

The slide features a decorative graphic at the top consisting of a dark blue square on the left with a white plus sign in the top-left corner and the UNIL logo (UNIL | Université de Lausanne) in the bottom-right corner. To the right of this square are four colored squares arranged in a 2x2 grid: purple (top-left), yellow (top-right), orange (bottom-left), and light blue (bottom-right).


Implementation of Foreign EPAs in Switzerland

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A. Introduction

- The Swiss EPA (« mandat pour cause d'inaptitude ») since 2013
 - Definition
 - Formal requirements
- A **limited success** so far:
 - A natural human reluctance
 - Insufficient advertisement
 - Excessive formal requirements
 - Hybrid nature of the instrument
 - Structural problem (EPA vs. ordinary agency contract)



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+ B. Why having to implement a foreign EPA?

- Best to establish a new instrument under Swiss law where long-term residence expected
- However:
 - Ignorance of the client
 - Most of the assets still located outside Switzerland
 - Client **already impeded** in his/her capacities

+ C. The case to be discussed

- a) *Sonia, aged 75, widow*
- b) *Italian citizenship*
- c) *was living in France before moving to Switzerland*
- d) *owns many condos on the French Riviera and on the Costa Dorada ...*
- e) *but holds also shares in several companies, registered in Ireland and the Netherlands*
- f) *Netherlands where she had lived during and a few years long ago, after her studies*
- g) *bank accounts with a Swiss private bank in Geneva*
- h) *lives in a very nice apartment in Lausanne*
- i) ***in 2010, Sonia established a "mandat de protection future" according to the French Civil Code***
- j) *she entrusted Felicity, her niece, with a very broad power of attorney*
- k) *no choice of law*
- l) *at the time Felicity was living in Austria but has now settled in Germany.*

+ D. Some good news ...

- Several countries have enacted regulations about EPAs since the 90's: foreign act is more and more likely + common language despite many material differences
- A multilateral treaty makes things easier: **The Hague Convention on the International Protection of Adults (2000)**
 - France and Switzerland are both parties to it.
 - Same as: Austria, Czech Republic, Estonia, Finland, Germany, Monaco (9 further signatures)
 - UK ? Only as far as Scotland is concerned!

+ E. Validity and effects in CH (1)

- Existence, extent, modification and extinction of such powers of representation are normally governed by the law of the State of the adult's **habitual residence** at the time of the act
 - Here: France
- But **very broad choice of applicable law possible in the act** (even where the State is not party to the 2000 Convention):
 - Nationality (here: Italy)
 - Former habitual residence (Netherlands)
 - State of location of the property (with respect to that property) (Spain for the condos on Costa Dorada; shares are located at the adult's residence)
 - No such choice made here
- When would it make sense? (EPA unknown to the State of habitual residence or uniform regime under foreign law is pursued)

+ E. Validity and effects in CH (2)

- Choices not admitted:
 - Law of future habitual residence (here: Switzerland)
 - Law of attorney's habitual present or former residence (here: Austria, Germany)
- **Recognition by operation of law**
- Registration possible with Swiss Infostar?

+ F. Enforcement / monitoring (1)

- Swiss authorities shall apply **Art. 481 par. 3 of French Civil Code** when determining the existence and extent of powers (mere registration)
 - Art. 363 Swiss Civil Code will not apply
 - When the foreign rules are more stringent (e.g. right for the relatives to oppose the EPA), Swiss authorities shall conform
- **Reporting and accounting?** Depends on French Law too
 - Private « mandat »: not mandatory, power for the judge (=CH)
 - Notarized « mandat »: to the notary-public
 - Reporting to the Swiss authority in any case

+ F. Enforcement / monitoring (2)

- Should the powers not be exercised in a manner sufficient to guarantee the protection of the person or property of the adult, Swiss authorities **may withdraw or modify the powers** (like in Art. 368 Swiss Civil Code) ...
- ... but always by taking the law governing the EPA into consideration

+ G. Exercise of powers (1)

- **WARNING:**
- The manner of exercise of the powers of representation is governed by the law of the State in which they are exercised
- **What is existence and extent, what is exercise of the powers?**
- 3 examples

+ G. Exercise of powers (2)

- Example 1:
- Felicity intends to **sell** Sonia's **immoveable property** in Switzerland
 - Under Swiss law, the agent is entitled to such a sale – no authorization from the Adult Protection Authority required
 - But this **has to do with the extent of powers** – French law applies
 - The answer depends on the kind of Mandat de protection (notarized: no approval needed; private: approval by the juge des tutelles)
 - The Swiss Adult Protection Authority shall approve instead of the juge des tutelles where required

+ G. Exercise of powers (3)

- Example 2:
- Where a Swiss mandate does not address the issue, **remuneration** of the agent shall be decided by the Adult Protection Authority
- However, under French law, the mandate is a non onerous one, by virtue of law
- Legal scholars **disagree** whether remuneration is a matter of extent or exercise of powers!

+ G. Exercise of powers (4)

■ Example 3

- **Donation** is permitted with regard to a French notarized mandate, subject to the approval of the juge des tutelles
- Swiss law prohibits any donation whatsoever
- It is a matter of extent ... the donation should be possible
- But the 2000 Convention reserves **mandatory national provisions** that shall apply whatever the law governing the act!

+ I. And if Sonia came from LA?

- Fortunately not much different !
- Swiss International Private Law refers to the 2000 Convention even toward non-contracting States.

+ J. Conclusion (1)

- Always inquire about the instruments made abroad – they may have full validity in CH
- A global EPA is to be recommended (for all kinds of assets, for all countries) where the countries involved are all parties to the Convention, even if the legal regime may prove to be uncertain (see examples)
- Choice of law will depend on the residence and location of majority of assets (multiple choice is admitted)

+ J. Conclusion (2)

- Trickier when countries with important assets are not a member of the Convention (will they recognize the EPA? If yes with which limits? Difficult to predict)
- Worthwhile to establish a Swiss EPA and separate acts for the assets located in those countries (when still possible)
- Good knowledge of the law applicable is requested to identify the possible issues and contradictions
- Global and coordinated counselling requested in any case!



Some further reading

- W. Boente, *Commentaire zurichoïse, Vorb. zu Art. 360-373 N 178 ss*, Zurich 2015
- A. Bucher, *La protection internationale des adultes*, in *Mélanges M. Stettler*, Zurich/Genève 2007, p. 63 ss
- A. Bucher, *Commentaire romand LDIP, etc., art. 85 LDIP*, N 43 ss, Bâle 2011
- B. Dutoit, *Droit international privé suisse*, 5^{ème} éd., Bâle 2016, ad art. 85 LDIP
- R. Frimston et alii, *The International Protection of Adults*, Oxford 2015
- D. Füllemann, *Das internationale Privat- und Zivilprozessrecht des Erwachsenenschutzes*, thèse St-Gall, Zurich 2008
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- F. Guillaume, *LDIP et CLaH 2000 in Commentaire du droit de la famille – Protection de l'adulte*, Berne 2013
- F. Guillaume/B. Durel, *La protection internationale de l'adulte*, in *Le nouveau droit de la protection de l'adulte*, Bâle 2012, 341 ss
- Ph. Meier, *Droit de la protection de l'adulte*, Zurich/Genève 2016, N 342 ss
- I. Schwander, *Kindes- und Erwachsenenschutz im internationalen Verhältnis*, PJA 2014 1351 ss