DIPLOMATIC CONFERENCE ON WILLS
Washington, D.C. October 16-26, 1973

SR/7 (Final)
October 29, 1973

SUMMARY RECORD - SEVENTH PLENARY SESSION
Friday, October 19, 1973

Convening of the Session

The Chairman opened the Seventh Plenary Session at 10:15 a.m., and called for further discussion of Article 6.

The Canadian Delegate referred to a suggestion in yesterday's session to delete paragraph 3 of Article 6, and disagreed with it. He suggested instead the deletion of the last three words in the paragraph: "by any means." The Delegates from the Federal Republic of Germany, France Yugoslavia, and the Observer from the Hague Conference all agreed subsequently to modifications of this paragraph. The Delegate from Belgium suggested the deletion of the entire paragraph, and was supported by the Delegate from Spain, and the Observer from the International Union of Latin Notaries. The Delegate from Mexico supported deletion of all of Article 6, with the stipulation that paragraph 2 of the article be included in Article 7.

The Delegate from Switzerland commenting on the apparent lack of support for paragraph 3, suggested that the discussion might therefore be curtailed. He added that he opposed making the lack of a date on the will a ground for invalidity. He reminded the Conference that it is dangerous to transpose observations which are valid in internal law to this international situation.

The inclusion of paragraph 3 was supported by the Delegates from Honduras, France, and the Federal Republic of Germany.

The Delegate from Spain stressed that the inclusion of a provision for a date on the will is fundamental, and that the validity of a will is often dependent on its date. He felt that a dated certificate attached to the will would be an efficient safeguard of the validity of the will's date. He added that if the certificate is not mandatory for the validity of the will, then his argument concerning its importance would be rendered invalid.

The Delegates of Iran and the USSR both agreed that paragraph 3 of Article 6 should be eliminated because of the complications it would engender.

The Delegate of Italy demurred, saying that Article 6, paragraph 3 could be retained if reworded to add: "of proof permitted in the jurisdiction." He also felt a distinction between cases of omission and dispute of date should be noted in the revised article.

The Chairman summarized the discussion. He felt the Conference wanted a clarification of paragraphs 1 and 2 and a reconsideration of paragraph 3 as to its wording, necessity, and relationship to Article 7, paragraph 4. He asked if there were any objections to referring Article 4 to the Drafting Committee on this basis. There being no objection he so ordered.

The Delegate from the Philippines emphasized the importance of adequate safeguards to ensure respect of the testator's wishes, noting that many customary safeguards are not contained in the draft. The Delegate stated that under these circumstances it will be necessary to rely heavily on Article 7 and on the authorized person. He suggested that the proposed rule of substantial compliance be made applicable to Article 7 and to other provisions that embody elements essential to the validity of the will.

The Delegate from Belgium stated that the problem to be resolved occurs when the authorized person does not issue the certificate according to the text. While there is no resulting invalidity, he stated that to be practical a concrete instrument to avoid dispute should be provided. He suggested that a certificate be issued in order to prove that the proscribed formalities have been met and secondly that in the event of dispute, any challenge must be brought before the courts of the authorized person. The Delegate further noted that the Uniform Law should contain details regarding form and make clear in what cases the will is void.

Observing that some delegates seem to be seeking to verify the true wishes of the testator, the Delegate from Switzerland stated that this matter is not a question of form and goes beyond the framework of the draft convention. He thought that the conference should concern itself with the formal validity of the will and nothing more. He further commented that there may be a tendency to increase the number of formal requirements and that the Conference may be moving towards a will which would be similar to that of national legal systems, thus compromising the purpose of an international will. He stated that UNIDROIT endeavored to establish a balance between the testator's freedom and the necessary formal safeguards. Referring to P/13, the Delegate questionsed the appropriateness of inserting a rule on conflict of jurisdiction in the Uniform Law or in the Convention. He stated that such problems should be left aside.

The Delegate from Japan concurred with the delegates from the Philippines and Belgium as to the form. He noted that in the exceptional cases in which the certificate is lost the problem will be whether to reject the suit at the first stage or get involved in troublesome fact finding. He stated that one of the purposes of the Conference is to diminish the troublesome problems of the courts.

The Observer from the Hague Conference on Private International Law stated that the certificate must be an instrument of proof assuring the international nature of the will, but should not affect the validity of the will. Citing P/13, he further stated that the question of establishing exclusive jurisdiction opens many new problems and that a Conference concerned with the form of an international will should avoid problems of international jurisdiction.

The Delegate of Australia suggested that the apparent confusion regarding Article 7 of the Annex might be better approached by confining discussion initially to the following three issues:

1.) whether there should be a certificate at all,
2.) if the idea of a certificate is acceptable, should it be in the form proposed by Belgium, or in the form proposed by the USA, and
3.) the consequences of the certificate's legality.

The Conference, he suggested, could then take up the miscellaneous questions regarding the certificate specifically.

The Delegate of Italy also raised the following points in asking if the delivery of the certificate should be mandatory or not. (1) Must the authorized person deliver the certificate ex-officio, meaning, does the authorized person have the option of refusing to deliver the certificate, or (2) Is the authorized person obligated to deliver the certificate at the request of the interested party? The Delegate from Italy favored the second method.

The Delegate of Belgium agreed with the Australian and Italian positions and stated further, with regard to the Delegate of Switzerland's earlier remarks, that Belgium did not insist on P/13, Item 2, paragraph 2 concerning "courts."

The Delegate of Switzerland agreed with Australia's procedural suggestions and felt the first two points should be discussed now and the third set aside for the moment. He clarified further the Italian point by making a distinction in terminology between "drawing up" a certificate, which is what the Annex is concerned with, and "delivering" the certificate which is another matter.

The Chairman ascertained that no delegate felt there should not be a certificate. The issue then seemed to be in what form the certificate should be, an issue complicated by the question of validity. The Chairman suggested the Conference concentrate on Article 7, paragraph 1.

The Deputy Secretary General raised a point regarding the Italian statement in that the current draft Annex requires the authorized person to draw up the certificate. Any possible sanction for non-cpmpliance would fall upon the authorized person only. The type of sanction would depend upon internal law.

The Delegate of France commented that if the conference is to consider the question of the validity of an international will without a certificate, it should consider the preliminary work and goals of the

of the original drafters of the annex. The purpose was to facilitate proof that the will exists and to facilitate the execution of an international will. The international will itself is independent of the certificate. The certificate is added to the will and not a condition for validity. The two documents are closely connected but have different juridical value.

The Delegate of Greece stated his support for the draft as is, believing that the certificate should not be a condition of validity of the will. He also stated that Article 7, paragraph 3 is actually redundant if Article 7 is not to be included in Article 1.

The Observer of the International Union of Latin Notaries asked what sanction was provided for the authorized person who did not draw up the certificate required by Article 7.

The Delegate of Honduras submitted to the Drafting Committee three suggested changes in the Spanish translation of the annex.

The Delegate of the US discussed the history of the certificate in terms of the 1971 revisions to the draft annex, when the provision was added to accommodate U. S. legal processes regarding the recognition of valid wills after death by U. S. courts. The U. S. does not support the idea that the international will is invalid without the certificate, if other proofs are available. With regard to the U. S. proposal (P/3), the Delegate explained (1) the proposal would eliminate Article 7, paragraph 3 in the draft annex, (2) the addition of paragraph 1, sub-paragraph (f) would strengthen the certificate, and (3) that P/3 increases the opportunities for the authorized person to show that he was satisfied regarding the identities of the testator and witnesses. The Delegate of the US stated that although the certificate should be considered an important document ("practically indispensible in the U. S. "), it should not be considered absolutely mandatory.

The Delegate of Yugoslavia agreed that the certificate should not be a condition of validity of the will, although it would be of great value if the will were to be contested. He supported the U. S. amendment. He also suggested the provision of P/4 which states the date the will was signed should be incorporated into P/3.

The Delegate of the United Kingdom felt the form of the certificate is an appropriate matter for the Drafting Committee. He supported the U. S. proposal to amend Article 7 of the draft annex and raised the question of whether Article 7 should appear in Article 1 as one of the conditions to affect the validity of the will. He stated the certificate would be a convenient, though not the only, method of proving that the conditions required in Articles 2-4 have been complied with.

The Delegate of Sierra Leone expressed his regret that he must depart the conference because of prior commitments elsewhere and wished the Chairman a productive conference on a most important topic.

The Chairman adjourned the session at 1:10 p.m.

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