

Title	2000 Protection of Adults Convention: Follow up on the 2022 Special Commission Meeting – Possible amendments to the Convention
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Mandate(s)	C&D No 23 of CGAP 2022; C&D No 31 of CGAP 2020; C&R No 34 of CGAP 2019
Objective	To report on the discussions that took place at the First Meeting of the Special Commission (SC) on the practical operation of the 2000 Protection of Adults Convention (9-11 November 2022) on the topic of possible amendments to the 2000 Protection of Adults Convention
Action to be Taken	For Decision <input type="checkbox"/> For Approval <input checked="" type="checkbox"/> For Discussion <input type="checkbox"/> For Action / Completion <input type="checkbox"/> For Information <input type="checkbox"/>
Annexes	Annex I: Relevant C&R adopted by the SC on the practical operation of the 2000 Protection of Adults Convention
Related Documents	Prel. Doc. No 12 of October 2022 (revised version) Conclusions and Recommendations adopted by the Special Commission (SC) on the practical operation of the 2000 Protection of Adults Convention

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2000 Protection of Adults Convention: Follow up on the 2022 Special Commission Meeting – Possible amendments to the Convention

I. Introduction

- 1 During the First Meeting of the Special Commission (SC) on the practical operation of the *Convention of 13 January 2000 on the International Protection of Adults* (the 2000 Protection of Adults Convention or the 2000 Convention), which was held in The Hague from 9 to 11 November 2022, the desirability, necessity and feasibility of amending certain aspects of the 2000 Convention were discussed. Prel. Doc. No 12 of October 2022 (revised version)¹ was prepared by the Permanent Bureau (PB), in consultation with the Working Group (WG) tasked with the development of a Practical Handbook under the 2000 Convention, in order to facilitate discussions at the SC meeting on this matter. The relevant Conclusions and Recommendations (C&R) that were adopted by the SC in this regard can be found in Annex I of this document.²
- 2 This document aims to provide a summary of the discussions that took place at the SC meeting and their outcome, with a view to inform and facilitate the continuation of such discussions at the 2023 meeting of the Council on General Affairs and Policy (CGAP).

II. Discussions at the SC meeting and their outcome

A. General remarks

- 3 It was made clear from the start of the discussions at the SC that any possible amendments to the 2000 Convention would have to be discussed and decided by CGAP. Some delegations were concerned that, because there had not been sufficient time for internal discussions and coordination to take place following the circulation of Prel. Doc. No 12 (revised version), discussions on this matter at the SC meeting would be difficult. However, given that the discussions at the SC meeting were preliminary and were only to serve to inform further discussions at CGAP, it was agreed that the SC was a good forum for delegates to exchange some initial ideas on this matter and utilise the expertise of the participants present.
- 4 There was agreement among delegates that amending the 2000 Convention would have certain policy considerations which CGAP may be better placed to discuss. Nevertheless, delegates were open to discussing the practical and substantive considerations of amending the Convention, as presented in Prel. Doc. No 12 (revised version).

B. Deletion of the terms “guardianship” and “curatorship” from Article 3(c)

- 5 The PB reminded delegates that the deletion of the terms “guardianship” and “curatorship” was first raised in 2018, during the Joint European Commission – Hague Conference on Private International Law Conference on the Cross-border Protection of Vulnerable Adults (EC-HCCH Joint Conference), where experts noted the incompatibility of the terms with the text of the *United Nations Convention of 13 December 2006 on the Rights of Persons with Disabilities* (UNCRPD).
- 6 The PB noted that some States have institutions or laws that utilise these terms despite domestic systems being in conformity with the UNCRPD, referring to the Public Guardian of British Columbia in Canada as an example. With this in mind, it was suggested that one must look beyond the

¹ “Possible Amendments to the 2000 Protection of Adults Convention”, available on the HCCH website at www.hcch.net under “Protection of Adults” then “Special Commission meetings”.

² The full C&R are available on the HCCH website at www.hcch.net see path indicated *supra* in note 1.

wording or “labelling” of such institutions and instead examine the substance of the law. Recalling the C&R adopted at the 2018 EC-HCCH Joint Conference, the PB reminded delegates that many States have, to varying degrees, departed from purely substituted decision-making regimes and have amended their domestic laws on guardianship and curatorship to reflect supported decision-making. It was also noted that, in limited or exceptional circumstances, the institutions of “guardianship” or “curatorship” as substituted decision-making regimes may still have a role to play in the area of adult protection. For instance, in a case where the personal faculties of an adult have suddenly become totally impaired and the adult has not conferred any powers of representation, a guardian may need to step in and represent them.

- 7 Delegates noted that Article 3 presents a non-exhaustive list of measures of protection that can be taken on behalf of the adult, of which guardianship and curatorship institutions form a part. Given that Article 3 can encompass both substituted and supported decision-making regimes, delegates noted that the provision as currently drafted did not pose any insurmountable difficulties. Therefore, there was consensus among delegates to retain the terms “guardianship” and “curatorship”.

C. Addition of a conflict rule regarding representation of the adult arising by operation of law (i.e., *ex lege* representation)³

- 8 Some delegates noted that the lack of a conflict rule regarding *ex lege* representation did not pose any practical problems or other insurmountable difficulties in their respective domestic systems. It was emphasised that this issue is regulated by States at the domestic level and that there was currently no need for a conflict rule in this area.

- 9 Delegates agreed with an observer who highlighted the importance of encouraging States to include information on *ex lege* representation in their future Country Profiles.⁴ As concluded by the SC, it was noted that, since *ex lege* representation falls under Article 1 and is, therefore, subject to the cooperation provisions in Chapter V of the Convention, there will be a section in the Country Profile allowing States to provide information on their domestic private international law (PIL) rules applicable to *ex lege* representation.

D. Addition of a provision regarding instructions given and wishes made by an adult (e.g., advance directives)⁵

- 10 It was noted that, as voluntary anticipatory acts containing instructions given and wishes made by an adult are not excluded by Article 4 of the 2000 Convention, they fall within its scope by virtue of Article 1. Therefore, similar to *ex lege* representation, such voluntary anticipatory acts are subject to the rules on cooperation under Chapter V of the Convention. It was noted that such voluntary anticipatory acts should also be covered in the Country Profile.

- 11 There was agreement among delegates that, where a representative is acting upon instructions and wishes contained in a voluntary anticipatory act, the rules under Article 15 can be applied rather straightforwardly. Difficulties arise in the application of the rules under Article 15 to those voluntary anticipatory acts which contain instructions and wishes but do not foresee the representation of the adult (e.g., instructions and wishes addressed directly to doctors and healthcare providers). It was noted, however, that, in most cases, such voluntary anticipatory acts will be governed by domestic law and that no difficulties have been reported in this area thus far.

³ C&R adopted by the SC to review the practical operation of the 2000 Protection of Adults Convention, C&R Nos 21-22.

⁴ See “2000 Protection of Adults Convention: Follow up on the 2022 Special Commission Meeting – Finalisation and adoption of documents”, Prel. Doc. No 6A of December 2022, available on the HCCH website at www.hcch.net under “Governance” then “Council on General Affairs and Policy”.

⁵ C&R Nos 23-26.

It was agreed that it would be useful for the PB to continue to consult Central Authorities in order to monitor any developments in this area.

- 12 Many delegates noted that, since no practical difficulties have been reported in this area as yet, there is currently no need to amend the 2000 Convention to include a provision regarding the instructions given and wishes made by an adult. Some delegates noted that such an amendment would require vast amounts of additional research and consultations, which, they felt, is unnecessary at this point in time.

E. Addition of clauses to allow Regional Economic Integration Organisations (REIO) to become a Contracting Party

- 13 The PB recalled that the purpose of the HCCH is to work for the progressive unification of the rules of PIL.⁶ The PB also recalled the declaration made by the European Union (EU), referred to as the European Community at the time, on the occasion of their Membership to the HCCH in 2007:

“The European Community endeavours to examine whether it is in its interest to join existing Hague Conventions in respect of which there is Community competence. Where this interest exists, the European Community, in co-operation with the HCCH, will make every effort to overcome the difficulties resulting from the absence of a clause providing for the accession of a Regional Economic Integration Organisation to those Conventions”.⁷

- 14 The PB noted that, even though the EU did not currently have competence in the area, the addition of a clause allowing an REIO to become a Contracting Party could still be considered, reminding delegates that an REIO clause was added to the *Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations* despite the EU not having competence to join at the time. The PB further reminded delegates that the addition of an REIO clause was becoming a systematic practice for all new HCCH Conventions.

- 15 A delegate from the EU noted that discussions were still ongoing regarding the best way forward in this area and informed the SC that, in the first half of 2023, the European Commission would make a proposal concerning the protection of vulnerable adults. The delegate also underlined the importance of hearing the views of both EU Member States as well as those of third States. The delegate from the EU noted that Prel. Doc. No 12 (revised version) presented the EU becoming a Contracting Party as an alternative to a measure obliging EU Member States to join individually. The delegate agreed that, should the EU become a Contracting Party as an REIO, the 2000 Protection of Adults Convention would be integrated into EU law and would bind all EU Member States. She noted, however, that the same outcome could also be reached through a measure obliging EU Member States to join individually. Finally, she clarified that any legislative proposal made by the European Commission was independent of an REIO clause, as it was the prerogative of the Commission to propose legislative initiatives that it deemed effective and necessary. She added that the final decision on this matter lay with the European Parliament and the Council of the European Union.

- 16 Many delegates agreed that such an amendment would present an opportunity for the EU rather than be an obligation. They noted that the 2000 Convention was a valuable tool that facilitated the handling of cross-border cases and that they have had positive experiences in its implementation. They noted that the cooperation provisions under the Convention allowed for effective communication among the Central and other authorities of Contracting Parties and facilitated the

⁶ Art. 1 of the Statute of the HCCH, available on the HCCH website at www.hcch.net under “Governance”.

⁷ This Declaration is available on the HCCH website at www.hcch.net under “Governance”, then “Statute”, then “Status table”, and “Declaration/Reservation/Notification”.

smooth handling of cases. It was also noted that the future Country Profile and the draft Practical Handbook⁸ contributed to a common understanding in the area. Bearing in mind that a significant number of cases involve EU Member States, delegates were of the view that a large number of people would benefit from the 2000 Convention being applicable across the EU. Many delegates favoured the easiest and fastest way to reach that objective and emphasised their readiness to engage in dialogues on the various ways in which to do so. Some delegates also noted that it would be necessary to further reflect on the utility and workload that this amendment would entail for the HCCH and the Contracting Parties. Since the SC meeting, the PB has carried out research and estimates that, subject to the processes described in section VI of Prel. Doc. No 12 (revised version) and other priorities, a Protocol prepared by a Working Group to amend the 2000 Convention to include an REIO clause could be ready for adoption by CGAP 2024.

- 17 There was consensus among delegates that discussions on the addition of an REIO clause, and the possible mechanisms by which to do so, were better suited for CGAP. It was agreed that the views expressed by delegates be reported to CGAP, with a view to inform and contextualise discussions.

III. Proposal to CGAP

- 18 The PB invites CGAP to take into consideration the C&R adopted by the SC in relation to the possible amendments to the 2000 Convention (see Annex I) and the contents of this document, in its discussion on these issues.

⁸ See *supra* note 4.

ANNEX

Annex I – Relevant C&R adopted by the SC on the practical operation of the 2000 Protection of Adults Convention

Part VIII – Possible amendments to the 2000 Convention

- 67 The SC welcomed the work completed by the PB, with the assistance of the WG, on Prel. Doc. No 12 of October 2022 (revised version) on the possible amendments to the 2000 Protection of Adults Convention.
- 68 The SC acknowledged the views of several delegations that there was insufficient time to review Prel. Doc. No 12 of October 2022 (revised version). In this regard, the SC noted that the discussions on the possible amendments to the 2000 Convention are preliminary and simply intended to assess, in the first instance, whether there is a need and an interest to amend the 2000 Convention and whether that is feasible. The Secretary General confirmed that the decision whether or not to amend the 2000 Convention is for CGAP to make. The PB indicated that a report will be prepared before the end of the year on the possible amendments to the 2000 Convention for the purpose of the meeting of CGAP in 2023 and will reflect the discussions that took place at the SC. HCCH Members were invited to share any additional developments pertaining to this issue with the PB, with a view to circulate them before the meeting of CGAP in 2023.

Section 1: Interest in deleting the terms “guardianship” and “curatorship” (Art. 3(c))

- 69 The SC recalled that the 2000 Convention does not, in and of itself, regulate or establish any protective regime. Noting that, in some States, the institutions of guardianship and curatorship are now based on supported decision-making regimes, the SC recommended keeping the terms “guardianship” and “curatorship” in the text of the Convention.

Section 2: Interest in adding a new conflict rule for “*ex lege* representation”

- 70 Recalling the past lack of consensus regarding the inclusion of a conflict rule on *ex lege* representation in the text of the 2000 Convention and taking into consideration that States have not reported any practical issues in this area, the SC noted that the absence of such a conflict rule from the Convention would not create insurmountable difficulties.
- 71 The SC acknowledged the views expressed by delegations that there is currently no need or interest in adding a new conflict rule for *ex lege* representation.

Section 3: Interest in adding a provision on “instructions given and wishes made by the adult, e.g., advance directives”

- 72 Considering the outcome of the discussions (see, *supra*, paras 23 – 26), the SC acknowledged that the absence of a specific conflict rule that covers instructions given and wishes made where no powers of representation have been conferred does not appear to create practical difficulties.
- 73 The SC took note of the views expressed by delegations that there is currently no need or interest in adding a provision regarding instructions given and wishes made by the adult.

Section 4: Interest in adding final clauses allowing Regional Economic Integration Organisations (REIOs) to join the 2000 Convention

- 74 During the course of discussions on this matter, the SC recalled that the 2000 Convention functions well and is fit for purpose. As such, it acknowledged the desirability and practical necessity for more States to be bound by the 2000 Convention as soon as possible and in the most efficient manner. The SC noted that there are several ways in which EU Member States can be bound by the 2000 Convention, which is a matter to be determined by the EU at the regional level.

- 75 The SC took note of the wish expressed by several delegations to have more time to discuss the inclusion of an REIO clause and that discussions on this matter are better suited to take place at the meeting of CGAP in 2023.

Section 5: Possible mechanisms to amend the 2000 Convention

- 76 The SC noted that the mechanism concerning a possible amendment to the 2000 Convention is to be discussed and decided by CGAP.