

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

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	Hong Kong
Barbados*	Isle of Man
Belize	Lesotho*
Bermuda	<u>Mauritius*</u>
British Virgin Islands	Montserrat
Brunei	St.Kitts-Nevis- Anguilla
Cayman Islands	St. Helena
Dominica*	St. Lucia*
Falkland Islands	St. Vincent*
<u>Fiji*</u>	Seychelles*
The Gambia*	<u>Swaziland*</u>
Grenada*	<u>Tonga*</u>
Guyana*	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 determined 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 jurisdictions (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 deter-
mined 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.

FORM OF WILLS

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.

FORM OF WILLS

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.