**Joint Conference European Commission/Hague Conference on Private International Law**

**“Cross-border Protection of Vulnerable Adults”**

**Catalina Devandas, UN Special Rapporteur on the rights of persons with disabilities**

Brussels, 5-7 December 2018

**Introduction**

I would like to begin my intervention by congratulating the **European Commission** and the **Hague Conference on Private International Law** for organising this needed discussion about the intersections between the 2000 Hague Convention on the Protection of Adults and the UN Convention on the Rights of Persons with Disabilities (CRPD).

The adoption of the CRPD represented a milestone in international human rights law and a watershed moment for the disability community. It positioned the rights of persons with disabilities for good in international human rights law. It changed the view of persons with disabilities from recipients of care and charity to autonomous rights holders. It was a call for transformation: of laws, policies, environments, attitudes, approaches. Yet, up to date, we have never discussed its impact in private international law.

The Hague Adult Protection Convention was adopted in 2000, with the aim to provide international protection to adults with disabilities who are deemed not to be in a position to protect their interests. For that purpose, the Convention provides for the recognition and enforcement of measures of protection in all contracting states, such as guardianships and curatorships; and establishes a complex system to determine the jurisdiction, the law to be applied, and the law that regulates the representation of the adult.

Today, from the 11 contracting States, all of them are EU Member States who are also State Parties to the CRPD.

On the other hand, the CRPD introduces a paradigm shift in relation to the legal capacity of persons with disabilities. Moving away from medical and paternalistic approaches to disability, the CRPD states that all persons with disabilities enjoy legal capacity on an equal basis with others.

Furthermore, it questions the existence of substituted decision-making regimes such as those recognised by the Hague Adult Protection Convention. Accordingly, States must abolish and prohibit all regimes of substituted decision-making. Instead, States must develop supported decision-making arrangements of varying types and intensity, including informal and formal support arrangements.

Therefore, two questions arise.

Should a State that has ratified the CRPD recognize a foreign guardianship?

But also: Can private international law be a way of expanding the CRPD standards?

As a general rule, a country must recognize and apply a foreign law, even if it differs from its domestic legislation. That is the foundation of private international law.

However, there is an exception. A country can reject the application of a foreign law if it is contrary to the country's *ordre public* - "the public policy exception". This exception has historically been the instrument used in private international law to deal with the impact of fundamental rights.

Indeed, human rights bodies have said that human rights law is part of an international *ordre public*. That's the case, for example, of the European Court of Human Rights and the Inter-American Court of Human Rights.

Consequently, it could be argued that Article 12 of the CRPD - a strong non-discriminatory provision - constitutes an *ordre public* rule, so a judge would be forced to dismiss the application of a foreign guardianship.

The Hague Adult Protection Convention was drafted before the CRPD and it considers substituted decision-making, including placement into an institution, as a form of protection. However, human rights must prevail over private law rules.

What about the opposite situation? Can the Hague Adult Protection Convention be a way of expanding the implementation of the CRPD?

For example, if a person with a disability has appointed a supporter in one country and goes to another that still does not recognize supported decision-making, can the Hague Adult Protection Convention be a way to advance the CRPD?

Let me remind you that this is not the first time that international private law and human rights law have addressed these questions. In some countries, international private law has been a way to expand certain rights that are not widespread recognized in domestic legal frameworks, such as the marriage between two persons of the same sex.

Clearly, when drafted, the Hague Adult Protection Convention did not anticipate such responsibility. Nevertheless, its text includes promissory provisions that could be used to ensure the recognition of support measures across countries. For example, Art. 3(d) indicates that the treaty covers the "designation and functions of any person or body having charge of the adult's person or property, representing or **assisting** the adult". Can we read it under a support paradigm?

Similarly, the reference to powers of representation in Art. 15 indicates that the Hague Adult Protection Convention covers advance planning. However, how to ensure that those advance plans do not lead to the incapacitation of the person? Or what about advance directives in the context of mental health vis-à-vis the limitations of Art. 4?

An interpretation in light of the CRPD can help us moving forward in the right direction, but it may not be sufficient.

We need to explore this different questions and solutions, but we also keep in mind that it might be necessary to update the Hague Adult Protection Convention or adopt an additional instrument in order to reflect better the support paradigm of the CRPD.

I believe this is just the beginning of a needed conversation on the recognition of the rights of persons with disabilities in the context of private international law. I am very sorry of not being physically present in the conference today but I look forward to being involved in such discussions.