

The Hague Convention on the International Protection of Adults - A position paper by experts involved in the ELI Adults' Project

The European Law Institute (ELI) has launched in 2017 a project on *The Protection of Adults in International Situations*.

The adults to which the project refers are persons aged 18 or more who are not in a position to protect their interests due to an impairment or insufficiency of their personal faculties.

The project purports to elaborate on the resolution of 1 June 2017 whereby the European Parliament, among other things, called on the European Commission to submit 'a proposal for a regulation designed to improve cooperation among the Member States and the automatic recognition and enforcement of decisions on the protection of vulnerable adults and mandates in anticipation of incapacity'.

The Commission has made known that it does not plan to submit such a proposal in the near future. At this stage, the Commission's primary objective is rather the ratification of the Hague Convention of 13 January 2000 on the International Protection of Adults by the Member States that have not yet done so.

The ELI project builds on the idea that the Convention, which is currently in force for twelve States (ten of which are also Member States of the Union), generally provides appropriate answers to the issues raised by the protection of adults in situations with a foreign element. That said, the team of experts charged with the project has taken the view that it would be desirable for the Union to legislate on the matter, in a manner consistent with the Convention, with the aim of improving the operation of the latter among the Member States.

The ultimate goal of the project is to lay down the text of the measure(s) that the Union might take for that purpose.

While the project is still in progress, a position paper has been issued on 3

December 2018, signed by some of the members of the project team, to illustrate the main views emerged so far from the discussion.

The paper suggests that the Union should consider the adoption of measures aimed, *inter alia*, to:

(i) enable the adult concerned, subject to appropriate safeguards, to choose in advance, at a time when he or she is capable, the Member State whose courts should have jurisdiction over his or her protection: this should include the power to supervise guardians, persons appointed by court or by the adult (by way of a power of attorney), or having power *ex lege* to take care of the adult's affairs;

(ii) enlarge the scope of the adult's choice of law, so that he or she can also choose at least the law of the present or a future habitual residence, in addition to the choices currently permitted under Article 15 of the Hague Convention of 2000;

(iii) outline the relationship between the rules in the Hague Convention of 2000 and the rules of private international law that apply in neighbouring areas of law (such as the law of contract, maintenance, capacity, succession, protection against violence, property law, agency);

(iv) specify the requirements of formal and material validity of the choice of the law applicable to a private mandate, including the creation and exercise (and supervision by the courts) of such mandates;

(v) address the practical implications of a private mandate being submitted (by virtue of a choice of law, as the case may be) to the law of a State whose legislation fails to include provisions on the creation or supervision on such mandates, e.g. by creating a "fall-back" rule in cases of choice of the "wrong" law, which does not cover the matters addressed (or at least applying Article 15(1) of the Hague Convention of 2000);

(vi) extend the protection of third parties beyond the scope of Article 17 of the Hague Convention of 2000 to the content of the applicable law, and possibly also to lack of capacity (or clarifying that the latter question is covered by Article 13(1) or the Rome I Regulation);

(vii) make it easier for those representing and/or assisting an adult, including

under a private mandate, to provide evidence of the existence and scope of their authority in a Member State other than the Member State where such authority has been granted or confirmed, by creating a European Certificate of Powers of Representation of an Adult (taking into account the experience developed with the European Certificate of Succession);

(viii) clarify and make more complete the obligations and procedures under Articles 22, 23 and 25 of the Convention in order to ensure 'simple and rapid procedures' for the recognition and enforcement of foreign measures; further reflection is needed to determine whether, and subject to which safeguards, the suppression of exequatur would be useful and appropriate for measures of protection issued in a Member State;

(ix) facilitate and encourage the use of mediation or conciliation.

The ELI project will form the object of a short presentation in the framework of a conference on *The Cross-border Protection of Vulnerable Adults* that will take place in Brussels on 5, 6 and 7 December 2018, jointly organised by the European Commission and the Permanent Bureau of the Hague Conference on Private International Law.