

EXPLANATORY REPORT

on the

Convention providing a Uniform Law on the Form of an International Will

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GENERAL REMARKS

The Washington Convention providing a Uniform Law on the form of the International Will is the third recent international instrument dealing with the law of testamentary succession, following the Hague Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of the Clauses of a Will¹ and the Convention on the Establishment of a Scheme of Registration of Wills² drawn up within the framework of the Council of Europe and signed in Basle on 16 May 1972. Bordering on this subject, there is also the Hague Convention of 1 October 1973 concerning the International Administration of the Estates of Deceased Persons.

The very fact that there are so many of these agreements shows, that international legal circles are interested in this subject, even though at first sight it seemed that it would not arouse much enthusiasm. The rules on testamentary succession in fact vary considerably in the different national legal systems, these rules and practices often being deeply rooted in tradition. However, the spectacular increase in the mobility of persons and goods, as a result of developments in the means of communication and transport and in international trade, has accentuated the drawbacks resulting from these differences. It thus appeared that for differences of pure form, the rule which favours respect for the intentions of the testator (“favor testamenti”), although universally recognised, could be overlooked³.

Two considerations in particular encouraged the International Institute for the Unification of Private Law (UNIDROIT) to undertake the work which led to the Washington Convention. The first is that many national laws already permit the co-existence of several types of will (for example, the public will, the holograph will, the mystic will, the oral will, or special forms in

^(*) The present report was drawn up in accordance with a decision taken by the Washington Conference in its Final Act. However, it reflects the personal opinions of the author and does not constitute an authoritative instrument of interpretation of the text of the Convention.

¹ As at 15 November 1973, this Convention was in force between the following States: Austria, Belgium, Botswana, Fiji, France, Germany, Ireland, Japan, Mauritius, Norway, Poland, South Africa, Swaziland, Switzerland, United Kingdom, Yugoslavia.

² Not yet entered into force.

³ See in particular the examples given by WILLIAM F. FRATCHER, *The Uniform Probate Code and the International Will*, 66 Michigan Law Review, 469-480 (1968).

exceptional circumstances). The second is that conflict rules tend to be more and more liberal as regards the validity of wills drawn up in forms accepted by another country's law. Thus, apart from a few exceptions⁴, the principle 'locus regit actum' is very widely accepted as regards the form of the will⁵.

The above-mentioned Hague Convention of 1961 also marked considerable progress in the field of rules on conflicts of law. The testator is given great freedom by Article I which allows him to make his will either according to the law of the place where he makes the will, or according to the law of the State where he is domiciled or has his habitual residence at the time the will is made or at his death, or according to the law of the State of which he is a national at the time of making the will or at his death, or, in the case of immovables, according to the law of the State where those immovables are situated. The Convention thus provides no less than seven or eight connecting factors as permitting the applicability of the law in accordance with which the will was made.

These circumstances led the Governing Council of UNIDROIT in 1960 to consider whether there might not be a possibility of making further progress beyond the provisions agreed on at The Hague in 1961. Seeing that use of such diverse forms of will is so readily accepted, might it not be possible, by going one further step, to agree on a certain form of will acceptable to the internal law of every country?

It was with this in mind that a Working Committee was convened by UNIDROIT in 1961 to draw up a preliminary draft of a uniform law introducing a new form of will, the "international will". The text of this preliminary draft, after having been submitted to the Governments of Member States, was revised by a Committee of governmental experts in 1971. It served as a basis for the work of the Diplomatic Conference which, on the initiative, and at the invitation of the United States Government, was held in Washington from 16 to 26 October 1973 and which adopted the "Convention providing a Uniform Law on the Form of the International Will".

Before starting on an article-by-article commentary of the provisions of the Convention, one should first recall its general characteristics and point out its interest and usefulness in the light of the Conventions already in existence.

It should first of all be stressed that the Convention does not aim at harmonising or unifying the forms that already exist in the different systems of national law. These are neither abolished nor modified. It simply proposes, alongside and in addition to the traditional forms, another new form which it is hoped practice will bring into use mainly but not exclusively when in the circumstances a will has some international characteristics.

The provisions of the Uniform Law deal only with form in the strict sense: all questions which may in certain respects relate to rules of substance such as the personal capacity required of the testator or of the witnesses, the joint will, have been left aside, as have questions relating to the revocation, destruction or modification of wills.

⁴ Thus, the validity of a holograph will made abroad by a person whose capacity is governed by Dutch law is not recognised in the Netherlands. A similar rule exists in Portugal.

⁵ See ALFRED E. VON OVRBECK, *L'Unification des règles de conflits de loi en matière de forme de testaments*, Editions universitaires, Fribourg, Switzerland, 1961.

The new form of will proposed was drawn up on a solid basis of comparative law and in particular on a preliminary, study specially provided by the Institute of Comparative Law in Belgrade⁶. Account was taken of the different forms preferred in those countries. The “international will” is certainly new, but it seeks to meet the needs shown in the various existing systems. Lawyers from civil law countries will not find in it the holograph will or the authentic will or the mystic will with which they are familiar, neither will Common lawyers find exactly the will made in the presence of witnesses; however, each will find therein different features that have been derived from these different forms, so that whatever the place or circumstances, neither testator nor practising lawyers will be surprised or bewildered by useless innovations.

Finally, it, was the intention of the authors of the Convention to give priority to the testator’s discretion and respect for his intentions over any form requirements unnecessary to guarantee the real intentions of the testator. This is why the Uniform Law prescribes two classes of formality: those that are prescribed on pain of the international will being declared void (Articles 2-5) and those for which, on the contrary, there is no penalty for non-compliance. The first provide the essential safeguards deemed to be necessary for the testator’s protection. The others were laid down for their practical convenience and in order to bring about a more thorough unification; however, these objectives were judged to be of minor importance by comparison with the faithful carrying out of the testator’s wishes.

The adoption of the international will is at the legal level an especially remarkable achievement of unification. First, by eliminating the problem of finding the applicable law within the countries which have adopted it, this instrument will ensure greater legal certainty, as the testator who has chosen this form is certain that it will be recognised as valid in all the States party to the Convention. The risk of a will being rejected because it was drawn up in accordance with the formal requirements of a foreign country is thus eliminated. It is true that the danger of this happening had already been lessened by the liberal approach of the conflict rules, which were still more liberal for those States which were parties to the Hague Convention. However, the validity of a foreign will that is admitted in this way should be assessed by reference to the foreign law. The judge has therefore to establish the contents and check the application of this foreign law and this presents complications and difficulties which are well known in legal practice. On the contrary, the validity of the international will is assessed directly in relation to the national law of each State that has adopted it, even if the will was drawn up in a foreign country and before foreign authorities. What is chiefly original and of interest in this Convention is this direct recognition of the formal validity of all international wills by each national law without any distinction being drawn between those drawn up in the country where the judge is sitting and those drawn up abroad on condition that the formal requirements laid down by Articles 2 to 5 of the Uniform Law have been respected. This direct assessment of the formal regularity of an act carried out abroad by reference to national law is an innovation which deserves to be underlined.

⁶ “Etude sur la forme du testament dans le droit comparé préparée par l’Institut de droit comparé de Belgrade”, UNIDROIT, U.D.P. 1962, Et. XLIII, forme du testament Doc. 1 and Doc. 3.

Moreover, the international will is not only valid in Contracting States, but it will also be valid in other States in application this time of the classical conflict rules, the considerably liberal approach of which has already been underlined. The international will will therefore be valid in all non-contracting States on the same footing as any other foreign will, on two conditions. First of all, the law in accordance with which it was drawn up must be acceptable according to the applicable conflict rule, In addition the form laid down by this law-in this case the Uniform Law-must have been correctly followed. In complete contrast to the situation obtaining as between Contracting States, the Uniform Law in these circumstances is a foreign law, and proof of its, contents and correct application would have to be made by reference to the methods and procedures laid down. for this purpose by each national legal system.

However, one effect of the working of the Convention introducing the international will is further to extend the number of applicable laws by virtue of the conflict rules of non-contracting States. Seen as a whole, the Contracting States, as concerns the international will, form in fact a unique legal system. Although its peculiar nature is of no practical effect with respect to the choice of the *lex loci actus* as the necessary connecting factor - this being the most widely used - it may, on the other hand, considerably extend the scope of the other connecting factors admitted, in some legal systems, in particular those mentioned in the Hague Convention: nationality, domicile, habitual residence, and for immovables the place where they are situated. The following two examples will illustrate this situation.

Let us suppose that the formal validity of an international will falls to be decided in State A which is not a party to the Convention and whose conflict rules would indicate the law of the domicile of the testator. If the testator has made an international will in State X which is not the country of his domicile, this will will, nevertheless be acceptable if he is domiciled in a State which is a party to the Convention, as it is directly by Virtue of the internal law of this State (in this case the Uniform Law), applicable according to the conflict rule, that the international will, even if made in a foreign country, is valid.

Second example: an international will, involving an immovable is contested in State A which is not a party to the Convention and the conflict rule of which designates the law of the place where the immovable is situated as governing the case in point. Even if the international will was drawn up in State X which is not where the immovable is situated, it will have to be accepted in State A if the State in which the immovable is situated is a party to the Convention; in this case the international will, even if made in a foreign country, is valid by direct application of the Uniform Law as part of the internal law, this being, applicable by virtue of the conflict rule.

This indirect effect of the Convention, through the action of the conflict rules, renders the Uniform Law even more interesting, especially as it is expanded by the effect of the rules in the Hague Convention which, as already stressed earlier, admits all the usual connecting factors simultaneously. Thus, the coexistence of the two Conventions, far from creating the risk of conflicts, has, on the contrary, the strange effect of extending the scope of them both.

Apart from these legal advantages, there are also practical and psychological advantages, the importance of which will be immediately appreciated by the increasingly large number of people who are brought to live far away from their country of origin and who, for

this or other reasons, have their property spread out over different countries. The existence of an “international will”, whose very title indicates that it was conceived with their needs in mind, will serve to reassure such people and remove their doubts and hesitations as to their choice of the form in which they should make their will so as best to ensure the faithful carrying out thereof. Another considerable advantage of the international will is the fact that it can be drawn up in any language, as this enables a testator established in a foreign country to choose, more often than not, his own language.

Finally, the fact that the system used by the draft has borrowed items from forms as they now exist in various countries will enable everyone to recognise in the international will some items with which they are already familiar. Everything, in this way, leads one to think that practising lawyers in the countries that accept the Convention will recommend this new form of international will in all cases in which there is some factor relating to the testator, the heirs or the property which extends beyond the national framework - especially as this form offers a simplicity and certainty which are often more satisfactory than in the traditional forms of will.

COMMENTARY ON THE ARTICLES OF THE CONVENTION AND OF THE UNIFORM LAW FORMING ITS ANNEX

The Washington Convention is in the form, of a text of 16 articles stating the obligations accepted by Contracting States: the most important of these is to introduce the Uniform Law annexed to the Convention into their respective national legislation. This Uniform Law provides 15 articles governing the form of the international will.

The technique used - Convention and annexed Uniform Law - allows for a high degree of international unification. It has already been used for several international instruments and in particular in the Geneva Conventions of 1930 and 1931 on bills of exchange and cheques and in the Hague Convention of 1964 on international sale.

I. THE CONVENTION

Article I

This article imposes two obligations on Contracting States: the first is essentially that they must introduce into their respective national legislation the rules regarding the international will set out in the Annex to this Convention; the second is that they must submit to the Depository Government - the United States Government - the text of the rules introduced in order to ensure reciprocal checking and information between the States party to the Convention, as the Depository Government will then, in accordance with Article XVI (2) (d), give notice of this information to all signatory States.

Paragraph 2 indicates the way in which States must satisfy the first of these two obligations. The text of the Annex is mandatory as it stands in the 4 original languages of the

Convention (English, French, Russian, Spanish). It can be translated from these original languages into any official language of the Contracting States. The strict nature of these solutions might seem excessive to some legal draftsmen, especially those who draft in one of the original languages as they cannot make the small changes in the presentation or vocabulary of the Uniform Law that might be justified by the traditions or customs of their drafting technique. The Conference, however, preferred to maintain this obligation in its strict form as guaranteeing a more perfect degree of unification. Moreover, it is to be hoped that States with a common official language other than one of the original languages will work towards a common translation, as has already been done once or twice in the past⁷.

The small inconveniences of form that may result from the straightforward introduction of the Uniform Law into national legislation are tempered by two provisions.

One is contained in the Uniform Law itself. Article 15 recalls the international origin of the Law and recommends that this should be taken into account in its interpretation and application. Thus, should the inclusion of certain provisions of the Uniform Law in a particular legal system have an unusual effect, the explanation and justification for this could then be found in the text itself.

There is a further factor which lessens the strict nature of this rule. This is the possibility of adding supplementary provisions stipulated in paragraph 3 of Article 1. Such provisions will enable States to introduce the Uniform Law more harmoniously and effectively into legal systems where a straightforward transplantation would prejudice the text's clarity or elegance. This is, however, not the only aim of paragraph 3: it also enables national legislators to add to the actual text of the Uniform Law supplementary measures which are implied, such as the designation of persons authorised to act in connection with international wills or those it suggests or authorises, such as provisions relating to the safekeeping of the international will (see Art. 8 of the Uniform Law and the Resolution adopted by the Diplomatic Conference included as an Annex to the Final Act). Further clarifications may be supplied regarding the choice between the two procedures for signature of the will of a person who either does not know how to or is physically incapable of signing; this choice is left to each Contracting State by Article 5 of the Uniform Law. More generally, according to the terms of paragraph 3, States may accompany the Uniform Law by "such further provisions as are necessary" to give "the Uniform Law's provisions full effect in its territory". This would even appear to cover provisions as to the payment of fees, rights or duties which may be demanded when a will is being drawn up. However, it is quite clear that the effect of these provisions could not be to impose added conditions or requirements as to form affecting in any way the validity of an international will.

Finally, it should be noted that the period of six months in which Contracting States may introduce the Uniform Law into their national legislation begins as from the date when the Convention comes into force in respect of the State under consideration. Now, under Article XI, the Convention normally comes into force six months after the instrument of ratification or accession has been deposited. The Contracting State will therefore have altogether one year

⁷ German-speaking countries have, for instance, prepared a common version of the 1930 and 1931 Uniform Laws on bills of exchange and promissory notes, and cheques.

as from the date of ratification or accession in which to introduce the Uniform Law into its national legislation. This is obviously the maximum time permitted: the Uniform Law, will often be introduced simultaneously with ratification of the Convention, in some cases by the same statute. It is even possible that the Uniform Law might be introduced into municipal law before the Convention has been ratified.

Article II

Under this article, Contracting States must, at the same time as they introduce the form of the international will into, their, municipal law, designate the persons. authorised to act in this connection. The United States Government is in charge of seeing, that' this, designation is communicated to all the other Contracting States (Article XVI, (e)), which is vital for the validity of duly conferred authorisation to be recognised in all these States (Article III).

Contracting States are given complete discretion in designating the persons authorised to act in connection with international wills. This idea of a person who is authorised to act is in no way unusual in all Civil law countries, for in these countries there is already a special category of professional lawyers, notaries, whose intervention is required, subject to conditions laid down by national law, in drawing up many private deeds and, in particular, for certain types of will. It is, therefore, to be expected that in many countries these notaries will be designated as the persons authorised to act for the purposes of the Washington Convention. However, Contracting States may also designate, instead of or in addition to notaries, if such exist, any other person with the requisite qualification and, if need be, the holders of a position or office, for instance the registrar of a court, or a judge, or the holder of an administrative post, a public officer, or the holder of a special office such as the Registry of Wills in Ireland.

In Common law countries where the office of notary, as it is known in Civil law countries, is generally unknown, the designation of persons authorised to act will give rise to certain problems but these ought to be solved without any great difficulty⁸. In England, for instance, solicitors are frequently involved in connection with wills, in particular with their drawing up and safekeeping. In the United States and in other federal states this point may be more delicate and may well lead to somewhat longer lists, but this would not cause any major difficulty⁹.

Article II also expressly stipulates the possibility for States to designate as persons authorised to act their diplomatic and consular agents abroad. This provision seems fully justified as the type of will with which we are concerned was specially intended for persons with a certain international mobility. Nationals of a State that has adopted this possibility may therefore, when in a foreign country - regardless of whether or not it is a Contracting State - use their consulate or embassy in drawing up their international wills. Naturally, this possibility only arises if the State where the consular or diplomatic authorities are resident is not opposed to such duties being given them on its territory. It seems that,, in practice, Contracting States

⁸ See WILLIAM F. FRATCHER, *op. cit.* pp. 494-495.

⁹ See KURT H. NADELMANN, The Formal Validity of Wills and the Washington Convention 1973 providing the Form of an International Will, 22 *Am. J. Comp. Law* 365, 376-377 (1974).

which wish to designate their diplomatic and consular agents as persons authorised to act in connection with international wills will have to do so by using a formula similar to the one in the second sentence of Article II, thus allowing for special agreements-particularly consular conventions-which sometimes contain special provisions. on these so-called notarial duties of consuls.

Finally, we should point out that the person designated as being authorised to act may be given other tasks in connection with an international will than those of simply receiving and delivering the certificate stipulated by the Uniform Law. He may, in particular, be requested to ensure the safekeeping of the international will or in some cases to collect certain fees or duties, in connection with what has already been mentioned regarding Article I, paragraph 3.

Article III

The categories of persons authorised will obviously differ from State to State. The only aim of Article III is to express the intention of each Contracting State to recognise the competence as persons authorised to act of all the authorities designated by the national law of the other Contracting States, in accordance with the provisions of Article II. Except in the case of diplomatic or consular agents, authorised persons can, of course, Only act within the territory of the State which conferred their authorisation. The phrase “in its territory” in Article II is perfectly clear in this respect. Article III cannot therefore be invoked to enable an authorised person to act outside the territory of his own country: his authorisation is to be recognised in all Contracting States, but his power to act as defined by this authorisation can only be exercised within the limits defined by this authorisation and these cannot overstep the territorial limits of his own country.

Article IV

The certificate made out in three copies by the authorised person is one of the most original aspects of the international will and probably one of its points of major interest.

Its main aim is to furnish proof of the observance of the requirements as to form laid down by the Uniform Law - and, in this way, proof of the validity of the international will itself (see Article 12 of the Uniform Law). Article IV of the Convention ensures the international effectiveness of these means of proof, recognised by all Contracting States. A certificate drawn up in a foreign country by a person authorised according to this foreign country's national law will therefore be just as effective as a national certificate. The inclusion of a model for this certificate in Article 10 of the Uniform Law should remove any doubts as to its contents.

Article V

It did not appear possible to lay down in the Uniform Law unified rules on the conditions requisite to acting as a witness to an international will. The various legal systems

contain different provisions on this subject and it would be unrealistic to try to derogate from these for the purposes of a piece of unification limited to the international will. The expression “conditions requisite” does not only refer to the general capacity required of witnesses, but also to any special limitation on those persons who may be witnesses – excluding, for example, close relatives or beneficiaries of legacies under the will.

On this point, the Convention, therefore, simply sets out a uniform conflict rule: the conditions requisite are those imposed by the law under which the authorised person was designated. This expression, which is often used in the Convention, indicates a link with what is sometimes called the “*lex magistratus*”,¹⁰ that is to say the law from which the officer acting in connection with the will derives his authority. For the international will, in the light of Article II of the Convention, this will always be the law of the State where the authorised person carries out his business and, therefore, the law of the place where the will was drawn up (*lex loci actus*) – unless the authorised person is a diplomatic or consular agent, in which case it could only be the law of the State which had sent the respective diplomatic or consular agent on mission.¹¹ The possibility of authorising diplomatic or consular agents is therefore the only reason why the “*lex magistratus*” was designated instead of the “*lex loci actus*”. As this is a uniform conflict rule, it could just as easily figure in the Uniform Law as in the Convention.

Paragraph 1 extends the rule for witnesses to interpreters. The Uniform Law does not, however, in any place stipulate the presence of interpreters. Their intervention may, nevertheless, be called for, in particular by the testator himself, to satisfy the requirements of the national law or of local customs which could, if necessary, be included among additional provisions of the Uniform Law, in accordance with Article I, paragraph 3.

Paragraph 2 aims at eliminating certain discriminations which exist and are difficult to justify, especially as regards the international will. In particular, it enables a testator abroad to choose compatriots as witnesses. Nevertheless, this provision is in no way contrary to certain legal systems which require that witnesses must be residents of the place in which they act.

Article VI

Certification of signatures, although required by some country’s national legislation, especially for documents drawn up in foreign countries, is often considered a cumbersome and not very effective formality. Following the example of a number of existing bilateral agreements and multilateral conventions¹², the Washington Convention dispenses with this formality, both for signatures appended to the will and for signatures appended to the certificate, as stipulated in Article 9 of the Uniform Law. This provision is in perfect harmony with the rest of the Convention which endeavours to eliminate any discriminations and differences between an international will made in the State where it is invoked and an international will made in another State. The words “like formality” refer to any other requirements equivalent to certification but

¹⁰ See VON OVERBECK, *op. cit.*, p. 68.

¹¹ See NADELMANN, *op. cit.*, p. 372.

¹² The main one of which is the Convention abolishing the requirement of Legalisation for Foreign Public Documents, concluded at The Hague on 5 October 1961 which, as at 15 November 1973, was in force between 19 States.

known by another name. This expression is frequently to be found in similar provisions in other Conventions¹³. The addition of the certificate stipulated by the Convention abolishing the requirement of legalisation for foreign public documents, concluded at The Hague on 5 October 1961, certainly qualifies as a “like formality”. Article 3 of this Convention moreover specifies that the addition of this certificate cannot be required if there already exists an agreement dispensing with certification. A certificate could not therefore be required for an international will.

This systematic dispensation with certification does not of course imply that the authenticity of signatures may not be checked when challenged. Paragraph 2 states this clearly, without, however, laying down any procedure for this purpose: the rules applicable in relations between the two States in question should be followed. The expression “the competent authorities” can refer either to administrative or judicial authorities, depending on the circumstances, and indicates that this check should be carried out by official channels, which is logical as what is involved is the checking of a document emanating from a person who received his authority under the law.

Article VII

Article VII lays down another conflict rule, as it was not found possible to establish a uniform system for the safekeeping of international wills. It should be remembered that the Washington Conference adopted a resolution annexed to the Final Act, which, in particular, encourages States to organise a system for the safekeeping, search, and discovery of international wills¹⁴.

The conflict rule that was adopted indicates the “lex magistratus” in the terms and for the reasons already set out above in relation to Article V.

Article VIII

Contracting States are not authorised to make reservations to either the Convention or its Annex. The principle embodied in this provision was criticised at the Diplomatic Conference by some delegations who considered that it interfered with States’ sovereignty. However, it was noted that none of the delegations participating in the Conference intended making reservations and, furthermore, that, in consideration of the structure and contents of the Convention, the making of reservations could well ruin the precise purpose of unification, which is the indispensable condition for the general recognition of the international will, in whatever country it may have been made. It was, therefore, considered wise to maintain the prohibition on reservations contained in Article VIII.

¹³ For instance, inter alia, the Hague Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters. The Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters talks, in the same way, of “equivalent formality”.

¹⁴ See the end of this Report for a commentary of this Recommendation.

Articles IX-XVI

These Articles form the final clauses which are of a diplomatic nature. They conform for the most part with international practice on this subject and do not, therefore, call for any particular comments. One might, however, stress the liberal scope of Article IX which lays down no limitation or specification as to the States that may sign the Convention. Article XIII contains the traditional clause making it possible for a Contracting State to extend the Convention to the territories that it represents at the international level. This provision was criticised at the Diplomatic Conference but it was maintained in consideration of the fact that, although it concerns increasingly fewer States, it nevertheless continues to have a certain practical usefulness. Special notice should be taken of Articles XIV and XV, intended to provide the adjustments and details required to facilitate adoption of the international will in federal States or States whose territory is composed of different units, for which the Convention offers the additional advantage of internal unification¹⁵. These so-called “federal” clauses are similar to those contained in the Convention which came out of the 12th session of the Hague Conference on Private International Law in 1972¹⁶. Article XIV enables a State incorporating two or more legislatures, each with independent legislation on this subject, to ratify the Convention in such a way that it will only apply to those of its territorial units which are in favour of it, whereas those other territorial units which do not wish to benefit from it are left out. A provision of this kind facilitates the ratification of the Convention for federal States. As for Article XV, this simply provides for a reference to the constitutional law of the States in question when it is a question of determining what is meant in the framework of the legal system described above in connection with Article XIV by the terms “internal law” or “the law under which the authorised person has been appointed”, terms which are both used in the Convention.

Article XVI lays down a system whereby signatory States are kept informed by the United States Government. The International Institute for the Unification of Private Law is included among those to whom this information must be addressed. It would therefore fit in with the statutory activities of this Organisation for it to give a lead to the movement towards unification begun by this Convention, and to draw conclusions from its efforts in this direction.

II. THE UNIFORM LAW

Article I

The Uniform Law is intended to be introduced into the legal system of each Contracting State. Article 1, therefore, introduces into the internal law of each Contracting State the new,

¹⁵ See NADELMANN, *op. cit.*, pp. 373-374.

¹⁶ See, in particular, Articles 35 and 36 of the Convention concerning the International Administration of the Estates of Deceased Persons.

basic principle according to which the international will is valid irrespective of the country in which it was made, the nationality, domicile or residence of the testator and the place where the assets forming the estate are located.

The scope of the Uniform Law is thus defined in the first sentence. As was mentioned above, the idea behind it was to establish a new type of will the form of which would be the same in all countries. The Law obviously does not affect the subsistence of all the other forms of will known under each national law.

The Uniform Law gives no definition of the term will¹⁷. The preamble of the Convention also uses the expression "last wills". The material contents of the document are of little importance as the Uniform Law governs only its form. There is, therefore, nothing to prevent this form being used to register last wishes that do not involve the naming of an heir and which in some legal systems are called by a special name, such as "Kodizill" in Austrian Law (ABGB § 553).

Although it is given the qualification "international", the will dealt with by the Uniform Law can easily be used for a situation without any international element, for example, by a testator disposing in his own country of his assets, all of which are situated in that same country. The adjective "international", therefore, only indicates what was had in mind at the time when this new will was conceived. Moreover, it would have been practically impossible to define a satisfactory sphere of application, had one intended to restrict its use to certain situations with an international element. Such an element could only be assessed by reference to several factors (nationality, residence, domicile of the testator, place where the will was drawn up, place where the assets are situated) and moreover, these might vary considerably between when the will was drawn up and the beginning of the inheritance proceedings.

Use of the international will should, therefore, be open to all testators who decide they want to use it. Nothing should prevent it from competing with the traditional forms if it offers advantages of convenience and simplicity over the other forms and guarantees the necessary certainty.

Some of the provisions relating to form laid down by the Uniform Law are considered essential. Violation of these provisions is sanctioned by the invalidity of the will as an international will. These are: that the will must be made in writing, the presence of two witnesses and of the authorised person, signature by the testator and by the persons involved (witnesses and authorised person) and the prohibition of joint wills. The other formalities, such as the position of the signature and date, the delivery and form of the certificate, are laid down for reasons of convenience and uniformity but do not affect the validity of the international will.

Lastly, even when the international will is declared invalid because one of the essential provisions contained in Articles 2 to 5 has not been observed, it is not necessarily deprived of all effect. Paragraph 2 of Article 1 specifies that it may still be, valid as a will of another kind, if it conforms with the requirements of the applicable national law. Thus, for example, a will written dated and signed by the testator but handed over to an authorised person in the absence of witnesses or without the signature of the witnesses and the authorised person could quite easily be considered a valid holograph will. Similarly, an international will produced in the

¹⁷ On this subjects see VON OVERBECK, *op. cit.*, pp. 93-94.

presence of a person who is not duly authorised might be valid as a will witnessed in accordance with Common law rules.

However, in these circumstances, one could no longer speak of an international will and the validity of the document would have to be assessed on the basis of the rules of internal law or of private international law.

Article 2

A joint will cannot be drawn up in the form of an international will. This is the meaning of Article 2 of the Uniform Law which does not give an opinion as to whether this prohibition on joint wills, which exists in many legal systems, is connected with its form or its substance¹⁸.

A will made in this international form by several people together in the same document would, therefore, be invalid as an international will but could possibly be valid as another kind of will, in accordance with Article 1, paragraph 2 of the Uniform Law.

The terminology used in Article 2 is in harmony with that used in Article 4 of The Hague Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions.

Article 3

Paragraph 1 of Article 3 lays down an essential condition for a will's validity as, an international will: it must be made in writing.

The Uniform Law does not explain what is meant by “writing”. This is a word of everyday language which, in the opinion of the Law’s authors, does not call for any definition but which covers any form of expression made by signs on a durable substance.

Paragraphs 2 and 3 show the very liberal approach of the draft.

Under paragraph 2, the will does not necessarily have to be written by the testator himself. This provision marks a moving away from the holograph will toward the other types of will: the public will or the mystic will and especially the Common law will. The latter, which is often very long, is only in exceptional cases written in the hand of the testator, who is virtually obliged to use a lawyer, in order to use the technical formulae necessary to give effect to his wishes. This is all the more so as wills frequently involve *inter vivos* family arrangements, and fiscal considerations play a very important part in this matter.

This provision also allows for the will of illiterate persons, or persons who, for some other reason, cannot write themselves, for example paralysed or blind persons.

According to paragraph 3, a will may be written in any language. This provision is in contrast with the rules accepted in various countries as regards public wills. It will be noted that the Uniform Law does not even require the will to be written in a language known by the testator. The latter is, therefore, quite free to choose according to whichever suits him best: it is to be expected that he will usually choose his own language but if he thinks it is better, he will sometimes also choose the language of the place where the will is drawn up or that of the

¹⁸ See VON OVERBECK, *op. cit.*, pp. 98 to 101.

place where the will is, mainly to be carried out. The important point is that he have full knowledge of the contents of his will, as is guaranteed by Articles 4 and 10.

Lastly, a will may be written by hand or by any other method. This provision is the corollary of paragraph 2. What is mainly had in mind is, a typewriter, especially in the case of a will drawn up by a lawyer advising the testator.

Article 4

The liberal nature of the principles set out in Article 3 calls for certain guarantees on the other hand. These are provided by the presence of three persons, already referred to in the context of Articles III and V of the Convention, that is to say, the authorised person and the two witnesses. It is evident that these three persons must all be simultaneously present with the testator during the carrying out of the formalities laid down in Articles 4 and 5.

Paragraph 1 of Article 4 requires, first of all, that the testator declare, in the presence of these persons, that the document produced by him is his will and that he knows the contents thereof. The word “declares” covers any unequivocal expression of intention, by way of words as well as by gestures or signs, as, for example, in the case of a testator who is dumb. This declaration must be made on pain of the international will being invalid. This is justified by the fact that the will produced by the testator might have been materially drawn up by a person other than the testator and even, in theory, in a language which is not his own.

Paragraph 2 of the article specifies that this declaration is sufficient: the testator does not need to “inform” the witnesses or the authorised person “of the contents of the will”. This rule makes the international will differ from the public will and brings it closer to the other types of will: the holograph will and especially the mystic will and the Common law will.

The testator can, of course, always ask for the will to be read, a precaution which can be particularly useful if the testator is unable to read himself. The paragraph under consideration does not in any way prohibit this; it only aims at ensuring respect for secrecy, if the testator should so wish. The international will can therefore be a secret will without being a closed will.

Article 5

The declaration made by the testator under Article 4 is not sufficient: under Article 5, paragraph 1, he must also sign his will. However, the authors of the Uniform Law presumed that, in certain cases, the testator might already have signed the document forming his will before producing it. To require a second signature would be evidence of an exaggerated formalism and, a will containing two signatures by the testator would be rather strange. That is why the same paragraph provides that, when he has already signed the will, the testator can merely acknowledge it. This acknowledgement is completely informal and is normally done by a simple declaration in the presence of the authorised person and witnesses.

The Uniform Law does not explain what is meant by “signature”. This is once more a word drawn from everyday language, the meaning of which is usually the same in the various

legal systems. The presence of the authorised person, who will necessarily be a practising lawyer will certainly guarantee that there is a genuine signature correctly affixed.

Paragraph 2 was designed to give persons incapable of signing the possibility of making an international will. All they have to do is indicate their incapacity and the reason therefore to the authorised person. The authorised person must then note this declaration on the will which will then be valid, even though it has not been signed by the testator. Indication of the reason for incapacity is an additional guarantee as it can be checked. The certificate drawn up by the authorised person in the form prescribed in Article 10 again reproduces this declaration.

The authors of the Uniform Law were also conscious of the fact that in some legal systems - for example, English law - persons who are incapable of signing can name someone to sign in their place. Although this procedure is completely unknown to other systems in which a signature is exclusively personal, it was accepted that the testator can ask another person to sign in his name, if this is permitted under the law from which the authorised person derives his authority. This amounts to nothing more than giving satisfaction to the practice of certain legal systems, as the authorised person must, in any case, indicate on the will that the testator declared that he could not sign, and give the reason therefor. This indication is sufficient to make the will valid. There will, therefore, simply be a signature affixed by a third person instead of that of the testator. Although there is nothing stipulating this in the Uniform Law, one can expect the authorised person to explain the source of this signature on the document, all the more so as the signature of this substitute for the testator must also appear on the other pages of the will, by virtue of Article 6.

This method, over which there were some differences of opinion at the Diplomatic Conference, should not however interfere in any way with the legal systems which did not admit a signature in the name of someone else. Besides, its use is limited to the legal systems which admit it already and it is now implicitly accepted by the others when they recognise the validity of a foreign document drawn up according to this method. However, this situation can be expected to arise but rarely, as an international will made by a person who is incapable of signing it will certainly be a rare event.

Lastly, Article 5 requires that the witnesses and authorised person also sign the will there and then in the presence of the testator. By using the words “attest the will by signing”, when only the word “sign” had been used when referring to the testator, the authors of the Uniform Law intended to make a distinction between the person acknowledging the contents of a document and those who have only to affix their signature in order to certify their participation and presence.

In conclusion, the international will will normally contain four signatures: that of the testator, that of the authorised person and those of the two witnesses. The signature of the testator might be missing: in this case, the will must contain a note made by the authorised person indicating that the testator was incapable of signing, adding his reason. All these signatures and notes must be made on pain of invalidity. Finally, if the signature of the testator is missing, the will could contain the signature of a person designated by the testator to sign in his name, in addition to the abovementioned note made by the authorised person.

Article 6

The provisions of Article 6 and those of the following articles are not imposed on pain of invalidity. They are nevertheless compulsory legal provisions which, can involve sanctions, for example, the professional, civil and even criminal liability of the authorised person, according to the provisions of the law from which he derives his authority.

The first paragraph, to guarantee a uniform presentation for international wills, simply indicates that signatures shall be placed at the end of international wills, that is, at the end of the text.

Paragraph 2 provides for the frequent case in which the will consists of several sheets. Each sheet has to be signed by the testator, to guarantee its authenticity and to avoid substitutions. The use of the word “signed” seems to imply that the signature must be in the same form as that at the end of the will. However, in the legal systems which merely require that the individual sheets be paraphed, usually by means of initials, this would certainly have the same value as signature, as a signature itself could simply consist of initials.

The need for a signature on each sheet, for the purpose of authenticating each such sheet, led to the introduction of a special system for the case when the testator is incapable of signing. In this case it will generally be the authorised person who will sign each sheet in his place, unless, in accordance with Article 5, paragraph 2, the testator has designated another person to sign in his name. In this case, it will of course be this person who will sign each sheet.

Lastly, it is prescribed that the sheets shall be numbered. Although no further details are given on this subject, it will in practice be up to the authorised person, to check if they have already been numbered and, if not, to number them or ask the testator, to do so.

The aim of this provision is obviously to guarantee the orderliness of the document and to avoid losses, subtractions or substitutions.

Article 7

The date is an essential element of the will and its importance is quite clear in the case of successive wills. Paragraph 1 of Article 7 indicates that the date of the will in the case of an international will is the date on which it was signed by the authorised person, this being the last of the formalities prescribed by the Uniform Law on pain of invalidity (Article 5, paragraph 3). It is, therefore, from the moment of this signature that the international will is valid.

Paragraph 2 stipulates that the date shall be noted at the end of the will by the authorised person. Although this is compulsory for the authorised person, this formality is not sanctioned by the invalidity of the will which, as is the case in many legal systems such as English, German and Austrian law, remains fully valid even if it is not dated or is wrongly dated. The date will then have to be proved by some other means. It can happen that the will has two dates, that of its drawing up and the date on which it was signed by the authorised person as a result of which it became an international will. Evidently only this last date is to be taken into consideration.

Article 8

During the preparatory work it had been intended to organise the safekeeping of the international will and to entrust its care to the authorised person. This plan caused serious difficulties both for the countries which do not have the notary as he is known in Civil law systems and for the countries in which wills must be deposited with a public authority, as is the case, for example, in the Federal Republic of Germany, where wills, must be deposited with a court.

The authors of the Uniform Law therefore abandoned the idea of introducing a unified system for the safekeeping of international wills. However, where a legal system already has rules on this subject, these rules of course also apply to the international will as well as to other types of will. Finally, the Washington Conference adopted, at the same time as the Convention, a resolution recommending States, in particular, to organise a system facilitating the safekeeping of international wills (see the commentary on this resolution, at the end of this Report). It should lastly be underlined that States desiring to give testators an additional guarantee as regards the international will will organise its safekeeping by providing, for example, that it shall be deposited with the authorised person or with a public officer. Complementary legislation of this kind could be admitted within the framework of paragraph 3 of Article 1 of the Convention, as was mentioned in our commentary on that article.

These considerations explain why Article 8 starts by stipulating that it only applies “in the absence of any mandatory rule pertaining to the safekeeping of the will”. If there happens to be such a rule in the national law from which the authorised person derives his authority this rule shall govern the safekeeping of the will. If there is no such rule, Article 8 requires the authorised person to ask the testator whether he wishes to make a declaration in this regard. In this way, the authors of the Uniform Law sought to reconcile the advantage of exact information so as to facilitate the discovery of the will after the death of the testator, on the one hand, and respect for the secrecy which the testator may want as regards the place where his will is kept, on the other hand. The testator is therefore quite free to make or not to make a declaration in this regard, but his attention is nevertheless drawn to the possibility left open to him, and particularly to the opportunity he has, if he expressly asks for it, to have the details he thinks appropriate in this regard mentioned on the certificate provided for in Article 9. It will thus be easier to find the will again at the proper time, by means of the certificate made out in three copies, one of which remains in the hands of the authorised person.

Article 9

This provision specifies that the authorised person must attach to the international will a certificate drawn up in accordance with the form set out in Article 10, establishing that the Uniform Law's provisions have been complied with. The term “joint au testament” means that the certificate must be added to the will, that is, fixed thereto. The English text which uses the word “attach” is perfectly clear on this point. Furthermore, it results from Article 11 that the certificate must be made out in three copies. This document, the contents of which are detailed

in Article 10, is proof that the formalities required for the validity of the international will have been complied with. It also reveals the identity of the persons who participated in drawing up the document and may, in addition, contain a declaration by the testator as to the place where he intends his will to be kept. It should be stressed that the certificate is drawn up under the entire responsibility of the authorised person who is the only person to sign it.

Article 10

Article 10 sets out the form for the certificate. The authorised person must abide by it, in accordance with the provisions of Article, 10 itself laying down this or a substantially similar form. This last phrase could not be taken as authorising him to depart from this form: it only serves to allow for small changes of detail which might be useful in the interests of improving its comprehensibility or presentation, for example, the omission of the particulars marked with an asterisk indicating that they are to be completed where appropriate. When in fact they do not need to be completed and thus become useless.

Including the form of a certificate in one of the articles of a Uniform Law is unusual. Normally these appear in the annexes to Conventions¹⁹. However, in this way, the authors of the Uniform Law underlined the importance of the certificate and its contents. Moreover, the Uniform Law already forms the Annex to the Convention itself.

The 14 particulars indicated on the certificate are numbered. These numbers must be reproduced on each certificate, so as to facilitate its reading, especially when the reader speaks a foreign language, as they will help him to find the relevant details more easily: the name of the authorised person and the, testator, addresses, etc.

The certificate contains all the elements necessary for the identification of the authorised person, testator and witnesses. It expressly mentions all the formalities which have to be carried out in accordance with the provisions of the Uniform Law. Furthermore, the certificate contains all the information required for the will's registration according to the system introduced by the Council of Europe Convention on the Establishment of a Scheme of Registration of Wills, signed at Basle on 16 May 1972.

Article 11

The authorised person must keep a copy of the certificate and deliver one to the testator. Seeing that another copy has to be attached to the will in accordance with Article 9, it may be deduced that the authorised person must make out altogether three copies of the certificate. These cannot be simple copies but have to be three signed originals. This provision is useful, for a number of reasons. The fact that the testator keeps a copy of the certificate is a useful reminder for him, especially when his will is being kept by the authorised person or

¹⁹ For example: The Hague Convention Abolishing the Requirement of Legalisation of Foreign Public Documents, concluded on 5 October 1961; the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, concluded on 15 November 1965; the Hague Convention concerning the International Administration of the Estates of Deceased Persons, adopted at the XIIth session of the Hague Conference.

deposited with someone designated by national law. Moreover, discovery of the certificate among the testators' papers will inform his heirs of the existence of a will and will enable them to find it more easily. The fact that the authorised person keeps a copy of the certificate enables him to inform the heirs as well, if necessary. Lastly, the fact that there are several copies of the certificate is a guarantee against changes being made to one of them and even, to a certain extent, against certain changes to the will itself, for example as regards its date.

Article 12

Article 12 states that the certificate is conclusive of the formal validity of the international will. It is therefore a kind of proof supplied in advance.

This provision is only really understandable in those legal systems, like the United States, where a will can only take effect after it has been subjected to a preliminary procedure of verification (“Probate”²⁰) designed to check on its validity. The mere presentation of the certificate should suffice to satisfy the requirements of this procedure.

However, the certificate is not always irrefutable as proof, as is indicated by the words “in the absence of evidence to the contrary”. If it is challenged, then the ensuing litigation will be solved in accordance with the legal procedure applicable in the Contracting State where the will and certificate are presented.

Article 13

The principle set out in Article 13 is already implied by Article 1, as only the provisions of Articles 2 to 5 are prescribed on pain of invalidity. Besides, it is perfectly logical that the absence of or irregularities in a certificate should not affect the formal validity of the will, as the certificate is a document serving essentially for purposes of proof drawn up by the authorised person, without the testator taking any part either in drawing it up or in checking it. This provision is in perfect harmony with Article 12 which by the terms “in the absence of evidence to the contrary”, means that one can challenge what is stated in the certificate.

In consideration of the fact that the authorised person will be a practising lawyer officially designated by each Contracting State, it is difficult to imagine him omitting or neglecting to draw up the certificate provided for by the national law to which he is subject. Besides, he would lay himself open to an action based on his professional and civil liability. He could even expose himself to sanctions laid down by his national law.

However, the international will subsists, even if, by some quirk, the certificate which is a means of proof but not necessarily the only one, should be missing, be incomplete or contain particulars which are manifestly erroneous. In these undoubtedly very rare circumstances, proof that the formalities prescribed on pain of invalidity have been carried out will have to be produced in accordance with the legal procedures applicable in each State which has adopted the Uniform Law.

²⁰ See WILLIAM F. FRATCHER, *op. cit.*, RICHARD W. WELLMAN, *Recent UNIDROIT Drafts on the International Will*, International Lawyer, 1973, pp. 205-219.

Article 14

The authors of the Uniform Law did not intend to deal with the subject of the revocation of wills. There is indeed no reason why the international will should be submitted to a regime different from that of other kinds of will. Article 14 therefore merely gives expression to this idea. Whether or not there has been revocation - for example, by a subsequent will is to be assessed in accordance with the law of each State which has adopted the Uniform Law, by virtue of Article 14. Besides, this is a question mainly concerning rules of substance which would thus overstep the scope of the Uniform Law.

Article 15

This Article contains a provision which is to be found in a similar form in several conventions or draft Uniform Laws²¹. It seeks to avoid practising lawyers interpreting the Uniform Law solely in terms of the principles of their respective internal law, as this would prejudice the international unification being sought after. It requests judges to take the international character of the Uniform Law into consideration and to work towards elaborating a sort of common case-law, taking account of the foreign legal systems which provided the foundation for the Uniform Law and the decisions handed down on the same text by the courts of other countries. The effort towards unification must not be limited to just bringing about the Law's adoption, but should be carried on into the process of putting it into operation.

THE RESOLUTION ADOPTED BY THE CONFERENCE

The Resolution adopted by the Washington Conference and annexed to its Final Act encourages States which adopt the Uniform Law to make additional provisions for the registering and safekeeping of the international will. The authors of the Uniform Law considered that it was not possible to lay down uniform rules on this subject on account of the differences in tradition and outlook, but several times, both during the preparatory work and during the final diplomatic phase, they underlined the importance of States making such provisions.

The Resolution recommends, organising a system enabling ... “the safekeeping, search and discovery of an international will as well as the accompanying certificate”. . .

Indeed lawyers know that many wills are never carried out because the very existence of the will itself remains unknown or because the will is never found or is never produced. It would be quite possible to organise a register or index which would enable one to know after the death of a person whether he had drawn up a will. Some countries have already done

²¹ See in particular: Article 17 of the draft Uniform Law on International Sale as revised by UNCITRAL; Article 7 of the Convention on Prescription in International Sales of Goods; Article 10, of the draft UNIDROIT Convention on Agency of an International Character in the Sale and Purchase of Goods.

something in this field, for example, Quebec, Spain, the Federal Republic of Germany, where this service is connected with the Registry of Births, Marriages and Deaths. Such a system could perfectly well be fashioned so as to ensure respect for the legitimate wish of testators to keep the very existence, of their will secret.

The Washington Conference also underlined that there is already an International Convention on this subject, namely the Council of Europe Convention on the Establishment of a Scheme of Registration of Wills, concluded at Basle on 16 May 1972, to which States which are not members of the Council of Europe may accede²².

In this Convention the Contracting States simply undertake to, create an internal system for registering wills. The Convention stipulates the categories of will which should be registered, in terms which include the international will²³. Apart from national bodies in charge of registration, the Convention also provides for the designation by each Contracting State of a national body which must remain in contact with the national bodies of other States and communicate registrations and any information asked for. The Convention specifies that registration must remain secret during the life of the testator²⁴. This system, which will come into force between a number of European States in the near future, interested the authors of the Convention, even if they do not accede to it. The last paragraph of the Resolution follows the pattern of the Basle Convention by recommending, in the interests of facilitating an international exchange of information on this matter, the designation in each State of authorities or services to handle such exchanges.

As for the organisation of the safekeeping of international wills, the resolution merely underlines the importance of this, without making any specific suggestions in this regard. This problem has already been discussed, in connection with, Article 8 of the Uniform Law.

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²² Article 13 of the Convention.

²³ Article 4 of the Convention.

²⁴ Article 8 of the Convention