

U.D.P. 1964 - Etude: XLIII bis
Forme du testament - Doc. 12

Secretaire de l'Etat

C O P Y

BAW/ST. 318.C.

J.W. Bourne, Esq.,
Lord Chancellor's Office,
House of Lords,
London, S.W.1.

19th May, 1964

My dear Bourne,

Your Ref: File 3739/45 -
Unidroit's Report of the Form of Wills

Many thanks again for your most helpful letter of the 20th, which I propose, together with its enclosure, to bring before the Commission.

The points you raise are most important and penetrating. One point occurs to me now, that is with regard to Article 10, the solicitor was to be an alternative, and I think at any rate that at the time he receives a will on deposit, he should be a commissioner.

I am sure the Committee will be most grateful to you, as indeed I am.

Yours sincerely,

B.A. WORTLEY

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Swiss. & Int'l. Yearb.

C O P Y

29.5.64

del Diritto Privato - Roma

Lord Chancellor's Office,
House of Lords,
London, S.W.1.

Our ref. File 3739/45

20th April, 1964

Dear Wortley,

Unidroit's Report on the Form of Wills

Evans sent me last February a copy of the Study Group's Report (U.D.P. 1963, Etude XLIII, Forme du Testament - Doc. 12) and invited me to send you such comments as I might wish to make. At his suggestion, I have worked on the revised draft which appears at pp. 3 - 7 of the paper. I enclose a note of the comments which have occurred to me and those I have consulted; I hope that you will find them useful.

May I make two general points? First, these comments are based on a translation from the French made by me and therefore likely to be inaccurate. Secondly, although I have thought it worth while to consider the draft in some detail, I should not like you to infer that the principle underlying the Report would necessarily command acceptance among the Departments concerned. No doubt your experience of these matters is sufficient to warn you of this without my saying anything!

I am sending copies of this letter and the comments to Evans.

Yours sincerely,

J.W. BOURNE

Professor B.A. WORTLEY, O.B.E.
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Draft Uniform Law on the Form of Wills

Provisional Comments

1. Generally

The draft does not make it clear whether the intention is that a "Unidroit will" should be accepted as formally valid in every case, or only if the testator has some connection (e.g., one based on nationality, residence or domicile) with a contracting state. There would seem to be some advantage in not imposing any such restriction on the scope of the uniform law.

2. Article 1

- (a) It seems difficult to impose on the depositary the responsibility for deciding whether the testator has the necessary capacity. Although it is easy enough for him to decide whether the testator is, e.g., old enough by the local law, he can hardly decide whether the testator has the necessary mental capacity.
- (b) The Article does not make it clear what is to happen if the depositary accepts the will but it turns out that either the testator or a witness was not capable or competent.
- (c) If the will is accepted and the testator's capacity is subsequently challenged, what law is to apply? The commentary specifies the local law, but this is not what the Article says.
- (d) It would be preferable if the Article did not impose on the depositary a duty to form any judgment on the question whether the testator has the necessary capacity and competence under the local law. It does not seem right that questions of testamentary capacity should be finally decided by the local law merely because the testator has made use of the new facilities which only relate to formalities. Questions of the testator's

capacity should continue to be governed by his personal law, so that competence and capacity under the local law, even if readily ascertainable, may well be irrelevant.

The competence of witnesses is a different question. Attestation is part of the formalities, and there is no reason why a witness's competence should not be governed by local law, though it is arguable whether the decision of the depositary should be conclusive. (See comment on Article 9).

3. Article 2

If the testator delivers a signed will to the depositary, such delivery should be effective only if he orally acknowledges his signature in the presence of the depositary.

4. Article 3

This Article makes no provision for a will in a foreign language (see Article 5) made by a person who cannot read. The depositary may not understand, or be able to read, the foreign language. There might be some advantage in getting the depositary to certify (possibly in his own handwriting) that the testator has

- (a) declared that he cannot read, and
- (b) authorised the depositary to execute the will on his behalf, and
- (c) appeared to understand what has been read over to him.

5. Article 4

It is not altogether clear whether the depositary's duty is to insert the date himself, or merely to see that it is correctly stated. It is suggested that the latter would be sufficient.

6. Article 6

- (a) Is it possible for the depositary (who is not obliged to read the will and may anyhow be unfamiliar with its language or the law which governs its construction) to say which erasures, etc., are capable of modifying the dispositions? It would be better if he were required to ensure that all erasures, etc., were countersigned.
- (b) What is to be the effect of the depositary's failure to carry out his duties under this Article?

7. Article 7

This Article does not appear to cater for the testator who cannot write but can "sign" by, e.g., making his mark.

8. Article 9

The effect of this Article is not clear: what, for example, is to happen if the depositary wrongly decides that a witness is competent? Is the will nevertheless valid?

The Article ought to say, if this is the intention, that acceptance by the depositary of a witness is to be conclusive evidence of that witness's competence. If this is not the intention, the Article is of little value.

9. Article 10

- (a) Notaries are not unknown in common law countries, e.g. England and Scotland, where notarial execution may be carried out by solicitors or certain other persons. Is the solicitor to be an alternative depositary in these countries, or is the notary to be excluded?
- (b) Will any solicitor be qualified, or only a practising solicitor?

10. Article 11

Is the intention that attestation by an interested party should, while not invalidating the will, invalidate any bequest to that party - as it does in English law? Or is any such rule of law to be overridden in the case of a "Unidroit" will?

(Acceptance of the principle underlying the Article would mean reversing the rule of Scottish law whereby notarial execution by an interested party can invalidate a will).

11. Article 13

It might be useful if the Article were to provide expressly for withdrawal, for the purpose of alteration, followed by redelivery, or for alteration made in the presence of the depositary.

12. Article 14

The Article ought specifically to provide that a "Unidroit" will is capable of being revoked by operation of law (e.g. (if English law applies) by the marriage of the testator, or (as may happen in certain circumstances under Scottish law) by marriage followed by the birth of a child).

Lord Chancellor's Office

20th April, 1964