within the Italian legal system.

In particular, it has been, and continues to be, the driver of a number of positive innovations in our internal legal order.

On one hand, it has spurred on and supported important legislative reforms, such as the recent delegated law on disability[10], provisions on inclusion within schools of pupils with disabilities[11] and the law on assistance for people with severe disabilities who do not have any family support[12].

[7] Law 3 March 2009, no. 18.

[8] EC-HCCH Joint Conference on the Cross-border Protection of Vulnerable Adults, Conclusions and Recommendations no. 2 (Brussels, 5-7 December 2018).

[9] Council Conclusions on the Protection of Vulnerable Adults across the European Union (2021/C 330 1/01): "Even though the CRPD [United Nations Convention on the rights of persons with disabilities] focuses on persons with disabilities and does not approach disability from a 'vulnerability perspective', but rather a human rights based approach, the 2000 Hague Convention should be implemented in full respect of the CRPD. The implementation of these two instruments shares the objective of promoting and protecting the rights of persons with disabilities".

[10] Law 22 December 2021, no. 227 (Delega al Governo in materia di disabilità).

[11] Legislative Decree 13 April 2017 no. 66 (Norme per la promozione dell'inclusione scolastica degli studenti con disabilità, a norma dell'articolo 1, commi 180 e 181, lettera c), della legge 13 luglio 2015, n. 107).

[12] Law 22 June 2016, no. 112 (Disposizioni in materia di assistenza in favore delle persone con disabilità grave prive del sostegno familiare). See also, as normative reforms subsequent to the implementation of the UN Convention, Law

On the other hand, and I would say above all, the United Nations Convention has constituted the basis for all of the most innovative decisions of the Italian courts, including the Constitutional Court, in favour of vulnerable persons.

The Constitutional Court has actually stressed that the United Nations Convention not only represents a source of international obligations for Italy, but can also take on enhanced status. Since the European Union itself has adhered to the United Nations Convention, the Convention is binding under Italian law with the same status as European Union law in those areas in which Italy is implementing Union law[13].

In the next paragraphs, I shall attempt to do three things.

Firstly, I shall briefly describe the measures provided for under the Italian law for protecting adults who, by reason of an impairment or insufficiency of their personal faculties, are not in a position to protect their interests (para no. 3).

Secondly, I shall shortly illustrate the current domestic Italian rules of private international law that now apply to vulnerable adults in cross-border situations (para no. 4).

Thirdly, I shall try to explain why things would improve if Italy ratified The Hague Adults Convention (para no. 5).

### 3. The substantive Italian rules on the protection of vulnerable adults

We currently have three types of protective measures.

To begin with, I would like to stress that all of them can only be adopted by a judicial authority. The Italian legal system does not provide for the adoption of protective measures by an administrative authority.

Decree 28 June 2013, no. 76, converted by Law 9 August 2013, no. 99, that modifies Legislative Decree 9 July 2003, no. 216 (Attuazione della direttiva 2000/78/CE per la parità di trattamento in materia di occupazione e di condizioni di lavoro); Law Decree 12 July 2018, no. 86, converted in Law 9 August 2018, no. 97, that modifies Legislative Decree 30 March 2001, no. 165 (Norme generali sull'ordinamento del lavoro alle dipendenze delle amministrazioni pubbliche); Law Decree 18 October 2012, no. 179, converted by Law 17 December 2012, no. 221, that modifies Law 12 March 1999, no. 68 (Norme per il diritto al lavoro dei disabili).

[13] Const. C., Judgment no 236/2012. See also Const. C., Judgments nos. 285/2009, 80/2010, 329/2011, 2/2016, 275/2016, 258/2017, 232/2018, 83/2019, 114/2019, 221/2019, 18/2020, 62/2020 and 152/2020.

Another element that I would like to underline is the following one. Two out of these three judicial measures are old, because they date back to the pre-republican fascist era when the Civil Code was written, culturally outdated and no longer in line with the obligation resulting from Article 12 of the United Nations Convention, which provides that: "States Parties shall recognize that persons with disabilities enjoy legal capacity […] in all aspects of life". Last year the EU Council recalled that the United Nations Convention "brought about a paradigm shift in relation to the legal capacity of persons" and "requires States Parties to take appropriate measures to support" – and not to substitute! – "persons with disabilities in the exercise of their legal capacity"[14].

On the contrary, both those outdated measures entail the vulnerable adult being legally incapacitated, either entirely or in part.

The two measures I am referring to are *interdizione* (which entails – automatically – full incapacitation) and *inabilitazione* (which implies – also automatically – partial incapacitation). *Interdizione* gives rise to a guardianship (*tutela*), while *inabilitazione* gives rise to a curatorship (*curatela*).

The guardian of a fully incapacitated person manages all of their assets and represents them in relation to all matters. Prior judicial authorisation is required for acts of extraordinary administration.

A partially incapacitated person can manage their own assets, except for acts not pertaining to ordinary administration. For those acts, the curator "supports" the vulnerable person, not in the sense of taking care of them, but rather in the sense of having the power to authorise or prohibit specific acts planned by the vulnerable person.

The Italian Ministerial Consultative Committee recently suggested repealing both *interdizione* and *inabilitazione*[15]. However, as mentioned above, following the collapse of the Government we will have to start from the beginning.

The third protective measure for vulnerable persons provided for under Italian law is far more recent, having been introduced in 2004: it is known as "support administration" (*amministrazione di sostegno*)[16].

[14] Council Conclusions on the Protection of Vulnerable Adults across the European Union (2021/C 330 1/01).

[15] See *Tavolo nazionale sui diritti delle persone fragili, 2. Abrogare l'interdizione e l'inabilitazione*, in *personaedanno.it*, 26 July 2022.

[16] Law 9 January 2004, no. 6.

It is a flexible judicial instrument that aims to limit as little as possible the ability of vulnerable persons to act. "In contrast to a measure establishing full incapacitation (*interdizione*) or partial incapacitation (*inabilitazione*), a measure appointing a support administrator does not entail any incapacitation of the interested party"[17]. A court-appointed support administrator takes action to secure both the assets and quality of life of the vulnerable person. However, when doing so they have solely and exclusively the powers established on a case-by-case basis by that court, having regard to the actual needs of the vulnerable person. Since the needs of that person change over the time, the powers that the court grants to the support administrator must also change.

The Constitutional Court takes the view that the measure gives effect to the "personalistic principle", which lies at the heart of the Italian Constitution. It also upholds the rights laid down by the United Nations Convention and the European Charter of Fundamental Rights. Thanks to this measure, according to the Constitutional Court, Italian law "now displays a greater sensitivity to the circumstances of persons with disabilities. It is more attuned to their needs and at the same time has greater respect for their autonomy and dignity than was the case in the past. Previously, the Civil Code simply established a clear distinction between persons who have legal capacity and those who do not, providing for inflexible, pre-determined consequences for each category"[18].

Moreover, the Court of Cassation has consistently interpreted the provisions on support administration in a manner that places the utmost emphasis on all those capacities of the interested party that have not been impaired by the physical, psychological or sensorial disability. For a number of years it has reiterated that the objective of support administration is to "protect without humiliating" the vulnerable person, guaranteeing them "the maximum possible protection in the face of the lowest possible sacrifice of the right to self-determination". In this sense for example, the Court of Cassation has upheld the position taken by the merits courts in finding that a person for whom a support administrator has been appointed retains the ability to carry out highly personal legal acts such as marrying[19] or donating[20], unless this has been expressly prohibited by a court for serious and specific reasons.

[17] Const. C., Judgment nos. 440/2005 and 114/2019.
[18] Const. C., Judgment no. 114/2019.
[19] Court of Cassation, first civil division, Judgment 11 May 2017, no. 11536; Court of Varese, first division, Judgment 6 October 2009.
[20] Court of Cassation, first civil division, Order 21 May 2018, no. 12460.

In addition, the Court of Cassation has repeatedly held, as far as support administration is concerned, that "the representation of or provision of assistance to a person with a disability must be genuinely exceptional, expressly justified in relation to specific extraordinary circumstances or acts and compliant with the principles of necessity and proportionality"[21]. It has also ruled that, as regards the judicial choice between incapacitation (whether *interdizione* or *inabilitazione*) and support administration, Article 12 of the United Nations Convention sets out an "interpretative criterion". This criterion requires that the specific protective measure most suited to the individual vulnerable person must be chosen, following a detailed examination by the courts of the factual circumstances[22].

It would indeed appear from this jurisprudential framework that the Italian courts now prefer to use support administration and only apply the rules on incapacitation – *interdizione* or *inabilitazione* – as a last resort[23] in extremely rare cases.

However, the numbers are at odds with this conclusion. It is not in fact true that legal incapacitation has been *de facto* replaced by support administration[24]. Support administration is currently being used in much more cases than incapacitation, that is in around 320,000 cases. Nonetheless, too many incapacitation orders are still in place: we still have, indeed, around 130,000 guardianships and around 6,000 curatorships[25] (even though some of these were probably adopted before 2004, when the instrument of support administration was introduced, and have unfortunately never been revoked and replaced by the new mechanism).

One final point. Alongside these three judicial measures – *interdizione*, *inabilitazione* e *amministrazione di sostegno* – Italian law does not provide for private mandates, i.e. the possibility of granting powers of representation to be exercised when the grantor is not in a position to protect his or her interests.

[21] For example Court of Cassation, first civil division, Judgment no. 7420/2022.

[22] Court of Cassation, first civil division, Order 7 March 2022, no. 3462.

[23] See Court of Foggia, first division, Judgment 2 March 2022, no. 617, but the case law seems consistent (Court of Lodi, first division, Judgment 17 March 2022, no. 177; Court of Terni, first division, Judgment 10 September 2021, no. 726; Court of Teramo, first division, Judgment 15 May 2021, no. 499; Court of Roma, first division, Judgment 1 April 2015, no. 7249).

[24] Differently P. Franzina and J. Long, *The Protection of Vulnerable Adults in EU Member States. The added value of EU action in the light of The Hague Adults Convention, Annex II*, in *Protection of Vulnerable Adults European Added Value Assessment Accompanying the European Parliament's Legislative Initiative Report (Rapporteur: Joëlle Bergeron)*, PE 581.388, September 2016, 126.

[25] https://webstat.giustizia.it/SitePages/StatisticheGiudiziarie/civile/Procedimenti%20Civili%20-%20flussi.aspx

Nevertheless, some years ago the Italian Parliament introduced the chance to write living wills (or advanced health directives, *Disposizioni Anticipate di Trattamento*, better known as *DAT*)[26]. *DAT* are legally binding statements of choices made by persons who, fearing they may not be mentally capable in future, express their own wishes in relation to health treatment. Persons granting a *DAT* can also appoint a trustee to represent them in future dealings with doctors. In the event of a dispute between the trustee and doctors concerning advanced health directives that to be clearly incongruous or not to reflect the current clinical condition of the patient, or if new treatment is available that can offer a tangible possibility of improving the condition of the interested party, the decision is left to the tutelary judge.

## 4. The current Italian rules of private international law on vulnerable adults (and their shortcomings)

Nowadays, the cross-border aspects to the protection of vulnerable adults are regulated by the general rules of private international law adopted in 1995 (Italian PIL Statute)[27], namely Article 43 on the applicable law and Article 44 on jurisdiction.

Article 43 provides that "The conditions and effects of protective measures for incapacitated adults, as well as the relationships between incapacitated persons and caregivers, are governed by the national law of the incapacitated person. However, the Italian courts may adopt the measures provided for by Italian law for the purpose of urgently protecting the incapacitated person or his or her property on a provisional basis".

Article 44 states, through a complex reference to other provisions, which the case law has not interpreted unequivocally[28], that Italian courts have jurisdiction to put in place a protection measure when the vulnerable person concerned is an Italian citizen and when the measure is necessary for the purpose of urgently protecting the incapacitated person or his or her property situated in Italy on a provisional basis.

[26] Law 22 December 2017, no. 219.
[27] Law 31 May 1995, no. 218.
[28] P. Franzina, La disciplina internazionalprivatistica italiana della protezione degli adulti alla luce di una recente pronuncia, in Cuadernos de derecho transnacional, 12(1), 2020, 222-225.

Both of these rules are different from those laid down in The Hague Adults Convention and – there is no doubt – also different from the rules of private international law on vulnerable persons of many non-States parties.

Consequently, as far as jurisdiction is concerned, there is – obviously – a serious risk of positive conflict.

However, I think that the difficulties concerning the applicable law are much more serious.

Indeed, the Italian rule of the law of the State of nationality of the adult in question is out of date. It is no longer appropriate for the reality of international movements of people and much more cumbersome than applying the rule of the adult's State of habitual residence. Above all however, it undermines the efficacy of protection provided to many vulnerable persons, including both Italian citizens and citizens of other EU Member States.

I shall mention only two examples of negative consequences that could be avoided if Italy ratified The Hague Adults Convention.

First example.

Consider a scenario in which the vulnerable person is an Italian citizen or a citizen of another State which, like Italy, does not provide for the possibility of private mandates (such as for instance Poland). Before becoming incapacitated, that person appointed a representative under a private mandate in accordance with the laws of other State with which they had a significant link.

In a case such as this one, it is currently impossible to enforce a contractual protective measure of this type in Italy, for example selling a property situated in Italy or settling relations with an Italian bank. The Italian notary or bank is in fact obliged to apply Italian law, or the law of the State of which the vulnerable person is a national, and this law does not provide for any form of contractual protection for incapacitated persons[29]. And naturally, if a private mandate is concluded, this means that there is not even any foreign court ruling that the Italian courts could implement. Ratification of The Hague Adults Convention would fill this gap in protection thanks to Article 15[30].

[29] P. Franzina and D. Boggiali, *Quesito n. 178-2020/A*, in *Consiglio Nazionale del Notariato*, Ufficio Studi and P. Franzina, *Il difficile esercizio in Italia di poteri di rappresentanza conferiti da un adulto in previsione di una perdita di autonomia*, in *Federnotizie*, 24 febbraio 2021.

[30] Article 15 states that "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

Now the second example.

It should be recalled that Italian protective mechanisms are only applicable to Italian citizens, except on a provisional basis under urgent circumstances. Thus – strictly speaking – a support administration could never be ordered for a foreign national resident in Italy, even if that person is an EU citizen[31], except obviously in cases involving "reverse renvoi" by the State of nationality of the vulnerable person[32].

However, a strange phenomenon seems to emerge from the case law.

In many cases, the Italian courts have disregarded – or we might say disapplied – this rule of private international law. They have done so with varying degrees of justification, and in some cases more explicitly than in others.

Why have they done this? I would say that there are two reasons. First of all, as I have mentioned, support administration is a good solution, because provides effective protection for vulnerable persons respecting their right to self-determination. Secondly, Italian courts, obviously, always prefer to apply Italian law, as foreign law is always difficult to identify and understand.

One might also ask how Italian courts are able to avoid following the Italian rules of private international law. I can answer this question straight away.

In most cases, the courts appoint a support administrator for a foreign person without considering their nationality, and thus without even considering the issue of the applicable law[33].

On some occasions however, the reasons for not applying the antiquated rules of private international law are explained. The most interesting reason I have found is as follows. Since "this case considers the fundamental right to psychological and physical health", and since the Italian Constitution recognises and guarantees the fundamental human rights of all persons, irrespective of their nationality, and also irrespective of whether they are lawfully present within Italy, it follows

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".

[31] E. Calo, *Amministrazione di sostegno e diritto internazionale privato*, in *Notarcomitato*, Feltre 2005/3.

[32]. See, for example, the "reverse renvoi" provided by the Macedonian law quoted in Court of Belluno, Judgment of 1 August 2019 and P. Franzina, *La disciplina internazionalprivatistica italiana della protezione degli adulti alla luce di una recente pronuncia*, in *Cuadernos de derecho transnacional*, 12(1), 2020, 219 ff.

[33] For example Court of Modena, Judgment 17 July 2016. See also, implicitly, *inter alia*, Court of Cassation, first criminal division, Judgment 7 November 2019, no. 48949 and Court of Modena, second division, Judgment 12 January 2018.

that there can be no difference in treatment between Italian citizens and foreign citizens as regards the right to have a support administrator[34].

The problem is obviously that not all Italian courts follow this reasoning and circumvent the applicable rules of private international law in order to ensure effective protection for vulnerable persons. As a result, foreign nationals in need are often denied the right to have a support administrator.

**5. In conclusion…**

In conclusion, Italy's experience shows that the main problem arising within a State that has not ratified the Convention is a lack of legal certainty, and we all know that legal uncertainty entails a tangible possibility of violating the interests, dignity and autonomy of individual vulnerable persons.

For this reason, we must return to the point I made right at the start. Ratifying The Hague Adults Convention could be regarded as a requirement for Italy, amongst other things in order fulfil its obligations under the United Nations Convention on the Rights of Persons with Disabilities.

To end on a positive note, I can say – thanks to the precious teaching of Pietro Franzina – that the accession to the Convention could require only some small specific legislative changes in the Italian legal order.

They are basically of three types. Firstly, it would be useful, or even necessary, to make a few adjustments to the Italian general rules of private international law, in order to regulate in harmony with the Convention the cases for which the Convention does not provide specific rules. An example for all could be the powers of the representative *ex lege* of the vulnerable adult, which some legal systems, such as the Austrian one, assign to the spouse or to other persons close to the interested party.

Secondly, it might be appropriate, for reasons of legal certainty and publicity, to provide for a rule establishing the procedures for the exercise, in Italy, of foreign "private mandates", that are

[34] Court of Reggio Emilia, Judgment 7 January 2008.

unknown in the Italian legal order. For example, the new rule could require to fill the private mandate with a notary.

Thirdly, it would be necessary to change the role of the Italian Consulates. Today our Consulates have the task of providing with their functions of voluntary jurisdiction to the needs of compatriots abroad, but tomorrow this function will have to be rethought, because the Convention, following the criterion of habitual residence, entrusts the care of our fragile compatriots to the authorities of the State in which they reside. After the accession to the Convention, in those States our Consulates should have essentially the role of reporting, either to the local authorities, or to the Italian ones, for the purposes of Articles 7 and 8 of the Convention.