

THE PROTECTION OF PERSONS WITH DISABILITIES IN PRIVATE INTERNATIONAL LAW

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Resumo: La tutela dell'adulto incapace è oggetto di crescente attenzione nell'ambito delle fonti internazionali di tutela dei diritti dell'uomo. Il riferimento principale, in tale contesto, è dato dalla Convenzione delle Nazioni Unite sui diritti delle persone disabili, che rappresenta una tappa fondamentale nell'evoluzione della tutela internazionale dei diritti fondamentali dell'individuo, considerato come soggetto individualmente e socialmente debole, destinatario di garanzie particolari, e non più quale soggetto di diritti garantiti per altre categorie di soggetti. Tale centralità del soggetto disabile stimola alcune riflessioni anche nell'ambito del diritto internazionale privato, per la necessità di coordinare le diverse fonti nazionali e internazionali (ad es. la Convenzione dell'Aja del 13 gennaio 2000) della disciplina, al fine di rendere più efficace l'attuazione dei diritti dello stesso.

Palavras-chave: persone disabili, soggetto portatore di handicap, diritti fondamentali dell'individuo, diritto internazionale privato, Convenzione dell'Aja del 2000 sulla protezione internazionale degli adulti, criteri di collegamento, residenza, cittadinanza.

Abstract: The protection of persons with disabilities is a fundamental topic within the international human rights law. The perceived centrality of person with disabilities as subject of rights, as pointed out by the Convention on the Rights of Persons with Disabilities and by the associated Optional Protocol, raises also new questions in the conflict of laws' field. Conflicts of laws may arise as much from the absence of a uniform definition of person with disabilities, as from the different national rules on this matter. The 2000 Hague Convention on International Protection of Adults provides a uniform legal framework for international cases concerning vulnerable persons. Where the Convention is not in force (e.g. in Italy), conflicts of laws and jurisdiction must be solved by the interpretation of the national rules. In this context, the role of human rights must be considered essential.

Key words: persons with disabilities, vulnerable persons, incapacitated persons, human rights, Private International Law, 2000 Hague Convention of International Protection of Adults, connecting factors, residence, citizenship.

Sumario: I. General remarks. Principles and fundamental rights of persons with disabilities. II. Definitions of person with disabilities and problems of private international law. III. The characterization of the category of person with disabilities. Problems arising from the application of measures unfamiliar to the forum.

I. General remarks. Principles and fundamental rights of persons with disabilities

1. The protection of persons with disabilities is a fundamental issue of the international human rights law, as the necessity of considering the needs and concerns of persons with disability is a generally accepted principle.

2. The perceived centrality of persons with disabilities as «subjects of rights, able to claim those rights as active members of society»¹ must be stressed. On this theme, the recent development of international law, and particularly the adoption of the Convention on the Rights of Persons with Disabilities and of the associated Optional Protocol by the General Assembly of the United Nations², «has been hailed as a great landmark in the struggle to reframe the rights of persons with disabilities»³. Before the adoption of this Convention, persons with disability were not been explicitly recognised in the binding instruments of international human rights law. None of the equality clauses of the 1948 Universal Declaration of Human Rights⁴, of the 1966 International Covenant of Civil and Political Rights⁵, and of the 1966 International Covenant on Economic, Social and Cultural Rights⁶, mention persons with disability as a protected category. For international human rights law, the principle of non – discrimination and equality is a value in itself that can be derived directly from human dignity⁷.

3. The 1989 Convention on the Rights of the Child refers to «mentally and physically disabled» children in Article 23⁸. This rule sets out a range of obligations designed to ensure that children with disability receive as a particular category of children, ‘special care’ in relation to their ‘special needs’.

4. In the 1950 European Convention of Human Rights⁹, we don’t find a specific rule for the protection of disabled people, but it is significant that the rules generally stated for the protection of fundamental rights of individuals have been largely implemented by the Strasbourg Court to protect persons with disabilities, above all after the entry into force of Protocol n. 12¹⁰.

5. The General Assembly Mandate, under which the Convention on Rights of persons with disabilities was developed, stipulated that the negotiating Committee was to put in practice the existing human rights in the particular circumstances of persons with disability¹¹. In spite of this, the Convention is a core constituent of international human rights law, rather than a subsidiary of existing law. Articles 3 to 9 contain overarching principles to be applied in the implementation of the convention. Article 3 enunciates the general principles on which the Convention is founded, including the inherent dignity of persons

¹ Statement by L. Arbour, UN High Commissioner for Human Rights on the Ad Hoc Committee’s adoption of the International Convention on the Rights of Persons with Disabilities, 5 December 2006, available at <http://www.ohchr.org/English/issues/disability/docs/statementhdec06.doc>

² See GA Res. 61/611, 13.12.2006, A/61/611; 15 IHRR 255. See *Disabilities – Handbook on the Convention on the Rights of Persons with Disabilities and its Optional Protocol* (Geneva: OHCHR, 2007), available at: <http://www.ohchr.org/english/about/publications/docs/ExclusionEqualityDisabilities.pdf>. See also: A. LAWSON, *The United Nations Convention on the Rights of Persons with disabilities: New Era or False Dawn?*, in *Syracuse Journal of International Law and Commerce*, 2007, p. 563; R. KAYESS, P. FRENCH, *Out of darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities*, in *HRLR*, 2008, p. 2; F. SEATZU, *La Convenzione delle Nazioni Unite sui diritti delle persone disabili: i principi fondamentali*, in *Diritti umani e diritto internazionale*, 3 (2008), pp. 535 – 559; ID, *La Convenzione delle Nazioni Unite sui diritti delle persone disabili: diritti garantiti, cooperazione, procedure di controllo*, in *Diritti umani e diritto internazionale*, 3 (2009), pp. 259 – 280.

³ R. KAYESS, P. FRENCH, *Out of darkness into Light?*, p. 2.

⁴ GA Res. 217 A (III), 10.12.1948.

⁵ 999 UNTS 171.

⁶ 993 UNTS 3.

⁷ J. C. McCrudden, *Equality and Non – Discrimination*, in D. FELDMAN (ED.), *English Public Law*, Oxford, 2004. Pp. 581- 607.

⁸ 1577 UNTS 3.

⁹ 213 UNTS 2889; Council of Europe, *European Treaty Series*, n. 5, 4 November 1950.

¹⁰ 29.3.2001, *D.N. v. Switzerland*, 27154/95 (art.5), § 42, where the Court states:»In the Court’s opinion, it would be inconceivable that Article 5 § 4 of the Convention, relating, *inter alia*, to such a sensitive issue as the deprivation of liberty of «persons of unsound mind» within the meaning of Article 5 § 1 (e), should not equally envisage, as a fundamental requisite, the impartiality of the court»; 1.12.2009, *G. N. and o. v. Italy*, 43134/05 (art.2, art. 14); 30.4.2009, *Glor v. Switzerland*, 134444/04 (art. 8); 7.2. 2012, *Cara-Damiani v. Italy* 2447/05 (art.3); 17.1.2012, *Stanev v. Bulgaria* 36760/06 (art. 5, art. 13), available at <http://www.hudoc.echr.coe.int>. On Protocol n. 12 see specifically C. PETTITI, *Le Protocole n. 12 à la Convention de sauvegarde des droits de l’homme et des libertés fondamentales. Une protection effective contre le discriminations*, in *Revue hellénique des droits de l’homme*, 2006, p. 805.

¹¹ J.E. LORD, *New Inspiration for the Human Rights Debate: the Convention on the Rights of Persons with Disabilities*, in *Netherlands Quarterly of Human Rights*, 2007, p. 397.

with disability, non – discrimination, and the full and effective participation of persons with disability in society. Article 4 sets out the general obligation to incorporate the terms of the convention into national laws, policies and programs, and to repeal national laws that are inconsistent with the convention¹².

6. Moreover, the Convention sets out arrangements for implementation and monitoring of the convention at both the national and international level. At the international level, it includes the establishment of a new treaty body to monitor implementation of the convention, and to receive complaints about violation of the rights of persons with disabilities. Under the Optional Protocol (art. 1), the treaty body is also empowered to receive complaints about violations of rights from individuals and groups of individuals where they have exhausted domestic remedies. The Optional Protocol also establishes an inquiry procedure in relation to gross violations of fundamental rights¹³.

II. Definitions of person with disabilities and problems of private international law

7. The question of a definition of «persons with disabilities» was one of the most controversial topics dealt with by the Convention. Among State delegations, the principal reason for this was concern about the impact of such definitions on different national systems. Article 1 describes persons with disabilities as «...those who have long – term physical, mental, intellectual or sensory impairments...». This notion seems open – ended and propositional, also because it is stated in the rule devoted to the application of the Convention (art. 1) and not in the Article 2, which is specifically aimed at the definition of five key terms used throughout the Convention. So it seems possible to extend the application of the Convention to persons with short – term impairments, arising from traumatic injuries and disease and to persons with episodic conditions (mood disorders, asthma). On this matter, it should also be noted that article 1, par.1, asserts that the purpose of the convention is «to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities»¹⁴.

8. However, in the absence of relevant case – law in this field, it must be pointed out that the boundaries of the category of persons to benefit from the Convention will be determined domestically.

9. So, in interpreting the definition of person with disabilities, we may therefore be able to find relevant constructive clues also in other sources, such as in the 2000 Hague Convention on the protection of adults, internationally in force since 1 January 2009¹⁵. The purpose of this Convention is in fact to organize «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» (art. 1, par. 1). As it is generally recognized that it is contrary to the interests of these unfortunate adults and of the carers

¹² For the Italian implementation of the Convention, see Corte Cost., 9 dicembre 2005, n. 440, in *Guida dir.*, 2006, p. 28.

¹³ On the Optional Protocol, see in *International Legal Materials*, 2007, p. 441, M. RASMUSSEN, O. LEWIS: «*It is disappointing, however to note the low number of States that have signed the Optional Protocol*»; J. VON BRNSTORFF, *Menschenrechte und Betroffenenrepräsentation: Entstehung und Inhalt eines UN-Antidiskriminierungsübereinkommens über die Rechte von behinderten Menschen*, in *ZAORV*, 2007, p. 1041.

¹⁴ On this topic, see F. SEATZU, *La Convenzione delle Nazioni Unite*, pp. 543 – 544, stressing the notion of disability as «evolving concept».

¹⁵ The Convention was drawn up under the auspices of the Hague Conference on Private International Law, to replace the 1905 Hague Convention. The text is published in *ILM*, vol. 39 (2000), p. 7. It is in force among: Czech Republic, Estonia, Finland, France, Germany, Switzerland and United Kingdom. On this Convention see generally: A. BUCHER, *La Convention de La Haye sur la protection internationale des adultes*, in *Revue suisse de droit international et de droit européen*, 2000, p. 37 e ss.; E. CLIVE, *The New Hague Convention on the protection of adults*, in *Yearbook of Private International Law*, 2000, pp. 1 – 23; P. LAGARDE, *La Convention de la Haye du 13 janvier 2000 sur la protection internationale des adultes*, in *Revue critique*, 2000, pp. 159 – 179; K. SIEHR, *Das Haager Übereinkommen über den internationalen Schutz Erwachsener*, in *RabelsZ*, 2000, pp. 715 – 751; A. R. FAGAN, *An alaysis of the Convention on the international protection of adults*, in *Elder Law Journ.*, 2002, p. 329; M. REVILLARD, *La Convention de La Haye sur la protection internationale des adultes et la pratique du mandat d'incapacité*, in *Le droit international privé: esprit et méthodes. Mélanges en l'honneur de Paul Lagarde*, Paris, 2005, p. 725.

looking after them, if there are disputes on such matters as jurisdiction, applicable law and the recognition in one country of measures taken in another¹⁶.

10. Regarding the definition of the incapacitated person's notion provided for by the 2000 Hague Convention, it must be pointed out that there was some discussion in the Special Commission about whether physical, as opposed to mental, impairment or insufficiency was covered. To clarify the matter, it must be probably followed the opinion that physical incapacity which is not accompanied by any mental incapacity does not put a person into a position where he or she cannot take decisions, and thereby protect his or her interests¹⁷.

11. Conflict of laws may arise as much from the absence of a uniform definition of person with disabilities as from different national rules on this matter. Conflicts of laws may emerge where there is not a uniform solution, e.g. in Italy where the 2000 Hague Convention is not in force. This Convention could determine the internationally agreed solution for the applicable law regarding different topics, such as the determination of incapacity, the placing of the adult with disabilities under the protection of a judicial or administrative authority, the guardianship, the curatorship and the analogous institutions¹⁸.

12. The Hague Convention on International Protection of Adults provides a uniform legal framework for international cases concerning vulnerable persons aged 18 and older. The Convention obliges Contracting States to introduce uniform rules on jurisdiction for matters within its scope, to adopt uniform rules on the law applicable to the measures adopted to protect persons with disabilities. The Convention stipulates the competence of State authorities as well as procedural standards for the recognition and enforcement of decisions taken in another State, and facilitates the issuance of a certificate, which is internationally valid, for the person entrusted with protection of the adult's person or property. Moreover, the system of inter-country cooperation is institutionalised by the Convention.

13. The Convention provides that a State has jurisdiction, regardless of the nationality of the vulnerable adult, if the vulnerable adult's «habitual residence» is located in that State. Concerning applicable law, the law of the State which has jurisdiction is applicable. However, there is an exception if the vulnerable adult is accidentally present in another Contracting State. In this case, the authorities of that State can take measures of protection of a temporary character, for which that State's own law is applicable. Those measures will lapse as soon as the State of «habitual residence» has taken action. In order to ensure the effective functioning of a system of protection, the Convention stipulates that the Contracting States have to designate Central Authorities, which have to co-ordinate the cross-border action to be taken. The Central Authorities can have recourse to the experience of professional agencies, such as International Social Service.

14. The 2000 Hague Convention has largely reduced the role of the citizenship as connecting factor, following the general trend to overcome the citizenship by the residence¹⁹. It recognises nationality as a independent ground of jurisdiction (art. 7, par. 1), but has provisions which give precedence to the habitual residence in case of conflict (art. 7, parr. 2 – 3)²⁰. Similarly the role of nationality has been reduced within many international Conventions, where the dominance of habitual residence over natio-

¹⁶ E. CLIVE, *The New Hague Convention*, pp. 2 – 3.

¹⁷ E. CLIVE, *The New Hague Convention*, p. 5: «On human rights grounds, compulsory measures of protection would not be justified in relation to persons who have full decision-making capacity».

¹⁸ See the Lagarde Explanatory Report, in *Conférence de la Haye de droit international privé, Actes et documents de la Commission spéciale à caractère diplomatique de septembre-octobre 1999*, La Haye, 2003, pp. 90 - 92.

¹⁹ L. I. DE WINTER, *Nationality or Domicile? The Present State of Affairs*, in *Recueil des Cours*, 1969, p. 347; D. F. CAVERS, 'Habitual Residence': a Useful Concept?, in *AULR*, 1972, p. 476; W. DUNCAN, *Nationality and the protection of children across frontiers, and the example of intercountry adoption*, in *Yearbook of Private International Law*, 2006, pp. 75-86.

²⁰ For some observations on this solution reached at the Hague Conference, see E. CLIVE, *The New Hague Convention*, pp. 16-18.

nality is now fully realised (e.g. 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children²¹), as well as within the European regulations adopted in the field of judicial cooperation in civil matters, where the nationality is recalled in exceptional cases (e.g. art. 3 (1) (b) of Regulation EC no. 2201/2003 on jurisdiction, recognition and the enforcement of judgments in matrimonial matters²²) and the habitual residence is the primary criterion²³.

15. Indeed many provisions on conflict of laws and jurisdictions, provided for by some national systems, make use of different connecting factors, e.g. Article 43 of the Italian Private International Law Act of 1995, which is based upon the citizenship of the person with disabilities²⁴, as a tribute to the Mancini's theories and to the «Italian School of International law»²⁵.

16. Within the 2000 Hague Convention, the concept of «habitual residence» is not defined, except to clarify that any reference to habitual residence in that State concerns the habitual residence in a territorial unit (art. 45, letter. A)²⁶. It 's self - evident, therefore, that the concept of «habitual residence» concerns, according to general criteria, is intended to factually connect an individual to a jurisdiction²⁷. To define the application of this connecting factor, it's convenient to refer to the *Explanatory Report* to the Convention by Paul Lagarde²⁸, which expressly recalls the elasticity of the concept as a guarantee of uniform application of the Convention, in light of the different interpretations of the concept of residence in some legal systems²⁹. Moreover, it seems appropriate to underline that the connecting factor of the habitual residence constitutes a criterion variable in space and time, changing as the circumstances of an individual, or family, change over time. The habitual residence is therefore likely to lead to different results, where considered with regard to different subjects, e.g. the members of the same family, but living in different States, thus making it difficult to determine a single family residence³⁰.

17. The notion of citizenship, as provided for by some national systems (e.g. the Italian) in some matters is more easily ascertainable and theoretically capable of achieving uniform regulation of the topics concerning persons with disabilities. When applying this criterion there is a general common understanding that in order to assess whether an individual possesses the nationality of a country, the law of such country should apply³¹.

18. Some problems may therefore arise in the application of this connecting factor, first in case of change of citizenship. The variability in this criterion may lead to problems of coordination between

²¹ The 1996 Hague was influential on the preparation of the 2000 Hague Convention: on this point, see E. CLIVE, *The New Hague Convention*, pp. 3-4.

²² In O. J. 2003, L 338/ 1-29. The Regulation is applicable to all States in the EU except Denmark.

²³ R. LAMONT, *Habitual Residence and Bruxelles II bis: Developing Concepts for European Private International Family Law*, in *JPIL*, 2007, p. 261; P. ROGERSON, *Habitual Residence: The New Domicile?*, in *ICLQ*, 2000, p. 49; BUCHER, *La famille en droit international privé*, in *Recueil des Cours*, 2000 (283), pp. 19 – 39.

²⁴ On article 43 see: C. HONORATI, *Art. 43*, in F. POCAR E ALTRI, *Commentario del diritto internazionale privato italiano*, Padova, 1996, p. 172; S. TONOLO, *Art. 43*, in G. CONETTI, S. TONOLO, F. VISMARA, *Commento alla riforma del diritto internazionale privato italiano*, Torino, 2009, p.

²⁵ On this topic, see S. TONOLO, *L'Italia e il resto del mondo nel pensiero di Pasquale Stanislao Mancini*, in *Cuad. der. transn.*, 2011, pp. 178 – 192.

²⁶ The United Kingdom ratified the Convention, but only for Scotland. However, in the English *Mental Capacity Act 2005*, it is provided that the Convention applies in England and Wales.

²⁷ R. LAMONT, *Habitual Residence and Bruxelles II bis*, p. 273.

²⁸ *Explanatory Report*, p. 90.

²⁹ In France, see the judgment of Cass., 14.12.2005, in *Droit de la famille*, 2006, p. 19.

³⁰ M. HUNTER – HENIN, *Droit des personnes et droits de l'homme: Combination ou confrontation?*, in *Revue critique*, 2006, p. 763.

³¹ On the citizenship as a connecting factor, see J. BASEDOW, *Le rattachement à la nationalité et les conflits de nationalité en droit de l'Union européenne*, in *Revue critique*, 2010, p. 427; E. PATAUT, *Citoyenneté de l'Union et nationalité étatique*, in *Rev. trim. dr. eur.*, 2010, p. 617; S. CORNELOUP, *Refléxions sur l'émergence d'un droit de l'Union européenne en matière de nationalité*, in *Clunet*, 2011, p. 491.

e.g. the law under which protection is established and then terminated. Then particular problems can be encountered as to the application of the link of citizenship in cases of persons with disabilities holding dual or multiple citizenship. With regard to this case, it may be found, in fact, that the choice of law with which the person with disability has the closest connection, according to rules like the art. 19, par. 2 of the Italian Private International Law Act of 1995, could affect the application of a protective measure, similarly to what would happen if among the different nationalities there was the Italian and then the protection disposed by the Italian law would be effective. Infact Article 19 par. 2 states that if an individual has the Italian and a foreign nationality, the former prevails. The protection provided by a foreign law could be rejected by the application of the Italian law.

19. A different solution could perhaps be reached in the countries where the effective nationality is taken into consideration in the choice of laws problems when the individual possesses the citizenship of the forum together with a foreign nationality and both nationalities are placed on the same footing. In any case this solution could be generally accepted as consistent with the objectives of protection of persons with disabilities: as the Italian Supreme Court established in relation to the 1961 Hague Convention on the protection of minors in the case of a minor with dual nationality³².

20. Moreover, particular conflict of laws' problems are determined by the contrast between connecting factors e.g. residence and citizenship, as well as by the different characterizations of connecting factors³³. These problems could be both resolvable through the ratification of the Hague Convention, or throughout the *renvoi*, as provided by e.g. the Italian conflict of laws system (article 13 of the Italian Private International Law Act of 1995)³⁴, which allows that the law of conflict of laws of the involved foreign states may be taken into consideration³⁵.

III. The characterization of the category of person with disabilities. Problems arising from the application of measures unfamiliar to the forum

21. The definition of the notion of person with disabilities is important also for another purpose of conflict of laws rules: the characterization as a prerequisite to determine the applicable law³⁶. It is interesting, in this regard, to note the choice of the 2000 Hague Convention which, as mentioned, does not use the term «incapacitated», because it is understood differently within individual jurisdictions and therefore jeopardizes the uniformity of the solutions, but refers more specifically to the adults who present an impairment or insufficiency of their personal faculties, rendering them unable to defend their personal interests or property (art. 1 par. 1).

³² Cass., s.u., n. 1, 9.1.2001, in *Riv. dir. int. priv. proc.*, 2002, p. 128.

³³ A. T. VON MEHREN, *The Renvoi and its Relation to Various Approaches to the Choice of Law Problem*, in *XXth Century Comparative and Conflicts Law, Legal Essays in honor of H. E. Yntema*, Leyden, 1961, pp. 380 – 394.

³⁴ On Article 13, see: F. MOSCONI, *Art. 13*, in F. POCAR ET AL., *Commentario del nuovo diritto internazionale privato* Padova, 1996, pp. 54 – 58; F. MUNARI, *Art. 13*, in S. BARIATTI (a cura di), *Legge 31 maggio 1995, n. 218, Riforma del sistema italiano di diritto internazionale privato, Nuove leggi civili commentate*, Padova, 1996, pp. 1018 – 1035; L. FUMAGALLI, *Rinvio e unità della successione nel nuovo diritto internazionale privato italiano*, in *Riv. dir. int. priv. proc.*, 1997, pp. 829 – 848; P. PICONE, *La riforma italiana del diritto internazionale privato*, Padova, 1998, p. 122; G. CONETTI, *Art. 13*, in G. CONETTI, S. TONOLO, F. VISMARA, *Commento alla riforma del diritto internazionale privato italiano, Legge 31 maggio 1995, n. 218*, Torino, 2009, p. 41.

³⁵ A. BRIGGS, *In Praise and Defence of Renvoi*, in *International and Comparative Law Quarterly*, 1998, pp. 877 – 884. For an application of the *renvoi* in the Italian conflict of laws' system in this matter, see Trib. Pordenone, 7 marzo 2002, in *Corr. giur.* 2002/6, pp. 773 – 774; in this case the Italian rules (art. 414 ss. c.c.) were applied to an Argentine citizen with disabilities domiciled in Italy.

³⁶ On the origins of the operation of characterization, see J. D. FALCONBRIDGE, *Characterization in the Conflict of Laws*, in *The Law Quarterly Review*, 1937, pp. 235 – 258, p. 236, where he states «characterize or define the juridical nature of the subject or question upon which its adjudication is required». On the development of different terms, e.g. «qualification», see A. MENDELSSOHN BARTHOLDY, *Delimitation of Right and Remedy in the Cases of Conflict of Laws*, in *British Yearbook of International Law*, 1935, p. 20 e ss. More recently, see K. LIPSTEIN, *Characterization*, in *International Encyclopedia of Comparative Law, III, Private International Law*, 5, 1999, pp. 3 – 35, p. 22.

22. Many doubts may arise e.g. in the case where the national law of the adult with disabilities provides for protection measures unknown to the forum (eg. forced hospitalizations in the treatment of drug addiction). This may happen in the Italian courts, holding almost unlimited jurisdiction in the matter, according to the dispositions of art. 44 of the Italian Private International Law Act of 1995. The Italian judge may be asked to apply measures unknown (created to protect a weak person), which may be the trust of the common law countries³⁷, the «mandat d'incapacité», recently regulated by some systems of civil law (Spain, Germany, France)³⁸, or a living will, governed by some foreign legal systems³⁹.

23. The application of unfamiliar measures is very complicated for the judge when he is asked for them⁴⁰. In order to overcome the lack of useful references within the law of the forum, it seems necessary to apply the method of comparative analysis of legal conflict⁴¹. It is convenient to see if within the context of the connecting factors, provided by the Italian system of private international law in relation to other cases, the measures required can be linked, by reason of the fact that the concepts aimed to describe such situations may be understood with the same meaning of the terms used by foreign legal systems. The identification of the applicable rules is then carried out as part of a subsequent and distinct method within the law invoked.

24. This happens, unless there is a specific discipline, such as e.g. the 1985 Hague Convention on the law applicable to trusts and their recognition⁴². Similarly, for the regulation of the «mandat d'incapacité», the solution may be found in the uniform rules posed by the 2000 Hague Convention (Article 15), identifying the law applicable to this case in the State of habitual residence of the person with disabilities at the time of the transfer of powers or, alternatively, in the written choice by the principal among the citizenship, the residence or the country of location of its assets⁴³. In this case it must be pointed out that the choice of law solution adopted in the Convention aims to protect the incapacitated person and not to guarantee the certainty of the legal state of affairs for third subjects having patrimonial intercourse with the incapacitated person.

25. A general solution for all these problems regarding persons with disabilities in the conflict of laws' field could perhaps be defined only throughout an interpretation guided by the general principles of the New York Convention⁴⁴, pending the desirable ratification of the 2000 Hague Convention. In fact it is generally recognized that, because of the relevance of fundamental rights also in conflict of laws' field, criteria must be found to allocate these rights in a suitable way⁴⁵. A mere reference to the personal

³⁷ Trusts are outside the provision of Article 15 of the 2000 Hague Convention on «powers of representation granted by an adult», as it is self-evident that a trustee is not a representative of the settlor. See E. CLIVE, *The New Hague Convention*, p. 6, nt. 15.

³⁸ On this topic, see M. REVILLARD, *La Convention de La Haye sur la protection internationale des adultes et la pratique du mandat d'incapacité*, p. 725.

³⁹ T. BALLARINO, *Is a conflict rule for living wills and euthanasia needed?*, in *Yearbook of Private International Law*, 2006, pp. 5-26.

⁴⁰ On this problem regarding measures like the Zugewinnausgleich in the German system, see W. LORENZ, *Gebrauchsvermögen, Ersparnisse und gesetzlicher Güterstand im deutsch-österreichischen Verhältnis: Normenmangel oder renvoi kraft abweichender Qualifikation?*, in *IPRax*, 1995, pp. 47 – 51; E. M. DERSTADT, *Der Zugewinnausgleich nach § 1371 BGB bei Geltung des französischen Erbrechts*, in *IPRax*, 2001, pp. 84 – 91.

⁴¹ E. RABEL, *The Conflict of Laws, A Comparative Study*, Ann Arbor; Chicago, 1945, vol. I, pp. 64 – 67; ID, *The Conflict of Laws, A Comparative Study*, Ann Arbor; Chicago, 1947, vol. II, pp. 294; ID, *The Conflict of Laws, A Comparative Study*, Ann Arbor; Chicago, 1950, vol. III, pp. 475 - 524.

⁴² On this Convention see: D. J. HAYTON, *The Hague Convention on the Law Applicable to trusts and on their recognition*, in *ICLQ*, 1987, p. 260; R. LUZZATTO, *Legge applicabile e riconoscimento di trust secondo la Convenzione dell'Aja del 1° luglio 1995*, in *Riv. dir. int. priv. proc.*, 1999, p. 5; G. CONTALDI, *Il trust nel diritto internazionale privato italiano*, Milano, 2005.

⁴³ On this issue see T. BALLARINO, *Is a conflict rule*, p. 21.

⁴⁴ See generally: R. KAYESS, P. FRENCH, *Out of Darkness into light?*, p. 29, nt. 123: «This is the first time access to justice has appeared as a substantive right in a UN human rights instrument. A more traditional formulation of the right of equality before the law is found in Article 12, CRPD».

⁴⁵ M. HUNTER – HENIN, *Droit des personnes et droits de l'homme*, p. 763.

law of the subject does not always seem suitable, even in countries which follow the national law's competence. Regard may be given to other laws, when the surroundings of the incapacitated person are located in such a way that it is not possible to rely exclusively on his personal statute, to make effective the search of a law which confers those rights in a transnational situation.