

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.

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

Miscellan- 9. (1) This Act comes into operation on
eous.
(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:

<u>Draft</u>	<u>Convention</u>	<u>U.K. Act</u>	<u>Barbados Act (Cap.251)</u>
cl.1.1.	-	s.7(1)	s.1.
cl.1.2.	-	s.6(1)	s.35.
cl.1.3.	Art 1, para 1	s.1.	s.36.
cl.1.4.	Arts 1(e), 2	s.2(1)(a) to (c)	s.37.
cl.1.5.	Art 5	s.3.	s.38.
cl.1.6.	Art 1, para 2	s.6(2)	s.39.
cl.1.7.	-	s.6(3)	s.40.
cl.1.8.	Art 8	s.7(4)	s.41.
cl.1.9.	-	s.7(2),(3)	-