

DIPLOMATIC CONFERENCE ON WILLS

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

SR/2 (Final) (add. 1)
October 24, 1973

SUMMARY RECORD - SECOND PLENARY SESSION
Tuesday, October 16, 1973

Convening of the Session

The Second Plenary Session of the Diplomatic Conference on Wills was called to order at 3:20 p.m., October 16, 1973, by the Chairman.

The Delegate of Italy commented on the earlier point raised by the United Kingdom regarding Article I, paragraph 2 of the Convention. He pointed out the distinction between (1) those states who shared the same language as the Convention, and (2) those states with a language different from that of the Convention. The former are tied to the letter of the law and may only adopt the Convention without modification. The latter, in translation, may make adaptations and select satisfactory wording, providing no substantive modification is made. Those countries with the same language as the Convention are in an inferior position as they are obliged to accept the Convention as is, while others have more freedom and flexibility. One solution would be to have states obligated to make their laws conform with the provisions of the Convention. A disadvantage would be that uniformity of domestic law would be diminished. The Delegate from Italy set forth these issues and the question of the appropriateness of a solution decided by the Drafting Committee.

The Delegate from Japan presented his compliments to UNIDROIT on the draft Convention and Annex and presented his delegation's position as follows for inclusion in the Summary Record: "My delegation does have one basic view which it would like to state at the beginning of these discussions in order to help focus the subsequent deliberations of the conference. This view is that, as to the law governing the forms of will, the formal guarantees necessary to ensure the legal authenticity of the content of such wills and the benefits to be derived from encouraging the freedom to make wills are both matters of vital importance and that, therefore, every effort should be made to strike an appropriate balance between them. In this connection the aim of the present draft is clearly commendable in that it seeks to place minimum restrictions on the formalities to execute wills. At the same time, in order to avoid any possible ambiguities and disputes as to whether the procedures which are prescribed by the uniform law are effectively enforced, and also for the purpose of mitigating the possible heavy burden which would be imposed on the courts of the respective contracting

parties as to the examination of facts which occur in foreign countries, the Japanese Delegation first of all considers it indispensable to attach to the will a certificate stating that the will was made in compliance with the requirements provided for in Article 2 to 4 of the Annex and in Article V of the Convention, for the purpose of giving effect to a document as an international will.

Secondly, I would like to suggest the advantage of amending Article 3, paragraph 1 of the Annex in order that the declaration made by a person who is unable to speak might also be accepted by means of script.

Thirdly, my Delegation is also of the view that this conference should address itself to the establishment of appropriate forms of revocation in order to avoid such conflict as might arise between the wills made in compliance with the form prescribed by the uniform law and any wills made subsequently in accordance with domestic law which seek to revoke, or would otherwise appear to have the effect of revoking, the will made under the uniform law."

The Delegate from the Philippines observed that some states are being asked to take two actions in ratifying the Convention and in introducing domestic legislation for the adoption of the draft law because the federal government cannot always commit the passage of domestic law.

The Delegate from the Ivory Coast expressed the desire for a clear and precise text to result from the conference and felt the proposed Convention and Annex would comprise an instrument useful in further strengthening Ivory Coast's ties with other countries.

The Delegate from the Federal Republic of Germany raised a point of order regarding the issue discussed earlier by the Delegate from Italy. He felt the Drafting Committee should deal only with those matters in which substance had already been settled by the full Conference. He felt there were considerable advantages in adopting the Convention and at the same time fully drafting a uniform law. Such a uniformly acceptable draft law would present no language problems with respect to the Convention. The Delegate recommended Article I, paragraph 2 of the draft Convention remain as is.

The Delegate from Canada supported the point of order raised by the Delegate from the Federal Republic of Germany.

The Delegate from Canada suggested the Conference was perhaps impeding itself unnecessarily by discussing the draft Convention before a detailed review of the draft law. Ambiguity in the very clauses of the draft uniform law should be clarified first.

The Chairman agreed that the issue seemed to be one of anticipating a problem without knowing its dimensions. If there were no problems with the draft law, then there would be no problems with Article I of the draft

Convention. The Chairman requested that proposed amendments be submitted in writing to the Secretariat, preferably one day in advance for translation and study purposes. This does not preclude amendments from the floor.

The Chairman announced that the Drafting Committee would be chaired by the Delegate from Switzerland, with membership composed of the Delegates of Brazil, Canada, France, Federal Republic of Germany, Iran, Ivory Coast, Japan, Mexico, Nicaragua, Philippines, Spain, United Kingdom, USSR and USA. The composition of the Drafting Committee was accepted by the Conference.

The Deputy Secretary General presented a brief summary of the Convention and the draft law, asking each delegate to bear in mind that (1) the draft law concerns only the form of wills and not substantive matters, (2) the draft law only adds another form of will to those already existing and in no way affects presently existing wills and will forms, and (3) the Convention is a diplomatic instrument and concerns only states and not domestic legislation. The draft law is intended to be a part of national legal systems and not part of international law.

The Chairman announced that the Delegation from Costa Rica wished to discuss the wording of the title of the Convention and the draft law. Since the Delegation from Costa Rica was not yet present, the Chairman postponed such discussion until the Convention is discussed as a whole.

The Chairman then proposed a discussion of each article of the draft law with approval on the basis of general consensus. If a substantial difference of opinion on an individual article occurs, then a vote will be taken.

The Chairman called for a recess at 4:15 p.m.

The Chairman reconvened the session at 5:00 p.m. and opened discussion on Article 1 of the Uniform Law.

The Delegate from the United Kingdom began by asking that the written suggestion he had made earlier regarding Article 1 be withdrawn.

The Delegate from Greece mentioned that as a lawyer he disliked superfluity and felt that the words "irrespective of the place where it is made and irrespective of the nationality, domicile or residence of the testator" in Article I, paragraph I, were unnecessary. He proposed changing the second "irrespective" to "as well as" and adding "or any other factor" after the word "testator." He also proposed changing Article I, paragraph II to read: "Failure to observe any such provision shall not by itself affect the validity of the will as to form if that is valid under the law applicable in accordance with the rules of private international law of the country concerned."

The Chairman then asked the delegate from Greece to submit the proposed amendments in writing.

The Delegate from Brazil proposed a similar amendment and referred to an Ecuadorian proposal adding the following words to Article I, paragraph II: "provided that such validity is admissible under the internal law of the state in which it is claimed." The Delegate from Brazil then asked if this formal Ecuadorian amendment had been introduced in writing and was told it had not been so introduced.

The Delegate from Switzerland disagreed with the Delegate from Greece concerning the alleged superfluity of Article I. He felt that the precision of the wording was very important. The argument is purely one of semantics, he believed, since the two previous proposals did not change substance of Article I. Rather, the two proposals might raise more problems. If the meeting did not approve of the somewhat elliptical nature of the Draft, he thought it preferable to make a single reference to "applicable law" rather than to refer in detail to questions of private international law.

The Delegate from France made the point that the French version of Article I should also be amended from "le testament" to "un testament." He opposed changing the words "irrespective.....testator," however.

The Delegate from Greece acquiesced to the Swiss delegate's remarks but added that the phrase "or any other factor" should be included in Article I.

The Delegate from Belgium proposed the following wording for Article 1, paragraph 1:

"A will shall be valid if it is made in the form of an international will complying with the provisions set out in Articles 2 to 4 hereafter."

The Uniform Law does not discuss legal competency, but Article 1 must make it clear that age is not an obstacle to the validity of the international will as regards form.

He referred, as regards the countries who have adopted The Hague Convention of October 5, 1961, on the form of wills, to Article 5 of that Convention.

He then wondered whether it was necessary to add a certificate to make the will valid. He distinguished between the international will and the certificate to be issued. The issuance of a certificate may commit the authorized person.

The Delegate from the Netherlands expressed his doubt as to whether Article I referred to internal requirements of a state or its international obligations. He added that if it was an international obligation it should be inserted in the Convention rather than in the Uniform Law.

The Delegate from Japan maintained that the attachment of the certificate to the will was essential to ensure its validity.

The Delegate from Switzerland suggested that it was premature to discuss Article I before discussing subsequent Articles. He added that while attachment of a certificate would be useful it would add additional requirements. He maintained that changing the wording would raise other problems.

The Delegate from Belgium and the Delegate from France agreed essentially with the Swiss delegate's position on the certificate.

The Delegate from Canada maintained that the words "irrespective... testator" were not superfluous but added that he was unopposed to adding the phrase "or any other factors."

The Delegate from the Philippines favored making the certificate essential to the validity of the will and cited three reasons for his position. He felt that the certificate was an added safeguard because it would assure that the will reflected the wishes of the testator.

The Delegate from Spain stated that safeguards were more important than ease or simplicity. Therefore, he too wanted the certificate attached as proof of validity.

The Delegate from the Federal Republic of Germany agreed with the Delegate of Spain but suggested Articles II through VI be covered before discussing the matter further since the certificate would again be covered in Article VII. He then asked his neighbors in Europe who followed "European" law to defer to the "Anglo-Saxon" tradition in law on this point and thus not to change Article I.

The Delegate from Ireland mentioned that the certificate was essential as a guarantee that the authorized person was qualified to receive wills in his country. The Delegate asked whether the age of testamentary capacity was to be regarded as a matter connected with formal validity. Both these problems arose under Article I.

The Delegate from Canada responded by saying that the criteria of age was irrelevant. It was not concerned with form but with capacity and, therefore, should not be discussed in Article I.

The Delegate from Switzerland made two suggestions: First, that the Deputy Secretary General give the delegates the rationale behind the wording of Article I so as to clear up any misunderstandings. Secondly, that observers, such as Mr. Russo and Mr. Droz, who had worked on the Uniform Law, be allowed to speak so that the delegates could benefit from their experience.

The Chairman mentioned that the observers' silence until now had been purely voluntary and suggested that the next session begin with their comments. The session was adjourned promptly at 6:00 p.m.

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