

DIPLOMATIC CONFERENCE ON WILLS

Washington, D.C. October 16-26, 1973

Doc. 4
September 12, 1973

COMMENTS OF GOVERNMENTS ON DRAFT CONVENTION AND UNIFORM LAW

GENERAL COMMENTS

Costa Rica

The Ministry understands the importance of the Convention and its Annex, inasmuch as they represent an attempt to prevent the conflicts and difficulties now arising from the existence of various legal systems that regulate the external form of wills. Indeed, the generally accepted application in International Law of the rule locus regis actum makes many foreigners feel disoriented when they make their wills, owing to the need to draft such wills in conformity with unfamiliar legal forms.

However, the Draft Convention in question is limited in scope, inasmuch as it deals exclusively with the external or formal aspects of wills. It does not establish any rules with respect to the substance of inheritance law or the capacity to execute a will. Therefore, some doubts and difficulties persist, arising from the existence of various inheritance regulations or systems which the Draft Convention does not seem to attempt to resolve.

In spite of the foregoing, the draft is of great practical value, even if it has to be supplemented on the international level by a convention relating to matters of inheritance law, a project which the Ministry understands is currently being worked on at the International Institute for the Unification of Private Law.

Mauritius

The Draft Convention and the Uniform Law will certainly help to fill a need and to solve a few legal problems which will certainly crop up--especially in view of the large number of expatriates and tourists now in Mauritius as well as the increasing number of Mauritians now living abroad and having property in Mauritius in one form or another viz., shares, immovable property devolving upon them from their ancestors, etc.

Spain

All systems of law acknowledge the existence of a variety of forms designed to make it possible for the testator to express his last wishes. From that standpoint, there is no objection to accepting in the Spanish system of law a new form of will which, being international, would offer the added advantage of being applicable in other countries.

Although inheritance law admits a variety of forms, it is very rigid in regard to the correct use of such forms, which have two essential purposes: To ensure that the content of the will corresponds to the wishes of the testator and to protect the document to which those wishes are committed by preventing substitutions, changes, or forgeries. Those two guaranties are essential to a legal act such as the making of a will, inasmuch as when the estate is executed the testator will have ceased to exist. These requirements are all the more important in the case of international wills, since they must often be executed far from the places where they are made. The draft international will does not appear to provide sufficient guaranties for the two essential purposes mentioned above:

(a) It does not provide sufficient guaranties to ensure that the wishes of the testator and the content of the will correspond.

The testator is not required to be able to read or to know the language in which the will is drafted. The date, time, and place of the drafting of the will are not indicated; these are important data for the purpose of judging the capacity of the testator.

(b) Even less guaranties are provided for the protection of the document:

The draft establishes no rules concerning the custody and preservation of the will; it leaves these matters to domestic legislation. Since our country has no regulations in that connection, some will have to be established, or it will be difficult to use this form of will;

... from the standpoint of the Spanish system of law, which is similar in this regard to most European systems, the draft should be revised to include the minimum guaranties considered essential by the Spanish laws in force.

United Kingdom of Great Britain and Northern Ireland

The United Kingdom Government welcome the draft Convention and believe that its effects will be beneficial. They have certain comments...

CONVENTION

ARTICLES I AND II

Costa Rica

Articles I (1) and II (1) of the Draft Convention use the word jurisprudencia in a different sense from that which it has in our legal system; therefore, it is suggested that the word legislación (legislation or law) or another equivalent word be used.

ARTICLE III

United Kingdom of Great Britain and Northern Ireland

Under paragraph 1, in a contracting State a person has to be "authorised", whereas under paragraph 2 in a non-contracting State he need only be "qualified". The reason for this is that a non-contracting State is not required to designate an authorised person under Article II. This may however open the way to the very legal difficulties the Convention is intended to avoid. There could be actions in one country, with evidence of the law of another, in an effort to decide whether a person was "qualified to receive wills" by the law of a non-contracting State. The expression "persons authorised by law to accept the deposit of wills" would provide a more clearly defined category than "qualified" and would be preferable.

ARTICLE V (2)

United Kingdom of Great Britain and Northern Ireland

It is assumed that this provision is in the Convention rather than the Annex because some States do not allow aliens to act as witnesses to wills. Presumably the insertion of this provision in the Convention implies an obligation on the part of a contracting State to make any necessary alterations in its internal law even if this is not expressly stated.

ARTICLE VI(1)Ecuador

In the Draft Convention, we would suggest that the final part of paragraph 1 of Article VI say: "...shall be exempt from the legalization requirement," in place of that stipulated.

(Suggested Addition)

ARTICLE . . .Canada

The draft convention proposes the insertion of a "federal clause" which does not in our view appear to be appropriate to a convention dealing with will forms, a subject within the exclusive jurisdiction of the provinces.

We think that it is essential to adopt a federal clause similar to those found in recent Hague Conventions, notably the conventions adopted by the 12th Session, in October, 1972. This clause reads as follows:

"If a Contracting State has two or more territorial units which have their own rules of law in respect of (...), it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention shall extend to all its territorial units or only to one of them or more of them, and may modify its declaration by submitting another declaration at any time.

"These declarations shall be notified to the Ministry of Foreign Affairs of the Netherlands, and shall state expressly the territorial units to which the Convention applies."

It should be noted that the Hague Conference adopted this model federal clause at the request and suggestion of the Canadian and United States delegations. As you know the Canadian delegation at the 12th Session was headed by Mr. D. S. Maxwell, then Deputy Minister of Justice.

Ecuador

...an article should be inserted that says: "In case of conflict between the provisions of this Convention and its Annex and those of the internal laws of each State, the former shall prevail."

...at the end of the existing articles, add an article conceived in these terms: "The authorized person shall deliver or send the will and certificate to the appropriate person immediately upon being requested to do so by the competent judge of the place in which the will is executed."

ANNEX (UNIFORM LAW)

GENERAL COMMENTS

Costa Rica

...in connection with the title of the Annex, which was originally called "Draft Uniform Law on the Form of Wills" and was subsequently changed to "Uniform Law on the Form of the International Will," the Ministry considers that the title is redundant, inasmuch as if there is a law or regulation governing an International Will, it must, by necessity, be uniform. We believe that it would be desirable to seek a more appropriate title.

Japan

It is understood from the Draft Convention that a will executed in the form prescribed by the domestic law of a contracting State takes effect as an "International Will" when it is accompanied by a certificate to be issued by an authorized person stating to the effect that the procedures prescribed by the Convention have been completed. It is also understood that such an International Will should rightly be considered effective by other contracting States in order that it would eliminate the examination as to whether or not it meets the requirements of the applicable law.

Article 1

Costa Rica

Article I(1) of the Annex states:

"1. A will shall be valid as regards form, irrespective of the place where it is made and irrespective of the nationality, domicile or residence of the testator, if it is made in the form of an international will complying with the provisions set out in Article 2 to 4 hereafter."

In connection with the paragraph transcribed above, if the Draft Uniform Law on the Form of the International Will does not propose to replace, even in part, rules of domestic laws governing the forms of wills, it would be necessary to include some provisions in the text of this Article to make it clear that the so-called "International Will" should be used only when the testator owns property abroad or when he has to make his will in a country other than his own.

Ecuador

In the text of the Draft Uniform Law, the following phrase could be added to the second paragraph of Article I for greater certainty:
"...provided that such validity is admissible under the internal law of the State in which it is claimed."

United Kingdom of Great Britain and Northern Ireland

Article 1 would seem to contain essential requirements for validity. It is suggested that the reference in Article 1 paragraph 1 should also be to compliance with the provisions of Article 5.

Article 4

Costa Rica

...Article 4 of the Annex in question established, in connection with the signing of the will, that the testator shall sign it when he executes it or, if he has previously signed it, he shall acknowledge his signature at that time. The Ministry considers that an omission has been made, inasmuch as the Article does not provide for the signing of the will by another person requested to do so by the testator, an important point in those cases in which the testator does not know how or is unable to sign.

Article 5

South Africa

Although it appears from explanatory report at page 31 that the formalities set out in Article 5 were judged to be of minor importance, it is felt that Article 5 of the Draft Uniform Law on the Form of the International Will should be included under the peremptory provisions for the validity of the International Will as contemplated in Article 1 to facilitate proof of the document and that the provisions of Article 4 and 5 could conveniently be combined. Further, it may be mentioned that the following words and phrases may, in the absence of an interpretation section, give rise to interpretation problems: "Sign" (in E.G. Article 4) and "unless the sheets follow each other and form a whole" (Article 5.2). The Draft also does not provide for the place on the will where the witnesses and the authorized person should sign, and in the case of a will consisting of several sheets, it is not clear why provision is made for signing by the testator only.

United Kingdom of Great Britain and Northern Ireland

It is not clear whether the whole referred to in paragraph 2 is a physical whole. The meaning of this provision should be clarified.

Article 6

United Kingdom of Great Britain and Northern Ireland

The date when a will takes effect is the date of death of the testator. The date of the will in paragraph 1 is the date of execution of the will and this could be clarified to avoid any ambiguity.

Article 7

Japan

...when there is a dispute between the parties involved as to its validity as a will, the decision of a court would be necessary as to whether or not the will has been executed in the form required by the applicable law. In such a case the Convention would practically be of little use unless the certificate has power to prevent such dispute. The Convention is not clear with regard to the following points: Whether, in order to make a will effective as an international will,

the attachment of the certificate prescribed in Article 7 of the Convention is required or any other suitable evidence proving that the procedures prescribed would suffice in the absence of such certificate? It would be necessary to make these points clear in the provisions.

Mauritius

There is however one aspect of the problem which I believe should be more fully canvassed. It refers to the proof of the identity of the testator. Article 7, paragraph 1 (d) provides that the authorised person's certificate must contain a statement to the effect that he has satisfied himself of the identity of the testator and of the witness. The very fact that the "testator" is making his will in surroundings foreign to him may render more likely the risk of forgeries and impersonations. Provision should be made to the effect that the certificate must also contain a further statement explaining the means by which the authorised officer has ascertained the identity of the testator, viz., by personal knowledge or by counter checking with some official documents such as a passport or identity card, the material particulars of which must also be stated in the certificate.

Further the provisions of Article 7, paragraph 3 is debateable. The absence of the certificate nullifies the minimum guarantee which is desirable to guard against abuses and forgeries. The absence of such certificate should therefore affect the validity of the document as an international will but need not affect the validity of the document as a will of another kind.

Spain

The rule contained in Article VII(3) providing that "The fact that the certificate has not been established does not affect the validity of the will" runs counter to the rule of Spanish law which established the nullity of wills that do not meet the prescribed formalities;

There are no rules to guarantee the authenticity of the will when it is opened (compare Articles 689 and 719 et seq. of our Civil Code and Article VII(4) of the draft).

Article 8

United Kingdom of Great Britain and Northern Ireland

This Article leaves contracting States to make their own internal law with regard to deposit or registration. In its present form the Article would not be appropriate as part of a State's internal law. It is a matter for consideration whether the Article would be better placed in the main part of the Convention rather than in the Annex.