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# INTERNATIONAL PROTECTION OF VULNERABLE ADULTS

## Palais des Congrès, Lille

### CONFERENCE PROGRAMME

#### Wednesday 17<sup>th</sup> September 2008

#### Open to the media

*This programme is subject to change*

Wednesday 17 <sup>th</sup> September 2008	
9-10 a.m.	Reception
10-10.15a.m.	<p><b><u>Presentation of the discussion:</u></b></p> <ul style="list-style-type: none"> <li>- <b>Mrs. Pascale FOMBEUR</b>, Director of the Civil Affairs and Seals Directorate</li> <li>- <b>Mr. Hugues FULCHIRON</b>, Professor at the University of Lyon-III</li> </ul>
10.15a.m.-12.45p.m.	<b>WHAT ARE THE DIFFICULTIES ENCOUNTERED?</b>
10.15-11a.m.	<ul style="list-style-type: none"> <li><input type="checkbox"/> Showing of the film made by the Ministry of Justice: <i>How French guardianship judges handle cases involving the cross-border protection of vulnerable adults.</i></li> <li><input type="checkbox"/> <b>The socio-demographic context: Changes and prospects</b> <u>Speaker:</u> <b>Mrs. Siri TELLIER</b>, Demographer, director at the United Nations Population Fund (UNFPA)</li> </ul>
11-11.15am	Break
11.15am-12.30pm.	<ul style="list-style-type: none"> <li><input type="checkbox"/> <b>The protection of adults in other countries of the European Union:</b> <u>Speakers:</u> Germany: <b>Mr. Gero BIEG</b> United Kingdom: <b>Mr. Justice SINGER</b> Spain: <b>Mr. José Antonio VARELA AGRELO</b> Czech Republic: <b>Mr. Lubomir PTACEK</b></li> <li><input type="checkbox"/> Discussion</li> </ul>
2-5p.m.	<b>WHAT SOLUTIONS EXIST OR NEED DEVISING?</b>
2-2.45p.m.	<ul style="list-style-type: none"> <li><input type="checkbox"/> <b>The Hague Convention of 13<sup>th</sup> January 2000</b> <u>Speaker:</u> <b>Professor Paul LAGARDE</b>, Professor at the University Paris I</li> </ul>

2.45-3.45p.m.	<p>□ <b>Possible synergies between the various international forums</b></p> <p><u>Speakers:</u> <b>Mr. Hans Van Loon</b>, Secretary General of The Hague Conference on International Law  <b>Mrs. Salla SAASTAMOINEN</b>, Head of unit at the Civil Justice, Rights and Citizenship Directorate – Directorate General for Justice, Freedom and Security (European Commission)  <b>Mr. Jan KLEIJSSSEN</b>, Director General of standard-setting, Council of Europe.  <b>Mr. Svend DANIELSEN</b>, Professor, expert at the Council of Europe.</p>
3.45-5p.m.	<p>Round-table discussion: <b>Future prospects, or the tools to be created to assist judges and citizens.</b></p> <p><u>Moderator:</u> <b>Mr. Hugues FULCHIRON</b>, Professor at the University of Lyon-III</p> <p><u>Participants:</u> <b>Mr. Antonio LOPEZ-ISTURIZ WHITE</b>, Member of the European Parliament (EPP, Spain)  <b>Mr. Kees BLANKMAN</b>, Professor, expert at the Council of Europe  <b>Mrs. Eva VON SCHEELE</b>, judge (Sweden)  <b>Ms. Anne CARON-DEGLISE</b>, Judge, Chair of the Association Nationale des Juges d'Instance (National Association of District/Regional Court Judges) (France)  <b>Maître DELABRE</b>, Notary (France)  <b>Mr. François RICHIR</b>, Director General of the <i>Association de tutelle des inadaptés</i> (ATI) for the North of France</p>
5-5.30p.m.	<p><b><u>Closure of proceedings.</u></b></p> <ul style="list-style-type: none"> <li>- <b>Mrs. Miglena TACHEVA</b>, Minister of Justice, Bulgaria</li> <li>- <b>Mr. Jacques BARROT</b>, Vice President of the European Commission</li> <li>- <b>Mrs. Rachida DATI</b>, Minister of Justice, France</li> </ul>
5.40pm	<b>Group photo</b>
5.50pm	<b>Press Conference</b>

## WHY HOLD A CONFERENCE ON THE INTERNATIONAL PROTECTION OF ADULTS?

**Protecting adults who have become dependent, for example through cerebral-motor disability or degenerative illness, has long been a concern for the nations of Europe.**

Every nation has rules governing how the protection of vulnerable adults is organised.

Changes in family structure and the increasingly common isolation of the most dependent people has led member states to modernise their legislation in order to cope with the new challenges society is facing.

For example, in France, reforms have been launched to refocus the guardianship/supervision system of people who have experienced a genuine deterioration in their faculties in order to provide them with suitable protection.

At the same time, increased migration, particularly related to work, has revealed a new aspect of this question.

More and more people are returning to their country of origin while retaining assets or sources of income in other states, or moving to warmer climates to spend their retirement. Such people may already be protected in the country they are leaving or need such protection after several years spent in their host country. As they grow older they may need protection.

In addition, the mobility of protected people also has to be facilitated in order to allow for support from family or friends when they are located in several different countries.

Finally we have to ensure that changes of residence from one state to another by people who are not themselves able to defend their own interests do not result in lack of care due to the absence of authorities responsible for their protection.

It has thus become indispensable to implement solutions capable of ensuring the individual rights of vulnerable adults are protected, including the right of free movement, whilst ensuring the continuity and effectiveness of government protection that their state of mental health demands.

**The Hague Convention of 13<sup>th</sup> January 2000 on the international protection of adults** constitutes a prime instrument of cooperation capable of encouraging this balance.

Convinced of the urgency of dealing with the question of protecting vulnerable adults on an international level, France has decided to ratify this Convention.

But this Convention can only be fully effective insofar as its geographical scope of application is broad enough, which assumes the greatest possible number of states ratifying it.

This is why France wants to encourage discussion on the advantages of this international convention.

The area of justice, freedom and security that the European Union is keen to promote seems the ideal place for such discussion.

Apart from the fact that the provisions of the Convention on the protection of adults coincide exactly with the basic principles of this area, the interest shown by the EU for this Convention is capable of generating interest in the Convention beyond the frontiers of the EU proper.

Discussions will include the implementation of the Convention and all the practical ways of strengthening cooperation between the administrative authorities and between courts to ensure better protection of vulnerable adults within the European Union.

## PROTECTION OF ADULTS IN FRANCE - THE LATEST

The French Act of 5th March 2007, which will come into force on 1st January 2009, reforms the right to legal protection for adults.

**What are the chief features of this reform?**

❑ **One constant:**

The three existing legal protection systems for adults will remain but will be modernised. Henceforth, they will aim not only at managing the property of the people being protected but will also explicitly protect the people themselves (everyday life, health care, relations with others, choice of residence, etc.). These three systems must comply with the principles of necessity, subsidiarity and proportionality required by the reform.

**Such measures are therefore only taken if:**

- ≈ the person concerned has suffered a medically observable deterioration of his/her mental or bodily faculties such as to prevent the expression of his/her wishes;
- ≈ there are no other legal measures less prejudicial to human dignity or human rights;
- ≈ and they are in strict proportion to the person's needs (measured on an individual basis).

- **Judicial protection** is a temporary protective measure that lasts for a single, renewable year under which the adult continues to exercise his/her rights. Placing someone under judicial protection means that any deeds, contracts or undertakings the adult concerned may sign during this period can be cancelled or reduced if such documents are prejudicial to him/her.
- **Supervision** is a long-term measure to protect adults who, by reason of a deterioration in their faculties, need to be continuously assisted or controlled in the major acts of civil life. Supervision is ordered by the guardianship judge at the request of the person concerned, his/her family or the *procureur de la République* (chief prosecutor in the *tribunal de grande instance*).

The guardian appointed by the judge may be the spouse, a family member or external agent, a *mandataire judiciaire à la protection des majeurs* (legally appointed adult protection officer), or a private voluntary or professional guardianship body. Supervision may be simple or reinforced (90% of supervision measures ordered are of this type), which constitutes a higher level of restriction for the adult concerned.

- **Guardianship** is a long-term measure to protect adults whose faculties have deteriorated and who need to be continuously represented in all acts of civil life.

Guardianship is ordered by the guardianship judge under an identical procedure to that of supervision and causes the adult concerned to lose the right to exercise his/her civil rights. The only acts that people under guardianship may still perform are those of a strictly personal nature such as acknowledging a child.

## ❑ Innovations:

### **The creation of a *Mandat de protection future* (mandate for future protection):**

**This new legal instrument** is based on the Quebec *mandat d'inaptitude* (incapacity mandate). It enables anybody to plan his/her protection in advance by drawing up a mandate stipulating the conditions and scope of the protection and appointing the person responsible for ensuring the protection.

The appointed person or trustee may be responsible for the protection of the person him/herself and his/her assets, or only one of these.

A “mandate for future protection” may be drawn up as a private document, countersigned by a lawyer or using a certified form. It only allows for property to be managed, not sold off. It may also be drawn up as a notarised document when allows for provision to be made.

### **The organisation and renewal of the work of professional guardians:**

- **The new “legal trustees for the protection of adults”** are now subject to common rules that stipulate how they must be trained and what powers they have, how they are evaluated and controlled, their responsibilities and payment.

The reform therefore covers every aspect of guardianship under ordinary law on social and clinico-social action and makes these professionals subject to approval or authorisation procedures depending on whether they work independently or under the auspices of a voluntary or government body.

It lays down strict, precise conditions for admission to status as a “legal trustee for the protection of adults” (requirements regarding qualifications, training, professional experience, character and guarantee of responsibility) and controls their work under the authority of the *Préfet* and the *procureur de la République*.

- **The funding of the work of these professionals** will also be harmonised and defined according to criteria that are fairer, more precise and clearer. The people protected will contribute to the cost of their protection according to their means. Where such means are insufficient, the pay the trustees receive will be subsidised out of public funds.
- **Introduction of the *mesure d'accompagnement judiciaire à caractère social*** (legal support measure on social grounds, or “MAJ”) enables judges to appoint professional trustees to undertake the management of benefits payable to people who, due to their mental or physical condition do not use them properly or live under unacceptable conditions. This is an educational, social measure that does not deprive the people concerned of any rights and is designed to enable them to recover their ability to manage a budget independently.

## BACKGROUND TO THE HAGUE CONVENTION

**Apart from the Vienna Convention of 24<sup>th</sup> April 1963, which refers to guardianship or supervision situations, there is nowadays only one multilateral text dealing with the international protection of adults, the Hague Convention of 17<sup>th</sup> July 1905 that relates to prohibition and similar protective measures. This convention has been rejected by France and is currently in force in only four countries.**

The Vienna Convention, which gives the consular authorities the power to act to protect the interests of their nationals at risk, is evidence of the concern of individual nations to protect their nationals when they find themselves faced with difficulties related to their disabilities when abroad.

On the other hand, the lack of enthusiasm for a reworking of the Hague Convention was a sign that until very recently the number of cases where adults needed international protection was insignificant.

Since the ageing of the population and the correlative increase in conditions in which the mental faculties are diminished, together with the mobility of such populations, having increased, the idea of being able to use rules under international law to ensure the international protection of people who are no longer able to defend their own interests is once again on the agenda.

Since questions of the legal capacity of vulnerable people, both adults and minors, present the same problems, at least technically, discussions undertaken under the auspices of the Hague Conference on the revision of the 1961 Convention on the protection of minors, have led the government experts present to ask whether it might be possible to extend the provisions for minors to adults.

**This is how the Hague Convention on the international protection of adults was drafted.** The Convention was agreed on 13<sup>th</sup> January 2000 and signed by five states including France; to date it has only been ratified by Germany and the United Kingdom (concerning Scotland). It has therefore not yet come into force.

The very recent changes in French law on the protection of adults now mean that France can ratify it without any additional changes to national law.

In application of Article 57 of the Convention, the ratification by France on 18<sup>th</sup> September will result in it coming into effect on 1<sup>st</sup> January 2009, i.e. on the first day of the month following the expiry of the three-month period after the instrument of ratification was filed by the French Minister of Justice with the government of the Kingdom of the Netherlands, which is acting as custodian for instruments drawn up in the context of the Hague Conference on international private law.

## THE HAGUE CONVENTION - WHAT CONTENT?

- **To whom and to what does it apply?**

To adults over 18 years old whose faculties are diminished or insufficient to enable them to look after their own interests. The measures that can be taken in application of this text, such as the appointing of a guardian, the appointing of a legal representative or the administration of property, are open-ended whereas the subjects excluded from the scope of application are listed exhaustively.

- **Which authorities have jurisdiction to take measures?**

In principle, the administrative or judicial authorities of the state in which the adult concerned usually resides have jurisdiction.

Exceptions to this rule are provided for, particularly when an authority in a different state of which the adult holds nationality is better able to evaluate the adult's interests – provided that the authorities in the usual place of residence have not already taken the measures required to protect the adult.

Where the interests of the protected person require, the authorities with power to act may transfer jurisdiction to an authority in a different contracting state for it to take protective measures, or to the authorities in a state in which the adult has property in order to protect such property.

- **What law is applied by the authority with jurisdiction?**

In principle, any authority taking protective measures applies its own domestic law while retaining broad powers to apply the law of another state with which the situation has close links if the personal protection of the adult so requires. This law may be that of a non-contracting state.

When a measure taken by one contracting state has to be implemented in a different state, it is the law of the second state that sets the conditions for application of the measure.

As far as the representation mandate given by an adult is concerned, to be implemented when he or she is no longer able to look after his or her own interests, the person issuing the mandate may choose the applicable legal system from those that may be designated by the Convention. An alternative legal system may only be applied if the chosen system threatens law and order.

- **What force have decisions made under the conditions laid down by the Convention?**

In principle, measures taken under the authority of a contracting state are automatically recognised provided they meet five conditions.

If compulsion is required to enforce a measure in a different contracting state from that in which the measure was issued and is enforceable, interested parties must use the procedure in force in the state in which they wish to have the measure enforced to obtain a declaration of enforceability; this procedure must be simple and fast.

Once a declaration of enforceability has been obtained, the measure is enforced in the other state under the same conditions as if it had been issued in that state and therefore in conformity with the legal system of that state.

- **How can the contracting states cooperate to ensure the objectives of the Convention are achieved?**

Cooperation between the contracting states requires the appointing of a central authority responsible for seeing that the objectives of the Convention are achieved. It will do this by channelling information, facilitating communications between authorities and helping identify adults at risk.

In particular, when the authorities of one contracting state are planning the placement of an adult in a different state, the placement may not go ahead if the authorities of the second state oppose it.

The central authorities are entitled to use a certain amount of discretion regarding the requests for cooperation to which they respond. In particular they are under no circumstances obliged to provide information that might endanger an adult, his or her property, family or friends.