

Title	Instructions given and wishes made by the adult within the scope of the 2000 Protection of Adults Convention
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Action to be Taken	For Decision <input type="checkbox"/> For Approval <input type="checkbox"/> For Discussion <input checked="" type="checkbox"/> For Action / Completion <input type="checkbox"/> For Information <input type="checkbox"/>
Annexes	<p>Annex I: Work. Doc. No. 4 (Proposal submitted by the Expert of the United Kingdom: A functional equivalent to “parental responsibility”).</p> <p>Annex II: Work. Doc. No. 41 F (Document submitted by the delegation of Canada for information (translation by the Permanent Bureau)).</p> <p>Annex III: Research report on discussions of advance directives during the initial drafting and subsequent negotiations of the 2000 Protection of Adults Convention.</p> <p>Annex IV: Relevant extracts from the study commissioned by the UN Special Rapporteur on the rights of persons with disabilities.</p> <p>Annex V: Relevant extracts from academic discourse on the topic of the inclusion of advance directives within the scope of the 2000 Convention.</p>
Related Documents	Prel. Doc. No 4 of February 2022 – Draft Practical Handbook on the Operation of the 2000 Protection of Adults Convention

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Instructions given and wishes made by the adult within the scope of the 2000 Protection of Adults Convention

I. Introduction

- 1 While drafting the Practical Handbook on the Operation of the 2000 Protection of Adults Convention (“2000 Practical Handbook”), some members of the Working Group (WG) tasked with its development questioned whether the language of the *Hague Convention of 13 January 2000 on the International Protection of Adults* (“2000 Protection of Adults Convention” or “2000 Convention”) was clear regarding the inclusion of advance directives within its scope. It was understood that there may be different views among Contracting Parties as to whether advance directives fall within the scope of the 2000 Convention and, in particular, Articles 15 and 16.
- 2 During discussions, the WG agreed that the cross-border transportability and operability of advance directives is generally desirable but was uncertain whether Article 15 of the 2000 Convention could be applicable to all types of advance directives. Therefore, the WG suggested that more research could be undertaken regarding the history of the negotiations, including the intention of the negotiators, in order to ascertain whether and to what extent advance directives fall under the scope of the 2000 Convention and, in particular, Articles 15 and 16. In this regard, it was agreed that the Permanent Bureau (PB) of the Hague Conference on Private International Law (HCCH) prepares a Preliminary Document (Prel. Doc.) on this matter with the assistance of the WG.
- 3 The issue examined in this Prel. Doc. was a challenging one to navigate and, as such, there have been many iterations of this document. In anticipation of a future impairment of their personal faculties, the adult may issue a voluntary, anticipatory act which addresses their instructions and wishes to a specific representative or to the world at large. Such voluntary, anticipatory acts may be available in different forms, such as advance directives or continuing powers of attorney. While it may be desirable for Articles 15 and 16 to apply to all voluntary, anticipatory acts, it may be difficult to characterise some of these acts as “powers of representation”, when they only contain instructions and wishes that are not addressed to a particular representative.
- 4 This document aims to facilitate discussions regarding the inclusion of instructions given and wishes made by an adult within the 2000 Convention at the 2022 Special Commission (SC) on the practical operation of the Convention. It will do so by highlighting all relevant documentation from the Working Group of April 1997¹ and its Drafting Group of June 1997, the September 1997 Special Commission (including its Drafting Committee), the 1999 Special Commission of a diplomatic character, the Explanatory Report,² the text of the 2000 Convention as well as relevant academic commentary and doctrine which may support discussions. This document also invites the SC to promote an interpretation of the term “power of representation” which encompasses all types of voluntary, anticipatory acts and which emphasises the notion of a “power” given by an adult, through their instructions and wishes, to a specific individual or to the world at large.

II. Definitions

A. Power of representation

- 5 The term “power of representation” is an autonomous concept developed by the June 1997 Drafting Group for the purposes of Articles 15 and 16 of the 2000 Convention. Article 15 provides

¹ Although the reports of the discussions of the Working Group of April 1997 are not available on the HCCH website, they are available upon request.

² P. Lagarde, [Explanatory Report on the Hague Convention of 13 January 2000 on the International Protection of Adults, New and Revised Edition](#), 2017 (hereinafter referred to as the Explanatory Report).

that “powers of representation [are] granted by an adult, either under an agreement or by a unilateral act, to be exercised when such adult is not in a position to protect his or her interests”.³ Such powers of representation enable the adult to plan, in advance, how they want to be supported in the exercise of their legal capacity and autonomy when the adult is not in a position to protect their interests.⁴

B. Power of attorney

6 A power or authority granted by one person (the granter, donor, mandator or principal) to another (the attorney, donee, mandatary or agent) authorising the attorney to act on behalf of the granter.⁵

C. Continuing power of attorney

7 A continuing power of attorney is “a mandate given by a capable adult with the purpose that it shall remain in force, or enter into force, in the event of the granter’s incapacity.”⁶

D. Advance directives

8 Advance directives are “instructions given or wishes made by a capable adult concerning issues that may arise in the event of his or her incapacity”.⁷ An advance directive is a type of voluntary, anticipatory act which, most commonly, concerns matters of health, welfare and other personal matters relating to the person of the adult, such as their place of care / treatment or their place of residence.⁸ Advance directives can also apply to economic and financial matters relating to the adult or their property, as well as to the choice of a guardian, supported decision-maker or assistant.⁹ Advance directives are unilateral documents which may be addressed to a particular individual or group of individuals who will make decisions on behalf of or affecting the adult.¹⁰ This individual or group of individuals could include persons close to the adult (e.g., a relative, partner or friend), an attorney acting under a (continuing) power of attorney, medical staff who may treat or assist the adult, social workers or any other person who may assist the adult or take actions affecting them. The individual or group of individuals could also be appointed through a measure of protection in accordance with the applicable law.¹¹ Advance directives may also be addressed to the world at large, providing instructions and wishes without necessarily identifying a specific individual or group of individuals to carry them out.

9 Many States provide for advance directives in their domestic law, for example, through legislation concerning the protection of adults, legislation on (continuing) powers of attorney, or legislation regarding health matters. Depending on the applicable law, some advance directives may contain legally binding instructions while others may be wishes which must be taken into consideration.¹² Although advance directives are not, *stricto sensu*, wills, the term “living will” is commonly used in

³ It is important to note that Art. 15 does not regulate whether the designation of a specific person or group of persons to represent or assist the adult needs to be done in advance of the power of representation coming into force or whether such designation can take place later, leaving this issue to the applicable domestic law.

⁴ *Practical Handbook on the Operation of the 2000 Protection of Adults Convention* (hereinafter referred to as the 2000 Practical Handbook), Glossary.

⁵ Dr. E. Clive, *Report on incapable and other vulnerable adults*, prepared at the request of the Council of Europe, (Document of January 1997), hereinafter the Clive Report, at page 17 of [Proceedings](#). Reference was made to the Clive Report throughout the work of the HCCH on the protection of adults from the meeting of the April 1997 Working Group to the Special Commission with a diplomatic character of 1999. It is to be noted that Eric Clive was the Chair of the *Special Commission with a diplomatic character* on the Protection of Adults. See also 2000 Practical Handbook, Glossary.

⁶ Council of Europe, [Recommendation CM/Rec\(2009\)11 on principles concerning continuing powers of attorney and advance directives for incapacity](#), see Appendix to Recommendation, Part I, Principle 2(1).

⁷ *Ibid.*, see Appendix to Recommendation, Part I, Principle 2(3).

⁸ *Ibid.*, see Explanatory Memorandum, paras 65 and 176.

⁹ *Ibid.*, see Appendix to Recommendation, Part III, Principle 14.

¹⁰ *Ibid.*, see Explanatory Memorandum, para. 177.

¹¹ *Ibid.*, see Explanatory Memorandum, para. 64.

¹² *Ibid.*, see Explanatory Memorandum, para. 32.

some domestic laws to describe both the binding instructions and the wishes to be taken into account in matters of health. Advance directives may accompany a (continuing) power of attorney, but they can also come as standalone documents. Advance directives may be registered in a public registry, and, in some States, advance directives may also be registered within a health insurance policy. Domestic law may oblige medical practitioners treating the adult to consult, where necessary, these public registries or health insurance policies.¹³

- 10 Continuing powers of attorney and advance directives are both “methods of self-determination for capable adults for periods when they may not be capable of making decisions”.¹⁴ While continuing powers of attorney generally come in the form of agreements, advance directives are unilateral acts.¹⁵ They may or may not be subject to formal requirements such as witnessing, registration or authentication / certification.

E. Instructions given and wishes made by the adult

- 11 Instructions and wishes expressed by an adult, in anticipation of a future impairment of their personal faculties, can be found in many types of voluntary, anticipatory acts,¹⁶ such as advance directives, advance arrangements, advance decisions in the health field or (continuing) powers of attorney. The term “voluntary, anticipatory act” is to be understood as an umbrella term which could encompass all the aforementioned terms.

III. Interpretation of HCCH Conventions

- 12 The interpretation and application of HCCH Conventions is subject to public international law rules, including those found in the *Vienna Convention of 23 May 1969 on the Law of Treaties*. Specifically, Article 26 provides that a treaty shall be performed in good faith. Article 31 provides that a treaty shall be interpreted in good faith and in accordance with the ordinary meaning of its terms, having regard to its context and in the light of its object and purpose. Other elements must be taken into account, together with the context, including any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation, and any relevant rules of international law applicable in the relations between the parties. Article 32 provides that recourse may also be had to supplementary means of interpretation, including to the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31 leaves its meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable.

- 13 In the context of the *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (“1980 Child Abduction Convention”), Contracting Parties to the Convention have concluded and recommended that the Convention should be “interpreted having regard to [\[their\]its](#)

¹³ For example, in Switzerland, the adult who issues an advance directive (referred to as “directives anticipées” in the Swiss Civil Code) must ensure that the addressees are made aware of it. They can, for instance, provide their attending physician with a copy of the advance directive, keep a copy of it on their person, entrust the advance directive to their designated representative or to a trusted person. The adult may register the existence and location of the advance directive on their health insurance card (Art. 371 para. 2 of the Swiss Civil Code). If the adult’s personal faculties are insufficient or impaired and the doctor who will be treating the adult does not know if the adult has issued an advance directive, the doctor must ascertain from the health insurance whether one exists, unless the adult requires urgent medical attention (Art. 372 para. 1 of the Swiss Civil Code). The doctor must comply with the advance directive unless it violates statutory regulations or there is reasonable doubt about whether it is based on the adult’s free will or whether it still corresponds to their will and preferences (Art. 372 para. 2 of the Swiss Civil Code).

¹⁴ Council of Europe, *op. cit.* note 6, see Explanatory Memorandum, para. 14. It is important to note that “decisions” can relate to legal as well as healthcare matters.

¹⁵ Council of Europe, [Recommendation CM/Rec\(2009\)11 on principles concerning continuing powers of attorney and advance directives for incapacity](#), see Explanatory Memorandum, at para. 177.

¹⁶ A voluntary, anticipatory act is a result of the conscious choice and independent will of an individual with capacity, who would like to ensure that this conscious choice and independent will be given effect in the event of a future impairment.

autonomous nature and in the light of [\[their\]its](#) objects”.¹⁷ Furthermore, the *Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance* (“2007 Child Support Convention”) provides that “[i]n the interpretation of this Convention, regard shall be had to its international character and to the need to promote uniformity in its application”.¹⁸ The interpretation of the 2000 Convention is supported by the Explanatory Report which summarises the discussions around each provision and provides assistance as to their interpretation. In case of doubt, transcripts of the discussions that took place during the Diplomatic Session¹⁹ at which the Convention was adopted are also publicly available, as are reports of meetings of the Special Commission,²⁰ and to some extent reports of Working Groups,²¹ charged with the development of a preliminary draft Convention text for the purpose of the Diplomatic Session. These supplementary interpretation materials are part of the *Travaux Préparatoires*.²²

IV. The development of the 2000 Convention

A. The Working Group of April 1997 and its Drafting Group of June 1997

- 14 During the preliminary work of the HCCH on the Protection of Adults in 1997, the Working Group tasked with developing a draft Convention text was provided with several documents drafted by experts in the area, in order to provide the necessary context for discussions. Such documents form part of the *Travaux Préparatoires*. One of those documents was a Report prepared by Dr. Eric Clive on “incapable and other vulnerable adults”, prepared in connection with the work of the group of Specialists on Incapable and Other Vulnerable Adults, which eventually led to the adoption of the recommendation No R(99) 4 by the Council of Europe.²³ In his Report, Dr. Eric Clive highlighted the paramountcy of the interests and welfare of the person concerned as a fundamental principle that must underpin a draft instrument in this area.²⁴ He noted that the paramountcy principle also extends to interventions in the health field (the area in which advance directives most commonly appear). In that regard, he recalled the Bioethics Convention of the Council of Europe, stating that, for the purposes of the implementation of a draft instrument in this area, any “advance

¹⁷ See Conclusions and Recommendations adopted by the Special Commission on the practical operation of the *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (22 – 28 March 2001), C&R No 4.1, available on the Hague Conference website < www.hcch.net > under “Child Abduction Section” then “Special Commission Meetings”.

¹⁸ Art. 53 of the 2007 Child Support Convention.

¹⁹ See [Proceedings](#) of the *Special Commission with a diplomatic character on the Protection of Adults*, which took place from 20 September to 2 October 1999.

²⁰ The Special Commission on the Protection of Adults took place from 3 to 12 September 1997. Reports and other relevant materials can be found in the [Proceedings](#).

²¹ The Working Group on the Protection of Adults met from 14 to 17 of April 1997 with a view to preparing the 1997 Special Commission on the protection of adults. A summary of the discussions of the Working Group can be found in the [Proceedings](#).

²² Art. 32 of the Vienna Convention.

²³ *Op. cit.*, note 5.

²⁴ The Clive Report, *op. cit.* note 5, was prepared in connection to the work of a Group of Specialists on Incapable and Other Vulnerable Adults which was set up by the European Committee on Legal Co-operation (CDCJ) of the Council of Europe. This Group of Specialists was instructed “to study and prepare draft principles concerning the legal aspects of acts of incapable adults; to study and prepare draft principles concerning the role and duties of representatives, carers, judicial and administrative authorities to assist and protect such persons; and to make proposals to the CDCJ with a view to the drafting of an international instrument (convention or recommendation) in these matters.” Their work led to the adoption of Recommendation No. R (99) 4 on principles concerning the legal protection of incapable adults by the Committee of Ministers of the Council of Europe on 23 February 1999. It is important to note that the Clive Report and the suggestions made therein shows that there was an interest, at the international level, in developing an instrument facilitating and supporting the self-determination of vulnerable adults and the “recognition” (*i.e.*, giving effect) of advance arrangements (cf. para. 3.16 of the Report).

directions”²⁵ should be taken into account.²⁶ He also highlighted that the wishes and feelings of the person concerned ought to be another fundamental principle of such a draft instrument.

15 Additionally, in his suggestions as to the possible contents of a draft text, Dr. Clive acknowledges “[...] the advantages of giving legal recognition [*i.e.*, legal effect] to arrangements made in advance by the person himself or herself while still fully capable”.²⁷ While he acknowledged the fact that the legal regulation of “advance arrangements” may vary considerably, he stressed that, in light of the “great deal of consideration [that] has been given to continuing powers of attorney [...] it may be useful to say something more about them [...]”.²⁸

16 In his Report, Dr. Clive listed several types of “powers”, such as “powers of attorney”, “continuing powers of attorney”, “advance arrangements”, “advance directions in the health field”, “welfare powers”, “springing powers” as well as “powers of family members and carers”.²⁹ In reference to this list of powers, the expert of the delegation of the United Kingdom, Mr. Peter Beaton, submitted a proposal during the April 1997 meeting of the Working Group that “[...] the new draft Convention should not be confined to ‘measures’ taken by authorities.” Instead, he stated that “[a] power of “representation” is intended to cover **any power** to take decisions for or on behalf of the incapable adult”.³⁰ [emphasis added] Members of the Working Group agreed with the suggestion of Mr. Beaton.

17 During the initial drafting stages of the 2000 Convention in 1997, the Drafting Group of June 1997 developed a new, neutral term “powers of representation”, most likely to avoid referring to concepts that had already been defined in other instruments.³¹ In introducing this term, it appears that the intent of the 1997 Working Group may have also been to ensure the broadest possible interpretation which would stand the test of time with regards to the rapid legislative evolution in the area.

B. The Special Commission of 3 to 12 September 1997

18 During the 1997 Special Commission, the delegation of Canada submitted and introduced Working Document Nos 41 E and 41 F, to inform the discussion.³² The Working Documents contained descriptions of parts of the Civil Code of Quebec and the laws of British Columbia dealing respectively with the “*mandat en prévision de l’inaptitude/incapacité*” and powers of attorney. According to these documents, a person with full capacity may give powers to another person to act on their behalf in the administration of their personal and property interests, in the event of an impairment of their personal faculties. Working Document No 41 F (detailing part of the Civil Code of Quebec)³³ explains that a “*mandat en prévision de l’inaptitude/incapacité*” (now called “*protection mandate*”) in the province of Quebec ~~may include, among other things, which concerns the care for the person of the adult, entails the power to~~ consent to physical or mental health care.

²⁵ *Ibid.*, at p. 21 of [Proceedings](#).

²⁶ Art. 9 of the [Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine](#) provides: “The previously expressed wishes relating to a medical intervention by a patient who is not, at the time of the intervention, in a state to express his or her wishes shall be taken into account.”

²⁷ The Clive Report, *op. cit.* note 5, at p. 17 of [Proceedings](#), para. 3.16.

²⁸ *Ibid.*

²⁹ *Ibid.*, at pp. 17-18 of [Proceedings](#).

³⁰ See Annex I for the full proposal made by the Expert of the United Kingdom.

³¹ Terms such as “(continuing) powers of attorney” and “advance directives” are well defined by the Council of Europe (see [Recommendation CM/Rec\(2009\)11 on principles concerning continuing powers of attorney and advance directives for incapacity](#)). Many jurisdictions espouse these definitions within their domestic legal frameworks. The Practical Handbook on the Operation of the 2000 Protection of Adults Convention also espouses these definitions.

³² Report of Meeting No 16 (12 September 1997, morning), at p. 1.

³³ Work. Doc. 41F. See Annex II. Although the Working Documents of the September 1997 Meeting of the Special Commission are not available on the HCCH website, they are available upon request.

Working Document No 41F mentions that the mandate may, therefore also contain instructions regarding care at the time of death (*i.e.*, a “living will” or advance directive).

19 Article 3 of the Preliminary draft Convention, which illustratively enumerates the types of measures which fall within the scope of the Convention, included a provision regarding “the supervision by a public authority of the care of an adult by any person having charge of the adult”.³⁴ This provision was retained from the text of the 1996 Convention in an abundance of caution, as a concrete example of its utility for adults had not been given. During the 1997 Special Commission, one expert expressed their concern that this provision could lead to conflict with the expressed wish of the adult not to persist with treatment in the event of a terminal illness.³⁵ As a result, the provision does not appear in the final version of the text of the Convention.

20 Regarding the matters to be excluded from the scope of the Convention, Prof. Paul Lagarde highlighted in his report on the 1997 Special Commission that “[...] these exclusions should in general be interpreted restrictively, in that Article 4 excludes only the measures required directly by the regulations applicable to the matters excluded, but not [...] measures of protection of a general nature which must be taken even when they intersect with the excluded matters.”³⁶

C. The 1999 Special Commission of a diplomatic character

21 The Report prepared by Dr. Eric Clive provided the delegates of the 1999 Special Commission of a diplomatic character with a general idea of how divergent voluntary, anticipatory acts can be.

22 During the 1999 Special Commission with a diplomatic character, most delegates were in agreement that the envisioned protection of any adult who falls within the scope of the Convention must necessarily include decisions on medical matters.³⁷ Many delegates spoke of end-of-life directives (*e.g.*, euthanasia) being included in the scope of the Convention, should the execution of such directives be available under the applicable law.³⁸ Delegates also discussed situations where giving effect to an end-of-life directive in a particular State could be manifestly contrary to the public policy of that State (Art. 21) or could be in conflict with a domestic provision of law the application of which is mandatory (Art. 20).³⁹ Delegates were in agreement that Articles 20 and 21 of the Convention sufficiently address any concerns regarding the cross-border effect and operability of end-of-life directives.⁴⁰

D. The final version of Articles 15 and 16

23 The provisions that regulate the law applicable to powers of representation were drafted in stages. Contributions from several delegations resulted in the language currently appearing in Articles 15 and 16.⁴¹ In short, the text regarding the “manner of exercise” of powers of representation (old Art. 14) was merged with the text regulating the applicable law to the existence, extent and extinction of powers of representation (old Art. 13) to become what is now Article 15. What is now

³⁴ Art. 3(f) of the Preliminary draft Convention on jurisdiction, applicable law, recognition, enforcement, and co-operation in respect to the protection of adults adopted by the Special Commission on 12 September 1997, at p. 77 of Proceedings.
³⁵ Proceedings, Lagarde Report on the Preliminary draft of the Convention adopted by the Special Commission on 12 September 1997, para. 27.

³⁶ *Ibid.*, para. 31.

³⁷ See Annex III, paras 1 - 5.

³⁸ See Annex III, paras 41 - 51. Such end-of-life directives (*e.g.*, euthanasia) can be considered “standalone” advance directives (*i.e.*, advance directives which are not accompanied by or included in (continuing) powers of attorney).

³⁹ See Annex III, paras 45 - 49.

⁴⁰ See Annex III, paras 50 - 51.

⁴¹ The Swiss and Canadian delegations proposed language for old Articles 13 (Doc. Trav. 24 E + F), 13A and 14 (Work Doc. No 25 E), text to which the US delegation added (Work Doc. No 18).

Article 16 is a more elaborated version of the rules surrounding the withdrawal or modification of powers of representation (old Art. 15), but the essence of the provision has remained the same.⁴²

24 Articles 15 and 16 concern the question of applicable law regarding the existence, extent, modification and extinction of powers of representation⁴³ 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 their interests by reason of an impairment or insufficiency of their personal faculties. Oftentimes, in powers of representation, one may find instructions and wishes given by the adult, authorising the refusal of any persistent course of treatment in the event of an incurable illness. Although such a mandate is common in some jurisdictions, it may be unknown in others.⁴⁴ To eliminate a potential conflict of laws arising in these matters, Article 15 provides that powers of representation are generally governed by the law of the State of the habitual residence of the adult at the time of the agreement or unilateral act that conferred the powers, unless one of the laws listed in Article 15(2) has been designated expressly in writing.⁴⁵

25 The applicable law rules outlined in Article 15 govern the cross-border effect to be given to such powers of representation.⁴⁶ Article 15(1) covers, *inter alia*, the “extent” of the powers of representation, referring to the scope of the powers of the representative of the adult and any limitations thereto. Article 15(2) provides an exhaustive list of the laws other than that of the habitual residence which may be designated, in writing, by the adult.⁴⁷ Article 15(3) covers the manner of exercise of the powers of representation established by an adult, which is subject to the law of the State in which they are to be exercised.⁴⁸ Article 16 allows the competent authorities that have jurisdiction under the Convention to withdraw or modify⁴⁹ the powers of representation established by the adult by virtue of Article 15⁵⁰ in cases where those powers are “not exercised in a manner sufficient to guarantee the protection”.

V. The Council of Europe’s 2009 Recommendation regarding continuing powers of attorney and advance directives

26 The Preamble of the Council of Europe’s 2009 Recommendation regarding “principles concerning continuing powers of attorney and advance directives for incapacity” reads as follows:

“Having regard to the Hague Convention on the International Protection of Adults (2000) and the United Nations Convention on the Rights of Persons with Disabilities (2006); [...]”⁵¹

27 Taking into account its Preamble, the 2009 Recommendation, which deals with both continuing powers of attorney and advance directives, is to be read and implemented in the context of both

⁴² See Annex III, paras 6 – 13.

⁴³ See Prel. Doc. No 10 of September 2022 – Toolkit on the law applicable to the Existence, Extent, Modification, Withdrawal and Extinction of powers of representation for further guidance on the interpretation of the term “powers of representation”.

⁴⁴ The Explanatory Report, *op. cit.* note 2, para. 96.

⁴⁵ *Ibid.*, para. 98.

⁴⁶ Powers of representation are given legal effect in a cross-border context through the rules on applicable law. They are not subject to the rules on recognition and enforcement in Chapter IV of the Convention, which are limited to measures taken by competent authorities.

⁴⁷ The Explanatory Report, *op. cit.* note 2, para. 102. “The laws which may be chosen are the law of a State of which the adult is a national, that of the State of a former habitual residence of the adult and that of a State in which property of the adult is located, but only as regards that property.”

⁴⁸ Art. 15(3). See also The Explanatory Report, paras 99 and 106.

⁴⁹ The modification might, for example, consist of ordering supervision of the person acting on behalf of the adult under the powers of representation.

⁵⁰ The Explanatory Report, *op. cit.* note 2, para. 108.

⁵¹ Council of Europe, [Recommendation CM/Rec\(2009\)11 on principles concerning continuing powers of attorney and advance directives for incapacity](#), at p. 7.

the 2000 Convention and the *United Nations Convention of 13 December 2006 on the Rights of Persons with Disabilities* (UNCRPD).

28 In the Explanatory Memorandum to the 2009 Recommendation, Articles 15, 16 and 38 of the 2000 Convention are highlighted as complementary to the interpretation and implementation of the Recommendation.⁵²

29 The Recommendation treats continuing powers of attorney and advance directives as similar instruments in that they both enable the self-determination of the adult and allow the adult to exercise their fundamental rights, giving effect to General Principles (a)⁵³, (b)⁵⁴ and (c)⁵⁵ as well as Articles 5⁵⁶ and 12⁵⁷ of the UNCRPD.⁵⁸

VI. June 2021 Study commissioned by the UN Special Rapporteur on the Rights of Persons with Disabilities

30 In June 2021, a study commissioned by the UN Special Rapporteur on the Rights of Persons with Disabilities was published analysing the interaction of the 2000 Convention with the UNCRPD.⁵⁹ The study suggests that unilateral advance directives (e.g., declarations communicating the choice of the adult to refuse certain medical treatments) do not fall within the scope of the 2000 Convention.⁶⁰ In order to solve this issue, the study recommends, *inter alia*, that the HCCH develop a protocol to the 2000 Convention on the matter.⁶¹ On the other hand, as stated in the study itself, the 2000 Convention lends itself to great opportunities for organic growth, in the context of a dynamically evolving legal landscape.⁶²

VII. Do instructions given or wishes made by an adult fall within the scope of the Convention?

31 While the academic commentary in the area of the international protection of adults is divided on the inclusion of advance directives within the scope of the 2000 Convention, there seems to be one common message underpinning the views of all scholars in this area: ensuring the dignity, autonomy and self-determination of the adult.⁶³ This is one of the primary goals the Convention aims to accomplish. In light of these divergent views, it would be highly beneficial for the SC to discuss and address the issue.

⁵² *Ibid.*, para. 20 of the Explanatory Memorandum provides the following: “Of special interest is the fact that Articles 15, 16 and 38 of the convention deal with international private law issues as regards continuing powers of attorney. As the new recommendation does not deal with these issues, these articles are of relevance as a supplement.”

⁵³ Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons.

⁵⁴ Non-discrimination.

⁵⁵ Full and effective participation and inclusion in society.

⁵⁶ Equality and non-discrimination.

⁵⁷ Equal recognition before the law.

⁵⁸ It appears that the Committee of Ministers, at the time of the adoption of its 2009 Recommendation, was of the view that the 2000 Convention is relevant to both continuing powers of attorney and advance directives.

⁵⁹ S. Rolland and A. Ruck Keene, *Study: Interpreting the 2000 Hague Convention on the International Protection of Adults Consistently with the 2007 UN Convention on the Rights of Persons with Disabilities*, 3 June 2021. See relevant extracts in Annex IV.

⁶⁰ *Ibid.*, at pp. 7-8. See relevant extracts in Annex IV.

⁶¹ *Ibid.*, see item (d) of *Appendix: Action items for securing consistency between the 2000 Convention, the CRPD, and other potential future relevant human rights instruments*, at page 24. See relevant extracts in Annex IV.

⁶² *Ibid.*, at p. 13. See relevant extracts in Annex IV.

⁶³ See relevant extracts in Annex V. It is important to note that some of the information presented above, whilst public (available upon request), is not available on the HCCH website. See, *supra*, notes 1 and 33.

A. General scope and cooperation

32 It is proposed that instructions given and wishes made by an adult fall within the general scope of the Convention under Article 1 and be subject to the co-operation provisions in Chapter V of the Convention.⁶⁴

B. Health matters

33 The instructions given and wishes made by an adult very often relate to the area of health and medical care. Although the Explanatory Report is unclear on the inclusion of instructions given and wishes made by the adult within the 2000 Convention, it highlights that “[a]ny measure directed to the protection of the person or the property of an adult, which is not excluded by Article 4, comes within the scope of the Convention”.⁶⁵ While “public measures of a general nature in matters of health” are excluded from the scope of the 2000 Convention (Art. 4(1)(f)), it is clear that specific health matters that concern a specific person are covered by the Convention.⁶⁶

34 Legal questions regarding powers granted by an adult in connection with health matters do fall within the scope of the Convention and are, as such, subject to its rules. The Special Commission agreed that the provisions of Article 20, on mandatory laws, and of Article 21, on public policy, sufficiently address the concerns of those States which were opposed to the inclusion of certain medical matters within the scope of the Convention.⁶⁷

C. Instructions given and wishes made by an adult

35 Voluntary anticipatory acts containing the instructions and wishes of an adult share a similar purpose: facilitating the autonomy and self-determination of the adult. On this basis, it is proposed that, whether they are addressed to a specific person⁶⁸ or not, instructions given and wishes made by an adult empower someone specific or the world at large to act upon them. In this regard, it could be desirable for all such voluntary anticipatory acts to fall under Articles 15 and 16.

36 If the scope of Articles 15 and 16 were to be limited only to those voluntary, anticipatory acts under which a specific representative is acting, the instructions given and wishes made by the adult which need to be directly acted upon by certain individuals (e.g., doctors and other medical professionals) would be excluded. To avoid limiting the scope of Articles 15 and 16 in such a way, a broader interpretation of Articles 15 and 16 could be considered.

37 In its ordinary meaning, “representation” is to act on behalf, and in the interests, of somebody else, based on the will, preferences, instructions and wishes of that person. This is the core notion of Article 15: an individual acting on behalf and in the interests of an adult, based on said adult’s will and advance planning. If the text of the 2000 Convention is to be interpreted autonomously, as a piece of international law, it may be helpful to keep this core notion in mind when considering the scope of Articles 15 and 16, to avoid being tied down by any domestic conceptions of what the term

⁶⁴ See Prel. Doc. No 5 of March 2022 – Application of the 2000 Protection of Adults Convention to *ex lege* representation.

⁶⁵ The Explanatory Report, *op. cit.* note 2, para. 29.

⁶⁶ *Ibid.*, paras 26, 29 and 40-42. Para. 42 provides the following: “[The Special Commission] discarded all proposals either for the total or partial exclusion of medical and health matters or for their submission to a special jurisdiction regime. It considered that, while medical acts in themselves, which fall within the domain of medical science and are the province of medical practitioners who are not authorities within the meaning of the Convention, fall outside the scope of the Convention, without there being any need to spell this out in the text, on the other hand legal questions concerning the representation of the adult connected with those medical acts (authorisations or designation of the legal or *ad hoc* representative) are included in the Convention and have to be subject to its general rules, without forming the object of rules of exception.” Art. 4(2) keeps all matters regarding the legal representation of the adult within the scope of the Convention, even when such matters relate to fields excluded by Art. 4(1).

⁶⁷ *Ibid.*

⁶⁸ A voluntary, anticipatory act containing the instructions and wishes of an adult which accompanies, for example, a continuing power of attorney will likely be the most straightforward document for a foreign (competent) authority to deal with.

“power of representation” means. Such conceptions could be far too specific, as they intend to meet the needs of one jurisdictional reality. In its ordinary meaning, “power” is the ability or capacity to do something or act in a particular way. By issuing a voluntary, anticipatory act of any kind, an adult is clearly stating “if I can no longer speak or act for myself, this is what I want”. Whether this statement comes in the form of instructions or wishes communicated to a specific person in a signed agreement, to a specific person in a unilateral act, or in a unilateral act addressed to the world at large, the essence remains the same: by conveying their instructions and wishes, the adult is expressly communicating their preferences as to how they want to be represented, regardless of who is to be considered representative or who is to be empowered in the specific situation envisioned by the particular voluntary, anticipatory act.

38 Instructions and wishes that are communicated directly by the adult through, for example, an advance directive are of equal importance to those instructions and wishes that are to be carried out through a specific representative appointed through, for example, a (continuing) power of attorney. In the spirit of the self-determination and autonomy of the adult, Contracting Parties may choose to make the rules of Article 15 and 16 applicable to all voluntary, anticipatory acts.

39 Some documents containing the instructions and wishes made by an adult may not include a choice of law provision, as they may have been originally drawn up in a purely domestic context. In such cases, applying a law other than that of the adult’s habitual residence at the time the document was drawn up may provide undesirable or inconsistent results.⁶⁹ For instance, where an adult draws up a document containing end-of-life instructions and wishes, in accordance with the law of their habitual residence, and subsequently relocates to another State, such instructions and wishes may not be able to be carried out fully or even at all, if the applicable law rule under Article 15 could not be relied upon and if such instructions and wishes are completely unknown in that other State.

VIII. Registration of instructions and wishes

40 Instructions and wishes registered in a public registry or enclosed within a health insurance policy may need to be exercised in a jurisdiction where there are no mandatory laws requiring healthcare professionals to consult the registry or insurance policy prior to administering treatment. In this regard, a Country Profile would be extremely helpful in explaining to foreign healthcare professionals how to access such registries in non-emergency situations.

41 In some States, instructions and wishes made by the adult in the event of an impairment of their personal faculties may be registered in the same register as powers of representation, while other States may provide for a separate registration.

42 Some States may provide that only those instructions and wishes which concern the choice of representative or assistant are to be registered. Other States may only foresee the registration of instructions and wishes relating to medical or end-of-life matters.

IX. Final remarks

43 Voluntary, anticipatory acts promote the self-determination and autonomy of adults by enabling them to effectively communicate decisions they have taken about their lives, in anticipation of a period during which they may be incapable of doing so. They are, therefore, an extremely important aspect of the autonomy and protection of adults. The core purpose of the 2000 Convention is to promote such autonomy and protection through rules of private international law.

44 If kept up to date, the instructions and wishes made by an adult represent an accurate depiction of their will and preferences. Divergent views as to their inclusion within the 2000 Convention could

⁶⁹ Art. 32 of the Vienna Convention. See also, *supra*, note 6.

lead to inconsistency and disharmony in the implementation of the Convention,⁷⁰ which may give rise to legal uncertainty and lack of predictability in cross-border situations. Such an outcome could be detrimental to the interests of the adult and to their right to self-determination which would defeat the object and purpose of the 2000 Convention.

45 Given that the regulations and operability of various types of voluntary, anticipatory acts may differ from one jurisdiction to another, it may be beneficial for all voluntary, anticipatory acts to be subject to the conflict rule in Article 15 or, at least, to the co-operation provisions in Chapter V of the Convention. By coming within the scope of the 2000 Convention, instructions given and wishes made by an adult will most likely enjoy a higher degree of legal certainty and predictability in cross-border situations.

46 In all circumstances, domestic laws the application of which is mandatory will prevail over certain voluntary, anticipatory acts in accordance with Article 20 of the Convention. Instructions given and wishes made in relation to a subject matter which goes against the public policy of the jurisdictions in which it is to be exercised will fall under the public policy exception under Article 21 of the Convention.

X. Proposal from the Permanent Bureau, with the assistance of the Working Group, for Conclusions and Recommendations

1 The SC noted that the 2000 Convention should be interpreted having regard to its autonomous nature and in light of its objects.

2 In the interpretation of the 2000 Convention, the SC highlighted that regard shall be had to its international character and to the need to promote uniformity in its application.

3 The SC noted that instructions given and wishes made by an adult, in anticipation of a future impairment of their personal faculties, fall within the general scope of the 2000 Convention under Article 1 and be subject to the co-operation provisions in Chapter V.

4 The SC also noted that instructions given and wishes made by an adult can be found in various types of voluntary, anticipatory acts such as advance directives, advance arrangements, advance healthcare decisions or (continuing) powers of attorney. The SC agreed that unilateral acts containing instructions and wishes without necessarily designating an individual to carry them out are important tools in ensuring the exercise of the adult's autonomy. In this regard, the SC invited Contracting Parties to interpret the term "power of representation" in Article 15 broadly, so as to allow for all voluntary, anticipatory acts to fall within its scope.

5 The SC further noted that the Country Profile will be extremely helpful in bringing to the attention of competent authorities and other interested parties the various types and forms of voluntary, anticipatory acts containing the instructions and wishes of the adult in different jurisdictions.

⁷⁰ Art. 53 of the 2007 Child Support Convention.

ANNEXES

Annex I

HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

WORK. DOC. No. 4

Working Group

Meeting with a view to preparing the Special Commission on the protection of adults

(14 – 17 April 1997)
April 1997

Distribution: 15

Proposal submitted by the Expert of the United Kingdom A FUNCTIONAL EQUIVALENT TO "PARENTAL RESPONSIBILITY"

It is respectfully suggested that the new draft Convention should not be confined to "measures" taken by authorities. Many countries are now attempting to find informal ways of protecting incapable adults without the need for such measures.

It would be useful for the Convention to deal with choice of law problems in relation to such techniques. Otherwise no answer will be provided to obvious questions such as "Which law determines whether the parent of an incapable 20 year old has power by operation of law to give consent to certain medical treatments?" or "Which law determines whether a person can validly appoint someone to represent him or her after the onset of incapacity?" The Convention on Children deals with such questions in relation to parental responsibility. What is needed in the Convention on adults is a functional equivalent of the concept of "parental responsibility".

One of the difficulties in this area is that terminology varies greatly from country to country and, indeed, from time to time within countries. Terms like "tutary", "curatory" or "guardianship" may not be appropriate for all systems or all times. A descriptive term would be more widely applicable, and more immune to Inure changes in terminology in national systems, than any technical legal term. What we are concerned with is any continuing power of representation or protection which is conferred by operation of law or by a juridical act, such as a mandate or continuing power of attorney. It is necessary to say "continuing" because *ad hoc* powers, such as the power of a doctor to carry out some minor treatment (especially if there is an emergency) might be governed by the law of the place where the adult was present rather than by the law of the adult's habitual residence. A power of "representation" is intended to cover any power to take decisions for or on behalf of the incapable adult.

It is suggested that consideration might be given to using an expression like "a continuing power of representation or protection" in place of "parental responsibility". If this were done article 1 (1)(c) might read

"to determine the law applicable to any continuing power of representation or protection which may be exercised by those other than authorities".

Articles 16 to 18 could be applied to adults with the substitution of "a continuing power of representation or protection" for "parental responsibility". In article 19, "power of representation" could simply be substituted for "parental responsibility".

Annex II

HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

WORK. DOC. No.

41F

[PB translation]

**Special Commission
on the protection of adults**

**(3 - 12 September 1997)
1997**

Distribution: 11 September

Document submitted by the delegation of Canada for information

**A POWERS GIVEN IN A MANDATE IN ANTICIPATION OF INCAPACITY IN ACCORDANCE
WITH THE CIVIL CODE OF QUEBEC**

The Civil Code of Quebec provides that any person of full age, while fully capable of exercising their civil rights and in anticipation of their incapacity, may give another person the authority to take charge of their person and the administration of their property.

Unlike the mandate which, in principle, ends at the onset of incapacity, the mandate in anticipation of incapacity takes effect at that time and will eventually be revoked upon the return of the mandator's capacity.

The power to care for the person includes, among other things, the power to consent to physical or mental health care; the mandate may also contain directives in this regard, especially for care near death (living will).

The power to manage property may be general or limited to certain property and it may be qualified as full or simple administration; full administration includes the power to alienate property, simple administration requires, in this respect, the authorisation of the court. There are limits to the powers of investment, given that it is an administration of another person's property.

In order for the mandate to take effect, the judicial authority shall intervene and verify its validity and the incapacity of the mandator.

If the mandate concerns only the protection of the person or the property or a part thereof, a protection regime may be established and the guardian shall assume the residual responsibility. In the case of a lack of clarity of a provision of the mandate, the rules of the general intermediary protection regime, guardianship, are used to interpret the mandate.

The mandate continues to have effect despite the establishment of a supplementary protection regime and the person responsible for the administration of the adult's

property, be it the guardian or the mandatary, must make an annual report of such management to whomever assumes the protection of the person. If the mandate is sufficient and its execution is irreproachable, it excludes the possibility of putting in place a protection regime.

The revocation of the mandate shall be pronounced by the judicial authority upon the request of the mandator and upon proof of the return of their capacity or upon the request of an interested party, including the public guardian, in case of the failure of the mandatary to perform their tasks properly.

B ROLE OF THE PUBLIC GUARDIAN IN QUEBEC

The public guardian is appointed by the Government and is responsible for the protection of adults under guardianship (partial incapacity) and curatorship (total incapacity) in all cases where it is impossible to find a parent or relative who is willing and able to take on the responsibility. The law imposes a duty to try to find such a person.

The public guardian also supervises all private guardianships and curatorships by means of inventories of assets and annual reports provided by the guardians and curators, and must also ensure that they maintain sufficient certainty to guarantee their administration.

The public guardian also acts as a provisional administrator of abandoned property and as a liquidator of legal entities.

The public guardian has a power of inquiry which they may exercise *ex officio* or on request with respect to the situation of any person under protective supervision or who has given a mandate in anticipation of incapacity to a third person.

Finally, the judicial authority may appoint the public guardian to act temporarily as tutor or curator of a person who is in Quebec without having their habitual residence there and the public guardian then assumes this task until the person is taken care of according to the laws of their habitual residence.

The Canadian delegation remains at the disposal of delegations wishing to obtain additional information.

Annex III

Research report on discussions of instructions given and wishes made by the adult during the initial drafting and subsequent negotiations of the 2000 Protection of Adults Convention.

Medical matters in the 2000 Convention

1. During the drafting of the 2000 Convention, there was considerable uncertainty about the inclusion of medical matters in the scope of the Convention.
2. For some delegates, such as Ms Pérez Vera (Spain), an adult is vulnerable usually due to a physical or psychiatric health problem or as a consequence of age. Thus, the protection of vulnerable adults necessarily must include medical issues.¹
3. Other delegates, notably Mr. Bucher (Switzerland), argued that including medical issues would lead to the application of all the provisions of the Convention, including the obligation to enforce and recognise decisions taken in another Contracting Party; however, such an obligation appears to be, according to him, unacceptable in medical matters.²
4. Given the difficulty of negotiating on this sensitive issue, the Chairman proposed to set up a small working group to deal with the question of medical treatments.³
5. Finally, none of the provisions of the 2000 Convention limit their application to the protection of property only. The provisions aim to protect both the property and the person of the adult (Article 3), including health matters.

The evolution of Articles 15 and 16 of the 2000 Convention

6. In earlier stages of drafting⁴, the law applicable to powers of representation was regulated by two Articles; former Articles 13 and 14 and later on by three Articles; former Articles 13, 14 and 15.
7. Initial text prepared by the Drafting Group (Meeting 13-14 June 1997)⁵ read as follows:

Article 13

1. *The existence or extinction of powers of representation in relation to an incapable adult under a contractual mandate or unilateral act granted by the adult while capable is governed by the law of the State of the adult's habitual residence at the time when the mandate or unilateral act is made, unless another applicable law has been chosen in accordance with the following paragraph.*
2. *The law of the State designated by the adult applies if that law is, at the time when the mandate or unilateral act is made, that of a State of which he or she is a national, or the State in which property affected is situated.*

Article 14

Any power of representation referred to in Article 13 may be terminated or modified by measures taken under this Convention.

8. A preliminary draft adopted by the Special Commission on the protection of adults on 12 September 1997⁶ read as follows:

Article 13

¹ [Proceedings of the Special Commission with a diplomatic character \(1999\)](#) (hereinafter Proceedings), Minutes No 11 (Meeting of 27 September 1999 (afternoon)), at page 299.

² Proceedings, Minutes No 12 (Meeting of 28 September 1999 (morning)), at page 306.

³ Proceedings, Minutes No 7 (Meeting of 23 September 1999 (morning)), at page 266.

⁴ Proceedings, at page 79.

⁵ Proceedings, at page 59.

⁶ Proceedings, Preliminary Document No 2 of June 1998, at page 79.

1. *The existence, extent and extinction of powers of representation granted by an adult, either under an agreement or by a unilateral act, to be exercised when such adult is not in a position to protect his or her interests, are governed by the law of the State of the adult's habitual residence at the time of the agreement or act, unless one of the laws mentioned in paragraph 2 has been designated expressly in writing.*
2. *The States whose laws may be designated are –*
 - a) *a State of which the adult is a national;*
 - b) *the State of a former habitual residence of the adult;*
 - c) *a State in which property of the adult is located.*

Article 14

Whatever law may be applicable to the powers of representation [granted in accordance with Article 13], with regard to the manner of their exercise the law of the State where they are exercised shall be taken into consideration.

Article 15

Any power of representation granted in accordance with Article 13 may be terminated or modified by measures taken under this Convention.

9. The final version of the provisions regulating the law applicable to powers of representation read as follows:

Article 15

1. *The existence, extent, modification and extinction of powers of representation granted by an adult, either under an agreement or by a unilateral act, to be exercised when such adult is not in a position to protect his or her interests, are governed by the law of the State of the adult's habitual residence at the time of the agreement or act, unless one of the laws mentioned in paragraph 2 has been designated expressly in writing.*
2. *The States whose laws may be designated are –*
 - a) *a State of which the adult is a national;*
 - b) *the State of a former habitual residence of the adult;*
 - c) *a State in which property of the adult is located, with respect to that property.*
3. *The manner of exercise of such powers of representation is governed by the law of the State in which they are exercised.*

Article 16

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

10. From jurisdiction to jurisdiction, there is great diversity in the regulation of powers of representation. Some jurisdictions allow for a broader scope of powers of representation, most notably in the medical field, with advance directives.
11. As defined by the Recommendation of the Committee of Ministers to Member States on principles concerning continuing powers of attorney and advance directives for incapacity, “advance

directives' are instructions given or wishes made by a capable adult concerning issues that may arise in the event of his or her incapacity".⁷

12. More than twenty years after the drafting of the Convention, the question arises today is whether advance directives were understood to be included in the "powers of representation granted by an adult".
13. It is therefore necessary to track down the relevant excerpts in the proceedings.

Mention of advance directives in the 2000 Convention proceedings

Working Group Meeting with a view preparing the Special Commission on the protection of adults (14- 17 April 1997)

14. The Expert of the United Kingdom submitted a proposal suggesting finding a functional equivalent of "parental responsibility" of the 1996 Convention (Working Document No 4). This document gave the purpose of a power of representation:

"A power of "representation" is intended to cover any power to take decisions for or on behalf of the incapable adult."

Summary of the discussions of the Working Group meeting with a view to preparing the Special Commission on the protection of adults (14 to 17 April 1997)

15. The opening discussions raised an issue: Should "private" measures that make advance arrangements for the future state of incapacity of the adult be included? For instance, such measures could be open-ended mandates (or "*post incapacitatem*") or trusts.⁸

"The participants spoke extensively on the need to define the legal acts at issue here, since domestic legislation covers so many different types of agency. The main distinction to be made is between agency relationships through which the principal handles the management of his or her property, but which terminate with the institution of a protective regime of said principal, and, on the other hand, those that take effect only upon the incapacity of the principal. There was unanimous support for a broad approach regarding these measures, as well as for the position that they should be considered in their entirety. [...]"

The issue was raised of the need for a provision ensuring the validity of a power of attorney granted in anticipation of a future incapacity, in cases where the adult moves his or her place of habitual residence, and the incapacity occurs in the new State of residence."⁹

16. During the Working Group meeting, a copy of the Dutch Model Medical Power of Attorney was handed out to participants. This document is particularly interesting as it includes detailed specific mandates that are akin to advance directives: "If I am no longer conscious, but there is a well-founded expectation that I could regain consciousness, then I hereby declare that it is my express wish that all medical acts, which are considered within reasonable limits necessary for this purpose, shall be taken."
17. This provision is not directly intended for a representative. It only expresses the will of the capable adult in the event of their incapacity.

Special Commission on the protection of adults (3 to 12 September 1997)

18. Regarding Article 4, "delegations questioned the possible exclusion of a number of specific issues from the scope of the Convention. One expert wondered whether arrangements that an adult can

⁷ Council of Europe, [Recommendation CM/Rec\(2009\)11 on principles concerning continuing powers of attorney and advance directives for incapacity](#), see Appendix to Recommendation, Part I, Principle 2(1).

⁸ Proceedings, Working Group meeting with a view to preparing the Special Commission on the protection of adults (14-17 April 1997), Summary of the discussions of the Working Group on 14 to 17 April 1997, at page 65.

⁹ *Ibid.*, at pages 69 and 71.

make in advance, such as to oppose any form of therapeutic prolongation, would be covered by the scope of this Convention.”¹⁰[*translation by the Permanent Bureau*]

19. The report does not mention any answer to this question. However, it can be observed that the subject of advance directives, notably “living wills”¹¹ was put on the table from the beginning and yet did not raise any controversy warranting an explicit decision in this regard, at the time.
20. About Chapter III on Applicable Law, “Mr Lagarde noted that it remained to be clarified whether Article 13 referred only to powers of representation which were specifically granted in anticipation of a future incapacity, or also to general powers of attorney which happened to pre-date an unexpected incapacity. Finally, Mr Lagarde affirmed that Articles 14 - 18 mirrored the equivalent provisions in Chapter III of the 1996 Convention.”¹²
21. Concerning old Article 13, paragraph 1, the English version of the report uses the expression “power of attorney” whereas the French version uses the expression “acte relatif à sa représentation” (act relating to their representation).¹³
22. With regards to Article 13, paragraph 2, the Swiss Delegation made the following proposal (Working Document No 24):

“2 The preceding paragraph applies without prejudice to the rules on public policy of the State where the protection of the adult is to be provided, in particular in matters of health.”
23. As explained in the Lagarde Report referring to this proposal, “the exception for mandatory laws, especially in the medical area, of the State in which the adult is to be protected, had first been proposed as a counterweight to the possibility given to the adult of choosing the law applicable to the powers of representation.”¹⁴
24. During the Meeting of Tuesday 9 September 1997 (morning), regarding this proposal from the Swiss delegation, the assembly discussed the need for a special provision on public policy. Some experts were entirely against the use of a public policy provision anywhere in the Convention, whereas others would prefer to have a separate provision pertaining specifically to this matter, as found in the Trusts and Agency Conventions. An expert noted that there is a need for a special provision because the general clause on public policy of Article 18 does not permit the refusal of the application of the powers of representation, but only the refusal of the application of law.¹⁵
25. Despite this concern, the idea was accepted by the Special Commission on the protection of adults and was broadened to all the situations involving the protection of the adult.
26. In addition, the Netherlands delegation presented the following proposal in Working Document No 29 (Work. Doc. No 29), inspired by Article 9 of the Convention on the Law Applicable to Agency:

“Article 13 a
Whatever law may be applicable to the powers of representation, with regard to the manner of performance, the law of the place of performance shall be taken into consideration.”
27. In this view, the law of the place of performance should be taken into account, whatever the law applicable to the powers of representation. A vote was taken on this Working Document, 17 votes were in favour, 4 against and 9 abstentions.¹⁶

¹⁰ French version of the Report of Meeting No 4 (4 September 1997, afternoon), at page 2.

¹¹ English version of the Report of Meeting No 4 (4 September 1997, afternoon), at page 2.

¹² English version of the Report of Meeting No 5 (5 September 1997, morning), at page 2.

¹³ *Ibid.*, at page 3.

¹⁴ Proceedings, Lagarde Report on the Preliminary draft of the Convention adopted by the Special Commission on 12 September 1997, para 108.

¹⁵ English version of the Report of Meeting No 10 (9 September 1997, morning), at page 2.

¹⁶ English version of the Report of Meeting No 11 (9 September 1997, afternoon), at page 3.

28. For information purposes only¹⁷, the delegation of Canada submitted and introduced Work. Doc. Nos 41 E and 41 F, containing descriptions of part of the Civil Code of Quebec and the Code of British Columbia.
29. According to these texts, a person with full capacity may give powers to another person to act on their behalf in the administration of their personal and property interests, in the event of an impairment of their personal faculties. As explained by Work. Doc. No 41 F (detailing part of the Civil Code of Quebec), the power may include, among other things, consent to physical or mental health care. The mandate may also contain instructions regarding care at the time of death (living will).
30. Such instructions can be regarded as advance directives.

Lagarde Report on the Preliminary draft of the Convention adopted by the Special Commission on the protection of adults (12 September 1997)

31. On sub-paragraph (f) of Article 3 (enumeration of the measures of protection)¹⁸

“[...] supervision by a public authority of the care of an adult by any person having charge of the adult;”
32. An expert expressed their concern about the possible conflict with this sub-paragraph and the expressed wish of the adult not to persist with therapy in the event of incurable illness, which has reached a terminal stage. The “expressed wish of the adult” could be understood as an advance directive.
33. This sub-paragraph does not appear in the final version of the 2000 Convention.
34. In relation to Article 13(1), the Proceedings of the Special Commission with a diplomatic character provide the following:

“This article envisages the situation in which the adult himself or herself organises in advance his or her protection for the time when he or she will not be in a position to protect his or her own interests. He or she does this by conferring on a person of his or her choice, by a voluntary act which may be an agreement concluded with this person or a unilateral act, powers of representation. [...]”

The situation envisaged here is characterised by the fact that the powers of representation cannot begin to be exercised until after the adult who has conferred them is no longer able to protect his or her own interests, and their taking effect normally requires, in any case in Quebec, the intervention of the judicial authority to establish incapacity. The powers thus conferred may be very varied. They have to do with the management of the adult's property as well as his or her personal care. One often finds in them the instruction given to the person mandated to refuse any persistent course of treatment in the event of incurable illness. This type of mandate, which seems to be quite common in certain States, and particularly in North America, is unknown in a number of European States, including France, where the mandate necessarily comes to an end in the event of the onset of incapacity; hence the interest in having a conflict of laws rule on the subject.”¹⁹
35. Referring to the Work. Doc. No 41 F submitted by the delegation of Canada during the Special Commission on the protection of adults (3-12 September 1997), this paragraph makes it clear that the conflict of laws rule is also designed for the import of an advance directive governed by a foreign law into another State where such instructions given or wishes made are unknown.

¹⁷ Report of Meeting No 16 (12 September 1997, morning), at page 1.

¹⁸ Proceedings, Lagarde Report on the Preliminary draft of the Convention adopted by the Special Commission on 12 September 1997, para 26.

¹⁹ *Ibid.*, para 90 - 91.

36. On Article 13(2), the Proceedings of the Special Commission with a diplomatic character provide the following:

“The power given to the adult to choose the law applicable to the mandate in case of incapacity inevitably poses the question of the fate of this mandate in the case where the law chosen does not recognise (or prohibits) this type of mandate. This question was long debated by the Special Commission. A first solution had been suggested, which drew its inspiration from Article 5 of the Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition.

The Canadian delegation had proposed, along these lines, to make it clear that paragraph 2 of article 13 should not be applicable when the designated law did not recognise this type of mandate (Work. Doc. No 25), but this proposal was rejected by 17 votes to 2 and 6 abstentions. A second proposal from the same delegation, repeating in substance the first and adding to it the possibility of nevertheless giving effect to the powers of representation to the extent required for the protection of the adult (Work. Doc. No 38), was also rejected by 15 votes to 4 and 6 abstentions. The other solution, which the Special Commission did not address directly but which seemed to follow from the rejection of the proposals referred to above, consists of regarding the powers conferred by the adult as not existing and of eliciting from the competent authority a measure of protection.”²⁰

Minutes of the Special Commission with a diplomatic character

37. During the meeting of 22 September 1999 (morning)²¹ the proposal made by the Netherlands in Work. Doc. No 35 was discussed. As summarised by the Spanish delegation and as confirmed by the Dutch delegation²², the idea of the proposal was to allow the adult an unlimited choice for the law applicable to their protection, even if the chosen law had no connection with the situation. The delegate from Switzerland (M. Bucher) expressed their concern about this proposal:

“**Mr Bucher** (Switzerland) stressed that the Swiss delegation was particularly sensitive to the fate of medical acts and that it would not accept such broad possibilities of representation in this area. He explained that Swiss domestic law did not recognise the incapacity mandate, but that this was evolving. Nevertheless, he understood the approach of the delegation from the Netherlands, the most progressive country with regard to the autonomy of the will in relation to medical acts, including even active or passive euthanasia, which a representative could carry out at the request of an adult. He feared that a Swiss national would choose Dutch law to have access to this right. The Swiss delegation therefore expressed the greatest reservation on this subject, as Swiss law had not yet made a decision on the acceptance and scope of this type of mandate. It should be avoided that Switzerland cannot consider ratifying the present Convention because of this.”²³ [*translation by the Permanent Bureau*]

38. The import of an advance directive governed by a foreign law is therefore clearly considered in the example taken by Mr. Bucher.
39. In response, Mr Lagarde referred to Working Document No 41 handed to the delegates during the Special Commission on the protection of adults (3-12 September 1997).
40. During the afternoon meeting (Minutes No 6), the Dutch delegation replied to the comments of the Swiss delegation.

“In response to Mr Bucher (Switzerland), Ms van Iterson said that, in her view, incapacity mandates could cover medical matters if the law applicable to mandates so allowed, which was for example the case in the laws of Canada and the United States. Ms van Iterson explained that in the Netherlands the law provides for the doctor to respect the powers of representation of the incapable person's representatives, but in compliance with the codes of medical ethics, which in any case remains applicable under Article 19 of this Convention. The argument put forward by the Swiss delegation, according to which the possibility of free choice of law might lead to the

²⁰ *Ibid.*, para 99

²¹ Proceedings, Minutes No 5, at pages 257 – 258.

²² Proceedings, Minutes No 6 (Meeting of 22 September 1999 (afternoon)), at page 260.

²³ Proceedings, Minutes No 5, at page 258.

application of particularly liberal laws, does not therefore seem sufficient, in Ms van Iterson's view, to refuse complete autonomy of will.”²⁴ [*translation by the Permanent Bureau*]

41. In her intervention, Ms van Iterson referred to Article 19 of the Draft text (current Art. 20 of the Convention): “The preceding Articles do not prevent the application of those provisions of the law of the State in which the adult is to be protected, particularly as concerns medical matters, where the application of such provisions is mandatory whatever the law which would otherwise be applicable.”
42. As an exception to the applicable law rules of the 2000 Convention, this article allows States to implement mandatory laws in their own territory, even if the protection of the adult has been arranged in accordance with the law of another State.
43. Understanding the concerns of M. Bucher about euthanasia, M. Lagarde added:
 “[...] the risk of applying a law admitting euthanasia is not linked to complete autonomy of will. Indeed, [...] a law chosen from among pre-selected laws could also lead to this result, the solution then lying in a remedy of public policy.” [*translation by the Permanent Bureau*]
44. The use of public policy was also suggested by M. Marques dos Santos (Portugal):
 “If, however, the practice of euthanasia appears too shocking for the requested State, [...] there is always the possibility of recourse to public policy, both in terms of the applicable law and the recognition of decisions, as well as to criminal law.” [*translation by the Permanent Bureau*]
45. The implementation of the public policy mechanism was provided for in Article 20 of the Draft text (current Art. 21 of the Convention).
 “Mr Bucher agreed that the respect of local law can always be ensured through Articles 19 and 20, but these exception clauses are sometimes difficult to interpret and apply. However, in the medical field, a clear and precise rule is, in his opinion, necessary.”²⁵ [*translation by the Permanent Bureau*]

Meeting of 23 September 1999 (morning) - Minutes No 7 (p. 266).

46. During the discussion about the redaction of the Article 15 (current Art. 16 of the Convention), Mr Bucher expressed once again his concern about the application of a law chosen by the adult that is contrary to the local law:
 “[...] it is legitimate to try to respect the adult's will as much as possible, but only within certain limits (for example, it would not be acceptable for the Swiss authorities to be obliged to apply, contrary to their mandatory law, a chosen law which, such as the Dutch law, allows active euthanasia).”²⁶ [*translation by the Permanent Bureau*]
47. In response, Ms De Hart (United States of America) expressed surprise that the question of euthanasia was raised again in the present debate, as she considered that article 19 overrode any provision interfering with medical matters.

²⁴ Proceedings, Minutes No 6 (Meeting of 22 September 1999 (afternoon)), at page 260.

²⁵ Proceedings, Minutes No 6 (Meeting of 22 September 1999 (afternoon)), at page 264.

²⁶ Proceedings, Minutes No 7 (Meeting of 23 September 1999 (morning)), at page 269.

Annex IV

Relevant extracts from Sonia E. Rolland and Alex Ruck Keene, *Study: Interpreting the 2000 Hague Convention on the International Protection of Adults Consistently with the 2007 UN Convention on the Rights of Persons with Disabilities*, 3 June 2021

Section 1, sub-section b, at pages 7 – 8:

“b. What the 2000 Convention does not do

It is perhaps important to make express, for the sake of clarity, what the 2000 Convention does not do:

- Not being based upon concepts either of mental incapacity or best interests as found in the laws of Contracting States, it does not seek to make such concepts the foundation either for the taking or recognition of protective measures.
- Whilst it mentions guardianship in Article 3 as an example of a protective measure, it does not say that this is the sole type of protective measure that it covers. Nor, in line with the fact that it does not seek to develop substantive international law norms, does it suggest that guardianship (or equivalent measures) should either be adopted or rejected in individual Contracting States: it is entirely neutral on the matter.
- The Convention expressly excludes a range of measures from its scope, including such personal matters as the formation, annulment of marriage or any similar relationship, issues relating to succession, public measures of a general nature in matters of health (for instance vaccination), criminal measures taken against the person, immigration and measures directed solely to public safety.
- As noted above, the 2000 Convention excludes – whether by accident or design, it is not entirely clear – the making by a person of a unilateral statement as to what they would wish or not wish (for instance an advance decision to refuse medical treatment). We return to this below, because this appears to us an omission which the Special Rapporteur may wish to take up.”

Appendix: Action items for securing consistency between the 2000 Convention, the CRPD, and other potential future relevant human rights instruments, at page 24

Item (d)

“Whether at the Special Commission in 2022 or separately, take steps towards proposing a protocol to the 2000 Convention specifically to address statements by individuals to enable them (to use the language of General Comment 1 to the CRPD) to “state their will and preferences which should be followed at a time when they may not be in a position to communicate their wishes to others.” Whilst it would ultimately be for the Hague Conference to determine the precise scope and mechanism to apply to such statements, the most logical approach would be to start with the equivalent framework to those applied in the 2000 Convention to private mandates in Articles 15 and 16. An article within the protocol equivalent to Article 15 would set out which law would govern the existence, extent, modification and extinction of such a statement. An article within the protocol equivalent to Article 16 would then set out (in effect) ‘override’ provisions, potentially also including a provision that such statements would not have to be given effect where to do so would be to conflict with a mandatory provision of the law of the receiving State.”

Annex V

Relevant extracts from Richard Frimston, Alex Ruck Keene, Claire Van Overdijk and Adrian Ward, *The International Protection of Adults*, Oxford University Press, 2015

Richard Frimston, Part I, Chapter 6: The Cross-border Protection of Adults: Hague 35, Non-Contracting Parties, page 72, para 6.52

“Advance directives are least likely to be effective across borders or subject to issues of Private International Law. Medical decisions are usually taken locally, and are generally subject only to the local law; any criminal sanctions will be local ones and therefore medical practitioners are mainly concerned with the local law.¹ It is therefore usual to consider separate Advance Directives for each relevant state. Even in extreme cases, when an adult may be taken abroad for particular treatment, issues of public policy in State B are likely to limit any effectiveness of an Advance Directive from State A.”

Alex Ruck Keene, Part II, Chapter 9: Hague 35: Private Mandates and Other Anticipatory Measures, pages 165 – 168, paras 9.39 – 9.42

“I. Other Anticipatory Measures

(1) Advance Decisions to refuse medical treatment

Advance Decisions to refuse medical treatment² are not addressed expressly within Hague 35. It is suggested that they cannot fall within the definition of a Protective Measure.³ Some commentators appear to proceed on the basis that such decisions are covered by the term “power of representation” (in the sense of a Private Mandate).⁴ It is suggested, however, that this [is] incorrect, at least as a blanket statement:

- Article 15 is specifically concerned with the grant of a power of representation by an agreement or a unilateral act;⁵ it is suggested that this of necessity implies that the power is granted to be exercised by another person (whether identified by name or by status).
- In some jurisdictions, as the Lagarde Report notes,⁶ a Private Mandate can carry within it an instruction given to the person mandated to refuse certain types of treatment under certain circumstances. Whilst conceptually such an instruction could be classified as an Advance Decision, it will not be effective save where the representative acts upon it in any dealing with medical professionals,⁷ and it could therefore be seen to fall within the broad definition of a power of representation.
- However, in other jurisdictions, a rather clearer distinction is drawn between: (1) a Private Mandate which carries with it a power to refuse medical treatment on behalf of the adult when the adult no longer has capacity to take such decisions; and (2) an Advance Decision

¹ As in the matter of *Re SB* [2013] EWCOP 1417 when the court did not appear to consider issues of PIL or whether it had jurisdiction

² The term ‘Advance Directive’ is also regularly used; the term ‘Advance Decision’ is used here as it that which is used within the MCA 2005 (in sections 24 – 26).

³ A decision (where such can be taken according to the particular legal system) by a competent court as to the medical treatment that an incapacitated adult is or not to receive is an entirely different matter as it is a decision which, by definition, is taken because the adult is not able to make their own decision.

⁴ See, for instance, David Hill, ‘Legislative Comment’ at 474-5 and Aimeé Fagan, ‘An Analysis of the Convention on the international Protection of Adults’ *Elder Law Journal* 10, no 2 (2002); 329-59.

⁵ Hague 35, Article 15(1).

⁶ Paragraph 96.

⁷ If a representative does not so act, then there would be an interesting argument as to whether this failure to comply with an express instruction would constitute conduct falling within the scope of Article 16 (i.e. a failure to exercise the power in a manner sufficient to guarantee the protection of the person). It is suggested that, given the important placed upon the autonomy of adults with capacity to determine their own fate, a clear failure of the representative in this regard would constitute such conduct.

which stands as an anticipatory refusal of medical treatment and, as such, capable without more of being binding and effective upon any medical professional aware of it.⁸

- A clear example of the distinction set out above is to be found in the law of England and Wales. This is discussed further at chapter 11, but in broad outline, the MCA 2005 makes separate provision for the creation of lasting powers of attorney with authority for the person(s) chosen as grantee(s) to take healthcare decisions,⁹ and Advance Decisions.¹⁰ A valid and applicable Advance Decision has effect as if the person has made it and had had capacity to make it, at the time when the question arises whether the treatment should be carried out or not.¹¹ By s.26(2), a person will incur liability¹² for carrying out or continuing treatment if, at the material time, they are satisfied that an Advance Decision exists which is valid and applicable to the treatment. In other words, the effectiveness of an Advance Decision depends upon its *existence* (and of the knowledge of the medical professionals as to its existence), not upon the *actions* of any representative; indeed, an Advance Decision will be invalidated by the creation of a lasting power of attorney granting authority to give or refuse consent to the same treatment.¹³
- In the circumstances where an adult purports to make an Advance Decisions under a system of law which affords them a status distinct to a Private Mandate, it is suggested that such an Advance Decision does not, in fact, constitute a power of representation falling within the scope of Article 15 of Hague 35.

It is suggested therefore that a 'pure' Advance Decision, therefore, is neither a Private Mandate nor a protective measure and is therefore, on a proper analysis, not catered for within the scope of Hague 35. If this is correct, then whether a 'pure' Advance Decision has any cross-border effect (and / or whether the courts of the country where treatment is proposed are required to consider the terms of the document in question) are questions that lie to be resolved by the national laws of the different Contracting States.¹⁴ In such a case (and by contrast with the position that would prevail in the case of a Private Mandate), it is suggested that the courts of any Contracting State would be under no obligation imposed by Hague 35 to apply any law other than its own.

(2) Advance Statements and statements of wishes and feelings

Alongside Advance Decisions to refuse medical treatment, certain jurisdictions give statutory force to statements made in advance as to the medical treatment that that adult would wish at a point when they do not have capacity to take the material decisions.¹⁵ Certain jurisdictions also require that in the taking of decisions (of any nature) for or on behalf of an adult without capacity, particular weight must be given to any written expression of wishes and feelings made by that adult prior to their loss of capacity.¹⁶

⁸ See, for a comparative review of the status of Advance Directives in the European context, predicated upon a distinction between these two categories: Roberto Andorno, Nikola Biller-Andorno and Susanne Brauer, 'Advance Health Directives Towards a Coordinated European Policy?' *European Journal of Health Law* 16, no 3 (2009); 207-27. In Scotland, a practice was developed of granting both a Private Mandate and an Advance Directive, cross-referring to each other, thus impliedly recognising the distinction between the two.

⁹ MCA 2005, sections 9 – 11.

¹⁰ MCA 2005, sections 24 – 26.

¹¹ MCA 2005, section 26(1).

¹² Which can be both criminal and civil (ie arising out of the operation of the law of tort).

¹³ MCA 2005, section 25(2)(b) provides that an Advance Decision will be invalidated if the adult subsequently grants a lasting power of attorney which confers authority upon a grantee to give or refuse consent, treatment to the treatment to which the Advance Decision relates. See, also in this regard *Re E* [2014] EWCOP 27.

¹⁴ MCA 2005, section 25(4), for instance, provides that for the purposes of the law of England and Wales the Court of Protection may make a declaration as to whether an Advance Decision exists, is valid and / or is applicable to a treatment. Equivalent provisions do not exist within the AWI 2000.

¹⁵ A good example being the provisions of the Mental Health (Care and Treatment) (Scotland) Act 2003, section 276, relating to Advance Statements in the psychiatric setting.

¹⁶ For instance, in England and Wales, the provisions of the MCA 2005, section 4(6)(a), which require that in determining for the purposes of the Act, any person (and the Court of Protection, where relevant) must consider so far as it is reasonably ascertainable the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he has capacity).

By parity of reasoning with the analysis set out above in relation to Advance Decisions, it is suggested that neither Advance Statements nor statements of wishes and feelings fall within the scope of Hague 35; again, whether they would have any cross-border effect would depend upon the national laws of the State in which they were being relied upon.”

Relevant extracts from Ian Curry-Sumner, “Vulnerable Adults in Europe: European added value of an EU legal instrument on the protection of vulnerable adults – Annex I” in European Parliament *The European added value of EU legislative action on the protection of vulnerable adults*, Brussels: European Union 2017.

At page 58, section 3.2.3.4: “Matters excluded from the scope of HAPC 2000”

“Before dealing further the technicalities posed by the power of representation in the form of advance directions, it is first necessary to determine whether such measures even fall within the scope of the HAPC 2000, as this is certainly not self-evident at present. It has been suggested that private mandates do not constitute protective measures in the sense of the HAPC 2000 and therefore fall outside the substantive scope of the Convention. This statement can be supported with reference to the text of the Convention itself,¹⁷ the Explanatory Report to the Convention,¹⁸ academic literature,¹⁹ as well as an analogous reference to the HCPC 1996.²⁰ That being said, private mandates do appear in the Convention in the context of Article 15, which will be discussed later when dealing with applicable law.

It has furthermore been suggested in academic literature that the following aspects would also be deemed not be covered by the HAPC 2000, namely:

- Advance decisions to refuse medical treatment;
- Advance statements as to a particular form of medical treatment;
- Statements of wishes and feelings;
- Joint accounts;
- Pure factual measures (e.g. wearing a bicycle helmet);
- Decisions made by medical practitioners;²¹ and
- Instruments executed by adults whose faculties are impaired but how are not the subject of a protective measure [.]”

Relevant extracts from Geraldo Rocha Ribeiro, *A Convenção de Haia de 2000 relativa à protecção dos Incapazes Adultos*, Revista do Ministério Público 125, Janeiro, Março 2011, pp. 13-87 [translation by the Permanent Bureau].

At page 56, footnote 97:

“[Powers of representation under Article 15 include] li[ving] wills and the attribution of powers of attorney for medical acts. Examples are the American ‘durable power of attorney for health care’, the English ‘advance directives’, the Spanish ‘instrucciones previas’ [...] In general, the framework [...] of Article 15 includes advance directives (including the aforementioned living wills), lasting powers of attorney, as well as the [...] appointment of a trustee, or the designation of a legal representative.”

Relevant extracts from Eric Clive, *The New Hague Convention on the Protection of Adults*, Yearbook of Private International Law, 2000, p. 15

I. Introduction

¹⁷ Article 38, dealing with the certificates that can be drafted, refers to situations “where a measure of protection has been taken or a power of representation confirmed.” In the situation outlined with Oscar, the private mandate was never confirmed. This is furthermore supported with reference to the temporal scope provided for in Article 50(2), which notes a different scope applicable to those private mandates that fall within the scope of Article 15 HAPC 2000.

¹⁸ See P. Lagarde, Explanatory Report for the Convention on the International Protection of Adults, The Hague: Hcch, 2000, §§ 93, 94, 96, 106, 109, 124, 134 and 146.

¹⁹ E. Clive, “The New Hague Convention on the Protection of Adults”, Yearbook of Private International Law, 2000, p. 15 and R. Frimston et al, International protection of adults, 2015, p.156.

²⁰ See N. Lowe and M. Nicholls, The 1996 Hague Convention on the Protection of Children, Bristol: Jordans, 2012, §2.6-2.7 and E. Clive, The New Hague Convention on Children”, Juridical Review, 1998, p. 171.

²¹ Bucher refers, for example, to the fact that a medical practitioner is not an authority in the sense of the HAPC 2000. It has also been suggested that acts sanctioned by judicial and administrative authorities on purely ethical grounds would also fall outside the substantive scope of the Convention. A. Bucher, “La Convnetion de la Haye sur la protection internationale des adultes”, Revue suisse de droit international et de droit européen, 2000, p. 44.

B. Background in Domestic Laws

Another common theme has been the recognition that adults while capable may wish to make their own arrangements for their representation should incapacity ensue at a later stage in their lives. Many legal systems have accordingly made new provisions for enduring powers of attorney²² or mandates with a view to incapacity. The powers of representation given by such techniques are generally subject to some control or supervision.

II. Outline of the Convention

A. General

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 taking and implementation of measures of protection and to mandates with a view to incapacity**, to recognise and enforce measures from other Contracting States and to set up mechanisms for co-operation

III. The Difficult Areas

E. Mandates with a View to Incapacity

Mandates with a view to incapacity, or **enduring powers of attorney**, have proved to be popular in those countries which have legislated on them. They give the adult some control over what will happen in the event of supervening incapacity. They can save money on costly procedures. Provided there is adequate public control they need involve no more danger than the appointment of a representative by a judicial or administrative authority. **The delegations from the United States of America and Canada were anxious to ensure that the benefits of enduring powers of attorney could be enjoyed across international borders.**²³ They therefore argued for a liberal choice of law regime, with maximum autonomy for the adult and maximum respect for the law governing the powers conferred.

Some delegations from countries whose legislation does not, or does not yet, provide for mandates with a view to incapacity had reservations about the possibility of a liberal choice of law regime. There were several fears. One was that if adults could opt too easily for the application of a country's laws, that country might in practice be forced to apply or even introduce protective laws even if it had no real connection with the adult.²⁴ Another was that, if modification or extinction of the representative's powers were governed by the law of, say, a former habitual residence, the authorities of the current habitual residence might experience difficulties in taking necessary measures of protection. Another was that the powers conferred might enable the representative to take decisions of a kind which would be unacceptable in the country obliged to give effect to them.²⁵ There was a certain underlying tension between these two points of view, both reasonable in themselves, at various points in the debates but the difficulties were eventually resolved. The solution contained several ingredients. First, the adult's freedom to choose a governing law was confined to the law of a State with which he or she had a strong connection.²⁶ Secondly, it was recognised that the authorities of the current habitual residence could take measures of protection, and apply their own laws in doing so, even if there was a representative operating under a mandate governed by a foreign law,²⁷ provided that they would withdraw or modify the powers of the privately appointed representative only where those powers were not exercised in a manner sufficient to guarantee the protection of the adult and that they would take into account the law governing those powers to the extent possible.²⁸ Thirdly, it was provided that the normally applicable law would not prevent the application of provisions of a mandatory nature in the State where the adult was to be

²² Terminology in English-speaking countries varies — 'enduring powers of attorney', 'continuing powers of attorney', 'durable powers of attorney' are all found. Sometimes a distinction is drawn between a continuing power, which was exercisable before incapacity and continues to be exercisable after incapacity and a 'springing power' which springs into existence only when incapacity occurs.

²³ The delegations provided very full and helpful information about the content of their laws on enduring powers of attorney and similar devices. The Quebec legislation, framed in civil law terminology, proved particularly interesting.

²⁴ This fear was expressed by the Finnish delegate, Mr M. HEIN, with particular reference to an early draft which gave too wide a choice of law to the adult.

²⁵ Decisions relating to the giving or refusal of certain types of medical treatment might be particularly controversial, as was pointed out forcefully by the Swiss delegate, Professor A. BUCHER.

²⁶ Basically, habitual residence, preceding habitual residence, nationality and, in relation to that particular property, the situation of property. See Article 15.

²⁷ The problem here is not essentially different from that which might arise where the appointment of a representative by a judicial or administrative authority of a former habitual residence falls to be recognised.

²⁸ Article 16.

protected.²⁹ And finally it was made clear that the application of the normally applicable law could be refused if this application would be manifestly contrary to public policy, a provision which, although now almost routine, is particularly well calculated to deal with the most controversial types of decision in the medical field.

IV. Conclusion

There is a need for a new Convention in this area. This Convention is a good one. Its core provisions – based on the importance of the habitual residence of the adult as a connecting factor and on the desirability of co-operation between Contracting States – proved entirely uncontroversial. Its more technical provisions draw on experience gained in the drafting of many previous Hague Conventions and, in particular, the Children Convention of 1996. **The difficulties which did arise, all reflecting genuine and reasonable concerns held by delegates on both sides of the arguments, were resolved in ways which seem entirely satisfactory.** It is to be hoped that the Convention will be widely ratified. [emphasis added]

Andreas Bucher, *La Convention de la Haye sur la Protection Internationale des Adultes*, 10 *Swiss Rev Int'l & Eur L* 37, 2000 [translation by the Permanent Bureau].

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The material scope of Article 15, which deals with powers of representation in case of incapacity, must be understood in a broad and autonomous sense. The question is important for Switzerland, since Swiss law does not have any rules on mandates in case of incapacity [...] However, this institution includes the so-called "représentant thérapeutique", who is responsible for making the necessary medical decisions in case the patient becomes incapable of discernment [...] Article 15 of the Convention could thus provide Swiss private international law with a precise rule of conflict which is currently missing [...] **One question that needs to be addressed is the scope and exercise of the powers of the health care proxy.** In the absence of legal rules, the situation is unclear in Swiss law. Admittedly, the therapeutic representative can only act within the framework of the protection of the patient's interests, and this according to the patient's **instructions and wishes.** [emphasis added]

Relevant extracts from Katja Karjalainen, *Strengthening the Right to Personal Autonomy and Protection of Vulnerable Adults: from Human Rights to Domestic and European legislation on Voluntary Measures*, K. Karjalainen et al. (eds.), *International Actors and the Formation of Laws*, 2022

Voluntary measures offer an essential means of supporting capacity in the area of law concerning the protection of adults whose decision-making capacity has diminished as they contribute to protecting individuals' personal autonomy and right to self-determination: in other words, a person's ability to govern his or her life choices. **Depending on the jurisdiction involved, these voluntary measures are referred to as, inter alia, private mandates, continuing powers of attorney (in Finnish *edunvalvontavaltuutus*, and in Swedish *framtidensfullmakt*), springing powers of attorney and advance directives.**³⁰

The Convention also addresses many of the thorniest cross-border problems relating to voluntary measures. Article 15 covers the choice of applicable law that determines 'the existence, extent, modification and extinction of powers of representation granted by an adult, either under an agreement or by a unilateral act, to be exercised when such adult is not in a position to protect his or her interests'. The article recognizes an adult's right to have his or her own previously expressed wishes respected in cross-border situations [...]

Relevant extracts from Tito Ballarino, *Is a Conflict Rule for Living Wills and Euthanasia Needed?*, *Yearbook of Private International Law*, Volume 8 (2006), pp. 5-26

²⁹ Article 20.

³⁰ Voluntary measures are determined as follows in the review of CM/Rec(2009)11: powers of attorney, advance directives, representation agreements, supported decision-making arrangements, co-decision-making arrangements, advocacy arrangements where the advocate is chosen by the person represented and all other measures established by people to be supported by such measures themselves, as contrasted with involuntary measures imposed by a court, tribunal, authority or other mechanisms, including by operation of law, rather than by the people subject to such measures themselves. See Ward (2017), p. 12

It is certainly possible under the Convention to petition a Court to enforce the advance directive, but it is unclear whether an administrative institution, like a health care organisation or a private physician, will perform *de plano* the advance directive.

During the *travaux préparatoires*, the question of medical treatment was discussed and some delegates pointed out that allowing excessive freedom of choice to grant the power of representation may lead to a shameful 'euthanasia shopping.' But, this risk hardly seems actual in light of the real meaning of euthanasia in the conflict of laws and the need to regulate it through the subject's decisive law.

The core of the Convention is the control of the power of representation, in view of an adult's protection. The advance directive meets these requirements insofar as the incapacitated patient, who has laid down the directive in an appropriate and careful manner, becomes certain that the person who is going to make decisions for him will have the power to protect him. But, an advance directive does not necessarily imply a power of representation given to a decision-maker.

Relevant extracts from European Law Institute, *European Commission's Public Consultation on the Initiative on the Cross-Border Protection of Vulnerable Adults*, 2022

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It is open to debate whether Article 15 of the Convention refers to continuing powers of attorney only. One could argue that Article 15 of the Hague Convention could be interpreted to include advance directives. **Indeed, it could be argued that, despite the wording of Article 15, which refers to 'powers of representation granted by agreement of unilateral act', the provision was intended to apply to all private measures taken by the adult in advance in the event that he or she loses mental capacity.** Such an interpretation would have to be derived from the Hague Convention itself, as its interpretation is to be made autonomously. If the interpretation of the Hague Convention was to lead to the conclusion that Article 15 applies to all private measures, the Hague Convention would be considered to (already) provide for a choice-of-law rule with regard to advance directives. This conflict-of-laws rule could become a unified European choice-of-law rule if the EU were to authorise its Member States to ratify the Hague Convention on the basis of Article 216 TFEU (above, Part 1H).