

# Special Commission on the Hague Adults Convention: Five Takeaways from its First Meeting

*This post was written by Pietro Franzina and Thalia Kruger, and is being published simultaneously on [Conflictolaws.net](https://www.conflictoflaws.net) and on the [EAPIL](https://www.eapil.org) blog.*

The delegations of more than thirty Member States of the Hague Conference on Private International Law attended the first meeting of the Special Commission charged with reviewing the operation of the Hague Convention of 13 January 2000 on the international protection of adults. The meeting took place in The Hague and online from 9 to 11 November 2022 (for a presentation of the meeting, see this post on [Conflictsoflaw.net](https://www.conflictoflaws.net) and this one on the [EAPIL](https://www.eapil.org) blog). A dozen organisations, governmental and non-governmental (including the Council of the Notariats of the European Union, the Groupe Européen de Droit International Privé and the European Association of Private International Law), were also in attendance.

The discussion covered a broad range of topics, leading to the conclusions and recommendations that can be found on the website of the Hague Conference. The main takeaways from the meeting, as the authors of this post see them, are as follows.

## **The Hague Adults Convention Works Well in Practice**

To begin with, the Special Commission affirmed that the Convention works well in practice. No major difficulties have been reported either by central authorities instituted under the Convention itself or by practitioners.

Doubts occasionally appear with respect to some provisions. Article 22 for example provides that measures of protection taken by the authorities of a Contracting State “shall be recognised by operation of law in all other Contracting States”, unless a ground for refusal among those listed in the same provisions arises. A declaration of enforceability, as stipulated in Article 25, is only necessary where measures “require enforcement” in a Contracting State

other than the State of origin.

Apparently, some authorities and private entities (e.g., banks) are reluctant to give effect to measures of protection that clearly do not require enforcement, such as a judicial measure under which a person is appointed to assist and represent the adult, unless that measure has been declared enforceable in the State where the powers of the appointed person are relied upon. The Special Commission's conclusions and recommendations address some of these hesitations, so that they should now prove easier to overcome. Regarding *exequatur*, see para. 33, noting that "measures for the protection of an adult only exceptionally require enforcement under Article 25", adding that this may occur, for instance, "where a decision is taken by a competent authority to place the adult in an establishment or to authorise a specific intervention by health care practitioners or medical staff", such as tests or treatments. Other doubts are dealt with in the practical handbook prepared by the Working Group created within the Hague Conference in view of the meeting of the Special Commission. The draft handbook (first version publicly available), which the Special Commission has approved "in principle", will be reviewed in the coming weeks in light of the exchanges that occurred at the meeting, and submitted to the Council on the General Affairs and Policy of the Conference for endorsement in March 2023).

### **Situations Exist in the Field of Adults' Protection that Are Not (Fully) Regulated by the Convention**

The Convention deals with measures of protection taken by judicial and administrative authorities, and with powers of representation conferred by an adult, either by contract or by a unilateral act, in contemplation of incapacity. By contrast, nothing is said in the Convention concerning *ex lege* powers of representation. These are powers of representation that the law of some States (Germany, Austria and Switzerland, for example) confers on the spouse of the adult or a close relative or family member, for the purpose of protecting the adult. Their operation is generally confined to situations for which no measures have been taken and no powers of representation have been conferred by the adult.

The Special Commission acknowledged that *ex lege* powers of representation fall under the general scope of the Convention, but noted that no provision is found in the Convention that deals specifically with such powers. In practice, *ex*

*lege* powers of representation may be the subject of cooperation between the authorities of Contracting Parties (notably as provided for under Chapter V), but, where the issue arises of the existence, the extent and the exercise of such powers, the courts and other authorities of Contracting States will rely on their own law, including, where appropriate, their conflict-of-laws rules.

There is yet another gap that the Special Commission discussed. The Commission observed that instructions given and wishes made by an adult in anticipation of a future impairment of their personal faculties (e.g., in the form of advance directives), similarly fall within the general scope of the Convention and are subject, as such, to the cooperation provisions in Chapter V. Whether or not a particular anticipatory act constitutes a power of representation for the purposes of Articles 15 and 16, on powers of representation conferred by the adult, is to be determined on a case-by-case basis. Some unilateral acts plainly come within the purview of Articles 15 and 16, as they actually include a conferral of powers on other persons. Others do not, and may accordingly be dealt with by each Contracting State in conformity with their own law.

### **States Do Not Currently See an Interest in Modifying the Convention**

The question has been raised in preparation of the Special Commission whether the Convention ought to be amended, namely by a protocol to be negotiated and adopted in the framework of the Hague Conference on Private International Law. In principle, a protocol would have provided the States with the opportunity to fill the gaps described above, and address other concerns. However, under international law only those Contracting States that ratify the protocol would be bound by the modifications.

The Special Commission witnessed that, at this stage, no State appears to see an amendment as necessary.

Only one issue remains to be decided in this respect, namely whether the Convention should be modified in such a way as to include a REIO clause, that is, a clause aimed at enabling organisations of regional economic integration, such as the European Union, to join the Convention in their own right. The matter will be discussed at the Council on the General Affairs and Policy of the Conference of March 2023.

The decision lies, in fact, in the hands of the Union and its Member States, as this

is currently the only Regional Economic Integration Organisation concerned by such a clause. Their decision will likely be affected by the approach that should be taken in the coming weeks concerning the proposal for a regulation on the protection of adults that the Commission is expected to present in the first half of 2023.

## **Efforts Should Now Be Deployed Towards Increasing the Number of Contracting Parties**

The main problem with the Convention lies in the fact that only relatively few States (fourteen, to be precise) have joined it, so far. Several States stressed the importance of further promoting ratification of, or accession to, the Convention.

It is worth emphasising in this respect that the Hague Adults Convention builds, to a very large extent, on cooperation between Contracting States. This means that a State cannot fully benefit from the advantages of the Convention by simply copying the rules of the Convention into its own legislation, or by relying on such rules on grounds of judicial discretion (as it occurs in the Netherlands and to a large extent in England and Wales), but should rather become a party to it.

Various States expressed an interest in the Convention. The responses to the questionnaires circulated in preparation of the meeting of the Special Commission suggest that at least five States are actively contemplating ratification (Hungary, Italy, Luxembourg, Mexico and Sweden), and that others have considered ratification (Slovakia) or are considering it (Argentina). For its part, Malta signed the Convention on the occasion of the meeting of the Special Commission, and will likely ratify it in the not too distant future.

## **Tools to Enhance the Successful Operation of the Convention**

Some of the practitioners present drew the participants' attention to practical difficulties in the cross-border protection of adults. To minimise practical difficulties, the Permanent Bureau, in some instances together with the Working Group on the Adults Convention, developed a number of tools.

The first is an extensive country profile, to be completed by Contracting States and made available on the website of the Hague Conference. This profile includes various matters of national law, such as names and content of measures of protection, jurisdiction of courts or other authorities to issue these measures,

transfer of jurisdiction, and names, forms and extent of powers of representation.

The second is a toolkit on powers of representation, which contains detailed information about the national laws of States that provided responses, on for instance who can be granted powers of representation, how this granting must take place, and the permitted extent of the representation.

### **Concluding remarks**

All in all, the issue of the cross-border protection of Adults has rightly gained attention over the past ten years. While States amend their domestic legislation to be in conformity with the UN Convention on the Rights of Persons with Disabilities, they seem to be increasingly aware of the importance of ensuring cross-border continuity. This includes continuity of measures of protection issued by authorities such as courts, as well as the powers of representation granted by adults themselves. These matters of private international law require dialogue on the international and European Union level, more States to join the Convention, and tools to assist practice.