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Title	**Advance Directives within the scope of the 2000 Protection of Adults Convention**
Document	**Prel. Doc. No 6 of April 2022**
Author	PB with the assistance of the Working Group on the development of a draft Practical Handbook on the 2000 Convention
Agenda item	TBD
Mandates	C&R No 34 of the 2019 CGAP; C&D No 31 of the 2020 CGAP; C&D No 26 of the 2021 CGAP
Objective	To provide information regarding the inclusion of advance directives within the scope of the 2000 Convention based on the text of the 2000 Protection of Adults Convention, the history of the negotiations and the work on the development of a draft Practical Handbook on the 2000 Convention. Members are invited to provide comments **before 10 June 2022** by writing to secretariat@hcch.net and indicating "PD No 6 comments [name of State]" in the subject line. Comments received after 10 June 2022 will not be taken into account.
Action to be taken	For Approval ☐ For Decision ☐ For Action ☒ For Information ☐
Annexes	- Annex I: Relevant extracts from academic discourse on the topic of the inclusion of advance directives within the scope of the 2000 Convention. - Annex II: Relevant extracts from the study commissioned by the UN Special Rapporteur on the rights of persons with disabilities. - Annex III: Work. Doc. No. 41 F (Document submitted by the delegation of Canada for information (translation by the Permanent Bureau)) - Annex IV: Research report on discuss ions of advance directives during the initial drafting and subsequent negotiations of the 2000 Protection of Adults Convention - Annex V: Work. Doc. No. 4 (Proposal submitted by the Expert of the United Kingdom: A functional equivalent to "parental responsibility")
Related documents	Prel. Doc. No 4 of February 2022 – Draft Practical Handbook on the Operation of the 2000 Protection of Adults Convention

Executive Summary

This Preliminary Document (Prel. Doc.) arises from the work of the Working Group (WG) tasked with the development of the Practical Handbook on the Operation of the 2000 Protection of Adults Convention ("2000 Practical Handbook"). During this process, the WG questioned whether it was clear that advance directives fall within the scope of the *Hague Convention of 13 January 2000 on the International Protection of Adults* ("2000 Protection of Adults Convention" or "2000 Convention") and, if so, whether and to what extent advance directives can be considered powers of representation under Articles 15 and 16. In response to these questions, the WG agreed to assist the Permanent Bureau (PB) of the Hague Conference on Private International Law (HCCH) with preparing this Prel. Doc. for the purposes of facilitating discussions on this matter at the 2022 Special Commission on the practical operation of the 2000 Protection of Adults Convention.

First and foremost, it is important to note that one of the main objectives of the 2000 Convention is to promote the autonomy and protection of adults falling within its scope through rules of private international law and cooperation mechanisms. Like all iterations of powers of representation, advance directives are a direct and accurate reflection of the wishes, will and preferences of the adult. They are, therefore, an important aspect of the self-determination and protection of adults.

Given the diverse regulation and treatment of advance directives across jurisdictions, it would be useful that the 2000 Convention in general, and Articles 15 and 16 in particular, be interpreted in the most broad and permissive way possible to cover all such advance directives. Such a liberal interpretation is especially desirable when it comes to the type and form of documents issued by an adult in order to communicate their instructions, wishes and preferences in anticipation of a time during which their personal faculties are insufficient or impaired. Differing views across jurisdictions as to whether advance directives fall under Articles 15 and 16 of the Convention could lead to a lack of uniform application of the 2000 Convention and could, thus, potentially result in legal uncertainty and lack of predictability in cross-border situations. This, in turn, could be detrimental to the interests of the adult and to their right to self-determination, which would be contrary to the object and purpose of the 2000 Convention.

As this Prel. Doc. will explain, in the interests of cross-border legal certainty and predictability, there appears to be no reason to warrant a restrictive approach to the inclusion of advance directives within the scope of the 2000 Convention. The open language of the Convention suggests that a broad and liberal interpretation could include advance directives. Additionally, the flexible and open language of Articles 15 and 16 lends itself to an all-encompassing interpretation of the term "powers of representation", which could include advance directives.

In the light of the aforementioned, the text of the Explanatory Report as well as the 2000 Practical Handbook and the history of the negotiation of the 2000 Convention, the PB submits the following preliminary draft conclusions and recommendations to the Special Commission for discussion:

1. The 2000 Convention should be interpreted having regard to its autonomous nature and in the light of its objects.
2. In the interpretation of the 2000 Convention, regard shall be had to its international character and to the need to promote uniformity in its application.
3. As a general rule, if they are consistent with Article 3 and not excluded by Article 4, advance directives, as well as (continuing) powers of attorney, fall within the scope of the 2000 Convention.
4. An advance directive which has been confirmed may be the subject of a certificate under Article 38 to be delivered to the person entrusted with the protection of the person or property of the adult.

5. In the interest of legal certainty and predictability and in order to promote a uniform application of the 2000 Convention across jurisdictions, advance directives are covered by Articles 15 and 16 because, in one way or another, they may be or are being acted upon in accordance with the applicable law.[1]
6. In case of doubt or a legal dispute, the appreciation of whether or not a particular type or form of advance directive is to be included within the scope of Articles 15 and 16 should be undertaken by competent authorities on a case-by-case basis.
7. A Country Profile would be extremely helpful in bringing to the attention of interested parties the various types and forms of advance directives in different jurisdictions and, when necessary, the publicity measures that can help foreign actors to get informed about them.

[1] See, *infra*, paras 40 – 41.

I. Introduction

1. At the beginning of the work on drafting the Practical Handbook on the Operation of the 2000 Protection of Adults Convention ("2000 Practical Handbook"), some members of the Working Group (WG) questioned whether it was clear that advance directives fall within the scope of the *Hague Convention of 13 January 2000 on the International Protection of Adults* ("2000 Protection of Adults Convention" or "2000 Convention") and, if so, whether and to what extent advance directives can be considered powers of representation under Articles 15 and 16. While some Contracting Parties may be of the view that advance directives fall within the scope of the 2000 Convention, others may have a different view, resulting in a non-uniform application of the Convention and giving rise to legal uncertainty and unpredictability.[1] Including the instructions and wishes of an adult (*i.e.*, advance directives) under the scope of the 2000 Convention would be desirable for the most effective fulfilment of the object of the Convention that applies to adults who, by reason of an impairment or insufficiency of their personal faculties, are not in a position to protect their interests, and whose dignity and autonomy are to be primary considerations.

2. During their discussions, the WG agreed that the cross-border circulation of advance directives is 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 with regard to the history of the negotiations, including the intent of the negotiators, in order to ascertain whether advance directives fall under 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. This paper will briefly elaborate on the scope of the 2000 Convention before presenting legal as well as practical considerations regarding the inclusion of advance directives therein. This document will then provide some background to the negotiations of the 2000 Convention, followed by briefly outlining the evolution of Articles 15 and 16. In doing so, this paper aims to facilitate discussions at the 2022 Special Commission on the practical operation of the 2000 Protection of Adults Convention regarding the inclusion of advance directives within the 2000 Convention.

II. Definitions

A. "Power of representation"

4. The term "power of representation" is an autonomous concept developed by the 1997 Drafting Committee for the purposes of Articles 15 and 16 of the 2000 Convention. A "power of representation" is to be understood as a document (unilateral act or agreement) which enables the adult to plan, in advance, how they want to be supported in the exercise of their legal capacity and autonomy when such adult is not in a position to protect their interests. The Explanatory Report suggests that a way in which the adult may exercise this self-determination is "[…] 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". It should be noted that, while this may oftentimes be the case, the text of

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[1] This statement is based on existing academic doctrine. See, *infra*, para 34.

the Convention itself does not mention any requirement of designation of a particular representative or assistant.[2]

B. "Power of attorney"

5. Dr. Eric Clive, in the "Report on incapable and other vulnerable Adults"[3] prepared at the request of the Council of Europe,[4] defines a "power of attorney" as follows:

> "A power of attorney is simply a power or authority granted by one person (the granter or donor or *mandant* or principal) to another (the attorney or donee or mandatary or agent) authorising the attorney to act on behalf of the granter. The scope of the power or authority depends on the terms of the grant or mandate which confers it."[5]

C. Continuing power of attorney

6. 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"

7. "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 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 may or may not identify a particular individual or group of individuals who may be called upon to provide assistance to the adult.[10] If a particular individual or group of individuals is identified in the advance directive, this could include, for instance, a representative appointed through a measure of protection, an attorney acting under a (continuing) power of attorney, other individuals, in accordance with the applicable law, such as medical staff who may treat or assist the adult, social workers or any other person who may take actions affecting the adult or who may assist the adult.[11]

8. Many States provide for advance directives in their domestic law, for example through legislation concerning the protection of incapacitated adults, legislation on (continuing) powers of attorney, or legislation regarding health matters. Depending on the applicable law, some advance directives may be legally binding while others may be wishes which must be

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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), at para 95. See, *infra*, paras 30 and 38.

3 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 10 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.

4 In the light of recent or proposed legislation in the area at the time, the purpose of the Report was to "study and make proposals which could be accepted at European level on […] the notion of incapable adults and the scope of incapacity; […] a legal set of principles applicable to the protection (including assistance) of incapable adults in the personal and economic sphere and the field of medical interventions; […] [the] representation of incapable adults: the role of close family members, legal representatives and carers." See, *infra*, note 25.

5 The Clive Report, at page 17 of Proceedings.

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 Council of Europe, *Recommendation CM/Rec(2009)11 on principles concerning continuing powers of attorney and advance directives for incapacity*), see Explanatory Memorandum, para 64.

taken into consideration.[12] Although advance directives are not, *stricto sensu*, wills, the term "living will" is commonly used in some domestic laws to describe both the binding instructions and the wishes to be taken into account in matters of health. Generally, 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 for the purposes of publicity. In some States, advance directives may also be registered within a health insurance policy. Generally, the law of these States may make it mandatory for medical practitioners treating the adult to consult, where necessary, these public registries or health insurance policies.[13]

9. 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] Like continuing powers of attorney, advance directives may take different forms. In addition to taking the form of either an agreement or unilateral act, advance directives may or may not be witnessed and may or may not be notarised.

III. Interpretation of Hague Conventions

10. The interpretation and application of Hague 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.

11. In the context of the 1980 Child Abduction Convention, Contracting Parties to the Convention have concluded and recommended that the Convention should be "interpreted having regard to its autonomous nature and in the light of its objects".[15] Furthermore, the 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".[16] The First Meeting of the Special Commission on the practical operation of the 2000

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

[13] For example, in Switzerland, the adult who issues an advance directive (referred to as a "patient decree" 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 Swiss CC). 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, *Recommendation CM/Rec(2009)11 on principles concerning continuing powers of attorney and advance directives for incapacity*), see Explanatory Memorandum, para 14. It is important to note that "decisions" can relate to legal as well as healthcare matters.

[15] 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".

[16] Art. 53 of the *Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance*.

Convention could conclude and recommend the same interpretation principles for this Convention.

12. The interpretation of the 2000 Convention is supported by an Explanatory Report[17] 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[18] at which the Convention was adopted are also publicly available, as are reports of meetings of the Special Commission,[19] and to some extent, reports of Working Groups, charged with the development of a preliminary draft Convention text for the purpose of the Diplomatic Session.[20] These supplementary interpretation materials are part of the T*ravaux Préparatoires.*[21]

IV. Do advance directives fall under the scope of the Convention?

A. Documents taken into account when developing the 2000 Convention

13. 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 preliminary documents drafted by experts in the area, in order to provide the necessary context for discussions. One of those preliminary documents was a Report prepared by Dr. Eric Clive on "incapable and other vulnerable adults".[22] In his Report, Dr. Eric Clive highlighted the paramountcy of the interests and welfare of the person concerned as a fundamental principle that must underline a draft instrument in this area.[23] 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 directions"[24] should be taken into account, in accordance with Article 9 of that Convention.[25] He also pointed to the wishes and feelings of the person concerned as another fundamental principle to be respected. As mentioned above, advance directives are defined as the instructions given or wishes made by an adult regarding the ways in which they prefer to be supported in the event of an impairment of their personal faculties.

14. 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".[26] While he acknowledged the fact that "advance arrangements" require varying levels of legal regulation, he stressed that, in light of the "great deal of consideration [that] has been given

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17 *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).

18 See "*Special Commission with a diplomatic character on the* Protection of Adults", *supra* note 3.

19 See "Special Commission on the Protection of Adults", *supra* note 3.

20 The Working Group on the protection of adults met from 14 to 17 April 1997.

21 Art. 32 of the Vienna Convention.

22 See, *supra*, note 3.

23 The Clive Report 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 tasked with, among other things, making proposals to the CDCJ "with a view to the drafting of an international instrument (convention or recommendation) […]". Although it is unclear whether it was intended for such a draft instrument to include provisions of private international law, what is important to note about the Clive Report and the suggestions made therein is that there was an interest, at the international level, in developing an instrument facilitating and supporting the self-determination of vulnerable adults.

24 The Clive Report, at page 21 of Proceedings.

25 Article 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."

26 The Clive Report, at page 17 of Proceedings, para 3.16.

to continuing powers of attorney […] it may be useful to say something more about them […]”.[27]

B. Understanding of the proceedings

15. In 1999, during the Special Commission with a Diplomatic Character, in the light of the discussions that took place and the examples given, it appears that it was understood that advance directives fall within the scope of the Convention. Due to the fact that this was a rather uncontroversial matter for delegations at the time, no explicit decision was taken to this effect. Certainly, no decision was taken to exclude them. A Working Document prepared by the Canadian delegation[28] explains that a “*mandat d’incapacité*” in the province of Quebec may sometimes include “advance directives”.[29] The 2000 Convention was drafted taking this document, among others, into consideration. It is apparent from this document that an advance directive which accompanies a document establishing (continuing) powers of attorney falls within the scope of the 2000 Convention.[30]

16. During the negotiations, 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.[31] 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 would be in conflict with a domestic provision of law the application of which is mandatory (Art. 20).[32] Delegates were in agreement that this provision of the Convention sufficiently addresses any concerns regarding the cross-border effect of end-of-life directives. Extracts of these interventions can be found in Annex IV of this document.[33]

C. Analysis of Articles 3 and 4 as to matters included and excluded from the scope of the 2000 Convention

17. Article 4 of the 2000 Convention 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”, the enumeration in Article 4 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.[34]

18. Several of the measures listed under Article 3 of the 2000 Convention could involve decisions regarding the healthcare of the adult[35] and Article 4 only excludes “public measures of a general nature in matters of health”,[36] making no mention of agreements or

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27 *Ibid*. See paras 31-38 below for additional discussion on the Clive Report and advance directives falling within the scope of the 2000 Convention.

28 Doc. Trav. 41 F. See Annex III for versions in French and English.

29 See Annex IV, paras 31 – 33.

30 In this regard, the inconsistency and unpredictability that would result from the inclusion of one type of advance directive and the exclusion of another or the inclusion of advance directives by some Contracting Parties and the exclusion by others must be highlighted.

31 See Annex IV, 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 powers of attorney) that would fall within the scope of the Convention.

32 *Ibid*., paras 45 – 49.

33 See Annex IV, paras 50 - 51.

34 The Explanatory Report, para 29. It is to be noted that the only type of legal agreement that could include measures directed to the protection of the person or property of the adult which is excluded from the scope of application of the 2000 Convention is one regarding “trusts” (Art. 4(1)(d)). As a result, advance directives that would be in the form of an agreement and include measures directed to the protection of the person or property of the adult would come within the scope of the 2000 Convention. Furthermore, it is to be noted that the only type of unilateral legal act that could include measures directed to the protection of the property of the adult after their death, which is excluded from the scope of application of the 2000 Convention, is one concerning “successions” (Art. 4(1)(d)). As a result, advance directives that would be in the form of a unilateral act and include measures directed to the protection of the person or property of the adult would come within the scope of the 2000 Convention

35 Art. 3(a), (d), (e) and (g).

36 Art. 4(1)(f).

unilateral acts by the adult regarding their individual health / medical preferences. By comparison, it is interesting to note that during the Seventh Special Commission on the 1980 and 1996 Conventions in 2017, it was decided that "private agreements between parents on parental responsibility", which were not provided for by the domestic law of all Contracting Parties, fell within the scope of the 1996 Convention "through the application of the rules on applicable law, if consistent with Article 3 and not excluded by Article 4".[37]

19. In addition, 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.[38] With this in mind, it stands to reason that any instructions given or wishes made by the adult regarding their preference for or refusal of certain medical treatments should fall within the scope of the 2000 Convention.

20. Article 3(d) provides that the Convention applies to measures dealing with "the designation and functions of any person or body having charge of the adult's person or property, representing or assisting the adult". The language is open with regards to who may be considered a representative or assistant of the adult and the extent of such representation / assistance. For example, an adult may issue an advance directive (standalone or accompanying a (continuing) power of attorney) wherein nobody in particular is named. However, an individual close to the adult (*e.g.,* a relative or a friend) would like to ensure that the instructions and wishes elucidated in the advance directive issued by the adult are accurately followed. If the substantive domestic law so provides and unless another person has already been identified for this purpose, a competent authority could appoint this person, in accordance with Article 3(d), to represent or assist the adult in accordance with the advance directive.[39]

D. The Council of Europe's 2009 Recommendation regarding continuing powers of attorney and advance directives

21. The Preamble of the Council of Europe's 2009 Recommendation regarding "principles concerning continuing powers of attorney and advance directives for incapacity"[40] reads as follows [emphasis added]:

> "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); […]"[41]

22. By including a reference to the 2000 Convention in the Preamble, it can be construed 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 continuing powers of attorney and advance directives.

23. Additionally, 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.[42]

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[37] Conclusion and Recommendation No 32 of the Seventh Meeting of the Special Commission on the Practical Operation of the 1980 Child Abduction Convention and the 1996 Child Protection Convention, 2017 provides the following: "The Special Commission recalls that private agreements between parents on parental responsibility (*i.e.*, parental agreements) do fall under the scope of the Convention through the application of the rules on applicable law, if consistent with Article 3 and not excluded by Article 4. Such parental agreements cannot be subject to the rules on recognition and enforcement, unless they have been confirmed or approved by a competent authority, or have been subject to an act of a similar nature by a competent authority with a view to giving such agreements force of law […]".

[38] See Annex IV, paras 1 - 5.

[39] If advance directives were to be covered by Articles 15 and 16, this will provide certainty and predictability as to which law would be applicable to their existence, extent, modification and extinction.

[40] Council of Europe, *Recommendation CM/Rec(2009)11 on principles concerning continuing powers of attorney and advance directives for incapacity*

[41] *Ibid.*, at page 7.

[42] *Ibid.*, see Explanatory Memorandum, para 20.

24. 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)[43], (b)[44] and (c)[45] as well as Articles 5[46] and 12[47] of the UNCRPD.

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

25. 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 *United Nations Convention of 13 December 2006 on the Rights of Persons with Disabilities* (UNCRPD).[48] 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.[49] In order to solve this issue, the study recommends, *inter alia*, that the HCCH develop a protocol to the 2000 Convention on the matter.[50] 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.[51]

V. Articles 15 and 16 of the 2000 Convention

26. The question that follows is whether advance directives fall within the meaning of the term "powers of representation" and thus, within the scope of Articles 15 and 16.

27. Articles 15 and 16 concern the question of applicable law regarding the existence, extent, modification and extinction of powers of representation[52] 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.[53] 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.[54]

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

[44] Non-discrimination.

[45] Full and effective participation and inclusion in society.

[46] Article 5(1) UNCRPD: "States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law."

[47] Equal recognition before the law.

[48] 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 II. It is interesting to note that A. Ruck Keene is also a contributing author in *The International Protection of Adults*, *supra* note 66, wherein he stated that advance directives do not fall within the scope of powers of representation under Articles 15 and 16.

[49] *Ibid*., at pages 7 and 8. See relevant extracts in Annex II.

[50] *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 II.

[51] *Ibid*., at page 13. See relevant extracts in Annex II.

[52] [See Practical Handbook on the Operation of the 2000 Protection of Adults Convention, Annex I for further guidance on the interpretation of the term "powers of representation".]

[53] The Explanatory Report, para 96.

[54] The Explanatory Report, para. 98.

28. The applicable law rules outlined in Article 15 govern the cross-border effect to be given to such powers of representation.[55] 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 which may be designated by the adult.[56] Article 15(3) covers the manner of exercise of the powers of representation conferred by an adult, which is subject to the law of the State in which they are to be exercised.[57] Article 16 allows the competent authorities that have jurisdiction under the Convention to withdraw or modify[58] the powers of representation conferred by the adult by virtue of Article 15[59] in cases where those powers are "not exercised in a manner sufficient to guarantee the protection".

29. In certain jurisdictions, for the powers of representation under Article 15 to come into effect, the intervention by a competent authority may be required in order to assess the capacity of the adult.[60]

30. It is important to note that Article 15 does not say anything with regard to the designation of a representative. This flexibility provides the adult with the possibility to name one or more specific representatives or to leave the representation to any person who will be in charge of taking care of and assisting the adult, in accordance with the law applicable.[61]

A. History of the 2000 Convention: The evolution of Articles 15 and 16

1. Preliminary work on the Protection of Adults and negotiations

31. The Report prepared by Dr. Eric Clive on "incapable and other vulnerable adults" which was presented to experts tasked with the development of a preliminary draft Convention text, for the purposes of the 1999 Special Commission with a diplomatic character, provided them with a general idea of how divergent the forms of agreements or unilateral acts for the protection of adults can be. Therein, several types of "powers" were listed, such as powers of attorney, continuing powers of attorney, advance directions in the health field, welfare powers, springing powers as well as powers of family members and carers.[62] 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 powers of representation are "[…] intended to cover any power to take decisions for or on behalf of the incapable adult".[63] Delegations agreed with the suggestion of Mr. Beaton.

2. Drafting stage and negotiations

32. During the initial drafting stages of the 2000 Convention in 1997, the Drafting Committee developed a new neutral term "powers of representation", most probably in order to include every possible powers and to avoid referring to concepts that have already been defined in

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[55] Powers of representation are documents which 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 which are limited to decisions made by competent authorities or, in the context of the 2000 Convention, measures taken by competent authorities.

[56] The Explanatory Report, 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."

[57] Art. 15(3). See also The Explanatory Report, at paras 99 and 106.

[58] The modification might, for example, consist of introducing surveillance of the person to whom powers of representation were conferred.

[59] The Explanatory Report, para. 108.

[60] The Explanatory Report, para. 96.

[61] See, *supra*, note 41.

[62] The Clive Report, at pages 17-18 of Proceedings.

[63] See Annex V for the full proposal made by the Expert of the United Kingdom.

the different national laws.[64] It appears that the intent may have been to include all analogous concepts under the single umbrella term of "powers of representation" as suggested by Mr. Peter Beaton during the discussions of the 1997 meeting of the Working Group,[65] to ensure the broadest possible coverage which would stand the test of time with regards to legislative evolution in the area.

3. The final outcome: Articles 15 and 16

33. The provisions that regulate the law applicable to powers of representation were drafted in stages. After contributions from several delegations, the language currently appearing in Articles 15 and 16 was produced.[66] 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 Article 13) to become what is now Article 15. What is now Article 16 is a more elaborated version of the rules surrounding the withdrawal or modification of powers of representation (old Article 15), but the essence of the provision has remained the same.[67]

B. Are advance directives covered by Articles 15 and 16?

34. There seem to be differing academic opinions on this matter. In one publication, an author is of the view that advance directives do not fall within the scope of powers of representation under Articles 15 and 16.[68] The author of another publication asserts that advance directives fall within the scope of powers of representation under Articles 15 and 16 when they are combined with or part of a (continuing) power of attorney.[69] However, the author does not appear to indicate whether they are excluded from these Articles if they are not combined or part of a (continuing) power of attorney (*i.e.*, if they are standalone). Another author is of the view that advance directives fall within the scope of powers of representation under Articles 15 and 16 regardless of the circumstances.[70]

35. Following detailed discussions during the work on the draft Practical Handbook on the Operation of the 2000 Protection of Adults Convention it appears that advance directives may fall within the scope of the term "powers of representation" under Articles 15 and 16, when, in one way or another, the instructions and wishes of the adult may be or are being acted upon, in accordance with the applicable law.

36. Article 15(1) may be applicable to advance directives, as they could determine the extent of the assistance that could be provided to the adult or the extent of the powers that could be exercised for the adult in light of their instructions and wishes. The provisions of modification or withdrawal may be necessary when it comes to advance directives that are not being adhered to effectively by the person named therein or if the instructions and wishes expressed by the adult are no longer in their interests.

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64 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 concepts within their domestic legal frameworks. The Practical Handbook on the Operation of the 2000 Protection of Adults Convention also espouses these definitions.

65 See, *supra*, para. 13.

66 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).

67 See Annex IV, paras 6 – 13.

68 See R. Frimston and A. Ruck Keene in R. Frimston, A. Ruck Keene, C. Van Overdijk and A. Ward, *The International Protection of Adults*, Oxford University Press, 2015, pp. 72 and 165 - 168, at Part I, Chapter 6, para 6.52, and Part II, Chapter 9, paras 9.39 – 9.42. See relevant extracts in Annex I.

69 See I. 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, p. 58. See relevant extracts in Annex I.

70 G. 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. See relevant extracts in Annex I.

37. Article 15 does not address the formal and substantial validity of the agreement or unilateral act. Therefore, advance directives, regardless of their form (*e.g.*, witnessed or not, notarised or not), may fall within the scope of the 2000 Convention and be covered by Articles 15 and 16.

38. A competent authority may be seised in order to take a decision on certain aspects of the advance directive (*e.g.,* the person who may act upon it or the manner in which it is to be exercised). It may be important for a competent authority called upon to intervene in this regard to determine, in accordance with Article 15, the law applicable to the existence, extent, modification and extinction of the advance directive, *i.e.,* the law of the habitual residence of the adult at the time of the act or the applicable law that the adult has designated expressly in writing.[71] It should be noted that, even though a competent authority may take a decision regarding a certain aspect of the advance directive (*e.g.,* the designation of a person who may act upon it in accordance with Art. 3(d)), this does not mean that the advance directive will become a measure and fall under Article 3. In such cases, the advance directive would remain a power of representation to which Articles 15 and 16 apply.[72]

C. Summary

39. As mentioned earlier,[73] Articles 15 and 16 make no reference to the concept of a "representative".[74] This open language lends itself to an all-encompassing interpretation of the term "powers of representation" which may be addressed to one or several specific individual(s) named therein or may be addressed to nobody in particular. There is nothing in the reports of the Drafting Committee, the Working Documents submitted by delegations, the *Travaux Préparatoires* or in the Proceedings of the Special Commission with a diplomatic character that would lead one to conclude otherwise.

VI. Practical implications regarding the inclusion or exclusion of advance directives from the scope of Articles 15 and 16 of the 2000 Convention

40. Advance directives, like all types of powers of representation, are a way for the adult to exercise their autonomy and ensure the respect of their dignity. If kept up-to-date, they represent an accurate depiction of the instructions, wishes, will and preferences of the adult. If there were to be different views from one State to another as to whether advance directives fall under Articles 15 and 16 of the Convention, this could lead to legal uncertainty and lack of predictability in cross-border situations. This, in turn, could be detrimental to the interests of the adult and to their right to self-determination, which goes against the object and purpose of the 2000 Convention. This section provides some practical examples to illustrate that the inclusion of advance directives within the scope of Articles 15 and 16 of the Convention would lead to legal certainty and predictability.

41. Practically speaking, any advance directive which accompanies a document establishing (continuing) powers of attorney would be the most straightforward to deal with, as they fall squarely within the scope of Articles 15 and 16 of the 2000 Convention. However, when faced with a standalone advance directive which, unilaterally or by express agreement, identifies one or more persons, competent authorities may need to verify whether the document confers powers which fall within the scope of Articles 15 and 16.

42. A document granting a (continuing) power of attorney to a particular representative may be accompanied by an advance directive which identifies nobody in particular. In the event of the death of the representative designated in the document granting (continuing) powers of attorney, the powers granted to the now deceased representative would become extinct. The advance directives will now stand alone but may remain relevant for the protection of the

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[71] Art. 15(3). See also The Explanatory Report, at paras 99 and 106.

[72] This is not to be confused with seising a competent authority to confirm an advance directive for the purposes of Article 38. Depending on the State concerned, the confirmation of a power of representation may or may not be a measure falling under Article 3.

[73] See, *supra*, para. 30.

[74] See, *supra*, para 20. See, also, para 9.10 of 2000 Practical Handbook.

interests of adult. The general instructions given or wishes made by the adult should not be disregarded simply because the (continuing) powers of attorney have become extinct. If the applicable law allows for the advance directive to remain valid following the extinction of the accompanying (continuing) power of attorney falling under the Convention, it could be desirable for the Convention to continue applying to this advance directive which is now standing alone.

43. If a standalone advance directive identifying nobody in particular has been, in one way or another, made accessible to those who need to be aware of the instructions and wishes of the adult, the question may arise (perhaps before a competent authority) as to who must act upon it, in accordance with the applicable law.[75] The individual(s) concerned may be considered and appointed as either the representative(s) of the adult or the individual(s) that can assist the adult. Alternatively, a competent authority could appoint another person in this regard, in accordance with the applicable law.[76]

44. An advance directive registered in a public registry or found in 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.

45. Additionally, if advance directives were excluded from the scope of the Convention from the outset, but later a specific advance directive becomes the subject of a decision taken by a competent authority (thus bringing them within the scope of Article 3), this would be a rather inconsistent outcome which could lead to unpredictability.

46. It should also be kept in mind that any advance directives regarding subject matters which go against the public policy of jurisdictions in which they are to be exercised (*e.g.*, euthanasia) will fall under the public policy exception under Article 21 of the Convention.

VII. Conclusions and Recommendations

A. Final remarks

47. Advance directives promote the self-determination and autonomy of adults who come under the scope of the 2000 Convention. They enable capable adults to make and effectively communicate decisions they have taken about their lives, in anticipation of a period during which they may be incapable of doing so. Like all iterations of powers of representation, such documents (if they are kept up-to-date) are a direct and accurate reflection of the will and preferences of the adult. Advance directives, therefore, are 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.

48. Although the regulation and treatment of advance directives will differ from jurisdiction to jurisdiction, a blanket exclusion of advance directives from the scope of the Convention may lead to discrimination, uncertainty and unpredictability. It could preclude a more nuanced approach involving the careful consideration of each advance directive on its own merits prior to concluding whether or not any given type of advance directive is operational for the purposes of the Convention.

49. In this document, the PB has endeavoured to highlight that advance directives, in one way or another, will come under the scope of the 2000 Convention:

- If they accompany documents establishing (continuing) powers of attorney, they would fall under the scope of Articles 15 and 16 and, if confirmed, could be mentioned in a certificate under Article 38. In that case, it should be noted that it is the (continuing)

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[75] See, *supra*, note 41.
[76] See, *supra*, note 41.

power of attorney which confers the powers, not the advance directive which accompanies it.

- If they are standalone and identify a particular person or specific persons, they fall under Articles 15 and 16, even if their form differs from that of a (continuing) power of attorney and they do not necessarily confer a legal mandate for decisions to be taken on behalf of the adult but instructions with regards to their assistance. They could also be the subject of a certificate under Article 38 under the condition that a competent authority has confirmed them together with the empowerment of a person identified therein.
- If they identify nobody in particular, they may also fall under Articles 15 and 16 because, in one way or another, the instructions and wishes of the adult may be or are being acted upon, in accordance with the applicable law.
- If they are registered in a public registry or are included in the health insurance policy of the adult, persons in a foreign State who may act upon such advance directives would be alerted to the existence of such a scheme by consulting the Country Profile of the State where the adult habitually resides or the State where the adult is insured. It may be very difficult to have access to the advance directive unless the adult has a copy with them.

50. In the light of the above information and analysis and with a view to provide as much breadth as possible to the interpretation of the 2000 Convention in the interests of cross-border legal certainty and predictability, there appears to be no reason to warrant a restrictive approach to the inclusion of advance directives within the scope of the Convention. Given the history of the negotiations, it can be said that the Drafting Committee intended that the text of a Convention which ultimately aims to facilitate, through private international law rules, the autonomy of adults whose personal faculties have been impaired, should be interpreted as broadly and liberally as possible. The open language of the Convention suggests that such an interpretation could include advance directives.

51. As it appears from Proceedings of the Special Commission of a diplomatic character,[77] by introducing the term “powers of representation”, the intention of the 2000 Convention Drafting Committee was to ensure that all unilateral acts and agreements enabling the adult to plan, in advance, how they want to be supported or assisted in the event of an impairment or insufficiency of their personal faculties (*e.g.,* (continuing) powers of attorney, private mandates and as has been explored in this document, advance directives) fall under Articles 15 and 16 of the Convention. With a view to respect this intention of the 2000 Convention Drafting Committee, it is important that the term “powers of representation” is interpreted as broadly as possible. Given the flexible language of Articles 15 and 16, the inclusion of every type of anticipatory act thereunder would be far more practical and efficient than making an assessment to that effect on a case-by-case basis.[78]

52. The 2000 Convention should be interpreted in the most broad and permissive way possible with regards to the type and form of documents issued by an adult in order to communicate their instructions, wishes and preferences in anticipation of a time during which their personal faculties are insufficient or impaired.

53. Realising that different jurisdictions will have divergent perspectives on the inclusion of the various types and forms of advance directives under Articles 15 and 16 of the Convention, with a view to increase legal certainty and predictability, the Special Commission is invited to give due consideration to stating clearly, in its Conclusions and Recommendations, that all advance directives fall under Articles 15 and 16 of the Convention. In that respect, for the purposes of the interpretation of the 2000 Convention, regard shall be had to its international character and to the need to promote uniformity in its application.

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[77] See, *infra*, Annexes III and IV.

[78] See, *supra*, para 44.

54. It is hoped that this document will lead to a fruitful discussion at the 2022 Special Commission on the practical operation of the 2000 Protection of Adults Convention.

B. Preliminary draft conclusions and recommendations

55. In the light of the aforementioned, the text of the Explanatory Report as well as the Practical Handbook and the history of the negotiation of the 2000 Convention, the PB submits the following preliminary draft recommendations to the Special Commission for discussion:

1. The 2000 Convention should be interpreted having regard to its autonomous nature and in the light of its objects.
2. In the interpretation of the 2000 Convention, regard shall be had to its international character and to the need to promote uniformity in its application.
3. As a general rule, if they are consistent with Article 3 and not excluded by Article 4, advance directives, as well as (continuing) powers of attorney, fall within the scope of the 2000 Convention.
4. An advance directive which has been confirmed may be the subject of a certificate under Article 38 to be delivered to the person entrusted with the protection of the person or property of the adult.
5. In the interest of legal certainty and predictability and in order to promote a uniform application of the 2000 Convention across jurisdictions, advance directives are covered by Articles 15 and 16 because, in one way or another, they may be or are being acted upon in accordance with the applicable law.[79]
6. In case of doubt or a legal dispute, the appreciation of whether or not a particular type or form of advance directive is to be included within the scope of Articles 15 and 16 should be undertaken by competent authorities on a case-by-case basis.
7. A Country Profile would be extremely helpful in bringing to the attention of interested parties the various types and forms of advance directives in different jurisdictions and, when necessary, the publicity measures that can help foreign actors to get informed about them.

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[79] See, *supra*, paras 40 – 41.

ANNEXES

Annex I

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.[81] 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 treatment[82] are not addressed expressly within Hague 35. It is suggested that they cannot fall within the definition of a Protective Measure.[83] 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).[84] 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;[85] 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,[86] 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,[87] and it could therefore be seen to fall within the broad definition of a power of representation.

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[81] 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

[82] 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).

[83] 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.

[84] *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.

[85] Hague 35, Article 15(1).

[86] Paragraph 96.

[87] 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.

- 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 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.[88]
- 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,[89] and Advance Decisions.[90] 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.[91] By s.26(2), a person will incur liability[92] 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.[93]
- 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.[94] 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

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[88] 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.

[89] MCA 2005, sections 9 – 11.

[90] MCA 2005, sections 24 – 26.

[91] MCA 2005, section 26(1).

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

[93] 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.

[94] 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.

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.[95] 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.[96]

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,[97] the Explanatory Report to the Convention,[98] academic literature,[99] as well as an analogous reference to the HCPC 1996.[100] 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;[101] and

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[95] 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.

[96] 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).

[97] 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.

[98] 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.

[99] 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.

[100] 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.

[101] 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

- 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."

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.

Annex II

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 III

HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

WORK. DOC. No. 41F
[PB translation]

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

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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 instructions 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 IV

Research report on discussions of advance directives 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.[102]

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.[103]

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.[104]

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.

Advance directives and Articles 15 & 16

The evolution of Articles 15 and 16 of the 2000 Convention

6. In earlier stages of drafting[105], 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)[106] 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.

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[102] Proceedings of the Special Commission with a diplomatic character (1999) (hereinafter Proceedings), Minutes No 11 (Meeting of 27 September 1999 (afternoon)), at page 299.
[103] Proceedings, Minutes No 12 (Meeting of 28 September 1999 (morning)), at page 306.
[104] Proceedings, Minutes No 7 (Meeting of 23 September 1999 (morning)), at page 266.
[105] Proceedings, at page 79.
[106] Proceedings, at page 59.

8. A preliminary draft adopted by the Special Commission on the protection of adults on 12 September 1997[107] read as follows:

Article 13

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. The intention of the Drafting Group was to ensure the broadest possible autonomy of the will of the adult. Such autonomy allows the adult to designate the law applicable to their powers

[107] Proceedings, Preliminary Document No 2 of June 1998, at page 79.

of representation. 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".[108]

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."

15. By comparing the definition of advance directives (see above) and the definition of power of representation, powers of representation could, in some cases, be considered a way in which to realise advance directives.

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)

16. 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.[109]

> "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. [...]
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> 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." [110]

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108 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).

109 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.

110 *Ibid.*, at pages 69 and 71.

17. Thus, the desire was to recognise as many measures as possible even if they are governed by a foreign law, so it seems obvious that advance directives would be included in this approach.

18. 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."

19. This provision is not directly intended for a representative. It only expresses the will of the capable adult in the event of their incapacity.

20. Therefore, the Working Group consulted a document containing model advance directives and did not explicitly exclude them from the scope of the Convention. This way, this can be taken as an implicit intention to include them.

<u>Special Commission on the protection of adults (3 to 12 September 1997)</u>

21. 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 make in advance, such as to oppose any form of therapeutic prolongation, would be covered by the scope of this Convention. "[111][*translation by the Permanent Bureau*]

22. The report does not mention any answer to this question. However, it can be observed that the subject of advance directives, notably "living wills"[112] 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.

23. 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."[113]

24. Mr Lagarde makes the distinction between powers of attorney and powers of representation, which can include advance directives.

25. 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). The French expression is wider and thus includes advance directives.[114]

26. 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."

27. 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

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111 French version of the Report of Meeting No 4 (4 September 1997, afternoon), at page 2.
112 English version of the Report of Meeting No 4 (4 September 1997, afternoon), at page 2.
113 English version of the Report of Meeting No 5 (5 September 1997, morning), at page 2.
114 *Ibid.*, at page 3.

first been proposed as a counterweight to the possibility given to the adult of choosing the law applicable to the powers of representation."[115]

28. 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.[116]

29. 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.

30. 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."

31. 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.[117]

32. For information purposes only[118], 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.

33. 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).

34. Such instructions can be regarded as advance directives.

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

35. On sub-paragraph (g) of Article 3 (enumeration of the measures of protection)[119]

> "[…] supervision by a public authority of the care of an adult by any person having charge of the adult;"

36. 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,

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[115] Proceedings, Lagarde Report on the Preliminary draft of the Convention adopted by the Special Commission on 12 September 1997, para 108.
[116] English version of the Report of Meeting No 10 (9 September 1997, morning), at page 2.
[117] English version of the Report of Meeting No 11 (9 September 1997, afternoon), at page 3.
[118] Report of Meeting No 16 (12 September 1997, morning), at page 1.
[119] Proceedings, Lagarde Report on the Preliminary draft of the Convention adopted by the Special Commission on 12 September 1997, para 27.

which has reached a terminal stage. The "expressed wish of the adult" could be understood as an advance directive.

37. This sub-paragraph does not appear in the final version of the 2000 Convention.

38. 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."[120]

39. 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.

40. 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."[121]

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120 Proceedings, para 90 - 91.

121 *Ibid.*, para 99

Minutes of the Special Commission with a diplomatic character

41. During the meeting of 22 September 1999 (morning)[122] 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 delegation[123], 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."[124] [*translation by the Permanent Bureau*]

42. The import of an advance directive governed by a foreign law is therefore clearly considered in the example taken by Mr. Bucher.

43. 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).

44. 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 application of particularly liberal laws, does not therefore seem sufficient, in Ms van Iterson's view, to refuse complete autonomy of will."[125] [*translation by the Permanent Bureau*]

45. 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."

46. 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.

47. Understanding the concerns of M. Bucher about euthanasia, M. Lagarde added:

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[122] Proceedings, Minutes No 5, at pages 257 – 258.
[123] Proceedings, Minutes No 6 (Meeting of 22 September 1999 (afternoon)), at page 260.
[124] Proceedings, Minutes No 5, at page 258.
[125] Proceedings, Minutes No 6 (Meeting of 22 September 1999 (afternoon)), at page 260.

"[...] 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*]

48. 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*]

49. 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."[126] [*translation by the Permanent Bureau*]

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

50. 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)."[127] [*translation by the Permanent Bureau*]

51. In response, Ms DeHart (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.

52. Thus, the preparatory work never mentions a clear opposition to the application of the Convention to advance directives.

53. In fact, the effects of an advance directive governed by foreign law was considered on several occasions during the negotiations. The inclusion of advance directives in the formulation of current Articles 15 and 16 was never rejected by delegates, who even proposed a solution through Articles 19 and 20 to alleviate any concerns that may arise.

54. In conclusion, it can be said that the Drafting Group had no intention of excluding advance directives from the scope of powers of representation in Articles 15 and 16. This view is reinforced by the content of the Explanatory Report by Paul Lagarde that states the wide variety of powers of representation that the adult may confer in the context of making advance arrangements regarding how they prefer their personal and property interests to be supported, without excluding any iteration of such powers.[128]

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126 Proceedings, Minutes No 6 (Meeting of 22 September 1999 (afternoon)), at page 264.
127 Proceedings, Minutes No 7 (Meeting of 23 September 1999 (morning)), at page 269.
128 P. Lagarde, Explanatory Report on the Hague Convention of 13 January 2000 on the International Protection of Adults, 2017, para 96.

Annex V

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**) **Distribution:** 15 April 1997

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 "tutory", "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".