

<b>Title</b>	Application of the 2000 Protection of Adults Convention to <i>ex lege</i> representation
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<b>Agenda Item</b>	Item IV
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<b>Objective</b>	To provide information based on the text of the 2000 Protection of Adults Convention, its Explanatory Report and the history of the negotiations with regard to the application of the Convention to <i>ex lege</i> representation and the findings of the 2000 Convention Practical Handbook Working Group in that respect
<b>Action to be Taken</b>	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"/>
<b>Annexes</b>	Annex I – Material from the April 1997 Working Group Annex II – Material from the September 1997 Special Commission Annex III – Material from the September-October 1999 Special Commission with a Diplomatic Character
<b>Related Documents</b>	N/A

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# Application of the 2000 Protection of Adults Convention to *ex lege* representation

## I. Introduction

1. During the drafting of the Practical Handbook on the Operation of the 2000 Protection of Adults Convention, the Working Group (WG) acknowledged the importance of giving as much clarity as possible to the concept of *ex lege* representation in the application of the *Convention of 13 January 2000 on the International Protection of Adults* (“2000 Protection of Adults Convention” or “2000 Convention”). To do this, it is essential to consider the discussions that took place regarding this issue during the negotiation of the 2000 Convention<sup>1</sup> as well as the explanations provided by Paul Lagarde in the Explanatory Report on the Convention.
2. During the negotiations of the 2000 Protection of Adults Convention, the question of whether *ex lege* representation falls within the scope of the Convention was often raised during discussions on the possible exclusion of the effects of marriage under Article 4. While they were discussed simultaneously, it should be noted that *ex lege* representation and the effects of marriage are two distinct issues. There was debate among the delegates regarding the exclusion of the effects of marriage under Article 4 of the Convention. However, “the [Special] Commission rejected all proposals seeking to exclude them.”<sup>2</sup>
3. This decision of the Special Commission was taken in light of domestic law examples of *ex lege* representation arising from marriage, aimed at the protection of the ailing partner. These examples led the most reluctant delegates to accept that *ex lege* representation related to the effects of marriage ought to be included in the 2000 Convention, insofar as they are aimed at the protection of the ailing partner. The Special Commission also rejected a proposal to provide, in the Convention, a rule determining the law applicable to *ex lege* representation. As a result, Paul Lagarde, in the Explanatory Report, elaborates that while the 2000 Convention does not include a specific provision on *ex lege* representation, it applies in principle to such representation, when it is aimed at protecting the adult, notably where such representation arises as a consequence of a marriage:<sup>3</sup>

“[A]ny restriction on the capacity of an adult or even on the free disposal of his or her rights can only be the result of a measure of protection. One will not find, therefore, in the Convention a provision equivalent to those which, in the 1996 Convention<sup>4</sup>, determine the law applicable to the attribution or to the extinction of parental responsibility by operation of law. The Commission rejected a proposal by the Finnish and Swedish delegations to apply to the *ex lege* representation of the adult the law of his or her habitual residence. The practical example was that of the representation by operation of law of one spouse by the other in order to take medical decisions after an accident plunging the former into a coma. So this question is not regulated by the Convention, even though it falls within its scope as a consequence of the marriage [...].”<sup>5</sup>

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<sup>1</sup> The negotiation of the 2000 Protection of Adults Convention took place from April 1997 until October 1999. The negotiations of the Convention started with the meeting of a Working Group on the protection of adults from 14 until 17 April 1997 (see Annex I for material resulting from the work of the Working Group relevant to *ex lege* representation). The negotiations continued with the meeting of the Special Commission on the Protection of Adults from 3 until 12 September 1997 (see Annex II for material resulting from the work of the Special Commission relevant to *ex lege* representation). The text of the 2000 Convention was concluded during the Special Commission with a diplomatic character on the Protection of Adults which took place from 20 September until 2 October 1999 (see Annex III for material resulting from the work of the Special Commission with a Diplomatic Character relevant to *ex lege* representation). See HCCH, *Proceedings of the Special Commission with a diplomatic character of September – October 1999, Protection of Adults*, The Hague, SDU, 2003 (hereinafter, “SC with a diplomatic character”).

<sup>2</sup> P. Lagarde, *Explanatory Report on the Protection of Adults Convention – New and Revised Edition*, The Hague, 2017, at p. 50, para. 35.

<sup>3</sup> *Ibid.*, at p. 69, para. 90.

<sup>4</sup> *Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* (hereinafter, “1996 Protection of Children Convention” or “1996 Convention”).

<sup>5</sup> *Ibid.*

4. *Ex lege* representation refers to “[...] powers, similar to some of those which might otherwise be derived from a [continuing power of attorney] or guardianship order, [that] are conferred by operation of law, usually upon a specified relative, without any procedure beyond establishment of relevant incapacity”.<sup>6</sup> Such representation exists in many States. *Ex lege* representation may arise from a marriage or similar relationship but may, in some jurisdictions, also arise in other contexts.
5. This being said, during the negotiations of the 2000 Convention and during the course of the work of the WG on the Practical Handbook, the issue of *ex lege* representation was primarily discussed as an effect of marriage. In this context, *ex lege* representation arises by operation of domestic law alone.<sup>7</sup> It is to be noted that representation of the spouse can be superseded and / or supplemented by a measure of protection through a decision of a competent authority, thus falling under Article 3 of the Convention.<sup>8</sup> It is also possible for an *ex lege* representation to be superseded and / or supplemented by a power of representation through explicit provisions (e.g., in a marriage contract), thus falling under Article 15 of the 2000 Convention.<sup>9</sup>
6. *Ex lege* representation may also arise from family relationships. For example, Article 378 of the Swiss Civil Code provides that, in the medical field, in the absence of advance directives from the adult, certain relatives, including in particular parents and siblings, are entitled to represent the adult lacking capacity, and sets out the order in which they are to be taken into account. The Portuguese Penal Code<sup>10</sup> provides that, in the case of an abortion, the vulnerable person must be represented by the legal representative, ascendant or descendant or, in their absence, by any collateral relatives. The Latvian Law on the Rights of Patients also provides that, with regard to medical decisions, the closest relative of the adult may take such decisions on their behalf in the following order: the children of the adult, their parents, siblings, their grandparents or their grandchildren.<sup>11</sup>
7. Although there is no explicit provision to this effect in the Convention, nothing in the 2000 Convention prevents *ex lege* representation arising in one State from being given effect in another. *Ex lege* representation may also be part of domestic applicable law which can be mandatory.

## II. Interpretation of HCCH Conventions

8. The interpretation of HCCH Conventions is subject to public international law interpretation rules, including those found in the *Vienna Convention of 23 May 1969 on the Law of Treaties*. Specifically, Articles 26 and 31 of the Vienna Convention provide that treaties should be performed and interpreted in good faith in the light of their 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.
9. 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 ~~thet is well-accepted that all HCCH- Conventions~~ should be “interpreted having regard to ~~its[their]~~ autonomous nature and in the light of ~~[their]its~~ objects”.<sup>12</sup>

<sup>6</sup> A. Ward, *Enabling Citizens to Plan for Incapacity: A review of follow-up action taken by member states of the Council of Europe, Recommendation CM/Rec(2009)11 on principles concerning continuing powers of attorney and advance directives for incapacity*, Council of Europe, 2018, at p. 11.

<sup>7</sup> See Art. 374 of the Swiss Civil Code.

<sup>8</sup> See Art. 376 of the Swiss Civil Code and Art. 219 of the French Civil Code.

<sup>9</sup> See, *infra*, Sub-section C. Article 15 - Powers of representation.

<sup>10</sup> See Art. 142 of the Portuguese Penal Code.

<sup>11</sup> See Art. 7(1) of the Latvian Law on the Rights of Patients.

<sup>12</sup> 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)” drawn up by the Permanent Bureau, C&R No 4.1, available on the HCCH website at [www.hcch.net](http://www.hcch.net), under “Child Abduction Section” then “Special Commission Meetings”.

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”.<sup>13</sup> The interpretation of the 2000 Convention is supported by the Explanatory Report<sup>14</sup> 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 Session<sup>15</sup> at which the Convention was adopted are also publicly available, as are reports of meetings of the Special Commission,<sup>16</sup> and to some extent reports of Working Groups,<sup>17</sup> 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.](#)<sup>18</sup>

### III. Provisions of the 2000 Convention relevant to *ex lege* representation and related explanations from the Explanatory Report

10. A review of the relevant provisions of the 2000 Convention and related explanations from the Explanatory Report will provide more guidance.<sup>19</sup>

#### A. Article 1 – Objects of the Convention

- “(1) This Convention applies to the protection in international situations of adults who, by reason of an impairment or insufficiency of their personal faculties, are not in a position to protect their interests.<sup>[20]</sup>
- (2) Its objects are – [...]
- c) to determine the law applicable to representation<sup>[21]</sup> of the adult; [...]
- e) [...].”

11. Paragraph 1 “indicates at the outset that the object of the Convention is the *protection* of certain adults. This idea of protection serves as guide and yardstick for defining the scope of application of the Convention. As we will see in connection with Article 4, this means that a measure taken by the authority of a State falls or does not fall within the scope of the Convention depending on whether it is or is not aimed at the protection of adults.”<sup>22</sup>
12. Sub-paragraph c) “give[s] notice of the provisions of Chapter III on applicable law. By mentioning in the first Article the determination of the law applicable to representation of the adult, the

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<sup>13</sup> Art. 53 of the *Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance*.

<sup>14</sup> See P. Lagarde (*op. cit. note 2*).

<sup>15</sup> See SC with a diplomatic character (*op. cit. note 1*).

<sup>16</sup> [\*ibid.\* 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](#)

<sup>17</sup> [See Working Group on the Protection of Adults, \*supra\*, note 1. 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.](#)

<sup>18</sup> [Art. 32 of the Vienna Convention.](#)

<sup>19</sup> Where relevant, references will be made to the work of the 1997 Working Group (Annex I), the 1997 Special Commission meeting (Annex II) and the 1999 Special Commission with a diplomatic character (Annex III).

<sup>20</sup> During the 1999 Special Commission with a diplomatic character, Paul Lagarde explained that effects of marriage which do not relate to the protection of partner will be left aside by the simple operation of the general limitation set out in Art. 1, para. 1 (see Annex III, para. 9).

<sup>21</sup> When considering the need for a Convention on the protection of adults, the idea was to take inspiration from the 1996 Protection of Children Convention (in terms of structure and the legal mechanisms provided), using it as a foundation for the creation of an instrument directed at the protection of adults. As a result of a discussion led by Peter Beaton that took place in the Working Group of April 1997 it was decided that, from a technical point of view, it was necessary to have a functional equivalent to the principle of parental responsibility of the 1996 Protection of Children Convention for the 2000 Convention. Therefore, there are provisions that deal with the representation of the adult in the Convention (see Annex I, para. 4).

<sup>22</sup> See P. Lagarde (*op. cit. note 2*), at p. 43, para. 8.

Convention shows that the relevant rule (Art[s 15 and 16]) will be a conflict of laws rule and not a simple rule of recognition.”<sup>23</sup>

## B. Article 4 - Matters excluded from the scope of the Convention

“(1) The Convention does not apply to – [...]

b) the formation, annulment and dissolution of marriage or any similar relationship, as well as legal separation;

c) property regimes in respect of marriage or any similar relationship; [...]”

13. “This Article enumerates certain matters or questions which are excluded from the scope of the Convention. Unlike that of Article 3, which includes the adverb ‘in particular’, this enumeration is exhaustive. Any 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.”<sup>24</sup>
14. “The exclusions set out in Article 4 have justifications which are different, one from the other. Some have to do with the fact that the matter excluded is already regulated by other conventions or that the rules of the Convention, in particular the failure to distinguish in principle between the *forum* and the *right*, would not be suitable. As for other exclusions, which touch on public law, it did not seem possible to impose on the Contracting States, in matters which touch on essential interests (criminal law, immigration), a treaty restraint on their jurisdiction.”<sup>25</sup>
15. “The exclusion of marriage is justified by the wish to avoid a conflict with the Convention of 14 March 1978 on Celebration and Recognition of the Validity of Marriages<sup>[26]</sup>. Article 11, No 4, of this Convention allows a Contracting State not to recognise the validity of a marriage if, under its law, one of the spouses did not have the mental capacity to consent. The inclusion of marriage within the new Convention would oblige this State to recognise the validity of such a marriage if it had been concluded pursuant to a protective measure conforming with it, which would contradict the 1978 Convention.”<sup>27</sup>
16. “The Convention treats ‘similar relationships’ on a par with marriage in order to exclude them from its scope. Although not naming them, it intended this expression to mean the officially recognised forms of union, whether heterosexual or homosexual, such as registered partnership in the legislation of Nordic States and the Netherlands or the solidarity civil covenant (*‘pacte civil de solidarité’* – “PACS”) which has since been introduced into French law.”<sup>28</sup>
17. “The exclusion covers the formation, annulment or dissolution of the union and also, in the case of marriage alone, legal separation. The Convention will therefore not apply to whether a mentally incapacitated person may or may not contract a marriage, or to whether an incapacity arising or belatedly revealed in one of the spouses can be a ground for the annulment or dissolution of the marriage.”<sup>29</sup>
18. “On the other hand, the Convention does apply to the effects of marriage and similar relationships. The Commission rejected all proposals seeking to exclude them.<sup>[30]</sup> Indeed, it appeared that all the rules governing relations between partners and particularly the representation between partners independently of the applicable matrimonial property regime, ought to be included in the Convention *insofar as they are aimed at the protection of the ailing partner*.<sup>[31]</sup> In the contrary case, the exclusion results from Article 1, paragraph 1. Hence, the authorisation a partner may request of a court to represent his or her partner not in a position to indicate his or her wishes (Art. 219 of French Civil Code) is a protective measure within the meaning of the Convention, as it is directed towards the ailing partner. On the other hand, the authorisation which the healthy partner requests

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<sup>23</sup> *Ibid.*, at p. 45, para. 13.

<sup>24</sup> See P. Lagarde (*op. cit.* note 2), at p. 49, para. 29.

<sup>25</sup> *Ibid.*, para. 31.

<sup>26</sup> See Annex I, para. 7.

<sup>27</sup> See P. Lagarde (*op. cit.* note 2), at p. 49, para. 33.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*, at p. 50, para. 34.

<sup>30</sup> The Special Commission rejected all proposals seeking to exclude them (see Annex III, para. 3) but also all the proposals seeking to include them explicitly (see Annex II, para. 1).

<sup>31</sup> See Annex III, para. 14.



of a court for the purpose of alone entering into a transaction for which the assistance of his or her partner would be necessary (Art. 217, French Civil Code) serves the interests of the healthy partner or of the family, but not those of the ailing one. It thus lies outside the scope of the Convention as defined by Article 1, paragraph 1. Similarly, the rules on the attribution of family accommodation are not aimed at the protection of the incapacitated partner and are thus in principle excluded from the scope of the Convention. But the decision by which a court would use these rules with a view, in a specific case, to the protection of that partner, should be considered as a measure of protection within the meaning of the Convention. <sup>[32]</sup><sup>33</sup>

19. “The exclusion of matrimonial property regimes seemed natural because of the existence of the Convention of 14 March 1978 on the law applicable to Matrimonial Property Regimes. For the sake of consistency, it is extended to ‘any similar relationship’. The inclusion in the Convention of the effects of marriage and the exclusion of matrimonial property regimes will give rise to a characterisation problem familiar from legal systems in which these two categories are subject to different connecting factors. Here this problem of characterisation appears to be very limited however as the rules of representation between partners falling under the matrimonial property regime are, in theory, aimed at the functioning of the regime, while it may be presumed that those concerned with the protection of the ailing partner fall under the effects of marriage.”<sup>34</sup>

### C. Article 15 – Powers of representation

- “(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. <sup>[35]</sup>
- (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.”

### D. Article 20 – Mandatory laws

20. Article 20 of the 2000 Convention provides the following:
- “This Chapter does not prevent the application of those provisions of the law of the State in which the adult is to be protected where the application of such provisions is mandatory whatever law would otherwise be applicable.”
21. The provision in Article 20 was included in the Convention with the medical field particularly in mind. Article 20 provides for the possibility of applying mandatory laws of the State in which the adult is to be protected. It 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.<sup>36</sup>

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<sup>32</sup> This passage from the Explanatory Report on the Protection of Adults Convention is the result of discussions that took place during the 1999 Special Commission with a diplomatic character (See Annex III, paras 6 *et seq.*).

<sup>33</sup> See P. Lagarde (*op. cit.* note 2), at p. 50, para. 35.

<sup>34</sup> *Ibid.*, at p. 50, para. 36.

<sup>35</sup> During the 1997 Special Commission meeting, the delegation of Finland made the proposal to explicitly include powers of representation which arose by operation of law in the Art. 15 (see Annex II, para. 1). Even if the final vote on this proposal was against such explicit inclusion, this passage is proof that the subject of *ex lege* representation was raised several times during the negotiations and that delegates were cautious on this issue. In addition, this issue was also discussed during the 1999 Special Commission with a diplomatic character (see Annex III, para. 10)

<sup>36</sup> See P. Lagarde (*op. cit.* note 2) **Error! Bookmark not defined.**, at pp. 77-78, para. 113. An example of this is Section 1358 of the German Civil Code (valid from 1 January 2023).

22. The Explanatory Report elaborates on one of the most common examples of such mandatory laws, namely the representation of the adult in healthcare matters:

“The exception for mandatory laws of the State in which the adult is to be protected was introduced with the medical field especially in mind. In particular, it was a counterweight to the possibility given to the adult of choosing the law applicable to the powers of representation. The delegation of the Netherlands instanced a Dutch law, which it regards as a mandatory law, which lays down specific forms of representation of the adult in medical matters, which derogate from the common law rules of guardianship and curatorship. Accordingly, it is the spouse who represents the patient for admission to a psychiatric hospital or geriatric clinic,<sup>[37]</sup> even if this patient has a guardian or curator. The same law requires the representative to obtain authorisation before any confinement. By excluding mandatory laws, the Commission wished to permit States having issued such rules to implement them in their own territory, even if the adult’s protection has been arranged according to another law. Although at the end of its session the Commission deleted the reference to the medical field, in conformity with the general decision already indicated (No 42 above), Article 20 will frequently be applied in medical matters and should make it possible to regulate the bulk of the problems encountered in this field during the negotiations.”<sup>38</sup>

#### IV. Proposal of the Permanent Bureau, with the assistance of the Working Group with regard to *ex lege* representation in the Practical Handbook on the operation of the 2000 Protection of Adults Convention

23. In the light of the provisions found in the 2000 Convention, the *Proceedings* of the HCCH on the Protection of Adults and the explanations of the *Rapporteur* on that work, the WG tasked with the drafting of a Practical Handbook on the Operation of the 2000 Convention summarised the application of the 2000 Convention to *ex lege* representation as follows:

~~3.55-3.56~~ *Ex lege* representation is not, as such, a measure of protection under Article 3 because it is not put in place by a competent authority, nor is it a power of representation under Article 15 because it has not been granted by the adult. *Ex lege* representation is a representation that arises by operation of law, for which there is no specific conflict rule in the Convention.<sup>39</sup> While there is no provision in the Convention that deals with *ex lege* representation *per se*, such representation, ~~whether or not it arises in the case of a marriage,~~ falls under the scope and object of the Convention by virtue of Article 1 when it is aimed at the protection of adults who, by reason of an impairment or insufficiency of their personal faculties, are not in a position to protect their interests (Art. 1(1)). Additionally, *ex lege* representation may be, by analogy and where appropriate, subject to the applicable law which determines the representation of the adult (Art. 1(2)(c))<sup>40</sup> or the subject of co-operation between the authorities of Contracting Parties (Art. 1(2)(e)).<sup>41</sup> Competent authorities will give effect to them according to their own domestic legislation, mindful of the fact that, as a matter of general international law, the States parties to a treaty are expected to perform it and interpret it in good faith and should accordingly refrain from acts that would frustrate the object and purpose of the treaty.<sup>42</sup> It is, however, important to note that a number of States may provide mandatory laws that require the authorisation of the spouse (*i.e.*, a spouse covered by the marital *ex lege* representation) or next of kin for certain

<sup>37</sup> According to practice, this is a typical example of an *ex lege* representation.

<sup>38</sup> See P. Lagarde (*op. cit.* note 2), at pp. 77-78, para. 113.

<sup>39</sup> It is to be noted that a person with *ex lege* representation may also be the representative of the adult, either under Art. 3 when the person with *ex lege* representation is designated as a representative by a competent authority or Art. 15 where the person with *ex lege* representation is appointed as a representative by the adult under a power of representation.

<sup>40</sup> ~~More generally, nothing in the Convention excludes the application of Art. 15, for instance, by analogy to *ex lege* powers of representation, as it is already the case in some States.~~

<sup>41</sup> See P. Lagarde (*op. cit.* note 2), at p. 50, para. 35 and at p. 69, para. 90.

<sup>42</sup> ~~More generally, nothing in the Convention excludes the application of Art. 15, for instance, by analogy to *ex lege* representation, as it is already the case in some States. See, *supra*, note 40.~~



medical treatments for the adult or their placement in a health institution. These mandatory laws, which fall under Article 20 of the Convention, may cover *ex lege* representation issues.”<sup>43</sup>

24. It is hoped that the First Meeting of the Special Commission to review the practical operation of the 2000 Protection of Adults Convention will agree with this summary.

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<sup>43</sup> Revised draft Practical Handbook on the Operation of the 2000 Protection of Adults Convention, at para 3.56.

## **ANNEXES**

## Annex I

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

1. When considering the need for a Convention on the protection of adults, the idea was to take technical inspiration from the 1996 Protection of Children Convention and use it as a foundation for the creation of an instrument directed at the protection of adults. It should, however, be noted that, although the starting point for the development of a future instrument on the protection of adults was based in child law, there is an important distinction to be made between these two very different areas. On this idea, the Government of Switzerland submitted to the Permanent Bureau a draft text on the protection of adults based on the 1996 Convention, in terms of structure and the legal mechanisms provided.
1. In April 1997, the Working Group worked on an article-by-article review of the 1996 Convention together with the Swiss draft.<sup>1</sup>
2. About the Articles 16-18 of the 1996 Convention:
 

“Articles 16-18 - Parental responsibility by operation of law

These Articles have been omitted from the Swiss draft. If medical decisions are included within the scope of the Convention, however, will there be a need to take into consideration provisions which give spouses, certain relatives or doctors authority to make a decision on the spot when the person in question cannot make it?” [emphasis added]
3. On the 15 April 1997, the Expert of the United Kingdom submitted a proposal suggesting finding a functional equivalent of “parental responsibility” of the 1996 Convention (Work. Doc. No 4).
 

“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".

[...] 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”.” [emphasis added]
4. The Working Group was also given a copy of the Report by Dr Eric Clive, prepared at the request of the Council of Europe which was examining the desirability of drafting a European instrument to protect incapable adults.<sup>2</sup> The Report was produced in connection with the work of the Group of Specialists on Incapable and other Vulnerable Adults which was set up in 1995 by the European Committee on Legal Co-operation (CDCJ). In his Report, Dr Clive identified the control of powers arising by operation of law as an important principle concerning the legal protection of incapable adults.

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<sup>1</sup> Draft checklist for the Working Group meeting on Protection of Adults to be held from 14-17 April 1997 at the Permanent Bureau.

<sup>2</sup> Dr E. Clive, *Report on incapable and other vulnerable adults*, prepared at the request of the Council of Europe, (Document of January 1997), in SC with a diplomatic character (*op. cit.* note 1 of the Prel. Doc.), at p. 10. Reference was made to that 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 Dr Eric Clive was the Chair of the Special Commission with a diplomatic character on the Protection of Adults.

“Part V - Principles relating to the role of representatives, family members and carers

Principle 15- Control of powers arising by operation of law

1. Consideration should be given to the need to limit or control any powers conferred on any person by operation of law, without the intervention of a judicial or administrative authority, to act or take decisions on behalf of an incapable or other vulnerable adult.

2. The conferment of any such powers should not deprive the incapable or other vulnerable adult of legal capacity.

3. There should be an adequate system whereby the exercise of such powers can be investigated and supervised in any case of suspected abuse.

4. Any such powers should be capable of being restricted or superseded at any time by a measure of protection taken by a judicial or administrative authority.

5. Principles 11 to 14 apply to the exercise of such powers as they apply to the implementation of measures of protection.”<sup>3</sup>

5. Even at the beginning of discussions in April 1997, when drafting the list of Article 4 of excluded matters from the Convention, the Working Group considered the necessity of including powers arising by operation of law, thus *ex lege* representations, within the scope of the Convention.

6. As explained in the Summary Report of the Working Group Meeting:

“The third main area discussed under Article 4 concerns matrimonial property regimes. Some domestic laws contain provisions concerning representation between spouses. Such a power of representation may result from a decision of an authority, which is the case of the "primary regime" of French law, or directly from the law.

Here again there is a risk of overlap with the 1978 Hague Convention on Matrimonial Property Regimes. This Convention, in its Article 1, paragraph 3, excludes capacity from its scope. And it is established that the "primary regime" of French law is not covered by this Convention either.

There seems to be agreement to expressly exclude matrimonial property regimes from the Convention in Article 4. However, there is still some hesitation about a possible provision in Article 16. It is envisaged that Article 16 might specify that the Convention respects the solutions resulting from the law applicable to matrimonial property regimes. This clarification is aimed at domestic laws which provide for rules of representation between spouses without the intervention of an authority.”<sup>4</sup> [emphasis added] [translation by the Permanent Bureau]

<sup>3</sup> Dr E. Clive (*op. cit.* note 2 of this Annex), at p. 27.

<sup>4</sup> Summary Report of the Working Group Meeting with a view preparing the Special Commission on the protection of adults (14- 17 April 1997), at p. 3.

## Annex II

### Minutes of the Special Commission on the Protection of adults (3-12 September 1997)

1. The Expert of Finland presented the Working Document No 26 (Work. Doc. No 26).

**“Proposal of the delegation of Finland**

*Article 13: Replace paragraph 1 with:*

1 The existence, content and extinction of powers of representation by the operation of law is governed by the law of the State of the habitual residence of the adult.

2 The existence, content and extinction of powers of representation under a specific agreement or unilateral act, which are in relation to an adult not in a position to protect his or her interests is governed by the law of the State of the adult's habitual residence at the time when the agreement or unilateral act was made, unless another applicable law has been chosen in accordance with the following paragraph.”

“He noted that his proposal included reference to the applicable law of powers of representation which arose by operation of law[emphasis added]. Furthermore, in an attempt at simplification it also introduced a distinction between the existence, content and extinction of powers of representation. The word 'content' therefore replaced the exercise' of powers. Several experts voiced their support for this latter change.

A short debate followed on the issue of whether powers of representation which arose *ex lege* could indeed arise independently of a decision being taken on the status of the adult. It was noted that there could possibly be such cases, for example where an adult was in a coma and his relatives were then able to act on his behalf. However, it was decided to leave this question to one side pending further information as to the precise position which existed in Member States. [...]

A vote was then taken on paragraph 1 of Working Document No 26 (Finland) as to whether there should be a measure providing for powers of representation arising *ex lege*.

7 votes were cast in favour, 15 against, with 5 abstentions.”<sup>1</sup>

2. As explained in the Lagarde Report on the Preliminary draft of the Convention, “the exclusion of the effects of marriage in Article 4b make this provision unnecessary”.<sup>2</sup>

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

3. About Article 4, Sub-paragraph c (matrimonial property regimes)<sup>3</sup>:

“34 The exclusion of matrimonial property regimes seemed natural because of the existence of the Convention of 14 March 1978 on the law applicable to Matrimonial Property Regimes. It is also consistent with the exclusion of the effects of marriage and makes it possible to avoid problems of classification between a matter relating to the effects of marriage and a matter concerning matrimonial property regimes.

One expert nevertheless pointed out that this exclusion could give rise to a conflict between protection under the general law, covered by the Convention, and rules of administration arising from the matrimonial property regime (or from the '*régime primaire*'), which would be excluded.

<sup>1</sup> Report of Meeting of Tuesday 9 September 1997, afternoon (No 11), at pp. 2-3.

<sup>2</sup> See SC with a diplomatic character (*op. cit.* note 1 of the Prel. Doc.), at p. 115, para. 83.

<sup>3</sup> *Ibid.*, at p. 99, para. 34.

If two spouses are separated de facto and are living in two different Contracting States, and the husband wishes to enter into a transaction for which the consent of his wife is necessary, but she is not in a condition to give her consent, a conflict will arise between the rules of the matrimonial property regime, which could allow the husband to obtain authorisation from a court to enter into the transaction alone, 15 and those of the general law, which might result in the placing of the wife under a protective regime.” [emphasis added]



## Annex III

### Minutes of the Special Commission with a diplomatic character on the protection of adults (September – October 1999)

1. During the Meeting of 20 September 1999 (afternoon)<sup>1</sup>, the delegation of Switzerland submitted a proposal (Work. Doc. No 9<sup>2</sup>) about the Article 4 of the Preliminary draft Convention adopted by the Special Commission on the protection of adults on 12 September 1997.
2. It was proposed to complete the subparagraph c) “matrimonial property regimes” with “and other rights and obligations arising out of marriage or similar institutions, like partnerships”.
3. During the Meeting, Mr. Bucher (delegate of Switzerland) added to the proposal the need to extend the exclusion of matrimonial property regimes to other effects of marriage.

“Mrs Jänterä-Jareborg (Sweden) [...] was hesitant to support the addition as proposed by Switzerland as a risk existed that situations would be excluded where a spouse due to marriage possessed an ex lege right to take action on behalf of an incapacitated spouse.”

Mrs Baur (France) associated herself with the intention expressed by the delegate of Sweden not to include the other effects of marriage among the matters excluded from the scope of the Convention, since some of those effects might concern the representation of a spouse declared incapable. It would therefore be preferable to keep them within the scope of the Convention.” [emphasis added] [translation by the Permanent Bureau]

4. Mr. Lagarde (Reporter) explained:

“Thus, the word “marriage” was chosen by the Convention as referring not only to the celebration of the union itself, but also to “the state of marriage”, including all its effects, such as the primary regime. Article 4, sub-paragraph b), should therefore be amended to specify that only the celebration of the marriage is excluded, its effects remaining expressly included in the scope of the Convention.” [emphasis added][translation by the Permanent Bureau]”

5. In the final version of the Article 4, the subparagraph b) is worded as follows: “b) the formation, annulment and dissolution of marriage or any similar relationship, as well as legal separation;” as recommended above by Mr Lagarde.

6. However, according to Mr. Bucher:

“As the representation of an incapable spouse is not a “measure” within the meaning of the Convention, its exclusion from the scope of the Convention would be appropriate. He recalls that, according to the original conception, the term “marriage” was indeed intended to allow for a much broader exclusion than the mere celebration of the union or the primary regime alone. He therefore suggests that the wording of sub-paragraph c) should be perfectly explicit as to the exclusion of all effects of marriage.” [translation by the Permanent Bureau]

“The Chairman noted that the question turned on the word “marriage” in sub-paragraph b) and whether it covered only the formation or also the effects of marriage. He stated that some of the effects of marriage were dealt with in sub-paragraph c) and that it was arguable that sub-paragraph b) should only cover the formation. He wondered whether an indicative vote would be helpful.”

“Mr Bucher (Switzerland) observed that it seemed to him regrettable to proceed immediately to a vote on the substance of Article 4, sub-paragraph b), when the discussion of the provision contained in sub-paragraph c) could possibly shed light on the content of the previous provision.

<sup>1</sup> See Minutes No 2, in SC with a diplomatic character (*op. cit.* note 1 of the Prel. Doc.), pp. 227-229.

<sup>2</sup> *Ibid.*, p. 155.

First, it must be made clear whether certain effects of marriage can be covered by the Convention, in particular representation between spouses. On this last point, Mr Bucher considers that there is no protective measure within the meaning of the Convention. He also points out that the rules of jurisdiction are not adapted to this question. Indeed, the main jurisdictional criterion used is the habitual residence of the "adult", without any further specification. The question arises as to which adult is concerned within the married couple. This difficulty arises because the provisions were not drafted with such situations in mind. Therefore, agreement must first be reached on the substantive purpose of the Convention, before deducing the express exclusion or inclusion of the effects of marriage through the provision in sub-paragraph b) or in another framework, such as sub-paragraph c)." [emphasis added] [*translation by the Permanent Bureau*]

7. In response, Mr. Lagarde referred to the problem raised previously by Mr. Bucher who wondered, in the case of representation of an adult by their spouse, about the protective purpose of such an institution, within the meaning of the Convention. The question was whether such representation truly serves the interests of the impaired spouse.
8. According to him, the answer must undoubtedly be qualified. To illustrate this point, Mr. Lagarde took two examples from French law showing that representation between spouses sometimes, but not always, ensures the protection of the impaired spouse. In his view, this variation according to the cases prevents such a question from being systematically placed outside the scope of the Convention.<sup>3</sup>
9. As a result, several opinions were expressed:

"Mr. Danielsen (Denmark) supported the proposal that the preliminary draft Convention should not apply to marital status and its effects."

"Mr. Helin (Finland) explained that legal systems existed whereby was possible for a spouse or near relative to represent others by operation of the law. They had recently changed the law to include *ex lege* representation in response to the Bioethics Convention of the Council of Europe. For example, if a patient was not able to give informed consent, then consent of another was needed. He felt that it would be important to take such situations into account when forming applicable law that such *ex lege* representation be covered by this preliminary draft Convention.

The Chairman said that answers were needed to two questions. First, whether the legal effects of marriage should be excluded from the scope of the Convention. Secondly, whether the references to marriage should be extended to marriage-like relationships.

Mr Bucher (Switzerland) firstly expressed concern about the insecurity caused by the lack of exclusion of the effects of marriage. He proposed postponing the decision on that subject for a while, in order to come back to it when other provisions were discussed, even if that step backwards might seem delicate, since he feared that some delegations might not clearly perceive the practical scope of the inclusion that they wanted. He recalled that the rules of the draft Convention had not been conceived in this sense, which might in practice give rise to difficulties, particularly as regards representation between spouses. It therefore seems more prudent to leave this question open for the time being." [emphasis added]

Mr Lagarde (Reporter) considers that only the celebration of marriage, and not all its effects, should be expressly excluded from the scope of the Convention. By the simple operation of the general limitation set out in Article 1, paragraph 1, those effects of marriage which are inappropriate will be left aside, but conversely the effects of marriage of a specific nature which correspond well to the object of the present Convention will remain within its scope insofar as

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<sup>3</sup> SC with a diplomatic character (*op. cit.* note 1 of the Prel. Doc.).

they may be relevant for the protection of adults.” [emphasis added] [*translation by the Permanent Bureau*]

10. On the 21 September 1999, the delegations of Finland and Sweden submitted a proposal (Work. Doc. No 29<sup>4</sup>) about the Article 13 of the Preliminary draft Convention adopted by the Special Commission on the protection of adults on 12 September 1997.
11. It was proposed to add a new paragraph: “1. The existence, extent and extinction of powers of representation by operation of law is governed by the law of the State of the habitual residence of the adult.”
12. According to the delegate of Finland,

“ [...] the purpose of this proposal was to bring to the attention of the Commission the fact in certain States in matters of health there were powers of representation arising by operation of law.”

“Mr Lagarde (Reporter) observed that the Finnish proposal had already been discussed in the Special Commission and had been rejected because it had been pointed out that the powers of representation by operation of law in favour of the capable spouse came under the effects of marriage, a field which was then excluded from the Convention. Mr Lagarde points out that if the effects of marriage, other than the matrimonial regime, are now included in the scope of the Convention, the current text undoubtedly contains a gap.

Mr Lagarde therefore felt that the drafting of a rule was undoubtedly necessary but wondered whether it was justified. He wondered whether a doctor practising in a country whose legislation contained a rule on legal representation could legitimately be obliged to request authorisation to act from the authorities of the country of the adult's habitual residence, on the pretext that such a rule on representation did not exist in the law of the latter country.

Mr Bucher (Switzerland) said that the question of whether the effects of marriage were included or excluded from the scope of the Convention had not been decided but should be taken up again in the discussion of Chapter III. In his view, if the effects of marriage were to be included in the scope of the Convention, the elaboration of a rule could be envisaged, if it was supplemented by provisions relating to mobile conflict, as was the case in the 1996 Convention for Article 16, together with 3 and 4.” [emphasis added] [*translation by the Permanent Bureau*]

13. During the Meeting of 22 September 1999 (afternoon), the proposal was put to a vote and was rejected, with 3 votes in favour, 10 against and 9 abstentions.<sup>5</sup>
14. During the Meeting of 23 September 1999 (afternoon)<sup>6</sup>, the discussions again focused on the Work. Doc. No 9 submitted by the delegation of Switzerland (see above).

“Mr Bucher (Switzerland) [...] still proposes to exclude the effects of marriage, except in one case, that of representation by a spouse of their spouse to be protected, whether this representation is *ex lege* or whether the spouse is declared to have priority as curator or guardian. The illustration given during the previous discussion, where a spouse is no longer able to provide for themselves, is reasonably subject to the Convention, according to Mr Bucher, even though this exception does not appear in Working Document No 5 because it had not been noticed when it was drafted. On the other hand, the other effects of marriage would not be covered by the Convention. Thus, taking the same example, he considers that if it is a question of deciding on the allocation of housing, following the designation of the spouse as representative, the Convention does not apply, but that the competent law will be that of the State in whose territory the property is situated.

<sup>4</sup> *Ibid.*, p. 160.

<sup>5</sup> *Ibid.*, pp. 263-264.

<sup>6</sup> *Ibid.*, pp. 274-282.

Mr Lagarde (Reporter) points out that another approach than the one proposed by Mr Bucher is possible for the situation, frequent in practice, of the representation of a patient between spouses. He had already stated this during the previous discussion on this subject. This approach consists in keeping the effects of marriage within the scope of the Convention but leaving under its control only those few measures that are genuinely directed towards the incapable person himself, by virtue of Article 1, paragraph 1. Thus, in the above example, the fate of the family home is not a genuine measure for the protection of the incapable person within the meaning of the Convention. The Reporter recognises that this requires a case-by-case interpretation, but a case-by-case approach is in any case required as the situation of a sick adult is always specific.” [emphasis added] [*translation by the Permanent Bureau*]

15. The delegate of Germany “agreed with the suggestion by the Reporter that the normal representation of a spouse *ex lege* was not within the scope of the Convention”.<sup>7</sup>

“Mr Bucher (Switzerland) [...] therefore accepted the interpretation proposed by the Reporter and the delegate of Germany that if the measure in question was not directed at the ill spouse, then it was excluded from the scope of the Convention on the basis of Article 1, paragraph 1. He was concerned, however, that the list of exclusions in Article 4 was therefore misleading, as it referred to "marriage", "legal separation" and "divorce". However, if one reads only this text, and not the detailed Report on the interpretation of Article 1, paragraph 1, one risks simplistically including all the effects of marriage within the scope of the Convention, and not only the relevant question of representation between spouses. He considers that there is a fortiori no point in mentioning it explicitly in the list in Article 4 if the matter is already excluded in some other way. He was satisfied with this [...], confirmed the withdrawal of the proposal made by the delegation of Switzerland.” [emphasis added] [*translation by the Permanent Bureau*]

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<sup>7</sup> *Ibid.*, p. 276.