

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.

* 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 II.1).

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.