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INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

COMMITTEE OF GOVERNMENTAL EXPERTS ON THE FORM OF WILLS

R E P O R T

of the Secretary's office of UNIDROIT

on the session held in Rome from May 3 to 8 1971

Rome, June 1971

1.- A Committee of governmental experts on the form of wills met from May 3 to 8 1971 upon the initiative of UNIDROIT at the seat of the Institute in Rome. The representatives of 19 States participated in the work. The Hague Conference on Private International Law, the Council of Europe and the International Union of Latin notaries had delegated observers. The list of participants appears in annex to the presente report. The expert of Switzerland, Mr. Pierre LALIVE D'EPINAY, Professor at the Faculty of Law and the Institut des Hautes Etudes Internationales in Geneva, was unanimously elected President of the Committee.

2.- The following working papers were placed at the disposal of the Committee :

-Draft Convention providing a uniform law on the form of wills, with explanatory report (U.D.P. 1966, Et. XLIII doc.30) ;

-Analysis of the remarks of governments on the draft convention providing a uniform law on the form of wills (Et. XLIII Doc. 31 - U.D.P. 1971) ;

The Committee could refer to different working papers which were distributed in the course of the session and in particular to Working Paper No. 1, "Draft of Uniform Law on the form of the international will", proposed by the Belgian delegation.

3.- After adopting the agenda which was proposed at the beginning of the session, the Committee proceded first to an exchange of views of a general nature on the basic draft which had been presented by UNIDROIT. Article by article, it then examined the draft uniform law which makes up the Annex of the Draft Convention, and then the Convention itself.

The Committee finally succeeded in establishing an altogether revised text entitled "Draft Convention providing a uniform law on the form of the International Will, which is reproduced in the document "Etude XLIII -Doc. 32 -U.D.P. 1971". This new text should constitute a basis for the work of a Diplomatic Conference which might be convoked in 1973 for the purpose of adopting an international Convention dealing with this matter.

4.- The object of the present report is to summari e the discussions of the Committee of Experts taking note in particular of the considerations which motivated the modifications of the initial text.

I.-GENERAL OBSERVATIONS

5.- The general discussion was opened by the delegate of the United Kingdom who particularly stressed that the essential objective of the projected convention was to avoid all uncertainty as to the validity of the act or form of a will drawn up by a testator who possesses property abroad or is made to draw up his will in a foreign country.

He deemed that in either case the basic questions of devolution of estate or therules governing the qualifications to draw up a will, were not and should not be affected by the draft of the study. He finally insisted on the fact that the international will would constitute yet only another possibility for the testator who would remain free to draw yp his will according to earlier forms, and that the article 1 of the draft on uniform law provided that the international will, even if it was void as such could be valid as a will of another kind.

He underlined the need to insure the harmonious joining of the draft with the Draft Convention on the establishment of a scheme of Registration of Wills which is currently being examined by the Member States of the Council of Europe, and confirmed the interest his country was taking in these two instruments which could constitute a useful international ruling on the subject.

6.- The delegate of the Federal Republic of Germany, while recognizing the theoretical interest of the proposed draft, expressed his doubts as to the opportuness of creating a new type of will such as the one proposed. The advantages of such a will seemed to him limited, and he noted that in the greater number of cases the holograph will would seem preferable to the international will whose form was weightier and more complicated. He underlined that no solution had been brought to bear on questions of substance which remained the

most important and in regard to which the uncertainties resulting from the rules of conflicts of laws remain intact. He likewise observed that the insertion of the uniform law into national laws -and in particular that of his country- would present difficulties. He finally noted that the formula adopted in the draft, having resulted from a mixture of techniques of diverse origins, had led to a hybrid conception of excessive formalism which was contrary to modern evolution which tended to ease forms. He indicated that his preferences would go more readily toward an attempt to determine several essential elements of form according to whitch the juge would confine himself to verifying the existence or the respect, for recognizing within an international context, the validity of the will.

7.- The delegate of Switzerland stressed the fact that difficulties and uncertainties deriving from the enforcement of rules of conflict of laws of succession do exist under all circumstances and that the instrument proposed was not intended to settle this specific question. He stated that the scope of the draft was actually comparatively limited, but this fact can in the end appear as rather beneficial from a pratical point of view, since in our times fortunes often extend beyond the national frontiers and modern means of transport encourage easy travel and migrations. With special regard to the situation of his country, he said that the international form might fulfill the wish of many foreigners residing in Switzerland.

8.- The Belgian delegation declared its overall interest in the proposed draft, while at the same time expressing the view that the formalism of the draft should be lessened, and that perhaps some rules of substance might be entered to a limited extent in the final uniform law. As an example, a provision could be included, setting forth the age for the legal capacity to make a will. The delegation finally stated that it was necessary to clearly specify for each of the formalities set forth, whether non-compliance therewith would or would not entail invalidity of the will, without drawing up in this connection too strict rulings which could end up in jeopardizing the clear intent of the testator, fulfillment of which must be assured in all circumstances.

9.- The delegate of France insisted on the necessity for drawing up regulations which would take account of the international framework in which the proposed instrument will be entered. To this effect, national laws must view the matter from a specific optics and grant special concessions required. He stressed that rigid formalism was to be avoided as it was outmoded and harmful and that the judge should be granted enough freedom to ensure first of all that the true wish of the testator was fulfilled. He felt hat the draft was an expedient instrument even though the need for it was not acutely felt and declared that he favoured the proposed general outline.

10.- The observer of the Hague Conference felt that the proposed draft was undoubtedly useful from a practical point of view and would certainly soothe the psychological uneasiness of the testators who are often at a loss when in a foreign country and hesitate to make a will drawn up according to the local formulas with which they are not familiar and which are quite different from the ones they are acquainted with. The merging of formulas taken from various systems will enable everyone to find some familiar element and be thus reassured ; the possibility of making a will in the testator's own language is also likely to draw a favourable response. Finally, he said that the draft is fully in line with the 1961 Convention of the Hague on conflicts of laws on the form of wills and cannot be conflicting with the draft presently undertaken in matter of laws on succession.

11.- The Secretary General of UNIDROIT emphasized the importance of the draft in the present situation, and stated that foreign colonies are increasingly larger in the different countries, especially because of the growing number of international officials. The proposed form is similar both to the holograph will and to the will by public deed and takes into account the fact that the notary in the Latin meaning of the word does not exist in several countries of the world.

12.- The observer of the Union of Latin Notaries noted in turn that the proposed form would prove undoubtedly useful for a good number of testators. He stated he was in favour of the technique used in the draft, that is, the merging of various elements taken from different existing systems.

13.- The delegate of the United States stated that his country was keenly interested in this attempt at drawing up an international form of will. The differences apparent at international level are also to be found within the United States where the matter is governed by State Laws. The Uniform Law could thus sere the purpose also of internal unification, removing the difficulties encountered in probate law procedures.

14.- Having thus assessed the interest of the Convention envisaged along the lines proposed in the draft uniform law, the Committee started the examination of the draft, article by article.

II.-REMARKS ON THE UNIFORM LAW

15.- For the sake of clarity, this report des not follow the chronological sequence of the discussions. An attempt is instead made at grouping together discussions on the different problems raised by tne various articles of the original draft which finally led to the drawing up of the new text.

16.- Title of the Draft Uniform Law

The original draft was titled as follows :

"Draft Uniform Law on the Form of Wills".

The Committee unanimously felt that the title was not accurate enough and did not exactly convey the contents of the draft. According to a proposal of the Belgian delegation, the new title quoted below was accepted :

"Uniform Law on the form of the international Will".

17.- General Conditions of Validity of the International Will. (Article 1 of the original draft. Article 1 of the new text of the draft).

Article 1 of the original text was :

"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".

The foregoing provisions raised no special objection. The article was amended at the end of the session in view of a decision taken by the Committee after thorough discussions on the matter of nullities. Most delegations and especially the Belgian delegation, actually felt that it was necessary to clearly specify -among the different formalities required to draw up an international will- such formalities which would be deemed essential and failure to observe which would entail nullity of the deed as an international will. Experts agreed that it was necessary, first of all to ascertain that the wishes of the testator were complied with and that it would be unreasonable to automatically invalidate an international will because a non essential formality had not been observed, especially since it was pointed out that such a will may actually be void not only as an international will, but also as another type of will if its form were not in line line with any of the forms accepted by the local laws.

18.- Thus the Committee decided that the uniform law should specify what provisions would and what provisions would not entail nullity of the will. Two possibilities were open : either to specify each time throughout the uniform law whether non-compliance with the provision considered would mean the nullity of the will ; or else, to state once in a single disposition, provisions which were to be necessarily complied with for the will to be considered valid. The

second solution was finally accepted and, after completion of the discussion on the different articles of the draft, the Committee listed all provisions which were to be deemed essential and non-observance of which would entail the nullity of the will as an international will.

19.- With reference to the final text of the draft, the experts agreed that nullity should be confined to failure to observe the following provisions :

-will made in writing (article 2 of the new draft)

-declarations of the testator in the presence of two witnesses and of an authorised person (article 3 of the new draft)

signature of the testator and of the two witnesses and of the authorised person (article 4 of the new draft).

20.- This decision of the Committee was finalised into an entry at the end of the first paragraph of Article 1. The new text of this Article is therefore worded as follows :

"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 articles 2 to 4 hereafter.

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

21.- Will in writing. Language in which the will is drawn up (Article 2 of the original texte, article 2 of the new draft)

Article 2 of the original draft was worded as follows :

"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.

22.- The Committee unanimously agreed on the fact that the written form specified under paragraph 1 was an essential condition for the validity of the will. It was noted on the other hand that the whole system envisaged in the draft law was conceivable and applicable only on the basis of a written will.

23.- The matter of the language caused some discussion. Some delegates felt that the text should set forth that the language used in the will be one known to the testator, or else a written translation thereof into a language known to the testator should be contemplated. The Committee felt that the important point was to make sure that the testator was acquainted with the content of his will. This was covered under article 3 of the new draft (see hereafter, par. 30). It was noted that a certain tolerance vis-à-vis the language used was one of the distinctive features of the international form proposed . It is to be expected that as a rule, the language used will be chosen for specific reasons of convenience : generally, the will be made whether in the testator's own language or also in the language of the country in which the will is being made.

24.- The Committee admitted that the will may be written by hand or by any other means, that is, mostly typewritten, or else on a printed form. Obviously, this possibility was admitted with respect to the requirements envisaged for the signature (articles 4 and 5 of the new draft). The Committee felt that the form of the Article was clear enough to exclude any other possibility, especially the case of a will recorded on tape.

25.- Article 2 of the original text was finally adopted with no changes as Article 2 of the new draft.

26.- Compulsory declarations by the Testator (Article 3 of the original text ; Article 3 of the new text)

Article 3 of the original draft was worded as follows :

"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".

27.- The provisions of this article were deemed to be altogether satisfactory.

28.- The Committee also wondered whether it was necessary to contemplate three persons, the two witnesses and the qualified person" to receive the will. Some members of the Committee found this number to be too high. It was however remarked that this provision was a combination of systems existing in the national laws : the qualified person corresponds to the Notary, a well known institution of the Civil law systems. Witnesses, on the other hand, are familiar in common law countries. The opportunity for retaining the presence of three persons in addition to the testator was finally admitted by the Committee.

29.- As regards the"qualified persons", the Committee approved the provision of Article II of the Convention whereby each contracting party shall designate the persons who, in its territory, shall be qualified to receive the international will. However, the majority of the experts objected to the very wording of "person qualified" which in their opinion was unsatisfactory. A suggestion whereby these words would be replaced by the words "public official" was rejected on the grounds that in many cases such a person would not in fact be a "public official". Then the Committee, having considered Article II of the Convention, decided to use the words "personne habilitée à le recevoir" in the French text and "person authorized to act in connection with it" in the English text. It was thus decided to use this expression in lieu of the one used previously and to replace, both in the Convention and the uniform law, the words "person qualified" with the words "authorized person". The Committee remarked that this person might well be a public authority, designed by the States in compliance with Article II of the Convention.

30.- The Committe likewise felt that it was necessary to make sure that the testator was acquainted with the content of his will (see para. 23 hereinbefore and paragraphs 50 and 51 hereafter). A statement made to this effect by the testator to the person authorized was deemed sufficient on this item and a provision to this affect was added in paragraph 1 of Article 3.

31.- The principle whereby the content of the will need not be told to the witness nor the authorized person was easily admitted by the Committee which deemed paragraph 2 of the proposed text to be satisfactory.

32.- Finally, the experts deemed that it was necessary to mention in writing that verbal formalities set forth under Article 3 had been complied with. This decision is covered under Article 7 of the new draft uniform law (see herafter, para. 60).

33.- In view of the various decisions taken to this effect, Article 3 of the new draft is worded as follows :

"1.-The testator shall declare in the presence of two witnesses and of a person authorized to act in connection with international wills that the document is his will and that he knows the content thereof.

2.-The testator need not inform the witnesses, or the authorized person, of the content of the will".

34.- Signatures to the will (Articles 4, 5, 7 and 8 of the former draft. Articles 4 and 5 of the new draft).

The following provisions of the original draft covered the question of signatures :

Article 4

1.-The will shall be signed by the testator in the presence of the witnesses and of the person authorized to receive it.

2.-The signature of the testator shall be placed at the end of the will.

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".

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.

Article 8

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

35.- The Committee deemed the signature to be an essential element of the will and that its absence should entail the nullity of the will. Provisions of paragraph 1 of Article 4 of the original draft were therefore approved. A lengthy discussion, however, covered the case of a testator bringing to the autorized person and to the witnesses a will already signed. Under Article 4, para. 1, he would therefore be obliged to sign again. If, through ignorance or negligence, he were to fail to do so, his will, though provided with his signature, would be null, at least as an international will. Several delegates felt that this was too severe a consequence and suggested that, whenever the signature of the testator was already affixed on the will, the testator could just confirm that the signature was in fact his own without being compelled to sign the will again. Some delegates however pointed out that affixing a second signature was not too burdensome a task and was a guarantee to the good accomplishment of the presentation of the will. They likewise stated taht the expression "confirms his signature" was vague and had no specific meaning. The delegate of the Netherlands noted that such a provision might be conflicting with the provision of the Dutch domestic law whereby notaries cannot testify as to deeds signed when they are not present . Finally, a vote

was cast on this matter. The result of the voting was 12 votes in favour, 2 votes against, and 1 abstention, and the testator was thus permitted to "recognise and confirm" his signature already affixed, instead of affixing his signature again. The Committee however stressed that the date of entry into effect of the international will would in all cases be the date of receipt thereof by the qualified person, as clearly set forth under article 6, para. 1, of the new text (see para. 45 hereafter).

36.- As regards the place of the signature, it was generally felt that provision set forth under para. 2 of Article 4 whereby signature shall be placed at the end of the will was acceptable. However, the majority of experts also felt that this specific statement as to the place of signature should not be regarded as too binding a clause and that the judge should be left a wide range of freedom in this connection so as to enable him to validate misplaced signatures, such as for instance, signatures affixed at the margin. Some experts even suggested that any all indication as to the place of signature should be deleted. The Committee finally decided to retain this provision under article 5 which, in view of the provisions of article 1, does not involve nullity of the will if it is not complied with while at the same time serving as a desirable guidance in this connection.

37.- The provision of article 5 of the original draft whereby the witnesses and the qualified person are to sign there and then the will in the presence of the testator was not objected to and was deemed to be an essential formality. Thus, it was transferred onto Article 4 of the new draft,.

38.- After some hesitations, the Committee approved provisions of Article 7, para. 1, of the original draft, covering the case of a will made on several sheets. Considering however that the idea of "initialling" was unknown in the procedure of some Countries, it was felt that the complete signature should be affixed on each sheet. Still for the purpose of leaving a good degree of freedom to the judge, this provision was entered under article 5 of the new draft, among the provisions which are not binding and for which non-compliance therewith does not imply nullity of the will.

39.- Paragraph 2 of Article 7 of the original draft covered the corrections in the body of the will and required either the signature or the initial of the testator.

This provision was sharply objected to by a number of experts which deemed it to be vague and dangerous. Some, however, stressed the interest which it might prove to have in protecting the testator against alterations made to the will by third parties, especially in the case of typewritten wills. Others objected that it was difficult to ascertain that this formality had been complied with because the content of the will, as a rule, is disclosed neither to the witnesses nor to the authorized person. The majority of delegates felt that this requirement was liable to multiply controversies and litigations rather than appease them. Therefore, the provision was deleted.

40.- The Committee also decided to delete the third paragraph of Article 7 of the original text covering additions subsequent to the signature. It was in fact noted that if these additions were aimed at modifying the will, they had to comply with the same provisions and procedures as the will itself. Therefore, in the opinion of the Committee, the question should be handled within the overall frame of modifications to a will already made and valid. In this connection, the Committee felt that the conditions under which a will may be modified or replaced by a subsequent provision fall under the authority of internal legislations. The Belgian delegation remarked that some difficulties might arise in Belgium in view of strict regulations governing conditions for modifying deeds drawn up by notaries.

41.- The Committee decided to delete the provision of Article 8 whereby the signature could be replaced by the fingerprints of the testator. In this connection, it was observed that this procedure for identification was not used in a number of countries. In addition, it was also noted that a fingerprint, unlike a signature, could be affixed after the death of the testator. In the opinion of the Committee, the question of a will made by an illitterate should be considered as marginal, especially because this class of persons are unlikely to have recourse frequently to an international will. It was remarked first of all, in the light of experience acquired by the different national legislations, that the illitterate testator would in most cases be authorized to affix a certain identification mark which would be assimilated to a signature. In this connection, the notion of signature must be left to the national law.

42.- In view of the foregoing decisions, the Committee drew up new articles 4 and 5 covering signatures :

"Article 4

1.-In the presence of the witnesses and of the authorized person, the testator shall sign the will or, if he has previously signed it, shall acknowledge his signature.

2.- The witnesses and the authorized person shall there and then sign the will in the presence of the testator.

Article 5

1.-The signature of the testator shall be placed at the end of the will.

2.-If the will consists of several sheets, each sheet also be signed by the testator, unless the sheets follow each other and form a whole".

43.- Date of the international will (Article 6 of the original draft ; Article 6 of the new draft).

Article 6 of the original draft was worded as follows :

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.

44.- Provisions on the date of the international will were discussed at length by the Committee which emphasized the importance of this element, especially in the event of successive wills, or still to ascertain the capacity of the testator.

45.- Experts felt that it was first necessary to state in the uniform law that the date of the international will is the date of its reception. This rule appeared to be logical and necessary to dispel any possible misunderstanding in case, for instance, the will

had been made some time before it was submitted to the authorized person and to the witnesses. A new provision to this effect was therefore added as paragraph 1 of Article 6 of the new draft.

46.- It was likewise stated that the date of reception should also be given in the will, as a natural consequence of the preceding remark. The Committee felt that the authorized person should affix the date on the will which was thus submitted to his.

47.- The question of the undated or mis-dated will was rather controversial. Some experts were inclined to declare the will null in such case. Most of the delegates, however, were somewhat reluctant to add a new case of nullity of the will, since they felt that in many cases the validity of will, and thus the respect for the will expressed by the testator could be protected through the evidence of the true date, easily determined by the witnesses and the authorized person. Finally, the Committee agreed on a new text inspired from the concept expressed in paragraph 2 of the original draft. This new text forms para. 3 of new Article 6 : it is stated therein that in the event of conflict, the date of the reception may be ascertained by any means. The expression "in case of dispute" covers the case of the absence of a date or of erroneous date.

48.- In view of these decisions, Article 6 of the new draft has been worded up as follows :

"Article 6

1.-The date of the will is the date of tis reception.

2.-The date of the reception shall be affixed to the will by the authorized person.

3.-In case of dispute the date of the reception may be established by any means".

49.- Case of the testator unable to read and of the testator who does not know the language in which his will is drawn (Article 9 of the original draft).

Article 9 of the original draft was worded as follows :

"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".

50.- These provisions were objected to by the Committee. It was deemed first of all that the first paragraph was already justifiable exception to the principle of the secrecy of testamentary provisions as had been stated under article 3, paragraph 2, of the new text. It was first suggested to state the reading of the will to the testator should not be made compulsory and that the testator could renounce this possibility. Finally, an addition made to article 3, paragraph 1, under which the testator must state that he knows the content of the will, was deemed to be an adequate guarantee and protection.

51.- The same arguments were retained by the Committee for para. 2 of the same article. Translation was criticized by the Committee, first because it provides no adequate guarantees of faithfulness, and then because it affects the secrecy of the will. The said provision added to article 3, para. 1, seemed adequate also in this case, and Article 9 of the original text was altogether deleted.

52.- Identity of the Testator and of the Witnesses (Article 10 of the original draft. Article 7, para. 1, of the new draft).

Article 10 of the original draft was worded as follows :

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

The necessity of such a provision was not denied by the Committee. As a matter of fact, the provision was deemed insufficient and it was felt that the identities should be put down in writing. Thus, these two ideas were entered within the frame of the establishment of a "certificate" which will be dealt with in paragraph 60 hereunder. In the certificate, the authorized person shall certify that he has made sure of the identity of the testator and of the witnesses and shall specify such identities.

53.- Capacity of Witnesses (Article 11 of the original draft uniform law, new article V of the Convention).

Article 11 of the original draft was worded as follows :

"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".

54.- With regard to paragraph 1, the Committee detected some ambiguity in this text which appears to be a conflict of laws rule worded in too general terms. The actual scope of the provision is much more limited, since it covers only the special capacity to act as witness in an international will. In order to convey this restrictive meaning, the Committee decided to speak of "conditions to be a witness" rather than of "capacity of the witnesses". In view of this amendment, the Committee adopted this regulation notwithstanding the remarks submitted by certain delegates who stated that, under certain circumstances, the provision might have a restrictive effect, such as for instance when the applicable law according to the rules of conflict of laws was more liberal -in regard of these conditions- than the law of the place where teh will is received.

55.- With a view to removing certain discriminations entered in some legislations and which appear hardly justifiable, especially in regard of the international will, the Committee added a provision whereby "Nevertheless, an alien may act as a witness of an international will." This provision will enable the testator in a foreign country to avail himself of witnesses of his own nationality.

56.- Paragraph 2 of article 11 of the original draft was objected to by the Committee which felt that it had no place within the framework of the uniform draft law. In the opinion of the experts, this question should be left entirely to the internal law.

57.- Finally, the Committee remarked that the whole of the provisions covering conditions for being a witness had an aspect of private international law that made their entry into the uniform law somewhat difficult. It was therefore decided to transfer these provisions into the Convention as Article V thereof, worded as follows :

"1.-The conditions to be a witness of an international will shall be governed by the internal law of the place where the will is received.

2.-Nevertheless an alien may act as a witness of an international will".

58.- However, to ensure the control of compliance with these regulations, the Committee specified that the authorized person shall make sure that the witnesses meet all the requirements of the local law, that is, his own law, to be witnesses. An indication to this effect was envisaged in the certificate to be drawn up by the authorized person under Article 7 of the new draft (see paragraph 61 hereinafter).

59.- Issuance of a certificate by the authorized person (Article 7 of the new draft).

The idea of the issuance by the authorized person of a certificate in view of the drawing up of the international will was first submitted by the United States delegation, which had resumed

certains written observations made by this country on the occasion of the comments on the original draft (see doc. XLIII - 31).

The proposal was favourably accepted by all the delegations and it became apparent that such a certificate might prove an expedient means for settling a series of different problems. After thorough discussions and different proposals, the Committee agreed on a text which forms Article 7 of the new draft.

60.- The certificate is issued by the authorized person and must be dated and signed by the said person. The Committee discussed on the question as to whether or not the certificate was to form part of the will itself or be annexed to it. The experts felt that both solutions should be retained and the text drawn up indicates the authorized person "shall add" the certificate to the will.

61.- The certificate is primarily intended to certify that the provisions of the uniform law for the drawing up of the international will have been complied with. Paragraph 1 of Article 7 of the new draft lists all the different formalities to be filled in this connection. The certificate therefore guarantees to a certain extent the compliance with legal provisions and indicates the identity of those present at the presentation of the will.

62.- The certificate also provides a material trace of the presentation of the international will and a receipt thereof, whenever it is not left in the hands of the testator. Paragraph 2 of Article 7 of the new draft actually sets forth that the authorized person shall keep a copy of the certificate and deliver one to the testator.

63.- Finally, the certificate bears proof of the compliance with procedures set forth as specifically stated under paragraph 4 of Article 7 of the new draft, especially with a view to specific difficulties arising in this field from the procedures required by the different legislations of the United States (see doc. XLII 31, page 13 of the french text and page 14 of the english text).

64.- Finally, the Committee felt that it should specifically be mentioned (para 3) that the fact that the certificate has not been established does not affect the validity of the will. Actually, the will exists regardless of the certificate which is solely the responsibility of the authorized person.

65.- Article 7 of the new draft was therefore worded as follows :

"1.-The authorized person shall add to the will a certificate stating that :

a)-the testator, in his presence and in that of the witnesses has declared that the document is his will and that he knows the content thereof ;

b)-the testator, in his presence, and in that of the witnesses, has signed the will or has acknowledged his signature previously affixed ;

c)-the witnesses have then signed it ;

d)-the authorized person has satisfied himself of the identity of the testator and of the witnesses ;

e)-the witnesses satisfied the requirements needed according to the internal law of the place where the will is received.

The authorized person shall also state his identity and those of the testator and of the witnesses. He shall date and sign the certificate.

2.-The authorized person shall keep a copy of the certificate and deliver one to the testator.

3.-The fact that the certificate has not been established does not affect the validity of the will.

4.-Unless impeached by competent proof, the foregoing certificate of the authorized person shall be accepted as sufficient proof in any cause or proceeding of all facts necessary to the due execution of the instrument as an international will".

66.- Safekeeping and official registration of the will (Articles 12 and 13 of the original draft, Article 8 of the new draft).

Articles 12 and 13 of the original draft were worded as follows :

Article 12

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

Article 13

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

67.- The idea expressed by Article 12 whereby the international will shall be left in the custody of the authorized person raised some objections, primarily from delegations of countries such as the United Kingdom and the United States where the practice of leaving the will in the custody of a Notary is unknown. The German delegate also stressed the difficulties such a procedure would cause in this country where the wills received by a Notary must be deposited by the latter with a Court. A proposal was thus made to delete these two articles. The Committee however felt that this was too drastic a solution and some members stated that the articles covering the custody were in their opinion the most importante and the most distinctive provisions of the whole draft and that its deletion might jeopardise the whole economy of the draft. The experts thus sought a solution establishing a voluntary custody. However, some delegates voiced some fears in the event the will were just returned to the testator ; in such case the latter or, and this would be more serious, other persons, might further modify the will.

68.- The attention of the Committee was also drawn on the type of custody and its consequences in connection with the system for the registration of wills envisaged by the draft Convention of the Council of Europe. Article 4 of the draft provides for compulsory registration in case of "formal will" or "formal deposit of a will". In case of an holographie will not "formally deposited", the testator can oppose registration. If the local law does not prohibit such opposition.

69.- Finally, the Committee decided that the question of the deposit and custody should be governed by the local law, with the provision however that the authorized person shall comply with such law.

Article 8 of the new draft is worded as follows :

"The authorized person has the duty to ensure the safekeeping of the will in accordance with the internal law of the place where the will is received, particularly by undertaking andy official deposit or registration required by that law".

III.-REMARKS ON THE DRAFT CONVENTION

70.- The modifications made by the Committee to the Draft Convention are meant to bring this in line with the decisions adopted on the draft uniform law. The expression "person qualified to receive the will" was replaced by "person authorized to act in connection with the will". The words "qualified person", however, were retained to indicate under paragraph 2 of Article III the person who was not specifically designated in compliance with article II.

71.- Article IV of the former Draft Convention was deleted in view of the deletion of Article 11 paragraph of the original uniform law.

72.- A new Article IV was entered to ensure international acknowledgement of the certificate contemplated under Artide 8 of the new uniform law. This new Article IV is worded as follows :

"The effectiveness of the certificate provided for in Article 8 of the Annex shall be recognized in the territories of all Contracting Parties".

73.- A new Article V as entered in conformity with the Committee's decision on the capacity of witnesses (see para 57 hereabove).

74.- Article V of the original Draft Convention now Article VI, was slightly modified to avoid any misinterpretation on the extent of the exemption from legalisation of the signatures. While the original text only mentioned an exemption from legalisation, the new text specifies that the signatures shall be exempt from any legalisation. This expression, which can be found in a number of recent international conventions, is in line with the modern liberal attitude in matter of legalisations.

75.- Article VI of the original Draft Convention was deleted. The Committee felt that it had become unnecessary since the compulsory safekeeping system had been cancelled, and that it would add nothing to the provisions of Article 8 of the new draft uniform law.

76.- All other articles of the original draft convention were adopted by the Committee without objections or discussions.

77.- The complete text of the new draft Convention and its annex providing a uniform law, as adopted by the Committee of Experts, form document "Study XLIII - Doc. 32".
