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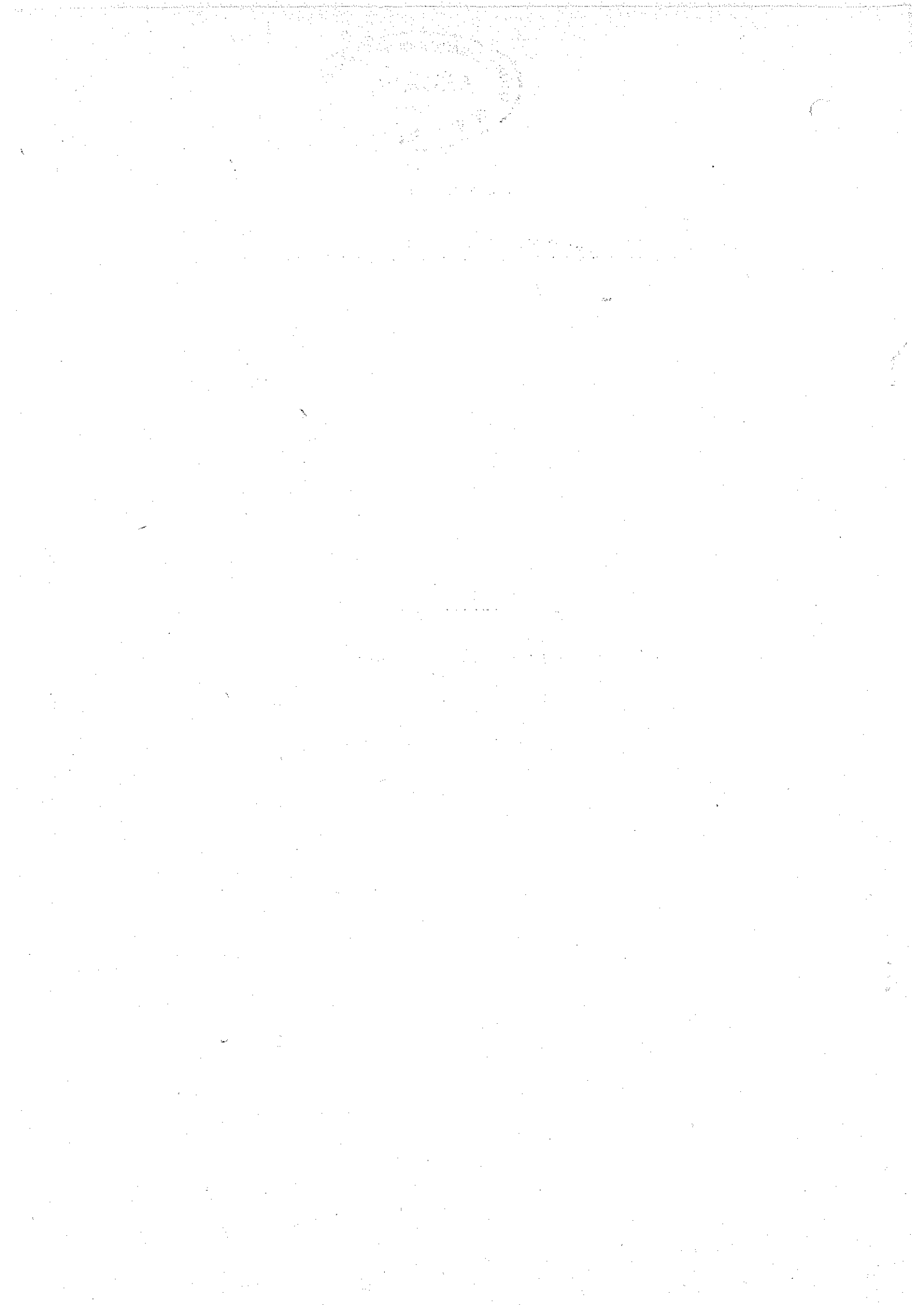
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INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

A N A L Y S I S

OF THE REMARKS OF GOVERNMENTS ON THE
DRAFT CONVENTION PROVIDING A UNIFORM LAW
ON THE FORM OF WILLS

Rome, April 1971



The Draft Convention providing a Uniform Law on the Form of Wills was prepared by a Committee of experts of UNIDROIT from 1963 to 1965.

The draft was submitted for observation to the UNIDROIT member States.

As a result of these observations, the Governing Council of UNIDROIT decided to submit the text of the draft Convention to a Committee of government experts.

It is for this Committee of experts that the Secretariat of UNIDROIT prepared the present working document which groups together and synthesizes the observations made by the States on the draft convention and the draft uniform law.

I. GENERAL CONSIDERATIONS

Thirteen States sent UNIDROIT observations or comments on the draft Convention providing a Uniform Law on the Form of Wills.

Some of them expressed a generally favourable opinion on the advisability of a legislation along the lines proposed in the Draft, viz. the United States, Greece, Portugal and Turkey.

Other States adopted a more reserved position either because they doubted the practical usefulness of the proposed Convention (Luxemburg, Austria, the Scandinavian countries), or because they showed little enthusiasm for the provisions of the Drafts which they judged hardly compatible with the provisions of their internal law (Czechoslovakia, Italy, Scandinavian countries).

The present analysis, the object of which is to act as a guide to the work of the Committee of government experts, is limited to presenting

in condensed form the suggestions and observations relating to the different Articles of the proposed texts.

After the observations, Article by Article, on the Draft Uniform Law, mention will be made of the lacunae found in such law, then on the observations made on the Draft Convention itself.

II. OBSERVATIONS ARTICLE BY ARTICLE

Article 1

" 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 hereafter.

2. Failure to observe any such provision shall not by itself affect the validity of the document as a will of another kind. "

No particular observation was made on this Article.

Article 2

" 1. The will shall be made in writing.

2. It may be written in any language, by hand or by any other means.

3. It need not be written by the testator himself. "

Italy is not very favourable to the typewritten form and suggests that some further guarantees should be studied in this respect, especially in relation to the cases considered in Article 9 of the Draft Uniform Law.

Greece suggests that the will should be drafted necessarily in a language known to the testator, and that any mention originating from the person qualified to receive the will should be translated in such language.

Czechoslovakia, for its part, is of the opinion that, in the same spirit, that it should be necessary to provide for the written translation of the will in the testator's language and to attach such translation to the original. It suggests, in this context, that the manner should be specified in which the witnesses and the person qualified to receive the will could verify the accuracy of the translation.

Luxemburg considers it indispensable that the will be drafted in the language of the testator.

Portugal would be disposed to accept the writing of the will in a foreign language, but foresees possible difficulties in connexion with opening procedures of will drafted in languages unknown to the authorities and suggests that States should be invited to make special provisions for this case.

Article 3

" 1. The testator shall declare in the presence of two witnesses and of a person qualified to receive the will that the document is his will.

2. The testator need not inform the witnesses, or the person qualified to receive the will, of the content of the will. "

Italy would prefer that compliance with the formality of declaration required in paragraph 1 be recorded in the document itself (as is indicated in paragraph 3 of article 9). It also suggests that the testator should declare that he knows how to read, and that the will is drafted in a language known to him, the latter suggestion possibly leading to merging in one provision of Articles 3 and 9 (see below, observations on Article 9).

Article 4

- " 1. The will shall be signed by the testator in the presence of the witnesses and of a person qualified to receive it.
2. The signature of the testator shall be placed at the end of the will. "

Greece and Italy suggest that it be stated in the document that the testator has signed in the presence of the witnesses and of the person qualified to receive the document.

Article 5

" The witnesses and the person qualified to receive the will shall there and then sign the will in the presence of the testator. "

Italy wishes that it be mentioned in the document that the witnesses and the person qualified to receive the will have signed the will forthwith in the presence of the testator.

Article 6

- " 1. The date of reception shall be indicated on the document.
2. The absence of a date or the indication of an erroneous date shall not affect the validity of the will. "

Italy and Luxemburg are not in favour of paragraph 2 and consider that the date is an essential and obligatory element for the validity of the will.

For Greece, the lack of date, or an erroneous date, should not affect the validity of the will if the actual date clearly results from other elements.

Portugal notes that in case of dispute the date of reception of the document, as indicated according to paragraph 1, can be considered as the date of the will.

Czechoslovakia proposes to specify in this provision that the date must comprise the day, the month and the year.

Article 7

" 1. If the will consists of several sheets, each sheet shall be signed or initialled by the testator, unless the sheets follow each other and form a whole.

2. Every correction in the body of the will shall be signed or initialled by the testator.

3. Additions subsequent to the signatures shall be signed by the testator, the witnesses and the person qualified to receive the will. "

Italy, not favourable to the type-written form, considers that an approval given by simple initialling of the corrections and erasures does not give a sufficient guarantee to the testator.

Austria remarks that the notion of initialling is foreign to certain national practices and that it facilitates forgeries. It suggests abolishing the requirement to initial the bottom of every page, or replacing it by the requirement of a full signature.

Article 8

" The signature or initials of the testator required by this law may be replaced by the fingerprint of the testator. "

Czechoslovakia observes that the affixing of fingerprints is unknown in Czechoslovakian practice and has not much meaning in states where there is no centralised finger-print identification system for the entire population. It would accept it only as a means of additional identification, besides that of the signature.

Austria is equally opposed to the assimilation of the affixing of fingerprints to the signature.

Italy is equally unfavourable to this procedure but it could accept it, if really necessary, only for the testator who cannot write, provided that this circumstance is mentioned in the document.

Portugal would also reserve the possibility of affixing fingerprints for a testator who cannot sign.

Article 9

" 1. If the testator is unable to read, the will shall be read to him in the presence of the witnesses and of the person qualified to receive the will.

2. If the testator does not know the language in which the will is drawn up, the will shall be read to him, translated into a language which he knows, in the presence of the witnesses and of the person qualified to receive the will.

3. Such circumstances shall be mentioned in the document. "

Luxemburg is of the opinion that the option to use the international will form should not be open to testators who cannot read, since the person called to receive the will fails to offer guarantees offered by a public official.

Italy makes a similar observation and specifies that according to its legislation an illiterate person may only have recourse to the form of the public will which offers the necessary guarantees by means of its rigid formalism and the special capacity of the public official who receives it. It also notes that the oral translation, as provided in the Uniform Law, does not offer a guarantee of oral translation, as provided in the Uniform Law, does not offer a guarantee of fidelity. It finally, wishes that the text should specify which person must read the will.

This last concern is also shared by Greece.

Austria wishes that the identity of the translator should be specified in the document.

Italy proposes, finally, to integrate Article 3 with Article 9 because the latter holds derogations of former.

Czechoslovakia suggests to obtain a greater accuracy of the term "document" mentioned in paragraph 3. Is it a question of the will itself or a document testifying to the receipt of it by a qualified person?

Portugal, finally, voices, in the case of an illiterate person, certain doubts similar to those of Italy and observes also that, in its present legislation, the only form of will open to illiterate people protects them by means of a formalism decidedly more rigid than that of the international will.

Article 10

"The person who receives the will satisfy himself of the identity of the testator of the witnesses."

Czechoslovakia wishes that the uniform law should specify the way in which the person qualified for receiving the will must prove the identity of the testator and witnesses. It foresees possible difficulties if the qualified person or the witnesses die before the testator.

Portugal notes that this provision relates to a point which can be left to the domestic law and expresses the opinion that the will should not be automatically invalidated in case of disregard of this obligation.

Article 11

" 1. The capacity of the witnesses shall be governed by the internal law of the place where the will is received.

2. The fact that a will contains a disposition in favour of a witness or of the person who receives the will or in favour of a parent, relation, including relation by marriage, or spouse of any of them, shall not affect his capacity to act as a witness or to receive the will. "

Italy notes that the first paragraph is contrary to the rule of Italian international private law, according to which the capacity of the witnesses is subject to personal law.

Portugal would welcome the suppression of paragraph 2 which is contrary to its internal law.

Czechoslovakia notes that the capacity of the witnesses or of the person qualified to receive the will, in the event of this containing provisions in their favour, cannot be recognised except if the testator has not informed them thereof. Otherwise situations could arise where, in the case of the reservation provided for in Article IV, the wish of the testator to make a bequest in favour of one of the people considered here could be frustrated. Czechoslovakia would suggest that this Article be the object of a deep re-examination together with Article IV of the Convention.

Article 12

" The will shall be left in the custody of the qualified person who has received it. "

The commentary of this Article by the United States notes that it is desirable to maximize the prospect that the international will procedure may come to be widely followed for carefully supervised will executions in the United States. But, the requirement that international wills must be retained in the custody of certain authorized persons may be a serious impediment in our states to widespread use of the international will format.

The commentary stresses that the principal problem is that existing will-making customs in the United States do not involve any clearly recognized agency which is generally used to keep possession of the will between the time of execution and the time of death. Perhaps the closest parallel under typical state law to such an agency is the local probate court or office which is frequently authorized by statute to receive and retain executed wills as a convenience to testators. Probate courts are public offices, frequently staffed with relatively poorly paid and poorly recognized minor officials. Typically there is a single office for each county. This means that there is a tremendous range between the size, complexity and impersonality of a probate office in a large city like Chicago or Detroit, for example, and one located in a sparsely populated rural community. It is not surprising, therefore, that there is great variance in the degree to which probate courts are used as will depositaries.

In the United States, two other kinds of offices are frequently used today as places where wills are executed and preserved. However, neither is well suited to being designated by statute to assist persons desiring to execute international wills. Thus, lawyers' offices are frequently used by testators, but there are too many lawyers in any given state of the country to permit any assurance that all such offices would have the specialized knowledge or permanency which should be

required of an expert group. Lawyer associations in many settings tend to be rather temporary affairs and there is commonly no connection between present occupants of a suite of law offices and those who may have occupied the offices ten or fifteen years earlier. Surely some system of identifying suitable law offices and of regulating the transfer of deposited wills from one set of occupants to another would be necessary. In turn, the need to solve these problems would add to the difficulty of designating lawyers as will custodians in this country.

Corporate fiduciaries, consisting of banks and trust companies, are increasingly important to testators seeking stable, reliable and confidential assistance in testamentary dispositions. At some future point in time, use of such institutions may be sufficiently recognized in practice to make legislative confirmation feasible.

Accordingly, the United States commentary suggests that an alternative procedure be added to permit an international will to be retained or controlled by the testator. Again it should be emphasized that the suggestions which follow are designed to leave the basic proposal largely undisturbed as far as its acceptability to Europeans is concerned. Thus, what is proposed would not effect the possibility that the qualified person might retain the custody of an international will as contemplated under the present draft. Rather, the flexibility of an option is desired. The option might be expressed in the Uniform Law so that it would be available within a jurisdiction adopting the law. Alternatively, it is conceivable that the point, like that concerning the capacity of witnesses, might be left for local law. Suggestions implementing each of these possible approaches are developed here.

The commentary now raises the following question. What optional procedure for the control of international wills between the time of execution and the time when the will is offered or asserted

after death might be suggested for inclusion in the Uniform Law ?

A requirement for any suggestion is that it offer protection approximately equivalent to that implicit in the Uniform Law as presently drafted.

Use of a photographic process should provide a means of preventing unauthorized or casual additions to an international will. Thus, the law might permit an approved will custodian to sign each sheet of an international will after its execution and to make and retain a photocopy of the will so marked before releasing the original to the custody of the testator. Post-death recognition of a photographed will would depend upon execution by the custodian of a second certificate. In it, the custodian would state that since the testator's death, he has compared the original as exhibited to him after death and found it identical with the photographic copy which he retained. The law would provide that with these certificates, the document would have the same effectiveness as a will kept in the custody of the authorized person until after the testator's death. Surely such a procedure would offer all of the safeguards of retained custody.

The procedure thus suggested would accommodate an important American practice which involves wills executed under the supervision of practicing attorneys and placed in the custody of corporations named as executors therein. Also, it lends itself to establishment of a state maintained filing system. At least, it is easier to imagine a state system keyed to microfilmed records of executed wills than one which would involve state control of original instruments. Hence, any step towards the use of photographic evidence of validly executed wills seems to be in the right direction.

Articles 12 and 13 of the proposed Uniform Law, as well as the suggested form of Article 14 as described earlier, would need to be reworked along the following lines to implement this suggestion:

"Article 12 --

The will may be left in the custody of the qualified person who has received it and if so deposited, it shall cease to be valid as an international will if it is withdrawn by the testator otherwise than pursuant to the procedures of Article 13.

Article 13

An international will may be returned to the custody of the testator without losing its validity as an international will if the qualified person authorized to receive it signs each sheet, makes and preserves a photocopy of the complete will and all signatures, and appends his certificate to the effect that he has complied with the provisions of this law, to the original document before delivering it to the testator.

Article 14

If the will has been released to the custody of the testator as provided in Article 13, a certificate by the person making the photocopy to the effect that, following the death of the testator, he has compared the original with the photocopy, that the original will is the same as it was when it was executed, plus his certificate that it was executed in conformity with the rules applicable to international wills shall, unless impeached by competent proof, be accepted as sufficient proof in any cause or proceeding of all facts necessary to the due execution of the certified instrument as an international will."

The alternative approach suggested in the United States commentary of leaving the question of custody of an international will after execution to local would be easier to implement. Thus, Articles 12 and 13 would simply be omitted. The article dealing with the certificate of the qualified person would become Article 12. It might provide:

"A certificate by a person qualified by the law of the place where the will is executed made after the testator's death and appended to the original will to the effect that the will has not been altered since its execution and that the will was executed in conformity with the rules applicable to international wills, unless impeached by competent proof, shall be accepted as sufficient proof in any cause or proceeding of all facts necessary to the due execution of the certified instrument as an international will."

According to the United States commentary, if the alternative procedure to accommodate custody of an international will by the testator is accepted, the several references in the Uniform Law to "person qualified to receive" should be changed. A more appropriate description might be "person qualified to supervise execution of." (A similar suggestion relating to the proposed Convention appears in the discussion of details concerning the Convention.)

If Article 12 of the Uniform Law is read with Article VI of the Convention, it is probably clear, in the opinion of the United States, that local law will provide that the "custody of the qualified person who received it" includes the custody of any duly designated successor of the original custodian. But, the Convention may not be adopted by all states enacting the Uniform Law. Hence, it seems desirable to add another sentence to Article 12 along the following lines:

"Reference in this statute to this person shall include his successors as duly designated in accordance with the rules applicable to authorized will custodians."

This addition also should be realigned to refer to "persons authorized to supervise execution of" international wills if the suggestion made above is accepted.

Article 13

The will shall cease to be valid, as an international will, if it be withdrawn by the testator.

Austria remarks that it would be advisable to consider the case of the testator who revokes his will but who cannot have it restituted because, for example, he dies before obtaining it or because the international will cannot be found immediately.

III. LACUNAE NOTED IN THE DRAFT

1. The following point has been made by the United States, in relation with a specific situation in that country.

Although the routine varies considerably in the several states, wills must be validated by post-death proceedings in all of the states of the United States. The details involved may amount to no more than filing the instrument and a sworn application for its probate with a local official. But, in many states, evidence of the will's validity must be supplied by witnesses who signed the will when it was executed or by other testimony if the attesting witnesses are not available.

In order to make wills executed under the proposed Uniform Law practical devices for devising property wherever located at death, a short provision anticipating some proof problems should be added to the proposed law. A statement in the proposed law that, unless contradicted, a certificate of due execution by an authorized will custodian shall be accepted as sufficient proof of all facts relevant to legal execution, is needed.

The following is offered as a suggested form of language to serve the purpose:

"Article 14

A certificate by a person qualified by the law of the place where the will is received and retained in custody until after the death of the testator that the will was executed in conformity with the rules applicable to international wills, unless impeached by competent proof, shall be accepted as sufficient proof in any cause or proceeding of all facts necessary to the due execution of the certified instrument as an international will."

This contemplates that an authorized will custodian might sign a brief, official statement which would be added to the will after the acts and signatures required for due execution have occurred, describing what has transpired to show that statutory requirements have been met. No such certificate or statement would be required for validity of an international will, but if such a certificate were appended, a court in a state of the United States which enacted the law would be able to "admit the will to probate" without further proof.

The statement should not affect the meaning of the law as adopted in those states where no post-death ceremony of probate is required. In a sense, it would serve only to give wills executed under the Uniform Law the same standing in the United States as is intended for them in European nations which may accept the draft.

2. Portugal raises the problem of the so-called "mutual" will, i.e., to use the terminology of Article 4 of the Convention of The Hague, the "testamentary dispositions made by two or more persons in one document."

The difficulties that can derive from this come from the fact that certain laws consider these wills from the point of view of their form and decide upon their validity according to the rule of conflict relating to form, while other laws consider them from the point of view of substance.

It would therefore be advisable to determine whether the proposed uniform law allows the "mutual" will or not.

IV. OBSERVATIONS CONCERNING THE CONVENTION

Article III

1. A will made in the form of an international will in the territory of a Contracting Party shall, in the territories of the other Contracting Parties, be considered as having been made in the presence of a person qualified to receive it whenever such person is so qualified according to the law of the Contracting Party in whose territory the will was made.

2. A will made in the form of an international will in the territory of a State which is not a Contracting Party shall, in the territories of the Contracting Parties, be considered as having been made in the presence of a qualified person whenever, in accordance with the law of such State, it has been received by a person qualified to receive wills and has been placed in his custody.

Greece suggests to add a provision allowing to consider as qualified persons to receive the international will those persons who are so qualified by virtue of the national law of the testator - in particular, consular authorities - independently of the territory where the document is drawn up.

Article IV

Each Contracting Party may provide in its law that the persons listed in article II, paragraph 2 of the Annex may not benefit from any dispositions in their favour that the will may contain.

Portugal does not see the usefulness of this Article since it is not related to the form of the will but to the capacity of receipt. Portugal suggests its elimination.

Czechoslovakia thinks that this provision should set forth the date before which the contracting Parties should adopt the provisions, corresponding to this Article, as well as the way in which its publicity would be assured, so that the persons qualified to receive wills would be informed and would be able to forewarn the intervening parties to a will (see comment to Art. 11). According to Czechoslovakia, it would be necessary proceed to a deep re-examination of this Article IV in connection with Article 11 of the uniform law.

Article V

1. The signature of the testator, of the person qualified to receive the will and of the witnesses of an international will shall be exempt from legalisation.

2. Nevertheless, the competent authorities of the Contracting Parties may verify the authenticity of such signatures.

According to the United States, this Article would be clearer if the term "legalisation" were used (possibly defined) as it is used in The Hague Conference's Draft Convention Abolishing the Requirement of Legalisation for Foreign Public Documents of October 26, 1960. In Article 2 of The Hague document it is stated:

"... legalisation means only the formality by which the diplomatic or consular agents of the country in which the document has to be produced certify the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which it bears."

So used, the requirement would be relevant to the signature and capacity of the person authorized by local law to receive international wills. Its use with reference to the signature of the testator and witnesses is inappropriate because the officials referred to would not be able to certify concerning the authenticity of the testator and witnesses' signatures, nor as to the capacity of these persons.

Some provision for international recognition of the officials approved by each contracting party is desirable. The system contemplated by The Hague Convention seems quite adequate. Under it, a certifying agency identified by the laws of the state where execution of the will occurred may issue the necessary statement. Also, a uniform form of certificate is suggested by the Convention. If this approach is accepted, it would mean that the genuineness of testator and witnesses' signatures would be established by the certificate of the authorized will custodian unless and until evidence to the contrary appeared. The status of the foreign will custodian would be established by a single certificate of an appropriate official of the state of execution.

Article V, if rewritten to accommodate this approach, might read as follows:

"The signature of the persons authorized to receive the will shall not be subject to legalisation except that the competent authorities of the contracting parties may require certification of his signature and of his authority under the law of his state from an authority designated by the laws of that state to identify authorized will custodians. The certificate of a person so identified to the effect that formal requirements applicable to international wills have been met shall be accepted, unless and until impeached by other evidence, to establish the authenticity of signatures, and required capacity, of testator and witnesses."

If the alternative procedure to accommodate custody of an international will by the testator is accepted, the several references in the proposed Convention to "person qualified to receive" international wills should be changed. A more felicitous expression might be "person qualified to supervise execution of" an international will.