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Explanatory Report to the Convention on the Establishment of a Scheme of Registration of Wills

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I. The Convention on the Establishment of a Scheme of Registration of Wills, drawn up within the Council of Europe by a committee of governmental experts under the authority of the European Committee on Legal Co-operation (CCJ), was opened to signature by the member States of the Council on 16 May 1972, at Basle, on the occasion of the VIIth Conference of European Ministers of justice.

II. The text of the explanatory report prepared by the committee of experts and submitted to the Committee of Ministers of the Council of Europe, as amended by the CCJ, does not constitute an instrument providing an authoritative interpretation of the text of the Convention, although it might be of such a nature as to facilitate the application of the provisions therein contained.

Introduction

1. A growing number of persons make their wills in a place not their home and even in a foreign country. Since most member States do not require wills to be deposited with a court of law, a notary or another authority, and have no central register, the heirs are often unaware of the existence and the whereabouts of a will.

It is therefore useful to establish a registration scheme, the aim being to make it possible to ascertain whether or not a deceased person has made a will and, if so, where this will can be found.

2. In 1967, the Consultative Assembly of the Council of Europe adopted Recommendation 481 (1967) recommending the Committee of Ministers to instruct the European Committee on Legal Co-operation to investigate the desirability of establishing such a registration system.

3. On the proposal of the European Committee on Legal Co-operation (CCJ), the question of the registration of wills was included in the Intergovernmental Work Programme of the Council of Europe for 1968-69, and a sub-committee was created to study it. Later the sub-committee was authorised to prepare a convention.

The following States were represented on the subcommittee: Belgium, Denmark, France, the Federal Republic of Germany, Italy, Luxembourg, the Netherlands, Switzerland, Turkey and the United Kingdom. The Hague Conference on Private International Law and the International Union of Latin Notaries also participated in the work of the sub-committee.

4. The sub-committee commenced its work by an exchange of information on the forms of wills existing in the different States and on registration schemes already being operated in some States. It took note, in particular, of the general central register *(Centraal Testamentenregister)* established in the Netherlands, the central register for aliens existing in the Federal Republic of Germany and the provisions relating to registration of wills in England and Wales.

The sub-committee's work resulted in the drawing up of a draft Convention.

Commentaries

General Considerations

5. The committee felt that it would not be appropriate to create a single international registry. The Convention therefore provides for the establishment of national registration schemes and contains supplementary rules governing the international co-operation between 'the different national authorities which will be entrusted with the registration.

6. Unlike other conventions prepared within the framework of the Council of Europe, the Convention on the Establishment of a Scheme of Registration of Wills does not carry the word "European" in its title. This reflects the committee's wish that non-member States accede to the Convention. The articles were, in fact, drawn up with the assistance of observers from the International Union of Latin Notaries (UINL), an organisation which also groups notaries from States other than the member States of the Council of Europe (e.g. Spain, Portugal, Latin American States). Having regard to the part that notaries are to play in implementing the registration system established by the Convention (cf. Article 5, paragraph 1), the sub-committee felt that the possibility should be provided for the accession to the Convention at least by those States where the Latin notary exists.

7. To avoid misunderstandings in relation to the fiscal registration in some of the French-speaking countries it was decided to substitute, in the French text, *inscription* for *enregistrement*.

Article 1

8. This article sets out the obligation of Contracting States to establish registration schemes.

9. Reference to the "existence of the will" is meant to cover information on whether the deceased has made a will, and if so, where the will can be found.

Article 2

10. This article deals with the machinery required for the application of the Convention.

11. In pursuance of the committee's decision not to provide for a single international register but to allow each Contracting State to make whatever domestic arrangements it deemed the most appropriate, Article 2 leaves it to Contracting States to provide for the setting up of one or several bodies to be entrusted with registration. The States are therefore free to establish one or more registries or, in cases where suitable machinery for the registration of wills exists already, to appoint one or several bodies for implementing the provisions of the Convention.

Contracting States which decide to set up or appoint several bodies have, in fact, the possibility of choosing between different solutions, for instance :

(i) Instead of one central register several district registries could be charged with the registration of wills.

(ii) Instead of establishing specific authorities for the registration of wills, other public authorities could be entrusted with the task of registering wills : the registrar could, for instance, register wills by making an annotation to the birth certificate. Upon the death of the person, he could inform the notary or authority with whom the will is deposited, thus facilitating the smooth liquidation of the estate according to the last will of the deceased.

Article 3

12. In order to facilitate registration in another Contracting State, Article 3 provides that Contracting States shall appoint a single national body to be entrusted with that registration, with receiving requests for registration from other Contracting States and with receiving and answering requests for information from other Contracting States (paragraph 1), and that they shall communicate the name and address of that national body to the Secretary General of the Council of Europe (paragraph 2) who will then in turn inform all other Contracting States.

13. This procedure enables the notary, public authority or competent person, entrusted with arranging for registration abroad, according to Article 6, paragraph 2, to address the request for registration to their national body which will then arrange for registration in the other Contracting State without having to pass through diplomatic channels.

14. The national liaison body appointed according to paragraph 1 need not be a body different from the registry set up according to Article 2. In States where a single register is established, the national body charged with international registration may be identical with the central registry. States which have instituted a decentralised system of registration, however, will have to designate a central national liaison authority, either by appointing one of the several registries or by setting up another authority independent from these registries (e.g. a department in the Ministry of Justice).

Contracting States are entirely free when choosing the national body ; they may, if they so desire, appoint a private agency (e.g. a professional organisation of notaries).

Article 4

15. This article lists the wills which are subject to registration.

16. Registration is not compulsory in all cases. Article 4 mentions only certain wills. As concerns wills not mentioned and other deeds affecting the devolution of an estate, Contracting States are free to extend the registration system provided for by this Convention to them (see Article 11).

17. Article 4 distinguishes between :

- formal wills executed by or formally deposited with a notary, public authority or competent person (paragraph 1 (a)), "formal deposit" meaning that a formal act of deposit was established ;

- and holographic wills which have been deposited without a formal act of deposit having been established, subject however to national law permitting such a deposit and the testator not being opposed to registration (paragraph 1 (b)).

18. Paragraph 1 (a) does not define the term "formal wills". It is thus left to national law to determine which wills it considers to be "formal wills". In any case, the will must be executed by a notary, public authority (e.g. a court) or any person authorised (i.e. a person other than a notary, entitled to execute wills, for instance in countries where the institution of the Latin notary does not exist).

Other wills shall be registered when they are formally deposited, meaning that an act of deposit was established upon deposit.

19. Paragraph 1 *(b)* refers to holographs which have been deposited with a notary, public authority or competent person without a formal act of deposit having been established. It covers namely the case where a notary offers his good services to keep a will without establishing a formal act of deposit.

Registration of those wills shall be compulsory, subject to two conditions :

- that the law of the Contracting State permits *such* informal deposits, the "law" within the meaning of this subparagraph being the law in force at the place of deposit

- that the testator is not opposed to registration.

20. Paragraph 1 applies only to wills executed by notaries, authorities or persons authorised exercising their functions in the territory of or on behalf of the Contracting State (e.g. a consul abroad). Each State is free, under Article 11, to provide also for registration of wills executed abroad by foreign authorities, persons etc.

21. Paragraph 2 is intended to ensure the keeping up to date of the register. It therefore stipulates that withdrawals, revocations and other modifications of the wills and deeds registered according to paragraph 1 shall also be registered.

Registration of these acts is compulsory "if they are established in a form which would make registration compulsory according to the preceding paragraph". This formula makes clear that the Convention does not interfere with provisions of domestic law relating to the form of testamentary dispositions (cf. Article 10) ; it therefore does not require revocations and modifications to be established in a certain form, but simply submits their registration to the same conditions which govern the registration of the original wills.

It is inevitable that in cases where the revocation or modification is not done in the same form in which the registered will was executed the register will not always be up to date : if, for instance, a formal will registered in accordance with paragraph 1 (a) is revoked by a holograph which is deposited without an act of deposit being established, and the testator is opposed to the registration of this revocation (paragraph 1 *(b)*), the holographic will revoking the original is not registered.

Article 5

22. This article concerns the right to request registration.

23. The Convention starts from the principle that registration shall be made through the intermediary of the notary, public authority or competent person by or before whom the will is drawn up or with whom it is deposited (paragraph 1). If a testator wishes to register a holograph he will have to deposit it with a notary, authority or competent person who will then arrange for registration.

In States where domestic law permits the informal deposit of wills (cf. Article 4, paragraph 1 (b)) an act of deposit need not be established for registration ; the testator may leave his will with the depositary for the purpose of registration.

24. The Convention makes an exception for special cases to be determined by national law (paragraph 2). In these cases (e.g. wills executed in exceptional circumstances, where a notary, a public authority or a person authorised is not within reach), the testator may himself, or through a representative, request registration.

25. National law will also specify the conditions under which registration may be requested by the testator directly ; it will, for instance, deal with the questions : what procedure should the testator follow, i.e. in which way must he address his request to the registry (e.g. by simple, or by registered letter, by using a form etc.) ? May the request be made on his behalf by a representative ?

Article 6

26. This article deals with the international aspects of the registration of wills.

27. Paragraph 1 concerns the scope of application *ratione personae* ; it clarifies that the testator at whose request the registration of a will is solicited need not be a national of or resident in the State where registration is requested. It is, in general sufficient that the will or *deed* is executed or deposited in that State ; this requirement follows implicitly from paragraph 2 ("... may request registration not only in the State where the will is made or deposited...").

28. Paragraph 2 provides for additional registration in other Contracting States where a scheme of registration exists. Registration will be made through the intermediary of the national bodies set up or appointed in accordance with Article 3, the only requirement being the request of the testator. Any register is thus open to anyone who deems useful the registration of his will at this particular register, without regard to his nationality, residence, domicile etc. The testator is free to choose the registry where lie wants the registration of his will to be effected. He need not prove an interest. Application of this principle is only restricted by the requirement that the will of an alien requesting registration must already be registered in the State where the will is made or deposited (cf. paragraph 27 supra).

Article 7

29. This article lists the minimum information to be included in the registration request. Contracting States are free to require further information.

States are also free to establish standard forms to be used for registration.

30. As to the item mentioned under (c) the committee adopted the phrase "address or domicile, as declared", because in some States "address" is not known as a legal term while in others the meaning of "domicile" differs. It follows from this wording that there is no duty under the Convention to cheek whether the address or the domicile declared by the testator is correct. This question is left to the law of each Contracting State.

31. The information required for the request for registration according to paragraph 1 must also be contained in the register, but Contracting States are free to stipulate in what form the register is to be kept (paragraph 2). It is, for instance, possible to establish a file containing the request forms and a separate register which only contains the name of the testator and a reference to the file, or to copy the contents of the registration form, or to incorporate the form itself in the register.

32. Paragraph 3 permits the Contracting States to provide for registrations to be deleted after a certain time.

Article 8

33. During the lifetime of the testator, registration shall be secret. Reference is made to "registration", thus indicating not only that the contents of a will or other act must be kept secret but that their existence should not be disclosed, either, before the death of the testator.

34. After the death of the testator, access is granted to the information concerning the existence of a will or other deed. The purpose of the registration scheme being limited to ascertain whether a deceased person has made a will And where this will can be found, it was not considered necessary to lay down rules concerning information relating to the contents of wills.

35. As to information concerning the existence of a will, Article 8 deals with two questions: Who should be entitled to request information ? How must those persons justify their request ?

The Convention stipulates that any person may obtain information, the only requirement being that such person presents a death certificate or another proof of death. The person requesting information must not prove a legal or other interest ; he need onlye prove the death of the testator. It is for the body receiving the request for information to decide whether the document presented is satisfactory proof of death.

36. Paragraph 3 relates to joint wills. It provides that information concerning the existence of a will shall be supplied immediately following the death of one of the testators, without it being necessary to wait until all the testators have died.

It should be pointed out however that some States do not recognise the validity of joint wills. Paragraph 3 must therefore be interpreted in the light of Article 10.

37. The committee expressed the wish that the States agree on standard forms to be used, on their territory, for the request for information and for the reply to be given by the registry.

Article 9

38. This article relates to the reimbursement of expenses between States.

Article 10

39. This article was inserted in order to stress the underlying principle of the Convention which is to respect the Contracting States' freedom !to regulate the validity of wills. It makes clear that the validity of a will is exclusively governed by domestic law.

Article 10

40. This article provides an option for Contracting States to decide :

- whether to extend the registration system laid down by the Convention to wills not mentioned in Article 4 as well as to other deeds affecting the devolution of an estate ; and

- under which conditions registration should be made, in particular, whether registration should be compulsory or voluntary.

41. The wills referred to in this article include, for instance holographs which are not deposited within the meaning of Article 4 ; wills executed abroad; wills executed in exceptional forms.

42. Secondly, this article refers to other deeds relating to the devolution of an estate. In fact, according to the law of some States, dispositions *mortis causa* may be contained in deeds which are not wills (e.g. marriage contracts, contracts of inheritance, contracts relating to the renunciation of inheritance).

Contracting States are free not only to decide whether such deeds should be registered, but also to determine the conditions for registration, for instance, whether these deeds should be registered in whole or only the part relative to the devolution of property on the death of the testator.

43. If a State avails itself of this option for holographic wills which are not deposited, paragraph 1 of Article 5 does not apply because the State will determine the conditions of registration in pursuance of Article 11. When doing so, the State is not bound by the rule laid down in Article 5, paragraph 1, but it may apply it to those cases if it so desires.

44. Article 11 mentions especially Article 6, paragraph 2. This is to make clear that at the request of the testator, a will or deed not referred to in Article 4 shall also be registered in other Contracting States regardless of whether that State requires registration for such a will or deed on its territory.

Articles 12 to 17

45. The final provisions (Articles 12 to 17) were drawn up in accordance with the model final clauses approved by the Committee of Ministers of the Council of Europe.