International Conventions in the Field of Succession

Explanatory Documentation
prepared for
Commonwealth Jurisdictions

Commonwealth Secretariat

INTERNATIONAL CONVENTIONS IN THE FIELD OF SUCCESSION

Explanatory documentation prepared for Commonwealth Jurisdictions by Professor Keith Patchett in association with the Commonwealth Secretariat.

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PREFACE

This is the second in a series of "accession kits" for international conventions in the field of private international law. The first, entitled The Hague Conventions on The Service of Process, The Taking of Evidence and Legalisation, was prepared by Professor David McClean in conjunction with the Commonwealth Secretariat, and this present "kit" was similarly prepared by Professor Keith Patchett.

At both their Winnipeg and their Barbados Meetings Law Ministers paid handsome tribute to the constructive and imaginative contribution made to Commonwealth legal systems by the two Professors, and for our part we, too, would formally record our own very great indebtedness to them.

Copies of both "kits" are available from the Commonwealth Secretariat on request.

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INTRODUCTORY NOTE

The Commonwealth Law Ministers at their Meetings held in Winnipeg in August 1977 and in Barbados in April/May, 1980 referred to the cooperation between the Commonwealth Secretariat and the Hague Conference on Private International Law and to the desirability of those Commonwealth governments who are not members of the Conference being kept fully informed of developments there. As a consequence of these initiatives, information is being prepared for Commonwealth governments on a number of existing Conventions prepared by the Hague Conference and other international agencies; in general, these Conventions are treaties which are already in force and which are open for accession by States in the Commonwealth.

The papers now presented are principally concerned to provide information about a series of Conventions in the field of succession. One, the Convention on the Conflicts of Laws relating to the Form of Testamentary Dispositions, already has five Commonwealth Contracting States and has been extended by the United Kingdom to 25 other jurisdictions, being her dependencies or former dependencies. The second, the Convention on the Form of an International Will, prepared by UNIDROIT, is also in force, and has been signed by two Commonwealth States and acceded to by Canada and extended by her to a number of Provinces.

The present papers include the text of the two Conventions (in the English version), a commentary on the text of each Convention and guidance as to decisions required prior to accession and as to possible legislation.

In addition, it has been thought useful to provide information about two other Conventions. The first, the Hague Convention concerning the International Administration of the Estates of Deceased Persons, is not yet in force but has been the subject of discussion at Regional Working Meetings of Commonwealth law officers in St. Kitts (1978),

Western Samoa (1979) and Kenya (1980) at which views were expressed favouring further examination of the regime proposed by this Convention. In addition to the English language text, a commentary on the Convention's principal provisions is provided. Detailed examination of the implications of this Convention for particular legal systems is required before any model legislation could be essayed. Accordingly, no guidance as to decisions required prior to accession and as to possible legislation is attempted.

A note is also provided, with the official text, on the Convention on the Establishment of a Scheme of Registration of Wills concluded through the Council of Europe in 1972, accession to which is open, on the invitation of the Committee of Ministers of the Council of Europe, to non-member States.

Further information about the Conventions may be obtained from the appropriate agency.

The address of the Hague Conference is:

The Secretary-General,
The Hague Conference on Private
International Law,
Bureau Permanent,
La Hague, Pays-Bas,
2C Javastraat,
NETHERLANDS.

The address of UNIDROIT is:

International Institute for the
Unification of Private Law,
Via Parisperna, 28 (Palazzo Aldobrandini),
00184 Rome,
ITALY.

The address of the Council of Europe is :

Secretary-General,
Council of Europe,
Palais de L'Europe,
67006 Strasbourg,
CEDEX,
France.

CHAPTER I

THE CONVENTION ON FORMAL VALIDITY

Introduction

The Convention on the Conflicts of Laws relating to the Form of Testamentary Dispositions was finalised at the Ninth Session of the Hague Conference on Private International Law, and concluded on 5 October 1961. It is in force, having been ratified or acceded to by

Austria
Belgium
Botswana
Denmark
Germany
German Democratic Republic
Finland
Fiji
France
Ireland
Israel
Japan
Luxembourg
Mauritius
Norway
Poland
South Africa
Swaziland
Sweden
Switzerland
Tonga
United Kingdom
Yugoslavia

In addition, Greece, Italy, Portugal and Spain have signed the Convention but not ratified it and France has extended it to her overseas Departments and Territories.

Of more significance in the Commonwealth context, the Convention has been extended under Article 17 by the United Kingdom to certain territories as dependencies. A number of these have subsequently become independent; in the majority of cases they have not taken steps since that time to accede to the Convention in their own right. The status of these states as successors to the Convention is, therefore, not totally clear. Insofar as any such states have enacted legislation to make the Convention effective municipally, the substantive law introduced by the Convention will be operative. These states and territories are:

Antigua
Barbados*
Belize
Bermuda
British Virgin Islands
Brunei
Cayman Islands
Dominica*
Falkland Islands
Fiji*
The Gambia*
Grenada*
Guyana*
Hong Kong
Isle of Man
Lesotho*
Mauritius*
Montserrat
St.Kitts-Nevis-Anguilla
St. Helena
St. Lucia*
St. Vincent*
Seychelles*
Swaziland*
Tonga*
Turks & Caicos Islands
Vanuatu*

* Now Independent Underlined states have acceded in their own right.

Aim of the Convention

Occasions arise in which a testator who has links with several legal systems has his testamentary instructions defeated because the will was made in a form not permitted by the particular legal system which, under the relevant conflict of laws rules, governed the matter. At common law, for example, a will relating to movables must be made in a form permitted by the law of the place where the deceased was domiciled at the time of his death. If, however, the testator used a form valid where he executed the will but not under the law of his domicile, the instrument would have no validity. A number of common law systems alleviated these hardships, if only partially, by the adoption of Lord Kingsdown's Act (Wills Act, 1861 - U.K.) which added to domicile a limited range of additional connecting factors. For all the now admitted shortcomings of that Act, its approach of increasing the number of connecting factors, and thus the choices of law, has been developed by the Convention. The aim of the Convention is to offer an extensive range of possible connecting factors, thereby increasing the possibility that the form of will used by the testator may satisfy the

requirements relating to formal validity in the law of at least one of the jurisdictions with which he had a relevant connection.

It needs to be stressed, however, that this Convention is confined to the question of formalities with which the instrument must comply: it has nothing to say on such matters as the capacity of a testator to make a will or the essential validity of the will, that is the validity of the dispositions themselves. The obligation under the Convention to recognise that the form of a will is valid does not affect the question of which legal system determines whether the testator could make the will at all or dispose of property as he attempted to do.

Application of the Convention

The rules of law introduced by the Convention do not, according to Article 6, depend upon any requirements of reciprocity. Once adopted they apply to all wills (or more exactly to all "testamentary dispositions") whose formal validity comes into question in a Contracting State, whether or not they have any connection with another Contracting Party. The effect of adhesion by a State to the Convention, therefore, is to give rise to an obligation there to make the Convention rules part of the general conflict of laws rules of that State. It is clear that a Contracting State could find itself obliged by adopting these rules to apply the law of a non-Contracting state in order to determine the validity of a will where there is a recognised connection with that latter state.

The rules once adopted are to be applied to wills whether made before or after adhesion to the Convention provided that the testator dies after such adhesion (Article 8). It is, however, open to a state, by an appropriate reservation, to restrict the operation to wills made after adhesion (Article 13).

The Convention does not restrict "testamentary dispositions" to those in writing. Thus an oral disposition if authorised by a legal system with which a recognised connection is established will be valid. This account, however, uses the term "will" rather than "disposition".

Basic Rules for Formal Validity

Article 1 describes which laws may be applied to determine whether the form of a testamentary disposition is valid. It is irrelevant that the testator did not have in mind to follow a particular legal system. Provided it can be established that he had at least one of eight alternative connections with a particular legal system, the requirements which that legal system imposes for the form of a will may be relied upon. A will which fails to satisfy the requirements of one legal system may still be valid because it satisfies those of another with which the testator had a recognised connection.

The execution of a will may, therefore, conform to the internal law in force in any of the following territories :-

(i) where the testator executed the will;
(ii) the nationality of which the testator held at the time of making the will;
(iii) the nationality of which the testator held at the time of his death;
(iv) where, at the time of making the will, the testator was domiciled;
(v) where, at the time of his death, the testator was domiciled;
(vi) where, at the time of making the will, the testator had his habitual residence;
(vii) where, at the time of his death, the testator had his habitual residence;
(viii) to the extent that the will makes any disposition of immovables, where the immovables in question were situated.

Except where the connecting factor relied upon is the situs of the property under (viii), these connecting factors will be effective in relation to a will whether it disposes of movables, immovables or both. This ensures that in many cases formal validity can be determined by reference to a single legal system. It seems clear, therefore, that the approach adopted in the Canadian Uniform Act (as revised in 1966) which confined the first seven factors to movables and insists that the lex rei sitae alone applies in relation to "land" is not in compliance with the Convention's requirements.

In each case, the law which will govern will be the "internal law" of the relevant legal system, i.e. the requirements as to form of wills operative in that legal system. This effectively excludes the possibility of renvoi, that is the reference in accordance with the conflict of laws rules of that legal system to the law of another legal system.

These rules offer, therefore, a much wider choice of law for the formal validity of wills than obtains in many Commonwealth jurisdictions. Since a number of these states, although common law jurisdictions, appear never even to have had the equivalent of Lord Kingsdown's Act, it is probable that formal validity can only be established in those states by reference to the law of the domicile at the date of death in the case of wills of movables (Brewer v Freeman (1857) 10 Moo.P.C.306) or by the lex situs in case of wills of immovables (Coppin v Coppin (1725) 2 P.Wms 291). For these states, as well as those with Lord Kingsdown's Act, additional problems can arise through the operation of the doctrine of renvoi which has particular play in relation to matters of formal validity of wills.

The new rules are not intended, however, to be exclusive of all others. For Article 3 permits states also to recognise testamentary dispositions which meet the requirements of other laws. The Article 1 connecting factors represent the common denominator of the scheme to which any state may, outside the scheme, add other factors which will be effective in that state, though not necessarily elsewhere.

It seems probable that many common law jurisdictions already follow the United Kingdom practice in permitting

(a) the connecting factors in Lord Kingsdown's Act to have effect (e.g. the lex loci actus in the case of a British subject's will of personal property);

(b) validity to be determined by any law referred to on a renvoi by the law of the domicile which the testator had at the time of his death (Collier v Rivaz (1841) Curt. 855);

(c) probate of a will which has been accepted as valid by a court of the domicile held by the testator at his death, regardless of which law is applied by that court (Enohin v Wylie (1862) 10 H.L. Cas.1.)

There is no reason why these should not, by virtue of Article 3, continue in those countries where they already obtain. It is, however, clear that such exceptional situations are unlikely to have any major significance, for the connecting factors in Article 1 cover a wide range of fact situations, which will normally render reference to these exceptional circumstances unnecessary.

The privilege afforded by Article 3 has in fact been invoked by the United Kingdom, since signing the Convention, in relation to wills which exercise powers of appointment but are formally invalid under the basic rules. The Wills Act, 1963, section 2(1) introduces a further rule, which is applicable to this particular category of wills to the extent that they exercise powers of appointment. The provision ensures that there is to be treated as properly executed -

"(d) a will so far as it exercises a power of appointment, if the execution of the will conformed to the law governing the essential validity of the power."

The U.K. Act, in section 2(2), has incidentally resolved a particular uncertainty about the formal validity of those wills which do not comply with the formalities required by the instrument creating the power. This provision reads -

"(2) A will so far as it exercises a power of appointment shall not be treated as improperly executed by reason only that its execution was not in accordance with any formal requirements contained in the instrument creating the power."

Inclusion of such provisions as these in the municipal law of a state is not required in order that the state can accede to the Convention.

Additional rules

(a) Additional rules relating to nationality as a connecting factor

In the cases where the connecting factor directs reference to the law of a nationality, problems will arise in respect of those states with a single nationality which comprise more than one system of law governing formal validity. Article 1 provides two alternative solutions:

(a) where there are rules in force in that state which determine the law to be applied, that law must be applied;

(b) where there are no such rules, the system to be followed is that with which the testator had "the most real connexion" ("le lien le plus effectif").

Several commentators have pointed to the unlikelihood of a federal or other non-unified state having a common conflict of laws rule determining the law to be applied on this matter but not having common rules on the question of formal validity itself. It may well be that this solution will rarely be helpful.

Accordingly the second solution may need to be relied upon. Again commentators have pointedly asked what evidence, not already related to domicile and habitual residence, which are distinct connecting factors, will establish the "most real connexion". The most persuasive answer has suggested that the evidence would be provided by the presence of a preponderance of assets: yet this situation may already be covered by the distinct connecting factor of situs of immovables. Even this answer will not meet the case of one who has nationality by descent only and has no connection with the country of that nationality by domicile or residence or through owning assets situated there.

It is probable, therefore, that in the case of non-unified systems, the nationality connecting factor will have little significance.

(b) Additional rule relating to domicile as a connecting factor

The Convention prescribes its own rules for determining whether or not the testator had his domicile in a particular place. This question is required, by Article 1, paragraph 3, to be determined by the law of that place. This requirement was preferred to the practice adopted in some jurisdictions, especially those applying the common law, of determining the question by reference to the law of the forum court. In particular it was thought to avoid the possibility that a testator may be properly advised that he is domiciled in one place, when by the law of the forum where the matter ultimately arises, such a domicile is not established. To the objection that the Convention rule may lead to a testator being held to have a domicile in several places as a result of the different laws of those places, it has been countered that this can only serve to increase the likelihood that the testator's intention will be found, by reference to some applicable law, to have been expressed in a valid form.

This rule, however, presents difficulties for common law systems and for that reason the Convention permits this requirement to be the subject of a reservation (Article 9: see below p. 17).

(c) Matters to be categorised as formalities

Some legal systems provide for testamentary dispositions to be made by two or more persons in the one document. Article 4 emphasises that the Convention's rules relating to formal validity apply to those documents as to any other type of will. But the Convention only applies when a question of the formal validity of such wills arises: it does not seek to deal with the prior question whether the validity of such joint wills gives rise to a question of substance rather than form. This issue was deliberately left open as it is likely to be decided differently in different legal systems. It remains, therefore,

for the forum court to determine that question according to its own conflict of laws rules. Such a court might, for example, decide that the making of a joint will should be classified as involving a question of capacity and is therefore governed in that respect by the law of the testator's domicile at the time of execution. In such a case, it would only be if that matter were favourably resolved that matters relating to the formal validity of the will would fall to be determined in accordance with the rules applicable by reason of the Convention requirements.

The Convention does, however, set out to settle one such question of classification. Article 5 provides that certain matters are to be categorised in the conflict of laws rules of all Contracting States as formal requirements only and thus to be dealt with in accordance with the basic rules set out in the Convention.

These are -

(a) any provision of law which limits the permitted forms of wills which may be executed by particular testators on account of their age, nationality or some other personal qualification;

(b) any provision of law which prescribes the qualifications which must be possessed by witnesses if a disposition is to have validity.

It should be emphasised that paragraph (a) deals solely with those cases in which a legal system restricts or denies the availability of particular types of will to certain persons e.g. because of their nationality or age. This provision was particularly designed to refer to those civil law systems which prohibit nationals from making holograph wills abroad or which permit minors to make wills provided a particular form is used. It does not purport to categorise such matters as that pertaining to the capacity of a minor to make wills at all as formal requirements.

(d) Revocation of Wills

The Convention, in Article 2, lays down uniform conflict of laws rules for the choice of law governing the formal validity of a will which revokes an earlier will.

Thus a will in so far as it purports to revoke an earlier will is valid as to form if -

(a) it fulfils the requirements of any law applicable under the basic rules contained in Article 1; or

(b) it complies with the requirements of any law by which, on account of Article 1, the revoked will had formal validity.

The former provision is in fact necessitated by the terminology of the Convention which refers throughout to "testamentary dispositions" rather than a "will". It is, of course, possible to conceive of a revocation being effected by a testamentary act or instrument which makes no dispositions. The paragraph puts the matter beyond doubt. The Convention, however, does not deal with the validity of other kinds of act by which a will might be revoked: e.g. subsequent marriage or simple destruction. The second provision permits a testator to revoke an earlier will by a will in a form in which that earlier will was (or could have been) validly made, when, through a change in the testator's circumstances, the basic rules in Article 1 no longer result in an applicable law whereby the later will is formally valid. The new dispositions, as distinct from the act of revocation, made by the later will will be ineffective but the policy view was that such an intestacy was preferable to the continued application of an earlier will which the testator had repudiated.

(e) Public Policy ("Ordre public")

Article 7 makes clear that the rules relating to formal validity which are made applicable under the Convention regime can be ignored in a Contracting State in one case only - where the application is

manifestly contrary to "ordre public". As the basic rules following adherence to the Convention are to become part of the conflict of laws rules of each Contracting State, it appears that the public policy objections normally available under such municipal law in respect of foreign laws could be invoked in any case. But Article 7 was introduced into the Convention out of an abundance of caution. The United Kingdom Wills Act, 1963 which makes the Convention effective municipally has not been thought to require this express restatement of a basic rule of the English Conflict of Laws. It seems improbable, in any case, that the application of foreign laws relating to the formal validity of wills will at all frequently conflict with municipal concepts of public policy or "ordre public".

Matters upon which Reservations may be made

Article 18 makes clear that reservations may be made on all or any of five matters regulated by the Convention. No other reservations are permissible. Such reservations may be withdrawn at any time by notification to the Ministry of Foreign Affairs of the Netherlands.

(a) Determination of domicile

As we have seen (p. 10), the Convention requires the testator's domicile to be determined by reference to the law of the place where it is alleged that he had his domicile. This presents problems for common law jurisdictions. Thus the United Kingdom pointed out during the deliberations upon the draft Convention that this requirement would complicate non-contentious probate proceedings by requiring them to become concerned with questions of proof of foreign law to determine domicile where it was alleged that the domicile was situated in a foreign jurisdiction. Moreover, it could result in domicile for purposes of probate and formal validity being situated in a different place from that in which domicile for purposes of succession could be found to be situated under the applicable lex fori. Similar differences may arise where part of the estate was disposed of by will but other parts were governed by the law of intestacy. For domicile as determine by the lex fori would apply in the latter case.

For reasons such as these, the Convention in Article 9 permits a Contracting State to reserve the right to determine domicile by reference to the lex fori and it is the practice for common law states adhering to the Convention to enter a reservation of this kind.

(b) Testamentary dispositions made orally

Oral wills are known to some developed legal systems especially in relation to dispositions by servicemen or sailors but such dispositions are in principle objectionable to many others. Accordingly, the Convention in Article 10 permits a State to reserve the right not to recognise such dispositions (which would include oral revocations) when made by one of its nationals (who has no other nationality). This exception is itself subject to the qualification "save in exceptional circumstances", a term which was conceived as referring to cases in which more formal dispositions were rendered impossible by military operations or by natural disasters. It appears, therefore, that it is not open to a State to make this reservation in relation to these exceptional cases. Whether oral dispositions made in those circumstances are valid would always be determined in accordance with the basic rules in Article 1. This reservation, however, appears to have little general application.

(c) Dispositions made by nationals abroad

Certain civil law systems have provisions in their municipal law prohibiting the making by their nationals of holograph wills abroad. The effect of the basic rules of the Convention could be to require such wills to be recognised in those states because they comply with the formality requirements of another system made applicable under Article 1.

Accordingly, Article 11 was introduced to permit such states to refuse to recognise such wills in a limited number of circumstances . A state's reservation will be effective solely in relation to a will which is valid as to form under the law of another state which is applicable solely because the testator made the will there. Moreover, it will be

effective only insofar as it relates to property situated in the reserving state and then only provided that the testator was a national of that state, was domiciled, or habitually resident, there and died in a state other than that in which he made the disposition. In essence, therefore, a state will become entitled to refuse recognition to certain dispositions which have been made abroad in a form which it is not open to nationals closely connected with the state to use there.

This reservation, therefore, is unlikely to have much importance for common law jurisidctions (which do not normally impose prohibitions on form by reference to such factors as nationality) but may call for consideration by those Commonwealth jurisdictions in which a civil law system operates.

(d) Clauses not relating to matters of succession

It is common practice in many jurisdictions for a will to contain clauses which deal with matters other than those connected with succession rights - for example, appointment of a guardian or legitimation. The Convention, through Article 1, is designed to embrace these wills or clauses in wills in the same way as those relating to dispositions of estate.

For some jurisdictions, these matters touch, for example, upon matters of family law and should not be subject to the Convention regime. Accordingly, Article 12 entitles a state to reserve the right to exclude from the regime any testamentary clauses which, under the law of that state, do not relate to matters of succession.

It remains, however, for each legal system, according to its conflict of laws rules, to determine whether such clauses are in any case permissible. It is only after such a question has been answered affirmatively that the question of form dealt with by the Convention will arise. This reservation, therefore, is unlikely to be of major importance.

(e) Application

As we have seen (p.5.), the Convention normally applies to wills, whenever made, of persons dying after accession to the Convention (Article 8). The right may however be reserved under Article 13 to apply the Convention only to those testamentary dispositions which are made after accession.

In view of the fact that the Convention has extended the range of laws which might be applicable to determine formal validity, Article 8 may be useful in saving the intentions of testators who made a will prior to accession in an invalid form but which is valid under a legal system which, as a consequence of Article 1, becomes applicable for the first time.

CONVENTION ON THE CONFLICTS OF LAWS RELATING TO THE FORM OF TESTAMENTARY DISPOSITIONS

(Concluded October 5, 1961)

The States signatory to the present Convention,

Desiring to establish common provisions on the conflicts of laws relating to the form of testamentary dispositions,

Have resolved to conclude a Convention to this effect and have agreed upon the following provisions:

Article 1

A testamentary disposition shall be valid as regards form if its form complies with the internal law:

a) of the place where the testator made it, or

b) of a nationality possessed by the testator, either at the time when he made the disposition, or at the time of his death, or

c) of a place in which the testator had his domicile either at the time when he made the disposition, or at the time of his death, or

d) of the place in which the testator had his habitual residence either at the time when he made the disposition, or at the time of his death, or

e) so far as immovables are concerned, of the place where they are situated.

For the purposes of the present Convention, if a national law consists of a non-unified system, the law to be applied shall be determined by the rules in force in that system and, failing any such rules, by the most real connexion which the testator had with any one of the various laws within that system.

The determination of whether or not the testator had his domicile in a particular place shall be governed by the law of that place.

Article 2

Article 1 shall apply to testamentary dispositions revoking an earlier testamentary disposition.

The revocation shall also be valid as regards form if it complies with any one of the laws according to the terms of which, under Article 1, the testamentary disposition that has been revoked was valid.

Article 3

The present Convention shall not affect any existing or future rules of law in contracting States which recognize testamentary dispositions made in compliance with the formal requirements of a law other than a law referred to in the preceding Articles.

Article 4

The present Convention shall also apply to the form of testamentary dispositions made by two or more persons in one document.

Article 5

For the purposes of the present Convention, any provision of law which limits the permitted forms of testamentary dispositions by reference to the age, nationality or other personal conditions of the testator, shall be deemed to pertain to matters of form. The same rule shall apply to the qualifications that must be possessed by witnesses required for the validity of a testamentary disposition.

Article 6

The application of the rules of conflicts laid down in the present Convention shall be independent of any requirement of reciprocity. The Convention shall be applied even if the nationality of the persons involved or the law to be applied by virtue of the foregoing Articles is not that of a contracting State.

Article 7

The application of any of the laws declared applicable by the present Convention may be refused only when it is manifestly contrary to "ordre public".

Article 8

The present Convention shall be applied in all cases where the testator dies after its entry into force.

Article 9

Each contracting State may reserve the right, in derogation of the third paragraph of Article 1, to determine in accordance with the *lex fori* the place where the testator had his domicile.

Article 10

Each contracting State may reserve the right not to recognize testamentary dispositions made orally, save in exceptional circumstances, by one of its nationals possessing no other nationality.

Article 11

Each contracting State may reserve the right not to recognize, by virtue of provisions of its own law relating thereto, forms of testamentary dispositions made abroad when the following conditions are fulfilled:

a) the testamentary disposition is valid as to form by reason only of a law solely applicable because of the place where the testator made his disposition,

b) the testator possessed the nationality of the State making the reservation,

c) the testator was domiciled in the said State or had his habitual residence there, and

d) the testator died in a State other than that in which he had made his disposition.

This reservation shall be effective only as to the property situated in the State making the reservation.

Article 12

Each contracting State may reserve the right to exclude from the application of the present Convention any testamentary clauses which, under its law, do not relate to matters of succession.

Article 13

Each contracting State may reserve the right, in derogation of Article 8, to apply the present Convention only to testamentary dispositions made after its entry into force.

Article 14

The present Convention shall be open for signature by the States represented at the Ninth session of the Hague Conference on Private International Law.

It shall be ratified, and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Article 15

The present Convention shall enter into force on the sixtieth day after the deposit of the third instrument of ratification referred to in the second paragraph of Article 14.

The Convention shall enter into force for each signatory State which ratifies subsequently on the sixtieth day after the deposit of its instrument of ratification.

Article 16

Any State not represented at the Ninth session of the Hague Conference on Private International Law may accede to the present Convention after it has entered into force in accordance with the first paragraph of Article 15. The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for a State acceding to it on the sixtieth day after the deposit of its instrument of accession.

Article 17

Any State may, at the time of signature, ratification or accession, declare that the present Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect on the date of entry into force of the Convention for the State concerned.

At any time thereafter, such extensions shall be notified to the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for the territories mentioned in such an extension on the sixtieth day after the notification referred to in the preceding paragraph.

Article 18

Any State may, not later than the moment of its ratification or accession, make one or more of the reservations mentioned in Articles 9, 10, 11, 12 and 13 of the present Convention. No other reservation shall be permitted.

Each contracting State may also, when notifying an extension of the Convention in accordance with Article 17, make one or more of the said reservations, with its effect limited to all or some of the territories mentioned in the extension.

Each contracting State may at any time withdraw a reservation it has made. Such a withdrawal shall be notified to the Ministry of Foreign Affairs of the Netherlands.

Such a reservation shall cease to have effect on the sixtieth day after the notification referred to in the preceding paragraph.

Article 19

The present Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 15, even for States which have ratified it or acceded to it subsequently.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands at least six months before the end of the five year period.

It may be limited to certain of the territories to which the Convention applies.

The denunciation will only have effect as regards the State which has notified it. The Convention shall remain in force for the other contracting States.

Article 20

The Ministry of Foreign Affairs of the Netherlands shall give notice to the States referred to in Article 14, and to the States which have acceded in accordance with Article 16, of the following:

a) the signatures and ratifications referred to in Article 14;

b) the date on which the present Convention enters into force in accordance with the first paragraph of Article 15;

c) the accessions referred to in Article 16 and the date on which they take effect;

d) the extensions referred to in Article 17 and the date on which they take effect;

e) the reservations and withdrawals referred to in Article 18;

f) the denunciation referred to in the third paragraph of Article 19.

In witness whereof the undersigned, being duly authorised thereto, have signed the present Convention.

Done at The Hague the 5th October 1961, in French and in English, the French text prevailing in case of divergence between the two texts, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channel, to each of the States represented at the Ninth session of the Hague Conference on Private International Law.

CHAPTER II

ACCESSION TO THE CONVENTION ON FORMAL VALIDITY

Accession Procedure

The Convention is open for accession to states which are not Members of the Hague Conference. Any state, either, at the time of accession, by a declaration or, anytime thereafter, by notice, may extend the Convention to any territory for whose international relations it is responsible. The instrument of accession and any notice of extension must be deposited with the Ministry of Foreign Affairs of the Netherlands. The Convention takes effect on the sixtieth day after the instrument or notice of extension has been deposited - Articles 15 and 16.

Decisions fall to be taken about possible reservations before accession can be effected: information on these matters must be communicated to the Depositary no later than the time of accession or when notification is made, in the case of any extension to a dependent territory - Article 18. Decisions must be taken whether to reserve the right -

(a) to determine in accordance with the lex fori the place where the testator had his domicile - Article 9;

(b) not to recognise testamentary dispositions made orally, by a national possessing no other nationality - Article 10;

(c) in the case of dispositions made abroad by nationals domiciled or habitually resident in the state in relation to property situated in the state, not to recognise dispositions in a form not open to nationals under the state's law - Article 11;

(d) to exclude from the scope of the Convention any testamentary clauses which do not relate to matters of succession - Article 12;

(e) to limit the Convention to dispositions made after the scheme comes into operation in the state - Article 13.

The considerations relating to these decisions have been examined above (pp 17-20). Precedents for relevant declarations based upon reservations actually made by Commonwealth states are as follows:

Article 9: "In accordance with Article 9 of the Convention, [the State] hereby reserves the right, in derogation of the third paragraph of Article 1, to determine in accordance with the lex fori the place where the testator had his domicile." (Botswana, Fiji, Swaziland, Tonga, United Kingdom and dependencies).

Article 10: "In accordance with Article 10 of the present Convention, [the State] hereby reserves the right not to recognise testamentary dispositions made orally, save in exceptional circumstances, by one of its nationals possessing no other nationality." (Mauritius and Tonga).

Article 13: "In accordance with Article 13 of the present Convention, [the State] hereby reserves the right, in derogation of Article 8, to apply the present Convention only to testamentary dispositions made after [date of entry into force of Convention in respect of the State]." (Botswana).

Reservations under Article 11 and 12 have not been made by any Commonwealth State.

Legislative provisions

Legislation will be necessary to give effect to the Convention in most Commonwealth states. In the United Kingdom, this was provided by the Wills Act, 1963. Several Commonwealth jurisdictions have introduced legislation modelled on this Act. A number of features of the Act are noteworthy.

(i) It provides a set of rules applicable to all testamentary dispositions, whether or not there is any connection with Contracting States to the Hague Convention. This is consistent with the spirit of the Convention which has effect independent of any requirement of reciprocity (Article 6).

(ii) It goes beyond the Convention in providing expressly for wills made on board a vessel or aircraft.

(iii) It goes further than the Convention in providing expressly in section 2 for wills which exercise powers of appointment, as proposed by the Private International Law Committee (see p. 8 above) and by re-enacting in section 4 a rule (see Wills Act, 1861 (UK), section 3) that the construction of a will is not to be altered by reason of a change in the testator's domicile after execution of a will.

(iv) It repeals the Wills Act, 1861 (Lord Kingsdown's Act) - a statute also found in some Commonwealth states.

A draft Bill, drawing upon the United Kingdom provisions follows. It does not include the provisions referred to in (iii) above, as these are not necessary for accession to the Convention. Such matters were omitted from the equivalent Barbados

legislation (Act No.1967-14, now Cap. 251, Part V), which has been used as the immediate precedent. Some notes relating to local adaptation are appended.

DRAFT WILLS (FORMAL VALIDITY) ACT, 198-

An Act to [repeal the [Wills Act 1861] and to]make new provisions [in lieu thereof]concerning the conflict of laws relating to the formal validity of wills and to give effect to the Convention on the Conflicts of Laws relating to the Form of Testamentary Dispositions concluded at the Hague on 5th October 1961.

BE IT ENACTED etc.

Short title

1. This Act may be cited as the Wills (Formal Validity) Act, 198-

Interpretation

2. For the purposes of this Act, the expression -

"internal law", in relation to any territory or state, means the law which would apply in a case where no question of the law in force in any other territory or state arose;

"state" means territory or group of territories having its own law of nationality;

"will" includes any testamentary instrument or act, and "testator" shall be construed accordingly.

General rule as to formal validity

3. A will shall be treated as properly executed if its execution conformed to the internal law in force in -

(i) the territory where it was executed; or

(ii) the territory where, at the time of its execution or the testator's death, the testator was domiciled or had his habitual residence; or

(iii) the state of which, at either of those times, the testator was a national.

Additional rules.

4. Without prejudice to section 3, the following shall be treated as properly executed -

(a) a will executed on board a vessel or aircraft of any description, if the execution of the will conformed to the internal law in force in the territory with which, having regard to its registration (if any) and other relevant circumstances, the vessel or aircraft may be taken to have been most closely connected;

(b) a will, so far as it disposes of immovable property, if its execution conformed to the internal law in force in the territory where the property was situated;

(c) a will, so far as it revokes a will which under this Act would be treated as properly executed or revokes a provision which under this Act would be treated as comprised in a properly executed will, if the execution of the later will conformed to any law by reference to which the revoked will or provision would be so treated.

Certain requirements to be treated as formal.

5. Where (whether in pursuance of this Act or not) a law in force outside [the State] falls to be applied in relation to a will, any requirement of that law that -

(a) special formalities are to be observed by testators answering a particular description; or

(b) witnesses to the execution of the will are to possess certain qualifications,

shall be treated, notwithstanding any rule of that law to the contrary, as a formal requirement only.

Applicability as between different systems of law

6. Where under this Act the internal law in force in any territory or state is to be applied in the case of a will, but there are in force in that territory or state two or more systems of internal law relating to the formal validity of wills, the system to be applied shall be ascertained as follows -

(a) if there is in force throughout the territory or state a rule indicating which of these systems can properly be applied in the case in question, that rule shall be followed; or

(b) if there is no such rule, the system shall be that with which the testator was most closely connected at the relevant time, and for this purpose the relevant time is the time of the testator's death, where the matter is to be determined by reference to circumstances prevailing at his death, and the time of execution of the will, in any other case.

Material date for determining validity

7. In determining for the purposes of this Act whether or not the execution of a will conformed to a particular law, regard shall be had to the formal requirements of that law at the time of execution, but this does not prevent account being taken of an alteration of law affecting wills executed at that time if the alteration enables the will to be treated as properly executed.

Application of the Act.

8. This Act does not apply to a will of a testator who died before the date of commencement of the Act but applies to a will of a testator who dies after that time whether the will was executed before or after that time.

Miscellaneous.

9. (1) This Act comes into operation on

(2) The Wills Act[1861]is hereby repealed but the said repeal does not invalidate a will executed before the commencement of this Act.

Notes.

It will be necessary to insert -

(a) the name of the enacting State in cl.5;

(b) the date of commencement of the Act or procedure for bringing into force in cl.9 and a corresponding entry in cl.8;

(c) if there is a local equivalent to Lord Kingdown's Act, appropriate references in the long title and cl.9(2): if not, those provisions should be excluded altogether;

(d) additional provisions relating to wills which exercise powers of appointment, if required, in cl.4. Appropriate precedents may be found in the U.K. provisions set out in the text above at page 8.

Table of derivations

This draft measure follows closely the texts of the U.K. Act of 1963 and the Barbados Act of 1967 (now Cap. 251 Part V). The following Table identifies the corresponding provisions:

Draft	Convention	U.K. Act	Barbados Act (Cap.251)
cl.1.	-	s.7(1)	s.1.
cl.2.	-	s.6(1)	s.35.
cl.3.	Art 1, para 1	s.1.	s.36.
cl.4.	Arts 1(e), 2	s.2(1)(a) to (c)	s.37.
cl.5.	Art 5	s.3.	s.38.
cl.6.	Art 1, para 2	s.6(2)	s.39.
cl.7.	-	s.6(3)	s.40.
cl.8.	Art 8	s.7(4)	s.41.
cl.9.	-	s.7(2),(3)	-

CHAPTER III

THE CONVENTION ON THE INTERNATIONAL WILL

Introduction

The Convention providing a Uniform Law on the Form of an International Will was drafted under the auspices of the International Institute for the Unification of Private Law (UNIDROIT) and concluded at a diplomatic Conference in Washington on 26th October, 1973. It came into force on 9th February, 1978. Although signed by 12 States (including Sierra Leone and the United Kingdom from the Commonwealth), none of which has ratified, it is at present only in force between:-

Canada (for Alberta, Manitoba, Newfoundland and Ontario)
Libya
Niger
Portugal
Yugoslavia

The Convention is in English, French, Russian and Spanish, each version being equally authentic (Article XVI).

Aim of the Convention*

The Convention introduces a different solution to the problems which arise in connection with the formal validity of wills. Unlike the Convention on Formal Validity, this Convention is not concerned with choice of law considerations. Instead it introduces a uniform set of rules, to be added to existing municipal law, which permit a testator, if he wishes, to make his will in a standard form which will be acceptable in all Contracting States. Wills in this form, known as "international wills", need not be the subject of further examination in order to establish their formal validity.

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* Articles in the Convention proper are given Roman numerals: those in its Annex which contains the Uniform Law are in Arabic numerals.

This scheme in principle has two significant benefits. Where the Uniform Law is complied with, it is unnecessary to enter into questions as to the existence of connecting factors, as to the systems of law which thereby may govern formal validity and as to the actual requirements of foreign systems (Article 1.1). More positively, it enables the testator to dispose of his immovable assets in several Contracting States by a single instrument acceptable to all, rather than, as is often the case, by several instruments in the various forms which comply with the requirements of the different legal systems concerned.

As is the case with the Convention on Formal Validity, this Convention is confined to the matter of formalities. It makes no changes in Contracting States' conflict of laws rules applying to questions of capacity or essential validity. These apply to international wills as they do to other forms. The principal obligation which results from accession to the Convention is to introduce provisions into municipal law which ensure that a will which complies with the requirements of the Uniform Law is accepted as formally valid (Article 1.3) and that such wills may be made in accordance with that law with a view to recognition as an acceptable form of disposition in Contracting States.

Application of the Convention

The Convention is concerned with those instruments made by an individual which effect testamentary dispositions (Article 2). Although it refers to "international wills", this term is merely intended to convey the notion that the instruments are in a form acceptable to more than one national system of law. The rules of the Convention, and particularly those in the Annex, are intended to take effect at the national levels, although in interpreting and applying the Annex, "regard shall be had to its international origin and to the need for uniformity in interpretation" (Article 15). The Convention on Formal Validity extends the conflict of laws rules of the Contracting States as they apply to all wills, whatever their origin: this Convention has a more limited effect. The Convention's obligation to accept instruments as formal valid applies only to those wills which comply with the

Uniform Law in the Annex. Since that law requires the involvement in the making of "authorised persons" and since such persons may only be designated by Contracting States, it follows that the Convention regime only applies to those wills with which Contracting States are connected through their designated authorised persons. Unless there are numerous adhesions to the Convention , therefore, the standard form will remain an alternative of limited usefulness to those forms which may be used under the general body of conflict of laws rules discussed in Chapter 1.

It should be noted, however, that an international will duly made in the presence of a person authorised by a Contracting State must be accepted as formal valid in that State itself, notwithstanding that it may not meet the requirements of the internal law on formalities. But it would not be accepted as formally valid in any other non-Contracting State, unless presumably, under that State's conflict of law rules, there was established a recognised connecting factor between the testator and the Contracting State which permitted reference to that State's laws giving effect there to the Convention.

Basic formality rules for making a valid international will

To achieve validity, an international will must comply with a number of specific requirements as to form set out in the Annex, Articles 2 to 5. If these are present, Article 1.1. makes clear that choice of law considerations for establishing informal validity are irrelevant. These conditions are that:

(i) the will does not comprise a testamentary disposition made by two or more persons in the instrument (Article 2);

(ii) it is made in writing, although it need not be written by the testator himself and it may be written in any language, and by hand or any other means (Article 3);

(iii) a declaration is made by the testator that the document is his will and that he knows the contents (though he need not divulge these when making such a declaration);

(iv) the declaration is made and his signature added or acknowledged in the presence of

(a) two witnesses; and
(b) an authorised person designated as such by a Contracting State (Articles 4 and 5.1);

(v) where the testator is unable to sign, either a note is made by the authorised person in the will of the reason for the inability (which the testator must give) or a signature on the testator's behalf is made by a person directed to do so by the testator (if permitted by the law under which the authorised person was designated) (Article 5.2);

(vi) attestation is made by the witnesses and the authorised person by signature in the presence of the testator (Article 5.3).

If these formalities are respected, the will is formally valid as an international will. Apart from a number of sub-rules to be used in elaboration of these basic rules, all the other requirements of the Annex are directory only and failure to comply will not affect formal validity (Article 1.1).

Sub-rules

The Convention and its Annex impose a number of requirements which expand upon these basic rules.

(a) Witnesses

Where a question of the competence of persons to act as witnesses to an international will or of witnesses to receive under such a will arise, choice of law issues will need to be resolved. For the Convention does not attempt to provide uniform rules for such matters, other than that no one may be disqualified solely on the grounds of being an alien (Article V.2). Questions of this kind must be resolved by reference to "the law under which the authorised person was designated" (Article V.1). In consequence, it is intended that the authorised person apply his own system of law (with which he can be expected to be most familiar) in determining "conditions requisite to acting as a witness". In any case, he must enter into the certificate he issues a statement that the conditions have been so met (Article 10 (10)).

(b) Authorised persons

The central formality which permits a will to be accorded the status of an international will is the participation in its making of a person formally designated by a Contracting State to act to witness the process. It is for each Contracting State to determine which persons are to be authorised to perform this function (Article II): the capacity of such persons must be recognised by other Contracting States, provided that the authority was duly conferred in accordance with the law of the designating state (Article III).

With a partial exception relating to diplomatic and consular agents (see below), the Convention is silent about the categories of persons who can be so designated, although it is made clear that, with the same exception, persons are to be designated to act only in the territory of the designating state (Article II.1).

The underlying assumption appears to have been that the principal recipients would be legal practitioners in the appointing state. Having regard to the need in certain matters to apply the wills law of that state, the case is strong for relying upon those in legal practice. Whether this should be confined to e.g. solicitors in

those cases where the legal profession is divided, or whether the authority should be conferred upon, for example, officers of trust departments or others with special competence in relation to succession matters is for decision by each Contracting State. Since it is always open to such States to modify their designations (Article II.2), it may be appropriate initially to confine the function to those in general legal practice. Restricting this, for example, to particular court officials appears likely to be unduly inconvenient and to reduce the likelihood that the procedure will be much used.

The Convention (Article II.1) permits the designation of diplomatic and consular agents as authorised persons competent to act abroad in relation to wills made by nationals, unless the law of their receiving state prohibits this. This has the marked advantage of permitting a national of a Contracting State living in a state which is not a Contracting Party to avail himself of a procedure which he knows will be acceptable in his national state, where certain of his assets may be sited or his principal beneficiaries living.

But this is not without unpredictable consequences where, for example, questions of choice of law arise in relation to competence of witnesses (see above) or signatures (see below). For, these must be resolved by the law of the agent's state. This may be the law with which the testator as a national is familiar, but where he is permanently resident in a foreign state, the application of his national, rather than the local, law to such matters may be unexpected.

A more serious problem arises where the agent is appointed by a Contracting State which comprises several different systems of law. For it is by no means clear, in those handful of issues where choice of law issues arise, which of the systems the agent must refer to. The Convention does not resolve this issue. Article XV merely provides that the reference to the agent's law must

> "be construed in accordance with the constitutional system of the Party concerned."

It may be doubted whether for some federal systems in the Commonwealth, especially where there is no uniformity on the law of formal validity between the units, this matter will be easily resolved.

One approach is for each unit territory or for any legislature with competence for the whole state to designate an agreed system of law which is to be treated as the law to be applied by the agent in every case (such as the law of the federal capital). The alternative would be to designate the choice of law rules by reference to some connecting factor, additional to nationality, between the testator and a unit, such as the presence of his assets in the unit. Again this would have to be a common solution adopted by all units concerned.

It is considerations such as these which may lead a Contracting State with several systems of law with different formality rules not to designate diplomatic or consular officers at all as authorised persons. This appears to be the Canadian decision.

(c) Signatures

The Convention expressly excludes the requirement of legalisation or similar formality in relation to any signatures required by the basic rules (Article VI.1). At the same time, it is open to the competent authorities in any Contracting State to satisfy themselves as to the authenticity of the signature of an authorised person (Article VI.2). The Annex in Article 5.2 makes specific provision for the exceptional case where a testator is unable to sign his own will (a provision mainly intended for cases where the testator is incapacitated). This may be met either by a statement of reasons given by the testator and added by the authorised person to the will or by a signature of another person when directed by the testator to sign in his presence on his behalf. The latter possibility which, under the rather ambiguous wording,may not be limited to cases of the testator's inability is permissible only if allowed for "by the law under which the authorised person was designated". Again this choice of law rule appears to be directed

normally towards the internal law relating to the making of wills in the state or unit of the state where the authorised person acts. (The same issue as to the law of a diplomatic agent arises in this connection as above).

It should be noted that the Convention does not have mandatory rules relating to the positioning and the like of signatures, although some are contained in the directory requirements (see below).

(d) Safekeeping of the will

The safekeeping of the will is, by Article VII, to be governed by the law under which the authorised person is designated. Thus, if that law imposes a mandatory rule about the safekeeping of the will, this must be complied with. Commonwealth legislation, if it makes any provision at all, is normally concerned merely to provide facilities in which wills may be kept. This requirement, therefore, will have little consequence.

Directory rules relating to formal validity

There are a number of further requirements which the Annex expects to be complied with. Whilst failure to observe these does not invalidate the will, it may preclude the possibility of obtaining the certificate which establishes that the obligations of the Annex have been complied with. For the certificate, in relation to most of them, must show that they have been complied with. Lack of such a certificate is likely to make it more difficult for the will to be accepted as an international will, even though Article 13 emphasises that absence or irregularity of such a certificate does not affect the formal validity of the will under the Annex.

(a) Signatures and dates

Signatures of testator, witnesses and authorised person must be entered at the end of the will along with the date of the authorised

person's signature entered there by him (This is deemed to be the date of the will.) (Articles 6.1 and 7). Where the will comprises several sheets, each must be numbered and signed by the testator or, in the case of incapacity, by any person acting on his behalf or by the authorised person (Article 6.2).

(b) Identity of parties

It is implicit from the terms of the certificate that the authorised person must satisfy himself as to the identity of the testator and witnesses, as set out in the certificate and he must enter that fact in the certificate (Article 10(9)).

(c) Safekeeping of the will

Where the applicable law contains no mandatory provisions requiring a will to be kept in a particular way (see above p. 39), the authorised person must elicit the testator's wishes in this respect. If expressly requested, he must enter details of any place selected in the certificate (Article 8).

(d) The certificate

The authorised person is under a duty to attach to the will a certificate establishing that the obligations of the Uniform Law have been complied with (Article 9). This certificate must in its essentials follow the prescribed form set out in Article 10. A copy of the certificate attached to the will is kept by both the authorised person and the testator (Article 11).

The effectiveness of a certificate must be recognised by all Contracting Parties (Article IV): it is generally conclusive of the formal validity of an international will, in the absence of evidence to the contrary (Article 12). It appears, therefore, that the burden will fall upon anyone who wishes to challenge the will's formal validity under the Convention scheme to produce evidence which contradicts the certificate's contents. These benefits, of course, will not be available if a proper certificate cannot be produced. In such a case, it would fall to the person seeking to prove the will to establish that the instrument is formally valid as an international will (see Article 13).

Revocation of international wills

Article 14 contains the ambiguous rule that the international will is "subject to the ordinary rules of revocation of wills". The main thrust of this Article appears to be that an international will is revoked by a subsequent international will made by the same testator with the necessary capacity to make the second will. Presumably this rule applies to both express and implied revocations. The position is less clear in relation to the revocation of an ordinary will by an international will and revocation of an international will by an ordinary will or by other forms of revocation. Presumably in the first case, an international will is expected to be given the same effect as an ordinary will in a Contracting State and will, therefore, revoke the latter if the testator had the necessary capacity. In the latter case, however, it must be assumed that reference must be made to the conflict of laws rules rather than the internal rules of the forum in which the question of revocation arises. So, for example, under common law principles, the question of whether revocation has occurred is generally dealt with by the application of the law of the testator's domicile, almost certainly at the time of the act of revocation. Where, however, the Convention on Formal Validity is in force, additional rules may be invoked for determining the choice of law in the case of revocation by a subsequent will (see p.12). Generally, the revocation of an international will by another will will be valid if the latter will satisfies the choice of law rules in that Convention. In one instance, however, that dealt with by Article 2 second paragraph of that Convention, it would be necessary to determine that the original will had been valid under those rules. In this one case, the formal validity of an international will would require consideration independently of the Annex.

The ambiguity of these provisions in Article 14 might appear to call for some legislative clarification. But none of the jurisdictions which to date has legislated on the matter has found this to be necessary, presumably leaving the matters, if they should arise at all, for judicial determination. Accordingly the draft Bill contains no provision on this matter.

CONVENTION
PROVIDING A UNIFORM LAW
ON THE FORM OF AN INTERNATIONAL WILL

The States signatory to the present Convention,

Desiring to provide to a greater extent for the respecting of last wills by establishing an additional form of will hereinafter to be called an " international will " which, if employed, would dispense to some extent with the search for the applicable law;

Have resolved to conclude a Convention for this purpose and have agreed upon the following provisions:

ARTICLE I

1. Each Contracting Party undertakes that not later than six months after the date of entry into force of this Convention in respect of that Party it shall introduce into its law the rules regarding an international will set out in the Annex to this Convention.

2. Each Contracting Party may introduce the provisions of the Annex into its law either by reproducing the actual text, or by translating it into its official language or languages.

3. Each Contracting Party may introduce into its law such further provisions as are necessary to give the provisions of the Annex full effect in its territory.

4. Each Contracting Party shall submit to the Depositary Government the text of the rules introduced into its national law in order to implement the provisions of this Convention.

ARTICLE II

1. Each Contracting Party shall implement the provisions of the Annex in its law, within the period provided for in the preceding article, by designating the persons who, in its territory, shall be authorized to act in connection with international wills. It may also designate as a person authorized to act with regard to its nationals its diplomatic or consular agents abroad insofar as the local law does not prohibit it.

2. The Party shall notify such designation, as well as any modifications thereof, to the Depositary Government.

ARTICLE III

The capacity of the authorized person to act in connection with an international will, if conferred in accordance with the law of a Contracting Party, shall be recognized in the territory of the other Contracting Parties.

ARTICLE IV

The effectiveness of the certificate provided for in Article 10 of the Annex shall be recognized in the territories of all Contracting Parties.

ARTICLE V

1. The conditions requisite to acting as a witness of an international will shall be governed by the law under which the authorized person was designated. The same rule shall apply as regards an interpreter who is called upon to act.

2. Nonetheless no one shall be disqualified to act as a witness of an international will solely because he is an alien.

ARTICLE VI

1. The signature of the testator, of the authorized person, and of the witnesses to an international will, whether on the will or on the certificate, shall be exempt from any legalization or like formality.

2. Nonetheless, the competent authorities of any Contracting Party may, if necessary, satisfy themselves as to the authenticity of the signature of the authorized person.

ARTICLE VII

The safekeeping of an international will shall be governed by the law under which the authorized person was designated.

ARTICLE VIII

No reservation shall be admitted to this Convention or to its Annex.

ARTICLE IX

1. The present Convention shall be open for signature at Washington from October 26, 1973, until December 31, 1974.

2. The Convention shall be subject to ratification.

3. Instruments of ratification shall be deposited with the Government of the United States of America, which shall be the Depositary Government.

ARTICLE X

1. The Convention shall be open indefinitely for accession.

2. Instruments of accession shall be deposited with the Depositary Government.

ARTICLE XI

1. The present Convention shall enter into force six months after the date of deposit of the fifth instrument of ratification or accession with the Depositary Government.

2. In the case of each State which ratifies this Convention or accedes to it after the fifth instrument of ratification or accession has been deposited, this Convention shall enter into force six months after the deposit of its own instrument of ratification or accession.

ARTICLE XII

1. Any Contracting Party may denounce this Convention by written notification to the Depositary Government.

2. Such denunciation shall take effect twelve months from the date on which the Depositary Government has received the notification, but such denunciation shall not affect the validity of any will made during the period that the Convention was in effect for the denouncing State.

ARTICLE XIII

1. Any State may, when it deposits its instrument of ratification or accession or at any time thereafter, declare, by a notice addressed to the Depositary Government, that this Convention shall apply to all or part of the territories for the international relations of which it is responsible.

2. Such declaration shall have effect six months after the date on which the Depositary Government shall have received notice thereof or, if at the end of such period the Convention has not yet come into force, from the date of its entry into force.

3. Each Contracting Party which has made a declaration in accordance with paragraph 1 of this Article may, in accordance with Article XII, denounce this Convention in relation to all or part of the territories concerned.

ARTICLE XIV

1. If a State has two or more territorial units in which different systems of law apply in relation to matters respecting the form of wills, it may at the time of signature, ratification, or accession, declare that this Convention shall extend to all its territorial units or only to one or more of them, and may modify its declaration by submitting another declaration at any time.

2. These declarations shall be notified to the Depositary Government and shall state expressly the territorial units to which the Convention applies.

ARTICLE XV

If a Contracting Party has two or more territorial units in which different systems of law apply in relation to matters respecting the form of wills, any reference to the internal law of the place where the will is made or to the law under which the authorized person has been appointed to act in connection with international wills shall be construed in accordance with the constitutional system of the Party concerned.

ARTICLE XVI

1. The original of the present Convention, in the English, French, Russian and Spanish languages(1), each version being equally authentic, shall be deposited with the Government of the United States of America, which shall transmit certified copies thereof to each of the signatory and acceding States and to the International Institute for the Unification of Private Law.

2. The Depositary Government shall give notice to the signatory and acceding States, and to the International Institute for the Unification of Private Law, of:

(*a*) any signature;

(*b*) the deposit of any instrument of ratification or accession;

(*c*) any date on which this Convention enters into force in accordance with Article XI;

(*d*) any communication received in accordance with Article I, paragraph 4;

(*e*) any notice received in accordance with Article II, paragraph 2;

(*f*) any declaration received in accordance with Article XIII, paragraph 2, and the date on which such declaration takes effect;

(*g*) any denunciation received in accordance with Article XII, paragraph 1, or Article XIII, paragraph 3, and the date on which the denunciation takes effect;

(*h*) any declaration received in accordance with Article XIV, paragraph 2, and the date on which the declaration takes effect.

In witness whereof, the undersigned Plenipotentiaries, being duly authorized to that effect, have signed the present Convention.

Done at Washington this twenty-sixth day of October, one thousand nine hundred and seventy-three.

ANNEX

UNIFORM LAW ON THE FORM OF AN INTERNATIONAL WILL

ARTICLE 1

1. A will shall be valid as regards form, irrespective particularly of the place where it is made, of the location of the assets and 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 5 hereinafter.

2. The invalidity of the will as an international will shall not affect its formal validity as a will of another kind.

ARTICLE 2

This law shall not apply to the form of testamentary dispositions made by two or more persons in one instrument.

ARTICLE 3

1. The will shall be made in writing.

2. It need not be written by the testator himself.

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

ARTICLE 4

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 contents thereof.

2. The testator need not inform the witnesses, or the authorized person, of the contents of the will.

ARTICLE 5

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. When the testator is unable to sign, he shall indicate the reason therefor to the authorized person who shall make note of this on the will. Moreover, the testator may be authorized by the law under which the authorized person was designated to direct another person to sign on his behalf.

3. The witnesses and the authorized person shall there and then attest the will by signing in the presence of the testator.

ARTICLE 6

1. The signatures shall be placed at the end of the will.

2. If the will consists of several sheets, each sheet shall be signed by the testator or, if he is unable to sign, by the person signing on his behalf or, if there is no such person, by the authorized person. In addition, each sheet shall be numbered.

ARTICLE 7

1. The date of the will shall be the date of its signature by the authorized person.

2. This date shall be noted at the end of the will by the authorized person.

ARTICLE 8

In the absence of any mandatory rule pertaining to the safekeeping of the will, the authorized person shall ask the testator whether he wishes to make a declaration concerning the safekeeping of his will. If so and at the express request of the testator the place where he intends to have his will kept shall be mentioned in the certificate provided for in Article 9.

ARTICLE 9

The authorized person shall attach to the will a certificate in the form prescribed in Article 10 establishing that the obligations of this law have been complied with.

ARTICLE 10

The certificate drawn up by the authorized person shall be in the following form or in a substantially similar form:

CERTIFICATE

(Convention of October 26, 1973)

1. I, ...(name, address and capacity), a person authorized to act in connection with international wills
2. Certify that on .....(date) at.....(place)
3. (testator) .....(name, address, date and place of birth)

   in my presence and that of the witnesses
4. (*a*) .....,(name address, date and place of birth)

   (*b*) ..... (name, address, date and place of birth)

   has declared that the attached document is his will and that he knows the contents thereof.

5. I furthermore certify that:

6. (*a*) in my presence and in that of the witnesses

(1) the testator has signed the will or has acknowledged his signature previously affixed.

*(2) following a declaration of the testator stating that he was unable to sign his will for the following reason.....
.....

—I have mentioned this declaration on the will

*—the signature has been affixed by.....(name, address)

7. (*b*) the witnesses and I have signed the will;

8. *(*c*) each page of the will has been signed by..... and numbered;

9. (*d*) I have satisfied myself as to the identity of the testator and of the witnesses as designated above;

10. (*e*) the witnesses met the conditions requisite to act as such according to the law under which I am acting;

11. *(*f*) the testator has requested me to include the following statement concerning the safekeeping of his will:
.....
.....

12. PLACE

13. DATE

14. SIGNATURE and, if necessary, SEAL

* To be completed if appropriate.

ARTICLE 11

The authorized person shall keep a copy of the certificate and deliver another to the testator.

ARTICLE 12

In the absence of evidence to the contrary, the certificate of the authorized person shall be conclusive of the formal validity of the instrument as a will under this Law.

ARTICLE 13

The absence or irregularity of a certificate shall not affect the formal validity of a will under this Law.

ARTICLE 14

The international will shall be subject to the ordinary rules of revocation of wills.

ARTICLE 15

In interpreting and applying the provisions of this law, regard shall be had to its international origin and to the need for uniformity in its interpretation.

CHAPTER IV

ACCESSION TO THE CONVENTION ON THE INTERNATIONAL WILL

Accession Procedure

The Convention is open to accession by any state. A Contracting State may extend the Convention to all or any of the territories for whose international relations it is responsible or, when the state comprises several territorial units with different systems of law, to all or any of those units. The instruments of accession and notices declaring any such extensions must be deposited with the Government of the United States of America, the Depositary. Such instruments of accession or notices take effect six months after being deposited. (Articles X, XIII, XIV).

A number of actions fall to be taken as a consequence of such a decision to accede or extend. These, however, do not include the question of entering reservations: for none is allowed (Article XVIII). These actions require :-

(a) a decision as to the mechanism whereby the rules relating to an international will in the Annex to the Convention are to be introduced into municipal law (Article I: see p. 50.)

(b) the introduction of such rules within six months of accession or extension (Article I.1.);

(c) transmission of the texts of such rules to the Depositary Government (Article I.4);

(d) a decision as to which persons are to be designated as authorised to act in connection with such wills (see pp. 35-37)and whether such persons should include diplomatic agents or consular officers abroad (Article II.1);

(e) notification of persons designated to the Depositary Government (Article II.2).

Legislative provisions

For most Commonwealth countries, municipal legislation will be required to give effect to the Convention. In States comprising several legal systems, such legislation will be required for each unit. In principle, this could take one of two forms:

(a) the enactment by statute that the provisions of the Convention and its Annex are to have effect as municipal law, reproducing those provisions as a Schedule to the statute;

(b) the restatement in legislation of the rules contained in the Convention and its Annex as detailed statutory provisions.

The only Commonwealth jurisdictions which have legislated in relation to the Convention to date are certain Canadian Provinces. The device used has been the former (e.g. The Succession Law Reform Act, 1977 of Ontario). Except in relation to the designation of authorised persons, the provisions of the Convention with its Annex are capable of taking effect without further elaboration by statute. This approach is the one adopted in this Chapter and the Ontario Statute has been used in the preparation of the draft Bill which follows.

Consideration was given, however, to the question whether a further set of provisions was required to give full effect to the Convention. For the Convention and the Annex in three places make specific, if indirect, reference to the law of the legislating state, referred to as "the law under which the authorised person was designated." Whilst this term might be seen as sufficient to constitute a choice of law rule under which the internal law would become applicable, it would be open to the legislating state to deal with some or all the matters

concerned in the legislation which provided for the designation of authorised officers. If this approach were adopted there would need to be, therefore, a decision whether -

(i) a testator should be authorised in the legislation to direct another to sign his will on his behalf, notably in circumstances where he is personally unable to do so (Annex, Article 5.2).

(ii) there should be any rule in the legislation, including any mandatory rule, about the safekeeping of international wills (Article VII and Annex, Article 8);

(iii) any provision should be made in the legislation concerning the conditions requisite to acting as a witness or an interpreter (Article V).

The draft Bill proceeds on the assumption that if any doubt arises that the internal law in relation to signatures, safekeeping, interpreters and witnesses applies, this should be resolved by the courts. These matters are not, therefore, dealt with in the model Bill.

Some notes relating to local adaptation are appended.

DRAFT INTERNATIONAL WILLS ACT, 198-

An Act to give effect to the Convention providing a Uniform Law on the Form of an International Will concluded in Washington on 26th October, 1973; and for purposes connected therewith.

BE IT ENACTED etc.

Short Title

1. This Act may be cited as the International Wills Act, 198-

Interpretation

2. For the purposes of this Act, the expression -

"Convention" means the Convention providing a Uniform Law on the Form of an International Will, including the Annex thereto, set out in the Schedule;

"international will" means a will made in accordance with the Annex to the Convention;

"legal practitioner" means any person registered under the [Act] as a person entitled to practice law in [the State].

Convention to have the force of law

3. The Convention has the force of law in [the State].

Authorised persons

4. (1) A legal practitioner in [the State] is a person authorised, for the purposes of the Convention, to act in connection with international wills.

(2) A diplomatic agent or consular officer of [the State] received by any State outside [the State] is a person authorised, for the purposes of the Convention, to act in connection with any international will made in that State by a national of [the State] , unless by the law of that

State the diplomatic agent or consular officer is prohibited from so acting.

Savings

5. Nothing in this Act affects the validity of a will which is valid by virtue of any other rules of law in force in [the State].

Application of the Act

6. This Act applies in relation to any international will made after, but not in relation to any such will made before, the commencement of this Act.

Commencement of the Act

7. This Act comes into force on[ ].

SCHEDULE
[Convention text]

Notes

(i) Should this legislation and that relating to formal validity (Chapter II) both be required, the two drafts Bills may be combined into a single Wills (Formal Validity) Act, with two Parts. An extended long title combining the existing long titles would be required. A single interpretation clause could be provided by combining these in the draft or alternatively the separate interpretation clauses could be retained for each Part. The substance of the Formal Validity Draft could appear as Part I and that relating to International Wills in Part II. References to "this Act" in this draft Bill would normally require replacement by "this Part". The commencement provisions would require power to bring the different Parts into operation on different dates should that prove necessary on account of the different provisions relating to commencement in the two Conventions.

(ii) References to the legislating state are necessary where [The State] appears. The commencement date or, if this is to be fixed by subsequent order or proclamation, the appropriate provision, should be inserted in cl.7.

(iii) Appropriate provisions in respect of legal practitioners would be required in cl.2 and 4(1), depending upon the decision as to appropriate agency and upon local legislative forms. If alternative

or additional persons, such as officers of trust departments, are to be designated, these should be included in cl.4(1).

(iv) If it is not desired that diplomatic and consular officers should be authorised for the purposes of the Convention, cl.4(2) should be deleted. In the case of Commonwealth States comprising two or more systems of law, it will be necessary if this provision is included to make clear how the choice of law issue in certain matters is to be resolved (see pp. 50-51).

(v) The Convention text will require to be reproduced in the Schedule.

CHAPTER V

THE CONVENTION ON ADMINISTRATION

Introduction

The Convention concerning the International Administration of the Estates of Deceased Persons was finalised at the Twelfth Session of the Hague Conference on Private International Law and signed on 21st October, 1972. It is not yet in force. It has been signed by seven states, including the United Kingdom, but has been ratified only by

Czechoslovakia
Portugal

It requires three ratifications to come into operation (Article 44).

Aim of the Convention

The aim is stated by the Convention to be "to facilitate the international administration of the estates of deceased persons". This is to be achieved by permitting one person to exercise the powers of administration over estates situated in several jurisdictions and by requiring all Contracting States to recognise that person's authority to administer. This authority would be conferred by an international certificate in standard form obtained in one Contracting State, which would be valid in all other Contracting States as proof of the administrator's authority.

The Convention does not set out to deal with conflict of laws rules relating to devolution of estates or questions of succession rights, still less with formalities of dispositions. It is designed to bridge an essential difference between the common law approach and that of civil law systems towards administration of estates. The former requires, with few exceptions, that there be some public grant of authority to a personal representative to administer and distribute the deceased's estate. Without such authority, the property of the

deceased cannot be dealt with. Under civil law systems, however, the general rule is that the deceased's estate automatically and directly vests in his heirs or universal legatee. It is only in the exceptional case that personal representatives are appointed and even then their functions are rather to supervise than to administer. It follows, therefore, that whilst an heir from a common law jurisdiction may be able to enter directly into his inheritance in respect of assets situated in a civil law system, an heir from a civil system will be able to inherit assets situated in a common law system only if a grant of administration has been formally issued there. The Convention's scheme, therefore, is likely to be of major benefit in the latter circumstances, since the certificate would obviate the need to seek a grant of administration. In the former case, where the heir is already permitted to deal with the estate, a certificate, as any other form of authorisation, is not strictly necessary. On the other hand, the personal representative with a grant from a common law jurisdiction, who is not the heir, may experience difficulty in having his powers recognised abroad. The Convention would meet this situation too.

Application of the Convention

The Convention scheme would be operative only between Contracting States, for the obligation upon the latter is to give recognition only to certificates drawn up in Contracting States (Article 1). The usefulness of the scheme, therefore, depends upon the extent to which states are prepared to accede to it. The Convention permits a Contracting State, which is not a unitary state, to extend its provisions to designated units only. In such a case, references in the Convention (and in this account) to the law of a state will be construed as reference to the law of the relevant designated unit (Articles 35 and 36).

Although the Convention may run alongside another multilateral treaty on the matter, it is intended to supersede bilateral

treaties on this matter between Contracting Parties, unless the latter are expressly preserved (Article 39). This provision may have significance for those Commonwealth states entering into bilateral Agreements for cooperation in judicial and legal matters with neighbouring civil law states.

The scheme contemplates the issue of certificates in respect of estates even where the deceased died before the Convention came into force in relation to the Contracting States concerned (Article 40).

Of principal importance, the Convention applies in the first place only in respect of estates of movable property(Article 1). This, however, is qualified by Article 30, which provides that the holder of a certificate is to be shown therein to have powers to deal with immovable property too if under the applicable law (normally that of the deceased's habitual residence) such powers are accorded (Article 30). But it is for Contracting States to determine the extent to which such powers will be recognised. Where recognition will be granted, details are to be notified to the Depositary (Article 38).

This may be of little value in respect of common law jurisdictions. For normally, a grant of administration in those systems gives no authority to immovables abroad: under usual conflict rules, the lex situs prevails. Accordingly, given the existence of such rules (which the Convention does not seek to alter), a certificate issued to a holder whose powers are determined by reference to a common law jurisdiction will not refer to immovables, whilst a certificate issued by reference to a civil law jurisdiction even though referring to immovables is unlikely to be accorded recognition in a common law system so as to enable the holder to administer immovables within the common law country. In the latter case, the Convention will not alter the requirement for the grant of administration under the normal procedures.

Issue of the International Certificate

The International Certificate, which is to be in the form set out in the Annex to the Convention, designates the person entitled to administer the estate of the deceased and his powers (Article 1). In reality it allows the issuing authority to select one of three alternative forms. The first sets out the holder's powers in a general form, i.e. indicating that he has full powers. Alternatively, he may be vested with full powers subject to specified exceptions. Or again he may be vested with only such powers as are specifically indicated in a detailed list scheduled to the certificate. It may be in the official language of the issuing State or in French or English (Article 33), but the holder may be required to furnish a translation.

The Certificate must be issued by the competent authority in the State where the deceased had his habitual residence at the time of his death (Articles 2 and 32). It is for each Contracting State to establish or determine its own competent authorities, which may be a public or official agency, whether judicial or administrative or, if any State so decides, members of a professional body (e.g. the legal profession or notaries) whose action is confirmed by a designated official agency (Article 6). Presumably in common law systems,the authority would normally be the probate court, with possible delegation to registrars thereof.

The connecting factor of the deceased's habitual residence, commonly employed in Hague Conventions, is used in preference to "domicile", although here as elsewhere the term is not defined. It is intended to avoid the legal artificialities of "domicile" by requiring greater emphasis to be placed upon questions of fact.

The certificate must designate the appropriate person to be holder and the extent of his powers in the form set out in the Annex. These matters are normally, to be settled by reference to the internal law of the issuing state, i.e. by the law of the place of the deceased's habitual residence (Article 3).

This formula precludes any question of renvoi arising, since the reference is to the state's internal and not conflict rules. There are, however, three exceptions to this basic rule:

(i) if the state of his habitual residence and that of his nationality have both made a declaration (under Article 31) that the internal law of the deceased's national state be applied, that law must apply;

(ii) if the state of habitual residence has not made such a declaration but the state of his nationality has, the internal law of the latter must apply, provided that the deceased lived in the former state for less than five years prior to his death (Article 3);

(iii) where a Contracting State by making the appropriate declaration permits the deceased to choose the internal law of his habitual residence or of his national state, his choice must be applied (Article 4).

The advantage of this general approach is that the issuing State will usually apply its own law to these matters. It may be expected that a declaration applying the law of the national state would rarely be made by common law jurisdiction since the law of the nationality is not normally a choice of law employed by them. Accordingly, it would be rare for a common law jurisdiction to engage upon questions of foreign law to determine who is to be the holder and the extent of his powers. These cases would normally only arise in the circumstances set out in (ii) above. Article 5 provides a procedure under which assistance from the national state concerning the compatibility of the certificate with its laws may be sought and, if not given within a prescribed time limit, permitting the issuing state's understanding of that national law to be followed.

On the other hand, common law jurisdictions will rarely be faced with certificates which under Article 3 determine the administrator and his powers by reference to their law as the national law in the absence of declarations by them under Article 31. This may arise, however,

if a national of that common law jurisdiction exercises a choice in favour of the national law which has been permitted by the issuing state under Article 4.

Special rules are necessary in the case of non-unitary states applying different systems of law. Habitual residence in the unit is normally required for the purposes of the issue of certificates. Where, however, the connecting factor of nationality is relied upon the question of which unit of the national state is referred to is to be determined by the law of that state, or, if there are no rules on that point, by ascertaining the unit with which the deceased had the closest ties (Article 36).

Whilst the Convention does not seek to set out a detailed procedure for the drawing up and issue of certificates, it does require that the certificate must be issued without delay, after sufficient publicity has been given to inform those interested, in particular any surviving spouse, and after any necessary investigations (Article 7). Further it requires in general terms that the issuing authority must inform any interested person or authority, on request, about the certificate and any annulment, modification or suspension. The latter changes must also be notified to persons notified in writing of the issue of the certificate (Article 8). The scheme, therefore, contemplates the keeping of registers in which such information is systematically recorded. It will be for each state to provide the administrative arrangements and procedures appropriate to its circumstances.

Recognition of the International Certificate

Whilst the Convention requires the recognition of certificates when produced in another Contracting State as proof of the authority and powers of the holder, without any legalisation or formality having been complied with, receiving States may, in specified circumstances notified to the Depositary under Article 37(3), make recognition conditional upon the advance publicity or compliance with a prescribed procedure in the receiving state (Articles 1 and 10). These provisions, therefore, envisage states electing either to grant automatic recognition or, in the interests of local creditors and beneficiaries,

to regulate the granting of recognition. In the latter case, however, regulation is permitted only in the circumstances prescribed by the Convention.

The requirements which the Contracting State may lay down may call for compliance with simple measures of publicity or with an expeditious procedure of opposition and appeal in that state. These appear to be analagous to the advertisement and caveat procedures used, for example, in the Colonial Probates scheme, although the form that they take would be for each Contracting State to determine through its internal law.

The grounds upon which the opposition to recognition would be permitted under the Convention scheme are set out in Article 13 to 17. This is an exclusive statement. It is for each Contracting State to prescribe which of these grounds may be relied upon and that refusal or recognition may be total or restricted to some only of the powers indicated in the certificate (Articles 18 and 19).

The grounds upon which it is permissible for recognition to be refused are -

(i) the certificate is not authentic or not in accordance with the standard form;

(ii) the certificate does not appear from its contents to have been drawn up by an authority which is a competent authority in the state of the habitual residence of the deceased ;

(iii) the deceased, in the view of the receiving state, had his habitual residence in that state;

(iv) in the view of the receiving state, the internal law of that state should have been applied under Articles 3 and 4 as the deceased had the nationality of that state and the contents of the certificate are contrary to that law;

(v) the certificate is incompatible with a judicial decision in relation to the estate on the merits which has been rendered or recognised in the receiving state;

(vi) there is incompatibility between two international certificates relating to the same estate;

(vii) recognition would be manifest incompatible with the public policy of the receiving state.

During the time period for the publicity or opposition procedures, the powers to distribute the estate or dispose of property are suspended. On the other hand, the requirement to comply with such procedures may prejudice the efforts of an administrator to discharge his functions by preventing any activity by him until the procedures are completed. Accordingly, the holder, on the presentation of a certificate, must be permitted, subject to any local law and required supervision, to take "protective or urgent measures" in the interim (e.g. sale of perishables or drawing-up of an inventory or carrying on a business) (Article 11). Such measures would be valid even though the time limits had expired or recognition was refused, although an interested party would be permitted to take proceedings to set them aside (Article 12).

Recognition may not be refused merely because national authority has already been granted to administer the estate. Article 20 requires priority to be given to the international certificate with the national administration merely being permitted to operate in circumstances to which the certificate does not refer or alternatively by acting jointly with the certificate holder. This provision is without prejudice to the power to refuse recognition if one of the prescribed grounds is also fulfilled.

Use of the International Certificate

Whilst the receiving state which recognises a certificate may not interfere with the designation of the holder or his certified powers, it may impose certain additional requirements governing the exercise of those powers. Thus, local law may demand that -

(i) the administration be subject to the same supervision (as for example, the giving of security for due administration) and control (as, for example, in paying estate tax) as is imposed on local administrations;

(ii) taking possession of local assets for distribution be subject to the payment of debts (Article 21).

Subject to these factors, the internal law of the habitual residence (or exceptionally of the nationality) will govern the administration of the estate. For common law jurisdictions, this would represent a major departure from the long standing rule that administration of assets in the forum is governed by the lex fori.

The Convention also puts beyond doubt the legal position of third parties affected by transactions carried out in reliance upon a certificate. Thus debtors of the deceased in the recognising state who settle their debts in good faith with the holder of the certificate must be discharged from future liabilities (Article 22) and persons in such a state to whom the holder has transferred property are protected when relying in good faith upon this certificate (Article 23).

Disputes Relating to the Certificate

The Convention sets out to provide for the consequences of the institution of proceedings when disputes concerning the merits of the designation or powers of a certificate holder arise. It does not, however, attempt to lay down any common rules which will determine which courts are to have jurisdiction to settle such questions. Such matters will be determined in accordance with existing conflict of laws rules.

The Convention contemplates the possibility that a certificate can be annulled or modified in consequence of the outcome of such litigation.

Where the result of litigation is that the issuing state annuls the certificate such annulment must be given effect in other states when

requested by an interested person or when informed by the competent authority. Where modification of a certificate is made in that state, however, the original certificate must be annulled and replaced by one which takes account of the modification (Article 26). The Convention is silent concerning the effects of litigation in other states.

Whilst such litigation is proceeding , however, rules in relation to the suspension of the certificate may be invoked. These provide that -

(a) a receiving state may suspend totally or partially the provisional effects of a certificate (see p. 62) which is in the course of its recognition procedure, if a challenge is made to merits of the certificate, until the matter is resolved by the appropriate court or, at least, until a set time-limit for such proceedings to be instituted has elapsed (Article 24);

(b) any state may, totally or partially, suspend a certificate until litigation commenced in the issuing state concerning its merits has been brought to an end;

(c) a receiving state may similarly suspend a certificate until such litigation commenced there or in another state has been brought to an end (Article 25);

(d) suspension by the issuing state must be given effect by all other states at the request of an interested person or if informed by the competent authority (Article 26).

Cases will arise, however, when action has been taken on the strength of a certificate which is subsequently annulled, modified or suspended or where recognition of a certificate is withdrawn or reversed. The Convention sets out to protect the interests of those affected,by denying retroactive effect to such events. Thus action taken by a certificate holder in any Contracting State prior to the relevant decision concerning the certificate is not invalidated (Articles 27 and 29). More controversially, however, dealings in good faith by a third party with the certificate holder after such a decision are similarly protected

(Articles 28 and 29), as far as that third person is concerned. This is a major concession to the principle of the international effectiveness of the certificate.

CONVENTION CONCERNING THE INTERNATIONAL ADMINISTRATION OF THE ESTATES OF DECEASED PERSONS

The States signatory to this Convention,

Desiring to facilitate the international administration of the estates of deceased persons,

Have resolved to conclude a Convention to this effect and have agreed upon the following provisions:

CHAPTER I — THE INTERNATIONAL CERTIFICATE

Article 1

The Contracting States shall establish an international certificate designating the person or persons entitled to administer the movable estate of a deceased person and indicating his or their powers.

This certificate, drawn up in the Contracting State designated in Article 2 in accordance with the model annexed to this Convention, shall be recognised in the Contracting States.

A Contracting State may subject this recognition to the procedure or to the publicity provided for in Article 10.

CHAPTER II — THE DRAWING UP OF THE CERTIFICATE

Article 2

The certificate shall be drawn up by the competent authority in the State of the habitual residence of the deceased.

Article 3

For the purpose of designating the holder of the certificate and indicating his powers, the competent authority shall apply its internal law except in the following cases, in which it shall apply the internal law of the State of which the deceased was a national :

(1) if both the State of his habitual residence and the State of his nationality have made the declaration provided for in Article 31;
(2) if the State of which he was a national, but not the State of his habitual residence has made the declaration provided for in Article 31, and if the deceased had lived in the State of the issuing authority for less than 5 years immediately prior to his death.

Article 4

A Contracting State may declare that in designating the holder of the certificate and in indicating his powers it will, notwithstanding Article 3, apply its internal law or that of the State of which the deceased was a national in accordance with the choice made by him.

Article 5

Before issuing the certificate, the competent authority, when applying the internal law of the State of which the deceased was a national, may enquire of an authority of that State, which has been designated for that purpose, whether the contents of the certificate accord with that law and, in its discretion, fix a time-limit for the submission of a reply. If no reply is received within this period it shall draw up the certificate in accordance with its own understanding of the applicable law.

Article 6

Each Contracting State shall designate the competent judicial or administrative authority to draw up the certificate.

A Contracting State may declare that a certificate drawn up within its territory shall be deemed to be 'drawn up by the competent authority' if it is drawn up by a member of a professional body which has been designated by that State, and if it is confirmed by the competent authority.

Article 7

The issuing authority shall, after measures of publicity have been taken to inform those interested, in particular the surviving spouse, and after investigations, if any are necessary, have been made, issue the certificate without delay.

Article 8

The competent authority shall, on request, inform any interested person or authority that a certificate has been issued and of its contents, and of any annulment or modification of the certificate or of any suspension of its effects.

The annulment or modification of the certificate or the suspension of its effects by the issuing authority shall be brought to the attention of any person or authority that has been notified in writing that the certificate had been issued.

CHAPTER III — RECOGNITION OF THE CERTIFICATE – PROTECTIVE OR URGENT MEASURES

Article 9

Subject to the provisions of Article 10, in order to attest the designation and powers of the person or persons entitled to administer the estate, the production only of the certificate may be required in the Contracting States other than that in which it was issued.

No legalisation or like formality may be required.

Article 10

A Contracting State may make the recognition of the certificate depend either upon a decision of an authority following an expeditious procedure, or upon simple publicity.

This procedure may comprise 'opposition' and appeal, insofar as either is founded on Articles 13, 14, 15, 16 and 17.

Article 11

If the procedure or the publicity envisaged in Article 10 is required, the holder of the certificate may, on mere production, take or seek any protective or urgent measures within the limits of the certificate, as from the date of its entry into force and throughout the duration of the procedure of recognition, if any, until a decision to the contrary is made.

A requested State may require that interim recognition is to be subject to the provisions of its internal law for such recognition, provided that the recognition is the subject of an expeditious procedure.

However, the holder may not take or seek the measures mentioned

in paragraph 1 after the sixtieth day following the date of entry into force of the certificate, if by then he has not initiated the procedure for recognition or taken the necessary measures of publicity.

Article 12

The validity of any protective or urgent measures taken under Article 11 shall not be affected by the expiry of the period of time specified in that Article, or by a decision refusing recognition.

However, any interested person may request the setting aside or confirmation of these measures in accordance with the law of the requested State.

Article 13

Recognition may be refused in the following cases –

(1) if the certificate is not authentic, or not in accordance with the model annexed to this Convention;
(2) if it does not appear from the contents of the certificate that it was drawn up by an authority having jurisdiction within the meaning of this Convention.

Article 14

Recognition of the certificate may also be refused if, in the view of the requested State –

(1) the deceased had his habitual residence in that State; or
(2) the deceased had the nationality of that State, and for that reason, according to Articles 3 and 4, the internal law of the requested State should have been applied with respect to the designation of the holder of the certificate and to the indication of his powers. However, in this case recognition shall not be refused unless the contents of the certificate are contrary to the internal law of the requested State.

Article 15

Recognition may also be refused if the certificate is incompatible with a decision on the merits, rendered or recognised in the requested State.

Article 16

Where a certificate mentioned in Article 1 is presented for recognition, and another certificate mentioned in the same Article which is incompatible with it has previously been recognised in the requested State, the requested authority may either withdraw the recognition of the first certificate and recognise the second, or refuse to recognise the second.

Article 17

Finally, recognition of the certificate may be refused if such recognition is manifestly incompatible with the public policy ('ordre public') of the requested State.

Article 18

Refusal of recognition may be restricted to certain of the powers indicated in the certificate.

Article 19

Recognition may not be refused partially or totally on any grounds other than those set out in Articles 13, 14, 15, 16 and 17. The same shall also apply to the withdrawal or reversal of the recognition.

Article 20

The existence of a prior local administration in the requested State shall not relieve the authority of that State of the obligation to recognise the certificate in accordance with this Convention.

In such a case the powers indicated in the certificate shall be vested in the holder alone. The requested State may maintain the local administration in respect of powers which are not indicated in the certificate.

CHAPTER IV — USE OF THE CERTIFICATE AND ITS EFFECTS

Article 21

The requested State may subject the holder of the certificate in the exercise of his powers to the same local supervision and control applicable to estate representatives in that State.

In addition, the requested State may subject the taking of possession of the assets situate in its territory to the payment of debts.

The application of this Article shall not affect the designation and the extent of the powers of the holder of the certificate.

Article 22

Any person who pays, or delivers property to, the holder of the certificate drawn up, and, where necessary, recognised, in accordance with this Convention shall be discharged, unless it is proved that the person acted in bad faith.

Article 23

Any person who has acquired assets of the estate from the holder of a certificate drawn up, and, where necessary, recognised, in accordance with this Convention shall, unless it is proved that he acted in bad faith, be deemed to have acquired them from a person having power to dispose of them.

CHAPTER V — ANNULMENT – MODIFICATION – SUSPENSION OF THE CERTIFICATE

Article 24

If, in the course of a procedure of recognition, the designation or powers of the holder of a certificate are challenged on the merits, the authorities of the requested State may suspend the provisional effects of the certificate, stay judgment and, if the case so requires, settle a period of time within which an action on the merits must be instituted in the court having jurisdiction.

Article 25

If the designation or powers of the holder of a certificate are put in issue in a dispute on the merits before the courts of the State in

which the certificate was issued, the authorities of any other Contracting State may suspend the effects of the certificate until the end of the litigation.

If a dispute on the merits is brought before the courts of the requested State or of another Contracting State, the authorities of the requested State may likewise suspend the effects of the certificate until the end of the litigation.

Article 26

If the certificate is annulled or if its effects are suspended in the State in which it was drawn up, the authorities of every Contracting State shall give effect within its territory to such annulment or suspension, at the request of any interested person or if they are informed of such annulment or suspension in accordance with Article 8.

If any provisions of the certificate are modified in the State of the issuing authority, that authority shall annul the existing certificate and issue a new certificate as modified.

Article 27

Annulment or modification of the certificate or suspension of its effects according to Articles 24, 25 and 26 shall not affect acts carried out by its holder within the territory of a Contracting State prior to the decision of the authority of that State giving effect to the annulment, modification or suspension.

Article 28

The validity of dealings by a person with the holder of the certificate shall not be challenged merely because the certificate has been annulled or modified, or its effects have been suspended, unless it is proved that the person acted in bad faith.

Article 29

The consequences of the withdrawal or reversal of recognition shall be the same as those set out in Articles 27 and 28.

CHAPTER VI — IMMOVABLES

Article 30

If the law in accordance with which the certificate was drawn up gives the holder powers over immovables situate abroad, the issuing authority shall indicate in the certificate the existence of these powers.

Other Contracting States may recognise these powers in whole or in part.

Those Contracting States which have made use of the option provided for in the foregoing paragraph shall indicate to what extent they will recognise such powers.

CHAPTER VII — GENERAL CLAUSES

Article 31

For the purposes of, and subject to, the conditions set out in

Article 3, a Contracting State may declare that if the deceased was a national of that State its internal law shall be applied in order to designate the holder of the certificate and to indicate his powers.

Article 32

For the purposes of this Convention, 'habitual residence' and 'nationality' mean respectively the habitual residence and nationality of the deceased at the time of his death.

Article 33

The standard terms in the model certificate annexed to this Convention may be expressed in the official language, or in one of the official languages of the State of the issuing authority, and shall in all cases be expressed either in French or in English.

The corresponding blanks shall be completed either in the official language or in one of the official languages of the State of the issuing authority or in French or in English.

The holder of the certificate seeking recognition shall furnish translations of the information supplied in the certificate, unless the requested authority dispenses with this requirement.

Article 34

In relation to a Contracting State having, in matters of estate administration, two or more legal systems applicable to different categories of persons, any reference to the law of that State shall be construed as referring to the legal system specified by the law of that State, as applicable to the particular category of persons.

Article 35

If a Contracting State has two or more territorial units in which different systems of law apply in relation to matters of estate administration, it may declare that this Convention shall extend to all its territorial units or only to one or more of them, and may modify its declaration by submitting another declaration at any time.

These declarations shall state expressly the territorial units to which the Convention applies.

Other Contracting States may decline to recognise a certificate if, at the date on which recognition is sought, the Convention is not applicable to the territorial unit in which the certificate was issued.

Article 36

In the application of this Convention to a Contracting State having two or more territorial units in which different systems of law apply, in relation to estate administration–

(1) any reference to the authority or law or procedure of the State which issues the certificate shall be construed as referring to the authority or law or procedure of the territorial unit in which the deceased had his habitual residence;

(2) any reference to the authority or law or procedure of the requested State shall be construed as referring to the authority or law or procedure of the territorial unit in which the certificate is sought to be used;

(3) any reference made in the application of subparagraph 1 or 2 to the law or procedure of the State which issues the certificate or of the requested State shall be construed as including any relevant legal rules and principles of the Contracting State which apply to the territorial units comprising it;
(4) any reference to the national law of the deceased shall be construed as referring to the law determined by the rules in force in the State of which the deceased was a national, or, if there is no such rule, to the law of the territorial unit with which the deceased was most closely connected.

Article 37

Each Contracting State shall, at the time of the deposit of its instrument of ratification, acceptance, approval or accession notify the Ministry of Foreign Affairs of the Netherlands of the following –
(1) the designation of the authorities, pursuant to Article 5 and the first paragraph of Article 6;
(2) the way in which the information provided for under Article 8 may be obtained;
(3) whether or not it has chosen to subject the recognition to a procedure or to publicity, and, if a procedure exists, the designation of the authority before which the proceedings are to be brought.

Each Contracting State mentioned in Article 35 shall, at the same time, notify the Ministry of Foreign Affairs of the Netherlands of the information provided for in paragraph 2 of that Article.

Subsequently, each Contracting State shall likewise notify the Ministry of any modification of the designations and information mentioned above.

Article 38

A Contracting State desiring to exercise one or more of the options envisaged in Article 4, the second paragraph of Article 6, the second and third paragraphs of Article 30 and Article 31, shall notify this to the Ministry of Foreign Affairs of the Netherlands, either at the time of the deposit of its instrument of ratification, acceptance, approval or accession or subsequently.

The designation envisaged by the second paragraph of Article 6, or the indication envisaged by the third paragraph of Article 30, shall be made in the notification.

A Contracting State shall likewise notify any modification to a declaration, designation or indication mentioned above.

Article 39

The provisions of this Convention shall prevail over the terms of any bilateral Convention to which Contracting States are or may in the future become Parties and which contains provisions relating to the same subject-matter, unless it is otherwise agreed between the Parties to such Convention.

This Convention shall not affect the operation of other multilateral Conventions to which one or several Contracting States are or may in the future become Parties and which contain provisions relating to the same subject-matter.

Article 40

This Convention shall apply even if the deceased died before its entry into force.

CHAPTER VIII — FINAL CLAUSES

Article 41

This Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Twelfth Session.

It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Article 42

Any State which has become a Member of the Hague Conference on Private International Law after the date of its Twelfth Session, or which is a Member of the United Nations or of a specialised agency of that Organisation, or a Party to the Statute of the International Court of Justice may accede to this Convention after it has entered into force in accordance with Article 44.

The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Such accession shall have effect only as regards the relations between the acceding State and those Contracting States which have not raised an objection to its accession in the twelve months after the receipt of the notification referred to in sub-paragraph 3 of Article 46. The objection may also be raised by Member States at the time when they ratify, accept or approve the Convention after an accession. Any such objection shall be notified to the Ministry of Foreign Affairs of the Netherlands.

Article 43

Any State may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect on the date of entry into force of the Convention for the State concerned.

At any time thereafter, such extensions shall be notified to the Ministry of Foreign Affairs of the Netherlands.

The extension shall have effect as regards the relations between the Contracting States which have not raised an objection to the extension in the twelve months after the receipt of the notification referred to in Article 46, sub-paragraph 4, and the territory or territories for the international relations of which the State in question is responsible and in respect of which the notification was made.

Such an objection may also be raised by Member States when they ratify, accept or approve the Convention after an extension.

Any such objection shall be notified to the Ministry of Foreign Affairs of the Netherlands.

Article 44

This Convention shall enter into force on the first day of the third calendar month after the deposit of the third instrument of ratification, acceptance or approval referred to in the second paragraph of Article 41.

Thereafter the Convention shall enter into force

- for each State ratifying, accepting or approving it subsequently, on the first day of the third calendar month after the deposit of

its instrument of ratification, acceptance or approval;

- for each acceding State, on the first day of the third calendar month after the expiry of the period referred to in Article 42;
- for a territory to which the Convention has been extended in conformity with Article 43, on the first day of the third calendar month after the expiry of the period referred to in that Article.

Article 45

This Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 44, even for States which have ratified, accepted, approved or acceded to it subsequently.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands, at least six months before the expiry of the five year period. It may be limited to certain of the territories to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 46

The Ministry of Foreign Affairs of the Netherlands shall notify the States Members of the Conference, and the State which have acceded in accordance with Article 42 of the following–

(1) the signatures and ratifications, acceptances and approvals referred to in Article 41;
(2) the date on which this Convention enters into force in accordance with Article 44;
(3) the accessions referred to in Article 42 and the dates on which they take effect;
(4) the extensions referred to in Article 43 and the dates on which they take effect;
(5) the objections raised to accessions and extensions referred to in Artices 42 and 43;
(6) the designations, indications and declarations referred to in Articles 37 and 38;
(7) the denunciations referred to in Article 45.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at The Hague, on the ..... day of ....., 19 . ., in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channel, to each of the States Members of the Hague Conference on Private International Law at the date of its Twelfth Session.

ANNEX TO THE CONVENTION

International Certificate
(Hague Convention of ... concerning the International Administration of the Estates of Deceased Persons)

A *Issuing Authority*
1 Country:
2 – The (name and address of the authority) certifies that:
or
– (name, address and capacity of the person) designated according to Article 6, paragraph 2 and whose certificate is confirmed in accordance with I *b* below, certifies that:
B *Information concerning the deceased*
3 following the death on ... at ... of ...[1] (marital status, sex of deceased, date and place of birth)

4 whose last known address was ...
5 of ... nationality[2]
6 whose last habitual residence was in (State, town, street)

7 whose will has/has not been produced to the authority
8 and whose marriage contract dated ... has/has not been presented

C *Holder of the certificate*
9 name ... address ... (of the person or body)
10 is/are entitled under ... law to effect all acts in respect of all corporeal or incorporeal movables in the estate and to act in the interest or on behalf of such movable estate[3],
or
is/are entitled under ... law to effect all acts in respect of all corporeal or incorporeal movables in the estate, and to act in the interest or on behalf of such movable estate[3],
with the exception of: ...
a) in respect of all assets: ...
b) in respect of any particular asset or category of assets: ...
or
is/are entitled under ... law to effect the acts indicated in the annexed schedule[3].
D *Powers, if any, over immovables*[4]*:*
E *Power to appoint an agent:*
Yes/No
F *Other remarks:*
G *Date, if any, of expiry of the powers:*
H *Date, if any, of the entry into force of the certificate:*
I *Date of the certificate and signatures:*

Drawn up on the ... at ...
Signature/seal of the issuing authority:
or
a) Signature/seal of the person drawing up the certificate,
and
b) Signature/seal of the confirming authority.

---

[1] For married persons, indicate, according to custom, maiden name or name of spouse.
[2] If the issuing authority knows that the deceased had more than one nationality, it may indicate them.
[3] The issuing authority may indicate the capacity in which the holder of this certificate may act (e.g. executor, administrator, heir).
[4] See Article 30 of the Convention.

Schedule

Acts which may be carried out in respect of the corporeal or incorporeal movables in the estate, and in the interest or on behalf of such estate	Put 'No' against acts which the bearer may not carry out	Severally	Jointly
To obtain all information concerning the assets and debts of the estate			
To take cognisance of all wills and other documents relating to the estate			
To take any protective measures			
To take any urgent measures			
To collect the assets			
To collect the debts and give a valid receipt			
To perform and rescind contracts			
To open, operate and close a bank account			
To deposit			
To let or hire			
To lend			
To borrow			
To charge			
To sell			
To carry on a business			
To exercise the rights of a shareholder			
To make a gift			
To bring an action			
To defend an action			
To effect a compromise			
To make a settlement			
To settle debts			
To distribute legacies			
To divide the estate			
To distribute the residue			
Any other acts[1]*:*			

Particular assets or categories of assets in respect of which acts cannot be carried out —

a) Particular assets or categories of assets:

b) Acts which may not be carried out:

[1] See in particular Article 30 of the Convention.

CHAPTER VI

NOTE ON THE REGISTRATION OF WILLS CONVENTION

The Convention on the Establishment of a Scheme of Registration of Wills, drawn up by member States of the Council of Europe, was concluded on May 16, 1972. It was then signed by 8 States, including the United Kingdom, and has subsequently been ratified by 5 States, including Cyprus but not the United Kingdom. It came into force on March 20th, 1976. The Committee of Ministers of the Council may invite non-member States to accede. To date, however, all Contracting Parties are European: Belgium, Cyprus, France, Netherlands, Turkey. There are now six signatories, including the United Kingdom, which have not yet ratified.

The purpose of the Convention is to establish a scheme for the registration of wills made in Contracting States, with a view to facilitating the discovery of the existence and whereabouts of a will after the testator's death. The mechanism proposed involves the establishment by each state of national agencies to be responsible -

(a) for registering wills which are drawn up by a lawyer or deposited with an agency in the state or which have been registered in another Contracting State; and

(b) for providing information, nationally and abroad, after the testator's death, about the existence of his will and its place of deposit.

The aim, therefore, is principally to establish a system of registration which will "reduce the risk of the will remaining unknown or being found belatedly".

The scheme calls for the registration with the appropriate national agency normally to be carried out by the lawyer (or public agency) before whom a relevant will is drawn up or with whom it is deposited. (Article 5). In addition the testator may request registration in other Contracting States, through the intermediary of the appropriate national agency (Article 6.2).

The scheme does not, however, embrace all wills made in a Contracting State. In far from clear language it appears to apply to -

(a) "formal" wills (each system of law will determine what comprises a formal will but it appears to be intended that it will be one executed by a notary (in a civil law system), a public authority, such as a court, or by a person authorised by law, for example a lawyer in a common law system);

(b) wills formally deposited with a public agency or person authorised by law to accept such a deposit;

(c) holograph wills (i.e. wills made in civil law systems by the testator himself without witnesses or similar formalities) which have been deposited (formally or informally) with a notary, public authority or other authorised person (Article 4).

It follows, therefore, that a will made in accordance with provisions equivalent to the Wills Act 1837 (U.K.) but without the involvement of a lawyer, will not fall within the scheme, even though the will may be informally deposited with a lawyer. It is, however, open to any Contracting State to extend the scheme to any other form of will or any other deed affecting the devolution of an estate (Article 11).

The registration relates to the existence of the will and where it may be found and not to its contents (Article 7). Information about the existence and whereabouts of the will must remain secret until the testator's death when a request for the information to be divulged may be made to the appropriate national agency (Article 8). Such information may be provided to anyone applying who can present satisfactory proof of the death of the testator.

It appears, therefore, that for common law jurisdictions in the Commonwealth, this scheme would require the imposition of a duty upon legal practitioners to cause the existence of a testator's will to be recorded in a register, at least in cases where the lawyer has been concerned with the execution of the will. Yet if the scheme is to be effective for common law systems, it would seem necessary at least to

extend it under Article 11 to include those wills drawn up by the testator which are informally deposited with a lawyer. The scheme does not, however, easily accommodate the case of a testator who wishes himself to keep the will which he has himself drawn up. For the duty to register would then have to fall upon the testator who may well be ignorant of the requirement (cp. Article 5.2).

Omissions from the register obviously weaken the value of the scheme. For the absence of a registration can never be taken as conclusive indication that a will does not exist. Indeed, even the last entry in a register cannot be treated as conclusive since it may have been rendered ineffective by a subsequent will made, for example, in a form which need not be registered. Moreover, whilst there is a Convention obligation to register wills and modifications or revocations thereof if made in a registrable form (Article 4.1 & 4.2), the Convention is silent as to the effect of failure to do so. What is clear is that the registration requirements are not intended to affect the validity of any will or subsequent revocations (Article 10).

The Convention does not impose any requirement either to create a formal system of deposit of wills or, where one exists, to make that compulsory. Provision exists in some Commonwealth states for deposit of wills of living persons with the Supreme Court or Probate Registry (cp. Supreme Court of Judicature (Consolidation) Act, 1925, section 172 and the Wills (Deposit for Safe Custody) Regulations 1978, SI 1978 No. 1724 of the United Kingdom). Although these are generally permissive arrangements, deposits thereunder appear to be caught by the Convention Scheme. It seems probable, however, that many Commonwealth states, for want of appropriate facilities, do not have such a scheme. Indeed, informal deposits with lawyers and banks are common practice in common law systems; the depositary would be under no obligation under the Convention scheme to register the will merely by reason of being depositary. Such an obligation which is consistent with the facultative provisions of Article 11 seems sensible, if the scheme is to be useful for a common law jurisdiction.

The only Commonwealth state to put the scheme into operation, Cyprus, has not enacted any additional statutory provisions, being merely content to pass legislation to ratify the Convention (The Convention on the Establishment of a Scheme of Registration of Wills (Ratification) Law, 1974) and administratively to designate the Principal Probate Registry of the Supreme Court as the body responsible for registration.

It is worthy of note that, at the Washington Conference at which the Convention on The International Will was concluded, the Conference called upon states to -

> "establish an internal system, centralised or not, to facilitate the safe-keeping, search and discovery of an international will as well as the accompanying certificate, for example, along the lines of Convention on the Establishment of a Scheme of Registration of Wills...
>
> "facilitate the international exchange of information on these matters and, to this effect, ... [to] designate in each state an authority or a service to handle such exchanges".

Such a development would be dependent upon the introduction of procedures for registration and, ideally, deposit of wills of living persons under the general law. For most Commonwealth states, this would be a divergence from the existing practice under which a testator is under no duty to record the existence or whereabouts of his will and would necessitate additional bureaucracy.

CONVENTION ON THE ESTABLISHMENT OF A SCHEME OF REGISTRATION OF WILLS

The member States of the Council of Europe, signatory hereto,

Considering that the aim of the Council of Europe is to achieve a greater unity between its Members ;

Wishing to provide for a registration scheme enabling a testator to register his will in order to reduce the risk of the will remaining unknown or being found belatedly, and to facilitate the discovery of the existence of this will after the death of the testator ;

Convinced that such a system would facilitate in particular the finding of wills made abroad,

Have agreed as follows :

Article 1

The Contracting States undertake to establish, in accordance with the provisions of this Convention, a scheme of registration of wills, with a view to facilitating, after the death of the testator, the discovery of the existence of the will.

Article 2

In order to implement the provisions of this Convention, each Contracting State shall establish or appoint one or more bodies responsible for the registration provided for by the Convention and for answering requests for information made in accordance with Article 8, paragraph 2.

Article 3

1. With a view to facilitating international co-operation, each Contracting State shall appoint a national body which shall, without any intermediary :

(*a*) arrange for registration in other Contracting States as provided for in Article 6 ;

(*b*) receive requests for information arriving from the national bodies of other Contracting States, and answer them under the conditions set out in Article 8.

2. Each Contracting State shall communicate to the Secretary General of the Council of Europe the name and address of the national body appointed in accordance with the preceding paragraph.

Article 4

1. The following shall be registered in a Contracting State :

(*a*) Formal wills declared to a notary, a public authority or any person authorised by the law of that State to record them, as well as other wills deposited with an authority or a person authorised by law to accept such deposit, with a formal act of deposit having been established ;

(*b*) Holographic wills which have been deposited with a notary, a public authority or any person authorised by the law of that State to accept them, without a formal act of deposit having been established, subject to that law permitting such deposit. The testator may oppose registration if the said law does not prohibit such opposition.

2. Withdrawals, revocations and other modifications of the wills registered according to this article shall also be registered if they are established in a form which would make registration compulsory according to the preceding paragraph.

3. Any Contracting State may exclude from the application of the present article wills deposited with authorities of the armed forces.

Article 5

1. Registration shall be made at the request of the notary, the public authority or the person referred to in Article 4, paragraph 1.

2. Any Contracting State may, however, in special cases determined and under the conditions specified by its national law, provide for the request for registration to be made by the testator.

Article 6

1. Registration shall not be subject to conditions of nationality or residence of the testator.

2. At the request of the testator, the notary, public authority or person referred to in Article 4, may request registration not only in the State where the will is made or deposited, but also, through the intermediary of the national bodies, in other Contracting States.

Article 7

1. The request for registration shall contain the following information at least :

(*a*) Family name and first name(s) of testator or author of deed (and maiden name, where applicable) ;

(*b*) Date and place (or, if this is not known, country) of birth ;

(*c*) Address or domicile, as declared ;

(*d*) Nature and date of deed of which registration is requested ;

(*e*) Name and address of the notary, public authority or person who received the deed or with whom it is deposited.

2. This information must be contained in the register, in the form stipulated by each Contracting State.

3. The duration of registration may be determined by each Contracting State.

Article 8

1. Registration shall be secret during the lifetime of the testator.

2. On the death of the testator any person may obtain the information mentioned in Article 7 on presentation of an extract of the death certificate or of any other satisfactory proof of death.

3. If the will has been made jointly by two or more persons, the provisions of paragraph 2 of this article shall apply, nothwithstanding the provisions of paragraph 1, on the death of any of the testators.

Article 9

Services between Contracting States pursuant to this Convention shall be rendered free of charge.

Article 10

This Convention shall not affect provisions which, in each Contracting State, relate to the validity of wills and other deeds referred to in this Convention.

Article 11

Each Contracting State shall have the option to extend, under the conditions to be established by that State, the registration system provided for by this Convention to any other will not referred to in Article 4 or any other deed affecting the devolution of an estate. In this case, in particular the provisions of Article 6, paragraph 2, shall apply.

Article 12

1. This Convention shall be open to signature by the member States of the Council of Europe. It shall be subject to ratification or acceptance. Instruments of ratification or acceptance shall be deposited with the Secretary General of the Council of Europe.

2. This Convention shall enter into force three months after the date of deposit of the third instrument of ratification or acceptance.

3. In respect of a signatory State ratifying or accepting subsequently, the Convention shall come into force three months after the date of the deposit of its instrument of ratification or acceptance.

Article 13

1. After the entry into force of this Convention, the Committee of Ministers of the Council of Europe may invite any non-member State to accede thereto.

2. Such accession shall be effected by depositing with the Secretary General of the Council of Europe an instrument of accession which shall take effect three months after the date of its deposit.

Article 14

1. Any Contracting State may, at the time of signature or when depositing its instrument of ratification, acceptance or accession, specify the territory or territories to which this Convention shall apply.

2. Any Contracting State may, when depositing its instrument of ratification, acceptance or accession or at any later date, by declaration addressed to the Secretary General of the Council of Europe, extend this Convention to any other territory or territories specified in the declaration and for whose international relations it is responsible or on whose behalf it is authorised to give undertakings.

3. Any declaration made in pursuance of the preceding paragraph may, in respect of any territory mentioned in such declaration, be withdrawn according to the procedure laid down in Article 16 of this Convention.

Article 15

No reservation shall be made to the provisions of this Convention.

Article 16

1. This Convention shall remain in force indefinitely.

2. Any Contracting State may, in so far as it is concerned, denounce this Convention by means of a notification addressed to the Secretary General of the Council of Europe.

3. Such denunciation shall take effect six months after the date of receipt by the Secretary General of such notification.

Article 17

The Secretary General of the Council of Europe shall notify the member States of the Council and any State which has acceded to this Convention of :

(*a*) any signature ;

(*b*) any deposit of an instrument of ratification, acceptance or accession ;

(*c*) any date of entry into force of this Convention in accordance with Article 12 thereof ;

(*d*) any communication received in pursuance of the provisions of paragraph 2 of Article 3 and of paragraphs 2 and 3 of Article 14 ;

(*e*) any notification received in pursuance of the provisions of Article 16 and the date on which denunciation takes effect.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at Basle, this 16th day of May 1972, in English and French, both texts being equally authoritative, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each of the signatory and acceding States.

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