

PHILIP AMRAM *

Hague on Divorces and Rome on Wills

Introduction

The Hague Conference on International Private Law has placed a draft Convention on the Recognition of Divorces and Legal Separations on the agenda for the October 1968 Session. The Committee of Experts (on which the new Solicitor-General, Erwin Griswold, represented the United States) held several meetings and prepared a Draft Convention in June 1967.

The International (Rome) Institute for the Unification of Private Law has prepared a draft Convention for the creation of a new "international will" which was approved by the Governing Council in 1966 and has been transmitted to the member Governments.

The Department of State is presently considering the position of the United States with respect to these two Conventions, and will welcome the informed comments of interested members of the Association.

The present English texts of the two Conventions follow. In certain instances in the Divorce Convention there are marked differences between the English and the French texts. In these instances, the French text is given in a footnote.

The basic question is, of course, whether the United States should adhere to either or both of these Conventions.

The Convention on Wills is in final form, and the answer can be a simple approval or disapproval. Although the United States was

* Member of the Pennsylvania and District of Columbia Bars. LL.B. University of Pennsylvania.

not represented in the preparation of this Convention, the work having been performed prior to our becoming a member of the Rome Institute, the common law point of view was well represented by Professor B. A. Wortley of the University of Manchester, England, who was chairman of the drafting Committee of Experts and the draftsman of the English text.

The situation with respect to the Divorce Convention is quite different. This is presently only in draft form. In a number of instances, the Committee of Experts was itself unable to agree and has submitted alternative proposals which are either so designated or appear enclosed in brackets.

Some illustrative policy questions presented are: (1) the bases for jurisdiction listed in Article 2; (2) whether a different rule should appear in Article 6 depending on whether the divorce is *ex parte* or contested; (3) whether Articles 7 and 16 should specify which State shall have the right to determine the existence of double nationality; (4) whether the escape clauses of Articles 15 and 16 are too broad; and (5) whether the present Article 18 or some other draft of federal-state clause should be included. This list is, of course, not all-inclusive and many other questions are suggested by the draft.

An article on the Divorce Convention by Professor Henry H. Foster, Jr., and Doris J. Freed has appeared in the *Family Law Quarterly*, published by the Family Law Section in the September 1967 issue.

Comments should be mailed to Philip W. Amram, Chairman of the Section's Committee of International Unification of Private Law, 700 Colorado Building, Washington, D.C. 20005, in time to reach him before March 15, 1968.

Hague Conference on Private International Law

DRAFT CONVENTION ON THE RECOGNITION OF DIVORCES AND LEGAL SEPARATIONS

adopted by the Special Commission
on the 9th of June, 1967.

English text

Article 1

(Scope)

The present Convention shall apply to divorces and legal separations obtained in a Contracting State following upon judicial or other proceedings officially recognised in that State.

The Convention does not apply to ancillary orders, if any, pronounced on the making of a decree of divorce or legal separation; in particular, it does not apply to orders relating to pecuniary obligations or to the custody of children.

Article 2

(State of the divorce or legal separation)

Such divorces and legal separations shall be recognised in all other Contracting States, subject to the remaining terms of this Convention, if, at the date of the institution of the proceedings in the State of the divorce or legal separation—

- (1) the respondent had his habitual residence there; or
- (2) the petitioner had his habitual residence there and one of the following further conditions was fulfilled:
 - a) such habitual residence had continued for not less than [1-3] years immediately prior to the institution of proceedings;
 - b) the spouses had their last matrimonial residence there;or
- (3) both spouses were nationals of that State; or
- (4) the petitioner was a national of that State and also had [or previously had] his habitual residence there.

Alternative:

- (4) the petitioner was a national of that State and also had his habitual residence there [or had his habitual residence there at any time within the preceding . . . years].

Article 3

(Domicile)

Where the State of the divorce or legal separation uses the concept of domicile as a test of jurisdiction in matters of divorce or legal separation, the expression "habitual residence" in Article 2 shall be deemed to include domicile as the term is used in that State.

Nevertheless, the preceding paragraph shall not apply to the domicile of dependence of a respondent wife.¹

Article 4

(Cross-petitions)

Where there has been a cross-petition, a divorce or legal separation following upon the petition or cross-petition shall be recognised if either falls within the terms of article 2.

Article 5

(Conversion of separation into divorce)

Where a legal separation complying with the terms of this Convention has been converted into a divorce in the State where the legal separation was obtained, the recognition of the divorce shall not be refused for the sole reason that the conditions stated in Article 2 were no longer fulfilled at the time of the institution of the divorce proceedings.

Article 6

(Control)

The authorities of the State in which recognition of a divorce or legal separation is sought—

¹ The French text reads:

"Toutefois, l'alinéa précédent ne vise pas le domicile de l'épouse défenderesse, lorsque celui-ci légalement rattaché au domicile de son époux," which may be rendered:

"However, the preceding paragraph does not include the domicile of a defendant wife when this is legally identical to the domicile of the husband."

- (1) shall be bound by the findings of fact upon which the authorities of the State of origin based their jurisdiction;
- (2) shall not refuse recognition for the sole reason either that the law of their own State would not allow divorce on the same grounds or that the authorities of the State of origin applied the rules of a system other than that applicable according to their own rules of private international law.²

Without prejudice to such review as is required by other provisions of this Convention, there shall be no review of the merits of the original decision.

Article 7

(Prohibition of divorce)

No Contracting State in which divorce is prohibited by law shall be bound to recognise a divorce when, at the time of divorce, both the parties were nationals of States in which divorce was similarly prohibited and of no other State.

Article 8

(Notice and opportunity to be heard)

A divorce or legal separation may be refused recognition if, in view of all the circumstances, adequate steps were not taken to give notice of the proceedings to the respondent or to afford him a sufficient opportunity to present his case.

Article 9

(Conflicting decrees)

The recognition of a divorce or legal separation may be refused in the State where recognition is sought if it is incompatible with

² The French text of sub-section 2 reads:

“2. Ne pourront refuser cette reconnaissance pour la seule raison, soit que leur loi interne ne permet pas le divorce pour les mêmes causes, soit que les autorités de l'Etat d'origine ont appliqué une loi autre que celle qui aurait été applicable d'après les règles de droit international privé de l'Etat de reconnaissance.”

Accordingly the closing phrase of the English text is incorrect and should read:

“... or that the authorities of the State of origin applied a law other than that which would be applicable under the rules of conflict of laws of the State where recognition is sought.”

a previous decision rendered or recognised in that State, determining the status of the parties to the divorce or legal separation.

Article 10

(Public policy—"Ordre public")

Exceptionally the recognition of a divorce or a legal separation may be refused if such recognition is manifestly incompatible with the public policy ("ordre public") of the State where recognition is sought.³

Article 11

(Remarriage)

Where a divorce has been obtained which fails to be recognised under this Convention, the remarriage of either party may not be refused for the sole reason that the law governing the personal status of that party does not recognise the divorce.⁴

Article 12

(Lis pendens)

Proceedings for divorce or legal separation in any Contracting State may be suspended when proceedings relating to the matrimonial status of either party to the marriage are pending in another Contracting State.

A Contracting State may declare that, under its own law, such proceedings shall be so suspended.

³ The term "ordre public" is not accurately translated as "public policy." The French phrase also includes concepts, as for example, absence of due process of law. See Nadelmann and von Mehren, "Equivalences in Treaties in the Conflicts Field," 15 *Am. J. Comp. Law* 195 at 199-201 (1967).

⁴ The French text reads:

"Ni l'un ni l'autre des époux, divorcés en vertu d'une décision qui doit être reconnue par application de la présente Convention, ne pourra se voir interdire un remariage au seul motif que la loi régissant son statut personnel ne reconnaît pas ce divorce," which may be rendered:

"Neither spouse, after a divorce which is required to be recognized under this Convention, may be forbidden to remarry for the sole reason that the law governing the personal status of that party does not recognize the divorce."

Article 13

(Non-unified systems)

In the application of this Convention to divorces or legal separations obtained or sought to be recognised in States having, in matters of divorce or separation, multiple legal systems of territorial application—

- (1) any reference to the law of the State of the divorce or separation shall be construed as referring to the law of the territory in which the divorce or separation was obtained;
- (2) any reference to the law of the State in which recognition is sought shall be construed as referring to the law of the forum; and
- (3) any reference to domicile or residence in the State of the divorce or separation shall be construed as referring to domicile or residence in the territory in which the divorce or separation was obtained.

Article 14

(Non-exclusive character of the Convention)

This Convention shall not prevent the recognition in any Contracting State of divorces or legal separations which would be recognised under rules of law which are more favourable to the recognition of foreign divorces or legal separations.

Article 15

(Other Conventions)

This Convention shall not derogate from Conventions to which at the time of its entry into force the Contracting States are Parties, or may in the future become Parties, and which contain provisions relating to the subject-matter of this Convention.

Contracting States, however, shall refrain from concluding between themselves other Conventions on the same matters incompatible with the terms of this Convention, unless for special reasons based on regional or other ties; and, notwithstanding the terms of such Conventions, they undertake to recognise in accordance with this Convention divorces and legal separations granted in Contracting States which are not Parties to such other Conventions.

Article 16

(Reservations)

Any Contracting State may, not later than the time of ratification or accession, reserve the right—

- (1) to refuse to recognise a divorce obtained in another Contracting State between two spouses who, at the time of the divorce, were nationals of the State where recognition is sought, and of no other State, if its law would not allow divorce on the facts on which the divorce granted was based;
- (2) to refuse to recognise a divorce obtained in another Contracting State between two spouses who, at the time of the divorce, were nationals of States in which divorce was prohibited by law and of no other State;
- (3) to refuse to apply the provisions of Article 11.

*Article 17 **

(Declarations)

Any Contracting State may make a declaration specifying the persons deemed to possess its nationality for the purposes of the present Convention.

Any Contracting State may also make a declaration defining the types of legal separation under its law which come within the scope of this Convention.

*Article 18 **

[(Federal clause)]

[If a State has more than one legal system it may, at the time of signature, ratification, or accession, declare that the present Convention shall extend only to one or more of its systems, and may modify its declaration at any time thereafter.

Declarations contemplated in the preceding paragraph shall

* *Note from the Permanent Bureau:* Provisions dealing with the procedure, publicity, entry into force, and withdrawal of these declarations will be grouped together in the Final Clauses.

be notified to the Ministry of Foreign Affairs of the Netherlands and shall state expressly the systems to which they apply.

No Contracting State shall be bound to recognize a divorce or legal separation granted in a State having more than one legal system unless at the time of the divorce or the legal separation the particular system in which it was granted was covered by a declaration contemplated in the foregoing paragraphs.]

ROME INSTITUTE DRAFT INTERNATIONAL CONVENTION PROVIDING A UNIFORM LAW ON THE FORM OF WILLS

The States signatories to the present Convention,

Desirous to provide to a greater extent for the respecting of last wills by establishing a form of will henceforth to be called an "international will" which, if employed, would dispense with the search for the applicable law and dispense with the examination of formalities prescribed by such 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 within six months of 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.

Article II

1. Each Contracting Party shall complete and 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 qualified to receive international wills.

2. The Party shall notify such designation, as well as any other later modification thereof, to

Article III

1. A will made in the form of an international will in the territory of a Contracting Party shall, in the territories of the other Contracting Parties, be considered as having been made in the presence of a person qualified to receive it whenever such person is so qualified according to the law of the Contracting Party in whose territory the will was made.

2. A will made in the form of an international will in the territory of a State which is not a Contracting Party shall, in the territories of the Contracting Parties, be considered as having been made in the presence of a qualified person whenever, in accordance with the law of such State, it has been received by a person qualified to receive wills and has been placed in his custody.

Article IV

Each Contracting Party may provide in its law that the persons listed in article II, paragraph 2 of the Annex may not benefit from any dispositions in their favour that the will may contain.

Article V

1. The signature of the testator, of the person qualified to receive the will and of the witnesses of an international will shall be exempt from legislation.

2. Nevertheless, the competent authorities of the Contracting Parties may verify the authenticity of such signatures.

Article VI

Each Contracting Party may in its law provide for rules relating to the custody of international wills.

Article VII

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

Article VIII

1. This Convention shall be open for signature from -----
to -----.

2. This Convention shall be ratified.
3. Instruments of ratification shall be deposited with -----.

Article IX

1. This Convention shall be open to accession by -----.
2. Instruments of accession shall be deposited with -----.

Article X

1. This Convention shall come into force six months after the date on which the fifth instrument of ratification or accession has been deposited.

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 come into force six months after the deposit of its own instrument of ratification or accession.

Article XI

1. Each Contracting Party may denounce this Convention by a notice addressed to -----.

2. Such denunciation shall take effect twelve months from the date on which the ----- has received notice thereof.

Article XII

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

2. Such declaration shall have effect six months after the date on which the ----- 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 XI, denounce this Convention in relation to all or part of the territories concerned.

Article XIII

The ----- shall give notice to the signatory or 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 X;
- d) any notice received in accordance with Article II, paragraph 2;
- e) any declaration received in accordance with Article XII, paragraph 2 and the date on which such declaration takes effect;
- f) any denunciation received in accordance with Article XI, paragraph 1, or Article XII, paragraph 3, and the date on which the denunciation takes effect.

IN WITNESS WHEREOF, the undersigned, being duly authorised thereto, have signed this Convention.

DONE at -----, the -----, in -----, the ----- texts being equally authoritative.

The original of this Convention shall be deposited with ----- who shall transmit certified copies thereof to each of the signatories and acceding States and to the International Institute for the Unification of Private Law.

Clause concerning federal and non-unitary States
(for possible insertion)

Article

a) With respect to those articles of this Convention and its Annex that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to that extent be the same as those of Contracting States which are not federal States;

b) With respect to those articles of this Convention and its Annex that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government

shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;

c) It shall also be the duty of the federal Government to notify the designation of persons qualified to receive international wills, in accordance with Article II, paragraph 2, and also any designation made by constituent states or provinces.

DRAFT UNIFORM LAW ON THE FORM OF WILLS

Article 1

1. A will shall be valid as regards form, irrespective of the place where it is made and irrespective of the nationality, domicile, or residence of the testator, if it is made in the form of an international will complying with the provisions set out hereafter.

2. Failure to observe any such provision shall not by itself affect the validity of the document as a will of another kind.

Article 2

1. The will shall be made in writing.
2. It may be written in any language, by hand or by any other means.
3. It need not be written by the testator himself.

Article 3

1. The testator shall declare in the presence of two witnesses and of a person qualified to receive the will that the document is his will.

2. The testator need not inform the witnesses, or the person qualified to receive the will, of the content of the will.

Article 4

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

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

Article 5

The witnesses and the person qualified to receive the will shall there and then sign the will in the presence of the testator.

Article 6

1. The date of reception shall be indicated on the document.
2. The absence of a date or the indication of an erroneous date shall not affect the validity of the will.

Article 7

1. If the will consists of several sheets, each sheet shall be signed or initialled by the testator, unless the sheets follow each other and form a whole.

2. Every correction in the body of the will shall be signed or initialled by the testator.

3. Additions subsequent to the signatures shall be signed by the testator, the witnesses and the person qualified to receive the will.

Article 8

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

Article 9

1. If the testator is unable to read, the will shall be read to him in the presence of the witnesses and of the person qualified to receive the will.

2. If the testator does not know the language in which the will is drawn up, the will shall be read to him, translated into a language which he knows, in the presence of the witnesses and of the person qualified to receive the will.

3. Such circumstances shall be mentioned in the document.

Article 10

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

Article 11

1. The capacity of the witnesses shall be governed by the internal law of the place where the will is received.

2. The fact that a will contains a disposition in favour of a witness or of the person who receives the will or in favour of a parent, relation, including relation by marriage, or spouse of any of them, shall not affect his capacity to act as a witness or to receive the will.

Article 12

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

Article 13

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

**SIGNIFICANT EXCERPTS FROM THE ROME INSTITUTE
EXPLANATORY REPORT ON THE DRAFT UNIFORM LAW
ON THE FORM OF WILLS**

Four preliminary observations should be made on the draft uniform law.

First, the draft, prepared by the Committee of Experts, has dealt only with the *form* of wills. The Committee, conscious of the difficulties that any other approach might raise, decided, at its second session, not to deal with *capacity* to make a will. They also refrained from dealing with question of *revocation, modification* or *destruction* of wills (subject to what will be said with regard to article 13).

Secondly, the draft law does not attempt to deal with every matter concerning the forms of wills. From the start of their work, the Committee felt that they should not, in a quest for complete unity, tackle all the forms of wills permitted by different systems of law at the present day, nor should they attempt to unify them. The draft in no way changes national laws: the forms of wills now available are neither abolished nor modified. The draft only requires that, besides and in addition to these forms, the various countries should admit a new form, which it is hoped practice will bring into use mainly, but not exclusively, when a will, because of the circumstances, has some international characteristics.

Thirdly, it should be stressed that the new form of will proposed by the Committee is not the result of mere abstract speculation by its members. The Committee was able to supply a solid basis of comparative law for its work, in particular by utilising the very considerable report provided for it by the Institute of Comparative Law of Belgrade. The Committee did consider the different forms of will used in a large number of countries and sought the reasons for the forms preferred in those countries, and they felt obliged to propound a form which is certainly new, but which tries to meet the needs shown to exist in different places. Continental European or Scottish lawyers will not find in the international will which the draft sets out, the holograph will or the authentic will or the mystic will with which they are familiar; common lawyers will not find in it the will made before witnesses which is familiar to them; however, each will find in the draft some different characteristics, which we shall bring out, that are derived from these different forms of will. A lawyer from the Continent of Europe will be reminded by the draft of the international will, more especially of the mystic will, shorn of excessive formalities; an Englishman will also see in it his will before witnesses, with a further task given to the solicitor, a task which, however, merely corresponds in most cases to a practice usually followed.

One last observation concerns the whole draft; it is as follows. By the word "will" the Committee has intended to cover every disposition by a last will made unilaterally. The will to which the draft relates can be either a disposition that does not include the institution of any heir, nor any designation of a universal legatee: it will include therefore a will strictly so-called and the codicil of Austrian law.

It is hardly necessary to set out the basis on which so short a law as this has been made. The order in which the articles follow one another has, however, had the attention of the members of the Committee and on this matter, as well as on the presentation and the style of the articles, have made every effort to put forward a scheme which, as much as possible, meets the requirements of good legislative technique.

Article 1

Article 1 sets out the object of the draft uniform law and determines its applicability according to what we have already said. The draft law simply aims at establishing a new type of will, which will be governed in the same way in all countries as regards its form: this will is to be called an *international will*. The draft law leaves in being all other forms of will known to various national laws. . . .

Article 2

Article 2 lays down an essential condition for the validity of the will as an international will; the will must be made in writing. . . . The will may be written by hand or by any other means; this formula includes, in particular, a type-written will. . . .

Article 3

The liberal approach in article 2 brings out the need for certain safeguards.

A first safeguard is provided by the requirement of article 3, paragraph 1: a testator must declare, in the presence of two witnesses and a person qualified to receive wills, that a certain document, presented to those persons, is his will. . . . The "person qualified" to receive wills is well understood in countries that are familiar with the public will. On the other hand, it may appear to be, in common law countries, something of an innovation. In England, however, the usual practice is to go to a solicitor who makes the will and holds it for the testator. . . . The simultaneous presence of the testator, of the two witnesses and of a qualified person, is necessary for the validity of the will.

The uniform law does not itself lay down what must be understood by a *person qualified to receive wills*. It will be open to each State to settle this and to make this known to other States (Conventions, articles II and XIII); one provision of the Convention attempts as far as possible to establish what must be understood by a qualified person in States which have not signed the Convention (article III, paragraph 2).

Article 4

A declaration made by the testator that a certain document is his will, does not suffice: it is necessary that the testator sign his will in due presence of the witnesses and of the person qualified to receive the will (paragraph 1).

He will do this by putting his signature at the end of the will (paragraph 2). . . .

Article 5

The witnesses and the person qualified to receive the will must sign it immediately in the presence of the testator. . . .

Article 6

. . . It is eminently desirable that it should be possible to know the date when the will, by the fact of its reception, takes effect as an international will. The absence of the date or the indication of an erroneous date does not, however, cause the invalidity of the will (para. 2). . . .

Article 7

In its first paragraph, article 7 deals with the case where a will comprises several sheets; it requires in that case that each sheet should be signed, or at least initialled, by the testator (para. 1). This requirement is not necessary, however, if the sheets "follow each other and form a whole". . . . Any correction in the body of the will must be signed or initialled by the testator (para. 2). . . .

Article 8

No provision in the uniform law settles what must be understood by *signature*. The Committee of Experts had long discussions on this, but came to the conclusion that in this matter it was necessary to follow local law and practice.

One element of uniformity, however, has been introduced by article 8, according to which the signature or the initials of the testator may in all cases be replaced by the testator's fingerprint. . . .

Article 9

Article 9 deals with two special cases: one when the testator cannot read, and the other where his will has been drawn up in a language he does not know.

Limiting the rule in article 3, paragraph 2, it is necessary in the first case that the will be read to the testator, in the presence of witnesses and the person qualified. In the second case, it is necessary that the will, translated into a language known to the testator, be read in the presence of the same persons.

These circumstances must be mentioned in the document (para. 3). . . .

Article 10

The person who receives the will is bound to satisfy himself of the identity of the testator and of the witnesses. . . .

Article 11

The capacity to be a witness is governed by the internal law of the place where the will is received (para. 1). The person who receives the will has, therefore, only to concern himself with the internal law of his country on this matter, with which he will be familiar. . . .

A certain misunderstanding occurred with regard to paragraph 2 of the article. The Committee of Experts wished, by this provision, to take into account the fact that neither the witnesses nor the person who receives the will necessarily know the content of the will (article 3, para. 2). Suppose the will contains a provision in their favour (or in favour of their [parent] spouse or close relation [including relation by marriage]).¹ Should we, by this fact, decide that they did not have the capacity to receive the document or to be witnesses, and should the will be accordingly rendered void as an international will? The uniform law answers this question in the negative. The will will therefore be valid; those laws which today take a contrary view will be altered by the uniform law in those States where the contrary solution is now accepted.

¹ Brackets added by Translator.

Will a legacy given to a witness or to a person who receives the will be valid and should it be executed? This is quite a different question. The reply to this question is to be found not in the uniform law, but in the international Convention introducing the uniform law. Article IV of that Convention makes it clear that States will prescribe such laws on this point as they think should be made: they have complete liberty. . . .

Article 12

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

Article 13

A will ceases to be valid as an international will if it is withdrawn by the testator from the custody of the person authorised to receive it. . . . If the testator withdraws the will, the will may remain valid as a will of some other type; but it will no longer be valid as an international will. . . . The draft does not regulate the question of the revocation of wills; this is one to be considered by the various national laws with all their diversities. . . .