

# THE HAGUE CONVENTION ON THE INTERNATIONAL PROTECTION OF ADULTS: OVERVIEW AND CONVERGENCE WITH THE BRAZILIAN LAW

*CONVENÇÃO DA HAIA SOBRE A PROTEÇÃO  
INTERNACIONAL DE ADULTOS:  
PANORAMA E REFLEXOS SOBRE  
O ORDENAMENTO BRASILEIRO*

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## **Abstract**

This article aims to give an overview of the Hague Convention on the International Protection of Adults, focusing on its scope as well as its rules of jurisdiction and those relating to applicable law. Moreover, based on the Brazilian case, this work discusses to what extent some underlying reasons for the Convention may indicate a degree of convergence between national and international rules regarding vulnerable adults.

## **Keyword**

The Hague Convention. Vulnerable adults. International Protection.

## **Resumo**

*Este artigo tem por objetivo expor, de maneira panorâmica, os contornos básicos e algumas questões relevantes da Convenção da Haia sobre a Proteção Internacional de Adultos, com enfoque no escopo da Convenção, nas regras de jurisdição e naquelas relativas à lei aplicável. Igualmente, a partir do estudo do caso brasileiro, serão discutidas algumas razões que podem*

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*indicar uma irradiação dos efeitos do espírito que rege a Convenção em relação a partes não contratantes.*

**Palavras-chaves**

*Convenção de Haia. Adultos vulneráveis. Proteção internacional.*

## 1. INTRODUCTION

Contemporary Private International Law (PIL) is marked by pluralism, which manifests itself in the field of values, objectives and sources (national and international ones)<sup>3</sup>. In addition, there is a strong link between today's PIL and human rights' foundations<sup>4</sup>.

This trend is clearly exemplified by the normative production of the Hague Conference on Private International Law, an international organization that brings together numerous states, including Brazil<sup>5</sup>, in order of drawing up international conventions (and, eventually, soft law instruments<sup>6</sup>) aiming at facilitating transnational commercial operations and private life issues<sup>7</sup>.

The goal of this work is to offer a critical overview on the Convention on the International Protection of Adults (CIPA), concluded on January 31st, 2000. The CIPA offers interesting and innovative perspectives for adults in need of protection concerning

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<sup>3</sup> RAMOS, André Carvalho. Pluralidade das fontes e o novo Direito Internacional Privado. **Revista da Faculdade de Direito da Universidade de São Paulo**, v. 109, jan./dec. 2014, p. 600.

<sup>4</sup> Ibid, p. 619.

<sup>5</sup> Brazil joined the Hague Conference from 1972 to 1978, returning only in 2001. Cf. RAMOS, André Carvalho. Pluralidade das fontes e o novo Direito Internacional Privado. **Revista da Faculdade de Direito da Universidade de São Paulo**, v. 109, jan./dec. 2014, p. 606.

<sup>6</sup> This is the case of the Hague principles on the choice of law implementation on international commercial contracts. On such subject, see LEVIN, Jonathan. The Hague Principles on Choice of Law in International Commercial Contracts: Enhancing Party Autonomy in a Globalized Market. **New York University Journal of Law and Business**, Vol. 13, Issue 1, Fall 2016, p. 271-294.

<sup>7</sup> VAN LOON, Hans. The Hague Conference on Private International Law. *Hague Justice Journal*. v. 2, n. 2, 2007, p. 03-12.

their individual and patrimonial interests. Indeed, the Convention carries a new way of thinking about the protection of vulnerable adults, one that is more concerned with enhancing their autonomy. Moreover, it seems to converge with national jurisdictions that are still outside the scope of CIPA. In such context, this article will also discuss to what extent the Brazilian private law provisions on vulnerable adults may indicate a degree of convergence between national and international rules regarding such theme.

The work is organized as follows:

First, section 2 approaches some preliminary issues regarding the Convention, notably its history, contracting parties, motivations, objectives and main features, in contrast to the 1996 Child Protection Convention.

Section 3 describes the Convention's structure, so that the reader can have a global understanding of the instrument.

Section 4 is dedicated to the most relevant controversies regarding the Convention, focusing on its scope, rules of jurisdiction and those referring to the applicable law.

Section 5 discusses to what extent some underlying reasons for the Convention may indicate a degree of convergence between national and international rules regarding vulnerable adults, based on Brazil's case.

Finally, section 6 presents some conclusive comments on the issue.

## **2. PRELIMINARY CONSIDERATIONS**

### **2.1. BACKGROUND, MOTIVATIONS AND OBJECTIVES**

CIPA, starting from January 31st, 2000, came to replace the Hague Convention of July 17th, 1905, on interdiction and other similar protection measures<sup>8</sup>.

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<sup>8</sup> Among others, cf. BLANCO, Dámaso F. Javier Vicente. La protección de los adultos en el derecho internacional privado codificado por la conferencia

The idea for a convention regarding the protection of adults had emerged on May 23rd, 1993, over the meeting of the Hague Conference in which the review of the Hague Convention of October 5th, 1961 on jurisdiction and applicable law in the field of minors protection was being discussed. At the time, a single Convention for minors and adults was envisaged, but such proposal did not reach a consensus, due to the fundamental differences between the interests of minors and adults<sup>9</sup>.

The literature points out that the elaboration of the CIPA takes place in a new social context of growing aging and mobility of the population, who start moving to different countries, e.g., in search of a more pleasant retirement. However, the process of aging goes hand in hand with increasing health-related issues, many of them mentally disabling, such as Alzheimer's. Thus, there is an urgent need to regulate the personal and patrimonial interests of vulnerable expatriate adults, who are no longer able to do so. The scenario is well described by Blanco<sup>10</sup>:

From a cross-border point of view, the new reality has led to legal situations in which people of great longevity and old age are involved (seventy, eighty and even ninety years of age or more) who have more or less important assets, who live in a different country from their original one and that suffer from illnesses resulting from age, illnesses that affect their mental faculties and their ability of discernment. These legal

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de La Haya: el convenio de 13 de enero de 2000 y sus soluciones. **Oñati socio-legal series**, v. 1, n. 8, 2011, p. 6.

<sup>9</sup> BLANCO, Dámaso F. Javier Vicente. La protección de los adultos en el derecho internacional privado codificado por la conferencia de La Haya: el convenio de 13 de enero de 2000 y sus soluciones. **Oñati socio-legal series**, v. 1, n. 8, 2011, p. 6.

<sup>10</sup> BLANCO, 2011, loc. cit, p. 5.

situations give rise to problems of private international law, due to the need to manage or sell the assets or to open up their succession, in case of death, having managed to express the last will in the new country of residence of their old age. Think of the foreign old person who suffers an accident in the country of residence or who has seen their health deteriorates and can no longer make the decisions that, in such cases, needs to be made about them or their property. The Hague Convention of January 13, 2000 on the international protection of adults proved to be the international community's response to raising awareness of this situation.

It is worth noting, however, that the number of situations like the one described above is still quite low. Therefore, CIPA has a predominantly anticipatory and proactive, non-reactive character. That is to say: the Convention seeks to offer solutions to problems that lie ahead, even though they are not yet present in a significant way. Still in this context, the CIPA aims to establish guidelines that may influence countries that have not enacted any legislation on such matter<sup>11</sup>.

## 2.2. CHARACTERISTICS

Blanco points to CIPA as an example of “substantivization” or “materialization” of PIL, as a consequence of the so-called

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<sup>11</sup> HILL, David. The Hague Convention on the International Protection of Adults. **The International and Comparative Law Quarterly**, v. 58, n. 2, 2009, p. 470.

“crisis” surrounding the procedural approach taken by the traditional “conflict of laws” method. Under such substantive paradigm, PIL’s priority is reoriented to meet the human interests at hand<sup>12</sup>. Nevertheless, the procedural part is not neglected, as seen below.

From a structural point of view, CIPA resembles the 1996 Hague Convention for the Protection of Minors, largely because of their common origin<sup>13</sup>. Nevertheless, from a substantive point of view, the literature is not uniform with regards to how the two Conventions compare to each other, especially because minors and adults may require different levels of protection.

Based on Borrás<sup>14</sup>, Blanco states that the two Conventions are clearly apart from each other. In sum, the main differences should be concentrated in three groups: 1 - the relevance of the assets and of the person in each case; 2 - the definition of competent authority and 3 - the degree of protection of the person<sup>15</sup>.

Concerning point 1, the protection of minors emphasizes their individual integrity and parental representation. As a result, ownership issues are deemed to be secondary. On the other hand, when it comes to adults, patrimonial protection is given priority over humanitarian aspects (which are not entirely overlooked, however).

As for point 2, it is argued that the Convention for the protection of minors avoids competition for competence, privileging, as the best protective solution, the competence of the

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<sup>12</sup> BLANCO, loc. cit., p. 8.

<sup>13</sup> Ibid, p. 7.

<sup>14</sup> BORRÁS, Alegría. **La protección internacional del niño y del adulto como expresión de la materialización del Derecho Internacional Privado**: similitudes y contrastes. In: Pacis Artes. Obra homenaje al profesor Julio D. González Campos, v. 2. Madrid: Eurolex, 2005, p. 1287-1308.

<sup>15</sup> The following three paragraphs are based on BLANCO, Dámaso F. Javier Vicente. **La protección de los adultos en el derecho internacional privado codificado por la conferencia de La Haya**: el convenio de 13 de enero de 2000 y sus soluciones. Oñati socio-legal series, v. 1, n. 8, 2011, p. 6/7.

authorities of the minor's habitual residence<sup>16</sup>. In the case of adults, while the general rule is also given to the ones whose jurisdiction encompasses the person's habitual residence, competition for competence is allowed in certain situations as a way of protecting the adults' assets.

With regards to point 3, which concerns the person's degree of protection, it is a matter of recognizing that "the child is, by definition, always and in any case, an incapacitated individual fully under the authority of their parents", while in the case of adults the challenge is to preserve their capacity as much as possible<sup>17</sup>.

However, there are those who disagree with the peremptory distinction between the (best) interest of the child and the interest of the vulnerable adult.

For Joëlle Long, for example, the principle of (best) adult interest plays, in CIPA, a very similar role to that exercised by the principle of the best interest of the child. As evidence, Long<sup>18</sup> argues that " the 'best interests of the adult' allow derogation from general conflict of laws rules in order to determine which law/jurisdiction better suits that vulnerable person's needs", under article 8, paragraphs 1 and 4 , article 9, first paragraph and article 10 of CIPA<sup>19</sup>. In her opinion, thus, CIPA embodies a typical example of the already mentioned "materialization" of PIL<sup>20</sup>.

### 2.3. CONTRACTING PARTIES AND STRUCTURE

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<sup>16</sup> The rule is not so peremptory, since the 1996 Convention does admit the exercise of jurisdiction by an authority other than that of the child's habitual residence, albeit exceptionally (see art. 8 of the Convention).

<sup>17</sup> BLANCO, 2011, loc. cit., p. 7.

<sup>18</sup> LONG, Joëlle. Rethinking vulnerable adults' protection in the light of the 2000 Hague Convention. **International journal of law, policy and the family**, v. 27, n. 1, 2013, p. 59.

<sup>19</sup> The provisions are mentioned below, when the issue of jurisdiction is addressed.

<sup>20</sup> Ibid., p. 60/61.

Currently, CIPA has 19 signatory countries, of which 12 have already ratified the Convention and 1 (Estonia) has added the instrument in its legal order through accession. Check out list<sup>21</sup>:

|    | Contracting Party | Signature   | Ratification (R) or Accession (A) |
|----|-------------------|-------------|-----------------------------------|
| 1  | Austria           | 10-VII-2013 | R                                 |
| 2  | Belgium           | 6-II-2017   |                                   |
| 3  | Cyprus            | 1-IV-2009   |                                   |
| 4  | Czech Republic    | 1-IV-2009   | R                                 |
| 5  | Estonia           |             | A                                 |
| 6  | Finland           | 18-IX-2008  | R                                 |
| 7  | France            | 13-VII-2001 | R                                 |
| 8  | Germany           | 22-XII-2003 | R                                 |
| 9  | Greece            | 18-IX-2008  |                                   |
| 10 | Ireland           | 18-IX-2008  |                                   |
| 11 | Italy             | 31-X-2008   |                                   |
| 12 | Latvia            | 15-XII-2016 | R                                 |
| 13 | Luxembourg        | 18-IX-2008  |                                   |
| 14 | Monaco            | 4-III-2016  | R                                 |
| 15 | The Netherlands   | 13-I-2000   |                                   |
| 16 | Poland            | 18-IX-2008  |                                   |
| 17 | Portugal          | 14-III-2018 | R                                 |
| 18 | Switzerland       | 3-IV-2007   | R                                 |
| 19 | United Kingdom    | 1-IV-2003   | R                                 |

<sup>21</sup> The list of countries is available on <https://www.hcch.net/en/instruments/conventions/status-table/?cid=71>. Access on 28 nov. 2019.



Regarding the structure, the convention is divided into preamble and seven chapters<sup>22</sup>.

### 3. MOST RELEVANT ISSUES

#### 3.1. SCOPE OF THE CONVENTION

The scope of CIPA is summarized in its article 1, according to which the “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”.

There is doubt in the literature as to the nature of the deficiency or insufficiency that would give rise to CIPA protection.

Eric Clive notes that the choice of the words “impairment” and “insufficiency” aims to avoid the use of technical terms, such as disability, which can have different meanings in each jurisdiction. In addition, the author acknowledges that the term “disability” would greatly reduce the protective scope of the CIPA. On the other hand, an expression like “vulnerable adults” would be too broad. Thus, Clive recognizes the correctness of the words used in art. 1, although he points out that the term impairment could designate, for example, an adult in a state of sleep, a situation clearly not supported by CIPA<sup>23</sup>.

Joëlle Long offers deeper reflections on the matter. For the author, it is essential to emphasize that disability is not a necessary requirement for the protective measures indicated in CIPA, since

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<sup>22</sup> The chapters are: Chapter I - Scope of the Convention (Articles 1 to 4); Chapter II - Jurisdiction (Articles 5 to 12); Chapter III - Applicable Law (Articles 13 to 21); Chapter IV - Recognition and enforcement (Articles 22 to 27); Chapter V - Cooperation (Articles 28 to 37); Chapter VI - General provisions (Articles 38 to 52); Chapter VII - Final clauses (Articles 53 to 59).

<sup>23</sup> CLIVE, Eric. The International Protection of Adults. **Journal of Private International Law**, Vol. 12, n. 1, 2016, p. 187.

the intention of the conventional instrument would also include capable vulnerable adults, whose right of self-determination must be respected<sup>24</sup>. So much so that art. 3 of CIPA lists a series of protective measures, not limited to the most drastic instrument of interdiction<sup>25</sup>. As a result, the lawyer states that CIPA breaks with the traditional symmetry between disability and protection of vulnerable adults<sup>26</sup>.

As for the nature of vulnerability, Long records several conflicting understandings on the matter. According to the CIPA Explanatory Report, authored by Lagarde, the vulnerability that justifies adult protection must necessarily be related to a disease. In this context, vulnerabilities resulting from prodigality and chemical dependency would not justify the enforcement of CIPA<sup>27</sup> (which causes us an uneasiness, since addiction and prodigality are certainly linked to underlying psychiatric illnesses).

For Long, however, the emphasis should be on effects, not causes. In other words: CIPA should be implemented to favor everyone who needs protection, regardless of the origins of the adults' deficiency or insufficiency. Thus, for example, the very decrease in mental faculties resulting from aging would justify

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<sup>24</sup> LONG, loc. cit., 2013, p. 62.

<sup>25</sup> THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW. **International Adult Protection Convention** (CIPA). 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.

<sup>26</sup> LONG, loc. cit., 2013, p. 64.

<sup>27</sup> Ibid, p. 62.

CIPA's protection, regardless of a background disease such as Alzheimer's<sup>28</sup>.

Still regarding the scope of CIPA, a relevant issue concerns the age requirement of adults subject to protection. Although the target audience of the Convention is mainly composed of the elderly, art. 2 is clear when encompassing all vulnerable adults over 18 years of age<sup>29</sup>.

CIPA also covers “measures in respect of an adult who had not reached the age of 18 years at the time the measures were taken”. Here, the basic idea is to keep under protection those newly turned adults who were already safeguarded by the minors’ Convention. There is, however, some room for frustration in this regard, since Article 22(2)(a) of CIPA itself makes it possible for an authority to refuse to recognize measures taken by someone whose jurisdiction has not been based on the provisions of Chapter II of the Convention for Adults or has been performed in disagreement with such rules<sup>30</sup>. Thus, as the jurisdictional criteria of the Convention for minors are different from those provided by CIPA, protective measures taken in favor of minors could be discontinued after the person’s transition to adulthood<sup>31</sup>.

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<sup>28</sup> LONG, *op. cit.*, 2013, p. 63.

<sup>29</sup> THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW. **Convention on the International Protection of Adults** (CIPA). 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.

<sup>30</sup> *Ibid*, 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.

<sup>31</sup> The observation is made by HILL, David. *The Hague Convention on the International Protection of Adults. The International and Comparative Law Quarterly*, v. 58, n. 2, 2009, p. 471/472.

### 3.2. JURISDICTION

The basic criterion for establishing jurisdiction under the CIPA is found in Article 5, according to which the judicial and administrative authorities of the adult's habitual place of residence have jurisdiction<sup>32</sup>. Article 6, on its turn, excludes the criterion of habitual residence in relation to refugees and internationally displaced persons due to disturbances in their countries of origin. Here, jurisdiction will rest with the authorities of the Contracting State in whose territory these adults are present<sup>33</sup>.

It seems clear that the adult's habitual residence criterion and the residual criterion implemented on refugees and displaced persons meet a basic principle of proximity: those authorities closest to the legal situation subject to regulation are the competent ones<sup>34</sup>.

This does not, however, prevent the authority with jurisdiction established on the basis of article 5 or article 6 of the CIPA from attempting to shift the action to another authority, in the interest of the protected adult, in accordance with article 8 of the Convention. For this purpose, in addition to the request of the declining authority itself or of the authority of the Contracting State, it is necessary that the State of the new processing authority

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<sup>32</sup> THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW. **Convention on the International Protection of Adults (CIPA)**. 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.

<sup>33</sup> *Ibid*, 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.

<sup>34</sup> BLANCO, loc. cit., 2011, p. 11.

has a strong link with the protected person, pursuant to the list contained in article 8 (2) of the Convention. Finally, if the designated authority refuses to accept jurisdiction, the original authority retains jurisdiction<sup>35</sup>. These normative constraints on the powers to decline jurisdiction make Blanco refuse the “forum non conveniens” doctrine as basis for analyzing such CIPA provisions<sup>36</sup>.

Article 7 of the CIPA also adopts a subsidiary criterion for defining jurisdiction based on the nationality of the adult to be protected. Naturally, the criterion is unenforceable on refugees and displaced persons of the State of nationality due to disturbances that have occurred there.

The jurisdiction of the adult’s State of nationality, however, suffers from severe limitations. First, the State can only enforce it by giving notice to the authorities having jurisdiction under article 5 or article 6, paragraph 2, of CIPA. In addition, the enforcement of their jurisdiction is subject to the will of the authorities provided in article 5, article 6, paragraph 2 or article 8 of the Convention, who

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<sup>35</sup> THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, *op. cit.*, 2000, 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.

<sup>36</sup> BLANCO, *loc. cit.*, 2011, p. 12/11.

may even decide that no action should be taken<sup>37</sup>. Finally, articles 10<sup>38</sup> and 11<sup>39</sup> establish hypotheses for emergency forums with

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<sup>37</sup> HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW. **Convention on the International Protection of Adults** (CIPA). 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.

<sup>38</sup> *Ibid*, 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.

<sup>39</sup> *Ibid*, 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

limited effects over time and subject to the actions of authorities with preferential jurisdiction.

### 3.3. APPLICABLE LAW

Regarding the applicable law, CIPA adopts a simple general criterion: the law accompanies the jurisdiction ("the authorities of the Contracting States shall apply their own law", article 13). However, paragraph 2 of art. 13 opens up another possibility, namely, "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."

According to Article 14 of CIPA, "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".

It is in Articles 15 and 16 of CIPA that resides the most important dispute of the chapter reserved to the applicable law. The provisions are transcribed above where relevant (emphasis added):

#### Article 15

(1) The existence, extent, modification and extinction of powers of representation granted by an adult, either under an agreement or by a

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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.

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.



The importance of the provisions of art. 15 is to honor the will declared autonomously and in advance by those who, in a future moment, lose the ability to do so and, hence, must rely on a previously appointed representative. As Blanco<sup>40</sup> says (free translation):

The relevance of such institute and its regulation lies in the attention to the adult's will, manifested before the diminishing of their abilities, so that the adult can govern her interests and her own destiny, either via an intermediary, once her capacities have become reduced (Revillard, 2005, pp. 725-735).

Evidently, as can be seen from the transcribed rules, CIPA seeks to safeguard the interests of the declarant, even allowing the decommissioning of the powers of representation, once the authority with jurisdiction finds any risk to the adult's personality or property (article 16) .

The risk is that a rule designed to honor the autonomy of the person's will, such as that of Article 15, becomes, after all, a dead letter. This position is especially true for extreme situations, such as the refusal of medical treatment declared in advance. After all, in the words of David Hill, "as the exercise of such powers [of representation] are governed by the law of the State in which they are to be exercised, it is unlikely that an advance medical directive will be implemented as the adult intended". As if that were not enough, articles 20<sup>41</sup> and 21<sup>42</sup> could easily be invoked to the detriment of the declarant<sup>43</sup>.

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<sup>40</sup> BLANCO, loc. cit. 2011, p. 16.

<sup>41</sup> HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW. International Adult Protection Convention (CIPA). Article 20: This Chapter does not prevent the application of those provisions of the law of the State

#### 4. CONVERGENCE OF CONCERNS BETWEEN THE CONVENTION AND NON-CONTRACTING PARTIES

It is important to make an initial caveat: the object of the article, in this part, is limited to emphasize the convergence of the Brazilian legal order to the idea of protecting the autonomy of vulnerable adults in the face of their dignity and autonomy.

As can be seen from the table inserted in section 2.3, both the contracting parties and those that have actually ratified the Convention are European nations, which could suggest that the problems that the international instrument intends to address would be only affecting the old continent.

However, it even sounds like truism that globalization has made it increasingly common for individuals to buy goods abroad, as well as increasing the number of marriages or the establishment of stable civil unions of people from different nationalities.

On the other hand, the increasing longevity of the global population increases the likelihood for vulnerability among adults. According to the latest report published by the United Nations, one in six people will be over 65 by 2050. The number of people over 80 will increase from the current 143 million to 426 million in 2050<sup>44</sup>. Moreover, a study conducted by 28 scientists led by Professor Vikram Patel from the Harvard Medical School, and published by the journal *Lancet*<sup>45</sup> reveals that the number of people

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in which the adult is to be protected where the application of such provisions is mandatory whatever law would otherwise be applicable.

<sup>42</sup> *Ibid*, 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.

<sup>43</sup> HILL, loc. cit., 2009, p. 474/475.

<sup>44</sup> UNITED NATIONS. Department of Economic and Social Affairs. **World Population Prospects**. 2019. Available on <https://population.un.org/wpp/>. Access on 14 nov. 2019.

<sup>45</sup> PATEL, Vikram et al. The Lancet Commission on global mental health and sustainable development. *The Lancet*. 2018. doi: [https://doi.org/10.1016/S0140-6736\(18\)31612-X](https://doi.org/10.1016/S0140-6736(18)31612-X). Access on 14 nov. 2019.

suffering from mental illnesses has been growing dramatically<sup>46</sup>. Not only Europe, but also the entire international community have been failing to tackle mental problems<sup>47</sup>.

Such data illustrate that the concern regarding vulnerable adults cannot be restricted to the signatory nations of the Convention.

The intention of this section, however, is not to conduct a comprehensive study with the different countries that have not signed the Convention. Instead, data related to the Brazilian reality (5.1) will be addressed, which can serve as evidence of how the new international concern may also influence domestic legislation (5.2).

#### 4.1 JUSTIFYING THE CONCERN STARTING FROM BRAZIL

The concern with the protection of adults also occurs in Brazil. According to the recent report by the Pan American Health Organization (PAHO)<sup>48</sup>, about 38% of the Brazilian population has some type of mental illness, which may or may not lead to disability.

To demonstrate the importance for Brazil of an international instrument that serves to protect the patrimonial interests of vulnerable adults, however, two groups must be analyzed: the

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<sup>46</sup> According to the study: “the increase in other adverse social determinants (such as income inequality coupled with demographic transitions) is likely to lead to an overall increase in the number of people at risk of mental disorders. This increase is already evident from the dramatically increasing contribution of mental disorders to the global burden of disease.” Ibid, p. 8.

<sup>47</sup> Also according to the study, “Government investment and development assistance for mental health remain pitifully small. Collective failure to respond to this global health crisis results in monumental loss of human capabilities and avoidable suffering.” Ibid, p. 11.

<sup>48</sup> ORGANIZACIÓN PANAMERICANA DE LA SALUD. **La carga de los trastornos mentales en la Región de las Américas**, 2018. Available on <http://iris.paho.org/xmlui/handle/123456789/49578>. Access on 14 nov. 2019.

Brazilians who have assets abroad and the foreigners who have assets in Brazil.

In relation to the assets of Brazilians located abroad, it should be noted that Brazilian law only requires the declaration of values in excess of US\$ 100 thousand<sup>49</sup>. Even so, the amount of declared assets is significant and growing.

According to data from the Central Bank<sup>50</sup>, released in 2018, the volume of Brazilian investments abroad broke a record with an increase of US\$ 43 billion (9.4%) in relation to 2016. It is noteworthy that US\$ 175.6 billion (35%) are external assets held by individuals. This number represents approximately 10% of the Brazilian GDP for that year, which is quite significant.

With regards to the assets of foreigners located in Brazil, there is a need for separating refugees and non-refugees. According to research carried out by a group of Brazilian universities and coordinated nationally by the Federal University of Paraná (UFPR), in partnership with the United Nations High Commissioner for Refugees (UNHCR)<sup>51</sup>, 83.16% of the refugees entered Brazil after 2010, mostly from Syria and Congo (53.32%) and Angola and Colombia (16.01%).

Unfortunately, refugees in Brazil, as a rule, do not have enough income to purchase properties. Indeed, research reveals that

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<sup>49</sup> BRAZIL. Central Bank. **Resolution No. 3.854/2010**. Available on [https://www.bcb.gov.br/pre/normativos/busca/downloadNormativo.asp?arquivo=/Lists/Normativos/Attachments/49620/Res\\_3854\\_v2\\_P.pdf](https://www.bcb.gov.br/pre/normativos/busca/downloadNormativo.asp?arquivo=/Lists/Normativos/Attachments/49620/Res_3854_v2_P.pdf). Access on 15 nov. 2019.

<sup>50</sup> BRAZIL. Central Bank. **Management report**. 2018. Available on <https://www.bcb.gov.br/content/publicacoes/Documents/ra2018-versao-impressao.pdf>. Access on 15 nov. 2019.

<sup>51</sup> UNITED NATIONS. UN refugee agency. **Profile of Refugees Residing in Brazil**. Available on <https://www.acnur.org/portugues/wp-content/uploads/2019/05/Resumo-Executivo-Versa%CC%83o-Online.pdf>. Access on 15 nov. 2019.

14 respondents (79.5%) have an income below R\$ 3,000.00, 95 of which have an income below R\$ 1,000.00. The remaining 20.5% have household income above R\$ 3,000.00 per month. Among the latter, only 15 refugees (less than 4%) declared household income above R\$ 5,000.00.

This reason ends up directly influencing the fact that “105 refugees (21.6% of the total respondents) live in collective households or another type of shared unit. In practice, they are renting individual rooms in hotels, pensions or collective residences”. Still, “among the 468 reporting cases, 314 (67%) stated that it is not enough to cover current expenses.”

The situation is different, however, when analyzing data on assets from non-refugee foreigners in Brazil. Regarding rural properties, for example, the study carried out by the Chamber of Deputies<sup>52</sup> cites a FAO report that indicates a significant amount of foreign properties in Brazil:

Until this year, foreigners had already acquired 46.6 million ha of land in developing countries. In Brazil, the SNCR (acronym for National Rural Registry System) data only allows a total of 4 million ha to be identified in foreign hands. The data, however, is far from reflecting the real situation of foreign appropriation of Brazilian land,

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<sup>52</sup> BRASIL. The Chamber of Deputies. **Land acquisition by foreigners: comparative legislation.** 2011. Available on [https://www2.camara.leg.br/atividade-legislativa/estudos-e-notas-tecnicas/publicacoes-da-consultoria-legislativa/areas-da-conle/tema2/2011\\_9291.pdf](https://www2.camara.leg.br/atividade-legislativa/estudos-e-notas-tecnicas/publicacoes-da-consultoria-legislativa/areas-da-conle/tema2/2011_9291.pdf). Access on 15 nov. 2019.

reflecting the lack of an efficient inspection apparatus. One of the strategies used by international capital to purchase land in the country has been the creation of Brazilian shell companies.

To be restricted to individuals, a recent article in local newspaper *Estadão*, its publishing being based on the intersection of data from INCRA (acronym for National Institute of Colonization and Agrarian Reform) and the National Rural Registry System, reveals that 1.293 million ha belong to foreigners<sup>53</sup>.

In other words, be it due to the volume of assets of Brazilians abroad, or due to the assets of foreigners in national territory, there is a great potential for the appearance of transnational patrimonial disputes.

This observation being made, how would it be possible to ensure these new demands in relation to vulnerable adults in Brazil, a country that is not a CIPA contracting party? The next section will investigate to what extent Brazilian domestic legislation have converged with CIPA in regard to adults in need of special protection.

#### 4.2 CHANGES IN BRAZILIAN LEGISLATION: POINTS OF CONVERGENCE WITH CIPA

In Brazil, the interest regarding the protection of vulnerable adults assumes a proactive character, as in the rest of the world<sup>54</sup>.

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<sup>53</sup> BORGES, André. Estrangeiros detem um Rio de Janeiro em terras. **Estadão Newspaper**. São Paulo. 2018. Available on <https://economia.estadao.com.br/noticias/geral,estrangeiros-detem-um-rio-de-janeiro-em-terras-no-pais,70002648650>. Access on 16 nov. 2019.

<sup>54</sup> LAGARDE, Paul. Convention of 13 January 2000 on the International Protection of Adults: Explanatory Report. 2017. Available on

The concern for vulnerable adults has been at the heart of Brazil's recent legislative debates. Indeed, when approving the bill 7.699 / 2006, Brazil created the Statute for People with Disabilities<sup>55</sup>, which imposed important changes in the legal regime provided by the Civil Code for disabled people. In doing so, it met the needs of “a population of almost 46 million people in Brazil, which corresponds to 25% of the Brazilian population”<sup>56</sup>.

The analysis of these changes reveals, moreover, that the general directives which had guided the work of CIPA have also been taken into account in Brazil.

In the system prior to the modification of the Civil Code, the discipline of disability followed the logic of all-or-nothing, that is, it used to grant impaired people only two options: full incapacitation or no limitation at all, both solutions being harmful to their interests. Such people “ended up and still end up often hampered by the free exercise of their choices due to an all-or-nothing (and mistaken, as already seen) enforcement of the disability institute.”<sup>57</sup>

Such rationality, clearly detrimental to the individual's autonomy, is no longer found in international instruments. As previously outlined, CIPA provides for several protective measures

<https://assets.hcch.net/docs/669b8095-0c39-4d10-a55b-792ef8e883cc.pdf>.  
Access on 28 nov. 2019.

<sup>55</sup> BRAZIL. Federal Law No. 13.146 of July 6, 2015. Institutes the Brazilian Law for Inclusion of Persons with Disabilities. Available on [http://www.planalto.gov.br/ccivil\\_03/\\_ato2015-2018/2015/lei/l13146.htm](http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2015/lei/l13146.htm). Access on 15 nov. 2019.

<sup>56</sup> BARBOZA, Heloisa Helena; ALMEIDA, Vitor. **A Capacidade Civil à luz do Estatuto da Pessoa com Deficiência**. In Joyceabe Bezerra de Menezes (Org.), *Direito das pessoas com deficiência psíquica e intelectual nas relações privadas: convenção sobre os direitos da pessoa com deficiência e Lei Brasileira de Inclusão*, Rio de Janeiro: Processo, 2016, p. 249.

<sup>57</sup> NEVARES, Ana Luiza Maia; SCHREIBER, Anderson. **Do sujeito à pessoa: uma análise da incapacidade civil**. In: TEPEDINO, Gustavo; TEIXEIRA, Ana Carolina Brochado; ALMEIDA, Vitor (Coords.). *O Direito Civil entre o sujeito e a pessoa: estudos em homenagem ao professor Stefano Rodotà*. Belo Horizonte: Fórum, 2016. p. 39-56. ISBN 978-85-450-0180-5.

other than sheer incapacitation<sup>58</sup>. The international paradigm, outlined in CIPA and the UN Convention on the Rights of Persons with Disabilities, has been incorporated into Brazil's legal order, so that the protection of adults should not overrule less restrictive measures, in order to the maintain their autonomy.

For this reason, in Brazil there is also the understanding that the protection regime “can be generalized or relate only to certain acts of the adult, or only to a domain of activity, and the incapacity they suffer can be only partial”<sup>59</sup>.

It must be said, however, that even before the reform undertaken by the Statute of People with Disabilities, the Civil Code already allowed judges to limit the powers of representatives.

Such concern is expressed in statement 574 approved at the VI Civil Law Conference, as follows: “The judicial interdiction decision must set the limits of the trusteeship for all persons subject to it, without distinction, in order to safeguard fundamental rights and the dignity of the person (art. 1.772)”<sup>60</sup>.

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<sup>58</sup> The measures referred to in Article 1 of the Convention may, in particular, concern: a) The determination of disability and the establishment of a protection regime; b) The placing of the adult in the custody of a judicial or administrative authority; c) Guardianship, trusteeship and similar institutions; d) The designation and functions of any person or body in charge of the adult and their property, as well as their representation or assistance; e) The placement of the adult in an institution or other place where their protection can be assured; f) The administration, conservation or disposal of the adult's assets; g) The authorization of a specific intervention to protect the adult and their property.

<sup>59</sup> LAGARDE, Paul. Convention from 13 January 2000 on the International Protection of Adults: Explanatory Report. 2017, p. 48. Available on <https://assets.hcch.net/docs/669b8095-0c39-4d10-a55b-792ef8e883cc.pdf>. Access on 28 nov. 2019.

<sup>60</sup> 59 COUNCIL OF FEDERAL JUSTICE. Judicial Studies Center. VI Civil Law Conference. Statement 574. 2013. Available on <https://www.cjf.jus.br/cjf/corregedoria-da-justica-federal/centro-de-estudos-judiciarios-1/publicacoes-1/jornadas-cej/vijornadadireitocivil2013-web.pdf/view>. Access on 28 nov. 2019.



It could not be any different. Pathologies and limitations can display several degrees of intensity. They can be curable or controllable. They can be permanent or provisional, and they can also affect all or just a few of the adults' legal relationships.

In this sense, the Brazilian Courts have been acknowledging the validity of acts performed in such a way that do not correspond to the limitation of the individual's autonomy. The judicial precedent transcribed above is exemplary:

APPEAL. STABLE CIVIL UNION. PROHIBITED. LEGAL FIT. FOOD. VALUE. ADEQUACY. The fact that the defendant / appellant is prohibited is not an obstacle, in the specific case, to the recognition of the stable civil union that he maintained with the plaintiff / appellate. **This is because the evidence on the record made it certain that, despite the incapacity for the acts of civil life, the defendant / appellate is not unable to have and demonstrate his feelings,** so much so that he had church wedding with the plaintiff / appellate, lived together with her, were seen by all as a couple, and even had two children. A stable civil union is not a solemn act like a wedding. On the contrary, it is a de facto relationship. And in terms of facts, the existence of a stable, public, continuous and lasting affective relationship with cohabitation and the bringing of children is well proven, which is why the recognition of a stable civil union is even appropriate.

There is no excess or disproportionality in fixing food for two minor children by 20% of the income earned by the appellant, and from the payment of social security benefits. DISMISSED. (Civil Appeal No. 70053566667, Eighth Civil Chamber, Court of Justice of RS, Rapporteur: Rui Portanova, Court Trial on December 12, 2013) - emphasis added.

With the changes brought by the Statute of People with Disabilities, however, Brazil has come closer to new international demands and to CIPA guidelines, even though not being a contracting party.

Indeed, with the repeal of items II and III of Art. 3 of the Civil Code, it is possible to affirm that there are no more adults absolutely incapacitated by legal determination, or, in the words of Nevares and Schreiber, there are no more “[...] abstract and a priori categories that bind to disability the adults who do not have a discernment to the acts of civil life”<sup>61</sup>, since that currently the only case of absolute incapacity refers to children under 16 years of age.

This means that "restrictions on the capacity to act and on the autonomy of individuals can only be enforced based on matters that are properly problematized and legitimately constructed in the specific case."<sup>62</sup>

Trusteeship, therefore, in addition to being a measure that should be studied in the specific case, to be implemented “when

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<sup>61</sup> NEVARES, loc. cit, 2016, p. 39-56.

<sup>62</sup> TEIXEIRA, Ana Carolina Brochado; RODRIGUES, Renata de Lima. **O Direito das Famílias entre a Norma e a Realidade**. São Paulo: Atlas, 2010. p. 48

necessary”<sup>63</sup>, should now also last “as short as possible”<sup>64</sup>, which reveals the concern of CIPA with the recovery of vulnerable adults.

Such innovation avoids the existence of any physical or mental deficiency, in itself, implied in the automatic declaration of the individual's incapacity, which, in the specific case, can demonstrate the aptitude to express their will in several other aspects of their civil life.

The personalist and existential motivation, clearly inspired by CIPA, seeks to give greater autonomy to people with disabilities. The concern with dignity can be found in Statement 637, of the VIII Civil Law Conference: “The possibility of granting the powers of representation to the curator regarding some acts of civil life, including those of an existential nature, to be specified in the sentence, as long as they are proven necessary to protect the incapacitated adult in their dignity.”<sup>65</sup>

In the justification for adopting the statement, it is noted that the need to observe the international context is expressly stated:

“The protection of people with disabilities is a constitutional requirement. The implementation of the rules of the International Convention on the Rights of Persons with Disabilities (CRPD), especially in exceptional situations of severe

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<sup>63</sup> BRAZIL. Federal Law No. 13.146 from July 6, 2015. Art. 84, § 1 “When necessary, the person with a disability will be subject to trusteeship, in accordance to the law”.

<sup>64</sup> Ibid, Art. 84, § 3 “The definition of trustee for a person with a disability is an extraordinary protective measure, proportional to the needs and circumstances of each case, and will last as short as possible”.

<sup>65</sup> COUNCIL OF FEDERAL JUSTICE. Judicial Studies Center. VIII Civil Law Conference. Statement 637. 2018. Available on <https://www.cjf.jus.br/cjf/corregedoria-da-justica-federal/centro-de-estudos-judiciarios-1/publicacoes-1/jornadas-cej/viii-enunciados-publicacao-site-com-justificativa.pdf>. Access on 28 nov. 2019.

impediment to the personal exercise of rights, must be done in the light of the principle of the most favorable rule.”

It should be emphasized, however, that there is still plenty to be learned and improved. In this context, Nevares and Schreiber's words are worth mentioning once again:

If, on the one hand, it was based on the perception that the disability regime as regulated by the civil order was not adequate to existential legal situations, starting a progressive expansion of autonomy spaces even for those considered “incapable” in the legal order, it is important to note that any and all sealed classification will be insufficient to absorb the problems related to the theme<sup>66</sup>.

In any case, the fact that Brazil is not a contracting party to the CIPA would in no way harm vulnerable adults in transnational situations when Brazilian law is applicable, since it also moves towards protecting the autonomy of the adults’ will.

## 5. CONCLUSION

The enactment of CIPA has clearly reinforced the tendency towards the "materialization" of Private International Law, focusing on the concrete satisfaction of human rights rather than on solving conflicts of laws in a neutral fashion.

As seen throughout this article, CIPA encourages the preservation of the vulnerable adults’ capacity, so that they can, as far as possible, express their own will. With this goal in mind, the

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<sup>66</sup> NEVARES, loc. cit, 2016, p. 39-56.

Convention promotes not only the autonomy of the will, but also the very dignity of the human person.

Based on the Brazilian example, moreover, this article emphasized a possible movement of convergence between international and domestic orders, insofar as the legal system of Brazil has also given more room for the autonomy of vulnerable adults. Consequently, it is expected that transnational demands involving vulnerable adults and the enforcement of Brazilian law will be resolved along similar lines to those provided by CIPA.

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