NEW YORK LAW SCHOOL

NYLS Journal of International and Comparative Law

Volume 12
Number 1 *VOLUME 12 NUMBERS 1 & 2 1991*

Article 5

1991

RATIFICATION OF THE HAGUE CONFERENCE ON THE LAW APPLICABLE TO THE ESTATES OF DECEASED PERSONS: TOWARD UNIFORMITY IN UNITED STATES ESTATE PLANNING

Lisa N. Frankel

RATIFICATION OF THE HAGUE CONFERENCE ON THE LAW APPLICABLE TO THE ESTATES OF DECEASED PERSONS: TOWARD UNIFORMITY IN UNITED STATES ESTATE PLANNING

I. INTRODUCTION

At the close of the Sixteenth Session of the Hague Conference on Private International Law,[1] delegates from thirty-three member states[2] unanimously approved a draft Convention on the Law Applicable to Succession to the Estates of Deceased Persons (the Convention).[3] The Convention is the product of over ten years of consideration and three years of bargaining and preliminary negotiations within the Hague, resulting in precisely structured concessions between the civil law countries and the common law nations.[4] This Note will focus on the advantages

1. October 3-20, 1988. The Hague Conference on Private International Law is an intergovernmental organization based in the Hague, Netherlands. "[I]ts purpose is to work for the progressive unification of the rules of private international law." van Loon, *Towards A Convention on the Law Applicable to Succession to the Estates of Deceased Persons*, in HAGUE YEARBOOK OF INTERNATIONAL LAW 270 (Kiss & Lammers eds. 1988); Robertson, *International Succession Law: A Co-ordinated Approach?*, 34 J.L. SOC'Y SCOT. 377, 378 (1989). It seeks to integrate the conflict of laws rules that are employed in member states and to a lesser degree, as a result of the Conference's influence, throughout the world. *See* Reese, *The Hague Conference on Private International Law: Some Observations*, 19 INT'L LAW. 881 (1985).

2. Argentina, Australia, Austria, Belgium, Canada, Chile, China, Cyprus, Czechoslovakia, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Israel, Italy, Japan, Luxembourg, Mexico, the Netherlands, Norway, Poland, Portugal, Spain, Sweden, Switzerland, the United Kingdom, the United States and Venezuela. Hague Conference on Private International Law: Convention on the Law Applicable to the Estates of Deceased Persons and the Final Act of the Sixteenth Session, 28 I.L.M. 146 (1989) [hereinafter Hague Conference on Succession].

3. *Id.*

4. Scoles, *Planning for the Multinational Estate*, PROB. & PROP., May-June 1989, at 59. Although the Conference delegates felt the overwhelming need for uniform rules, there was great difficulty in negotiating rules that would accommodate the policies and concerns of the delegates' constituencies. *Id.* Most people feel strongly that their views on this personal area

that a United States citizen may derive from the Convention.

Occasions arise in which the instructions of a testator who has links with several legal systems are defeated because her will was made in a form not permitted by the particular legal system governing the matter.[5] The common goal of the delegates of the Convention was "to address the need for practical, predictable rules [for determining] the applicable law in order to avoid the costly confusion and delay incident to settling estates of decedents who die leaving assets in different countries."[6] Generally speaking, the Convention was primarily intended to provide uniform law applicable to the distribution of assets owned by the deceased[7] that would pass by intestacy[8] or by will.[9] It does not apply to *inter vivos* transfers[10] or assets that pass outside the probate estate.[11] Additionally, the Conven-

---

of the law are both superior and very much an integral part of the fabric of their society. Interestingly, although there were delegates from all over the world, the central distinctions which needed to be harmonized were within the European states. *See* Robertson, *supra* note 1, at 380.

5. COMMONWEALTH SECRETARIAT, INTERNATIONAL CONVENTIONS IN THE FIELD OF SUCCESSION (Explanatory Documentation Prepared for the Commonwealth Jurisdictions) 4 (1980) [hereinafter Explanatory Documentation].

6. *See* Scoles, *supra* note 4, at 58. In the past, the basic inquiries as to who the decedent's heirs are and what their share will be in the decedent's estate have proved to be quite onerous to answer because of the skepticism in ascertaining which nation state's law would contribute the answer. *Id.* Choice of law issues are, therefore, critical in dealing with the variations in the indefeasible shares of spouses and children, in addition to dealing with modifications in the intestate share of family members. *Id.*

7. *Id.*

8. Intestacy is the "condition of dying without having made a valid will, or without having disposed by will of a part of [the deceased's] property." BLACK'S LAW DICTIONARY 737 (5th ed. 1979).

9. "A 'will' is generally defined as an instrument by which a person makes a disposition of his property, to take effect after his death, and which by its own nature is ambulatory and revocable during his lifetime." *Id.* at 1433.

10. *See infra* notes 147-50. An *inter vivos* transfer is "a transfer of property during the life of the owner." *Id.* at 737.

11. Article 1 provides:

> 2. The Convention does not apply to
> a. the form of dispositions of property upon death;
> b. capacity to dispose of property upon death;
> c. issues pertaining to matrimonial property;
> d. property rights, interests or assets created or transferred otherwise than by succession, such as in joint ownership with right of survival, pension plans, insurance contracts, or arrangements of a similar nature.

Hague Conference on Succession, *supra* note 2, art. 1. In this way, the formal requirements of a will are left to existing law. Id. Roughly all states of the United States have existing statutes with alternative validating references which validate a will executed in accordance with

tion mandates rules for the disposition of international law cases and does not concern itself with local law or solely interstate cases between the states of the United States.[12] Therefore, the conflicts rules of the fifty states regarding interstate cases remain in effect.

Specifically, "[t]he [C]onvention identifies the law applicable to the succession of property at the death of United States citizens who die while living abroad[13] for an extended time for business, personal or retirement reasons; and of United States citizens who, while remaining in the United States, own assets abroad; or of former United States citizens who emigrate."[14] Further, it affects citizens of different countries intending to live in or immigrate to the United States, as well as outsiders solely owning assets in the United States.[15]

Three underlying policies provide the basis for each of the provisions of the draft Convention:

> First, that owners of property should be able to control the disposition and select the applicable law to the maximum extent

---

the law of the place where it is executed or the state where the deceased had his domicile at the time of execution or death. Scoles, *supra* note 4, at 59. Likewise, interest in joint tenancies, joint and survivorship bank accounts, and insurance are left to existing law and not reached by the Convention. *Id.*

Upon ratification, the Convention becomes a uniform law and is not dependent upon reciprocal provisions in the state whose law is to be applied under the Convention. *Id.*

12. Article 21 of the Hague Conference on Succession provides: "A Contracting State in which different systems of law or sets of rules of law apply to succession shall not be bound to apply the rules of the Convention to conflicts solely between the laws of such different systems or sets of rules of law." *Id.* art. 21, at 151. Even where not endorsed, great deference is given worldwide to the Conventions, and moreover, their impact unquestionably has an extreme influence on courts and legislators. Reese, *supra* note 1, at 885. "This influence is not limited to states that are members of the Conference. It extends throughout the world and undoubtedly has [a significant] effect upon the thinking of persons in developing countries in the area of conflict of laws." *Id.*

13. When Americans do not designate an alternative, it is presupposed that they would elect to retain their ties with their American state until they become "substantially integrated" in the foreign populace where they reside. Memorandum from Eugene F. Scoles, U.S. Delegate, Hague Conference on Private International Law on Succession to John Wallace, Director, Probate and Trust Division RPPT, ABA (Sept. 18, 1989) (discussing the Hague Conference on Succession) [hereinafter Scoles memorandum I].

14. *Id.* The Convention deals with concerns of citizens, immigrants, and visitors; concerns that are deeply imbedded in the legal concepts and attitudes of the nation states involved. *Id.*

15. *Id.* With respect to foreigners emigrating to the United States, a presumption exists in favor of them retaining their ties with the country of their nationality until they become "substantially integrated" in America. If their intention is to become United States citizens, however, then they are deemed to be integrated as quickly as is feasible. *Id.* at 2.

> consistent with shared public policy. Second, that the same ought to determine both the persons who succeed to the estate and the shares they receive in the decedent's estate even though the assets are located in different countries. The estate should be treated as a unit. Third, that the nation having the predominant interest in the decedent's family affairs should determine any limits on testation for protection of the family.[16]

Section II of this Note examines the historical problems associated with foreign wills and the disposition of foreign assets. Section III outlines past attempts to remedy these problems and section IV discusses the major operative provisions of the 1988 Conference, as well as specific matters that may cause concern. Finally, section V concludes that adoption of the Uniform International Will would be extremely advantageous to American families.

II. HISTORICAL BACKGROUND

Dating back to the nineteenth century, the administration of foreign wills presented vexing issues for English courts. *Bremer v. Freeman*[17] and *In the Goods of Raffenel*[18] both illustrate the historical dilemmas with foreign wills and choice of law rules.[19] The courts, in both cases, held that wills executed in the English form by English citizens domiciled in France were invalid.[20] In *Bremer*, a will effectuated in the English form by an English woman domiciled in France was held to be ineffective in England.[21] The court in *Raffenel*, following *Bremer*, held a will invalid as to English assets because it was executed in France in the form imposed

---

16. *Id.* To the degree that the owner's classification does not govern, "the law which governs the succession of assets at death should [accordingly] be the law of the place where the decedent's personal and family life was centered, for example, one's domicile." *Id.* The term "domicile" is not used functionally throughout Europe. Consequently, the delegates adopted the term "habitual residence" as the primary reference which, while undefined in the convention, bears the same implication as domicile. *Id.*

17. *See* Fratcher, *The Uniform Probate Code and the International Will*, 66 MICH. L. REV. 469, 469 & n.1 (1968) (*Id.* In the Goods of Raffenel, 3 SW. & TR. 49, 164 Eng. Rep. 1190 (Prob. 1863), *following* Bremer v. Freeman, 10 Moore 306, 14 Eng. Rep. 508 (P.C. 1857)).

18. Id.

19. *See id.*

20. *Id.*

21. *See* Stevens, *The Convention Providing a Uniform Law on the Form of the International Will*, REAL PROP., PROB. & TR. J. 293, 293 & n.2 (1976) (citing Bremer v. Freeman, 10 Moore 306, 14 Eng. Rep. 508 (P.C. 1857).

by English law.[22] At the time, English law mandated that a will relating to movables must be governed by the law of the testator's domicile at the time of death, while immovables were to be governed by the law of the situs.[23] Therefore, the testator in *Raffenel* would have required two wills to devise proficiently immovable property[24] in England and bequeath movable property[25] in France.

The historical disparities pertaining to authenticity and legitimacy are stressed by the two points of view that exist within the common law system.[26] Some common law jurisdictions require witnessed written wills based on the English Statute of Frauds,[27] whereas the English Wills Act of 1837 regulates the remaining jurisdictions.[28] Under the common law rules, neither the place of execution nor the testator's domicile or nationality at the time of execution bear on the will's validity. Thus, a "will disposing of an interest in land must be in the form prescribed by the law of the place where the land is situated; a will disposing of movables must be in the form prescribed by the law of the testator's domicile at the time of his death."[29]

These common law distinctions, however, are minor in comparison to those that exist between the common law and the civil law.[30] The civil law acknowledges three different types of wills: the holographic will, the public (open) will, and the mystic (closed) will.[31] The holographic will

---

22. Fratcher, *supra* note 17, at 469. French law requires a notary present upon execution. *Id.*

23. *Id.* at 471 & n.9 (citing English Wills Act, 1837, 7 Will. 4 & 1 Vict., ch. 26, § 9 (1837), *as amended*, Wills Amendment Act, 15 & 16 Vict., ch. 24, § 1 (1852)).

24. Devise refers to "[a] testamentary disposition of land or realty" or "immovables." BLACK'S LAW DICTIONARY 407 (5th ed. 1979)

25. To "bequeath" is to give personal property or "movables" by will to another. *Id.* at 145.

26. For a discussion on common law rules of validity, see Note, *The Uniform International Will: The Next Step in the Evolution of Testamentary Disposition*, 6 B.U. INT'L L.J. 317, 320-21 (1988); *see* Fratcher, *supra* note 17, at 471.

27. Fratcher, *supra* note 17, at 471 & n.8 (citing English Statute of Frauds, 1677, 29 Car. 2, ch. 3, § 5 (1677)). "These jurisdictions require signature by or for the testator and subscription in his presence by three witnesses." *Id.*

28. *Id.* at 471 & n.9 (citing English Wills Act, 1837, 7 Will. 4 & 1 Vict., ch. 26. § 9 (1837), *as amended*, Wills Act Amendment Act, 15 & 16 Vict., ch. 24, § 1 (1852)). "These jurisdictions require that the testator sign at the foot of the will and that two present witnesses acknowledge the signature and contemporaneously subscribe." *Id.* at 471-72.

29. *Id.* at 471.

30. Note, *supra* note 26, at 321.

31. Kearney, *The International Wills Convention*, 18 INT'L LAW. 613, 615-16 (1984); *see also* Note, *supra* note 26, at 321.

must be handwritten and signed by the testator, without the need for any witnesses or a notary.[32] The public will is orally declared by the testator in the presence of at least one witness and a notary, who transcribes it into written form.[33] The mystic will is sealed in some form of container or envelope and is attested to by the testator in the presence of a notary and at least one witness.[34] The civil law rules as to choice of law are, in comparison to the previously stated common law rules,[35] uncomplicated and more coherent.[36] A will is valid, under civil law, if it was executed in a form authorized at the time of execution by the law of the place of execution.[37] Additionally, a will that meets the formal requirements of the testator's law of nationality at the time of execution will be held valid[38] and a subsequent acquisition of property or a later change of domicile will not affect the validity of the will.[39] A will executed under particular common law rules, however, is defective under the civil law.[40] The common law rules regarding situs and the last intended domicile of the testator, for example, are not recognized under the civil law.[41]

The difference between the civil law and common law requirements for wills has caused much confusion, as is evidenced by the laws of the United States.[42] This confusion has led to the courts' tendency to reach arbitrary results in probate proceedings.[43] The consequence in a structure

---

32. Kearney, *supra* note 31, at 615-16.

33. *Id.*

34. *Id.*

35. *See supra* note 26-29 and accompanying text. The common law characterizes movable property as governed by the law of the testator's domicile, and immovable property as governed by the law of the situs. *Id.*

36. Note, *supra* note 26, at 321.

37. *Id.* Civil law also takes the opinion that the situs of property is inconsequential. *Id.* Additionally, the civil law does not make a distinction as to the law governing the disposition of movable and immovable property. *Id.*; *see also* Fratcher, *supra* note 17, at 478.

38. Kearney, *supra* note 31, at 615-16.

39. Fratcher, *supra* note 17, at 477-78. The legal situation is "fixed" upon execution of the will. *Id.* Therefore, the formal validity of the will not affected by inconsequential occurrences. *Id.*

40. *See id.* at 477.

41. *Id.*

42. *Id.* at 322. American jurisdictions haphazardly have chosen and combined the requirements of the Statute of Frauds, the English Wills Act, and the civil law. *Id.*; *see* Kearney, *supra* note 31, at 615-16.

43. Kearney, *supra* note 31, at 615.

Whether there should be two or three witnesses to a will, or whether these witnesses must sign the will, both in the presence of the testator and of the other witnesses,

such as the United States is a melange of formal requirements among the states that often frustrates the testator's intentions.[44] American jurisdictions aimlessly select criteria based on differing or combined aspects of the civil law and the common law.[45] The result is an assortment of different forms that may often defeat the intent of the testator. A court may, for example, refuse to admit the will to probate, resulting in a declaration of intestacy.[46]

Insofar as they operate to thwart testamentary intent, both the present common law and civil law choice of law rules serve no practical function and seem to tolerate much abuse.[47] Conceivably, a uniform international agreement on choice of law rules, if universally acknowledged, would be a logical, intelligent approach to administering foreign wills.[48]

III. INTERNATIONAL EFFORTS TO RECOGNIZE CHOICE OF LAW APPROACHES

International endeavors to reconcile existing choice of law approaches in the area of intestate succession ("succession") commenced many years ago.[49] In the 1920s, the Hague Conference on Private International Law marked a futile attempt in this area.[50] Further, in 1955, a convention unsuccessfully sought to harmonize the dissimilarities between domicile

---

or whether the testator must make a special kind of oral declaration are matters of custom more than of logic.

Id.

44. *Id.* For example, witnesses to a Pennsylvania will are not required to sign the will if the testator has signed. *Id.* at 615 & n.10 (citing DECEDENTS, ESTATES & FIDUCIARIES, 20 PA. CONS. STAT. ANN. § 2502 (Purdon 1975)). No other jurisdiction within the United States has an analogous requirement. *Id.* at 615 & n.11 (citing Reese, *American Wills Statutes: I*, 46 VA. L. REV. 613, 621-22 (1960)).

45. Note, *supra* note 26, at 322. For example, it was held that the will of a New York testator, which was invalid under New York law when made because it was not signed by witnesses, became operative when the testator changed his domicile to Pennsylvania, where witnesses are not required to sign the will. *In re* Beaumont's Estate, 216 Pa. 350, 65 A. 799 (1907).

46. Note, *supra* note 26, at 322.

47. *See* Fratcher, *supra* note 17, at 478. "What possible good is served by a decision of an English court that a will of property in England is void because it was executed in the form prescribed by English law?" *Id.*

48. *Id.*

49. Scoles memorandum I, *supra* note 13, at 5.

50. *Id.*

and nationality as choice of law bases.[51] The Hague Conference delegates grew increasingly interested in the subject, however, as the mobility of people and assets continued to escalate. Thus, in 1961, the Convention on Conflict of Laws Relating to the Form of Testamentary Dispositions (the Wills Convention) was successfully promulgated.[52] The Wills Convention validated wills that complied with the internal law of either the place of execution, the testator's nationality at the time of execution or death, the place of the testator's habitual residence at execution or death, or the situs of immovable assets.[53] The Wills Convention set forth circumstances establishing the will's validity notwithstanding the situs of the court.[54] Under the Wills Convention, in order for a will to be legitimate, its validity must be proven in its country of origin. This specification tended to generate obstacles related to alien forms and foreign languages, thereby frustrating the testator's intent.[55] Moreover, the Wills Convention did not settle the procedural and administrative concerns relating to issues of proof.[56] Consequently, American attorneys were likely to be faced with grave problems, such as the possibility of the will's being rejected.[57] This would seem to circumvent the Convention's objective of furthering the goal of *favor testamenti*[58] that developed in the post-World War II era.[59]

In 1961, the International Institute for Unification of Private Law

---

51. *Id.*

52. *Id.* American conflict of laws cases concerning decedent's estates have long been a source of confusion and skepticism. *Id.* Resultingly, foreign attorneys, notaries and courts have tended to withstand collaboration of common law concepts of succession in American law. *Id.* The United States government's non-participation in international attempts to decide issues of private law has intensified this defiance. *Id.*

53. Fratcher, *supra* note 17, at 480-81.

54. Kearney, *supra* note 31, at 618.

55. *Id.*

56. *Id.* For example, if the Wills Convention were in force in the United States, an attorney seeking probate of a foreign will on the basis of domicile of the testator in that country could be required to prove that the testator, at the time of death, had complied with the requirements of establishing domicile under the law of the foreign country. *Id.*

57. *Id.* Additionally, the United States sent an "observer" delegation, although not formally a member state of the Hague Conference. *See* Nadelmann, *The Formal Validity of Wills and the Washington Convention 1973 Providing the Form of an International Will*, 22 AM. J. COMP. L. 365, 367-68; *see also* Fratcher, *supra* note 17, at 480 & n.50 (American observers "influenced" the form of the Convention).

58. *Favor testamenti* is a general rule in conflicts favoring the validity of a will. BLACK'S LAW DICTIONARY 548 (5th ed. 1979).

59. Nadelmann, *supra* note 57, at 365-68 (goal of *favor testamenti* advanced by the Hague Convention); *see* Note, *supra* note 26, at 324.

(UNIDROIT) was formed.[60] UNIDROIT established a Committee of Experts who were charged with developing an international will form.[61] As recently as 1964, the United States became a member of UNIDROIT and contributed in its preliminary efforts.[62] In 1973, the United States hosted the Diplomatic Conference on Wills, which was held in Washington, D.C. (the Washington Convention).[63] The central complication in designing a uniform law yielding international validity for wills was the vast diversity of the national rules governing the making of wills[64] for the differences were of such great magnitude that the delegates could not consolidate existing forms.[65] Rather, the delegates decided to employ a well-defined innovative form:[66]

> The International Will, therefore, does not affect the freedom of a testator to select any other kind of will. What it does do is to provide an alternate way of making a will in every country which becomes Party to the Washington Convention and to provide a number of advantages over all other forms of wills.[67]

The major provisions are that: the will may be in any language, but it must be in writing; the testator must affirmatively proclaim it to be her will in the presence of two witnesses and a person "authorized" to act in association with an international will; the testator must sign or acknowledge her name in the presence of the witnesses and the authorized person; the testator must sign her name at the end of the will and at the bottom of every page; and the witnesses and the authorized person must certify in the presence of the testator.[68] Failure to comply with these restrictions annuls

---

60. Note, *supra* note 26, at 325.

61. *See* Hall, *Towards a Uniform Law of Wills: The Washington Convention 1973*, 23 INT'L & COMP. L.Q. 851, 853 n.6 (1974).

62. Kearney, *supra* note 31, at 619. Since then, the United States has sent representatives to all of the plenary sessions. Reese, *supra* note 1, at 881.

63. Diplomatic Conference on Wills: Convention Providing a Uniform Law on the Form of an International Will, 12 I.L.M. 1298 (1973), *reprinted in* S. DOC. NO. 385-17, 99th Cong., 2d Sess. 28 (1986) [hereinafter Washington Conference]. For a complete discussion on the Washington Conference, see generally Hall, *supra* note 61; Kearney, *supra* note 31; Note, *supra* note 26, at 326.

64. Kearney, *supra* note 31, at 619.

65. *Id.*

66. *Id.*; *see* Plantard, *Explanatory Report on the Convention Providing a Uniform Law in the Form of the International Will*, UNIDROIT 35 (1974).

67. Kearney, *supra* note 31, at 619.

68. Beckman, *The International Will*, 113 TR. & EST. 71 (1974).

the will with respect to its international status. However, it may possibly retain its validity as a local will.[69] A will achieves international status by a certificate administered by the "authorized person," asserting that the will was executed in conformity with the formalities set forth in the Washington Convention.[70]

Thus, the objective of the Washington Convention "was to establish a uniform international will form which would be recognized in signatory countries[71] without regard to the testator's nationality, residence, or domicile, the location of the assets, or whether or not the form complied, when it was written, with the law of the place of execution."[72] Non-signatory states would acknowledge the will form's lawful effect on the same foundation as any other foreign will.[73] Thus, "[t]he form would *complement not supplant*, existing will forms."[74]

The delegates of the Washington Convention accomplished their two main aims.[75] The first was to afford testators the opportunity to create an international will in a jurisdiction in which the Washington Convention was effective.[76] The second was "to ensure the recognition of an international will in all signatory States as a matter of local law."[77]

IV. THE 1988 HAGUE CONFERENCE ON SUCCESSION

The 1988 Conference on Succession is structured in five parts or chapters and each chapter is subdivided into articles. Chapter 1 sets out

---

69. S. DOC. NO. 385-17, 99th Cong., 2d Sess. 3 (1986) (Dep't of State Letter of Submittal to the President).

70. *Id.* at 4. Each jurisdiction was to choose the classes of people who are to be "authorized." *See* Kearney, *supra* note 31, at 630. In the United States, all attorneys in good standing would be denoted as "authorized" within the meaning of the Convention. *See id.* at 630 (stating that the National Conference of Commissioners on Uniform State Laws expressed the "pragmatic reasons" for this rule); UNIF. PROB. CODE, pt. 10, prefatory note at 178, 180-81 (1982).

71. A signatory is a "nation which is a party to a treaty." BLACK'S LAW DICTIONARY 1239 (5th ed. 1979).

72. Note, *supra* note 26, at 327.

73. *Id.* at 327 n.112 (citing Brandon, *UK Accession to the Wills Convention*, 32 INT'L & COMP. L.Q. 742, 745 (1983) (adding that such recognition is still preconditional on other factors)).

74. Note, *supra* note 26, at 327 & n.113 (citing S. DOC. NO. 385-17,99th Cong.,2d Sess. 3 (1986)) (emphasis added).

75. *Id.* at 328. *See generally* Kearney, *supra* note 31, at 628.

76. Note, *supra* note 26, at 328-29.

77. *Id.* This goal was quite significant because it established an enforcement mechanism for the Convention. *Id.*

the scope of the Convention, namely, to determine the law applicable to the estates of deceased persons. It is important to recognize that it does not apply to the form of testamentary dispositions, as embodied in the 1961 Wills Convention. Chapter 2 is the heart of the Convention, as it sets out the rules for determining the applicable law. Chapter 3 contains provisions about agreements as to succession (*pactes successoraux*). The fourth and fifth chapters cater to *commorientes*, where two or more persons, each of whom has rights in the other's estate, die simultaneously.

A. Chapter 2

Articles 3, 5, 6, and 7 are the leading provisions of the Convention.[78] Article 3 is the essence of the Convention, insofar as it provides a homogeneous procedure for ascertaining which state's law applies in the absence of testamentary direction. Articles 5 and 6 interpret the prerogative of the estate owner to select the choice of law to administer the succession of her estate.[79] Article 7 prescribes the breadth of the Convention's use as to assets and issues.[80]

Essentially, article 3 is the result of an understanding among the differing preferences regarding basic choice of law, that is, nationality or domicile.[81] Article 3 concerns the "no conflict" situation where "the citizen has [her] home and nationality in the same place but owns assets abroad."[82] Article 3(2) creates a presumption wherein the law of the place

78. Scoles memorandum I, *supra* note 13, at 2.

79. *Id.*

80. *Id.* Whichever law is applicable under the Convention, it governs the determination of heirs and legatees, respective shares and obligations imposed on them by the deceased, disinheritance accounting for gifts and advancement, and etc. *See id.*; *see infra* note 97.

81. Hague Conference on Succession, *supra* note 2, art. 3. The Conference delegates explicitly rejected the concept of nationality as the "single connecting factor" and, additionally, could not acquiesce on a particular meaning of domicile. *Id.* "It was accepted that domicile contained elements of home, family focus, [and] intention to stay permanently or indefinitely . . . [however,] there was no agreement on the weight to attach to factors of intention as opposed to the physical facts of residence, property, etc." *Id.* Robertson, *supra* note 1, at 379.

82. Article 3 provides:

> 1. Succession is governed by the law of the State in which the deceased at the time of his death was habitually resident, if he was then a national of that State.
> 2. Succession is also governed by the law of the State in which the deceased at the time of his death was habitually resident if he had been resident there for a period of no less than five years immediately preceding his death. However, in exceptional circumstances, if at the time of his death he was manifestly more closely connected with the State of which he was then a national, the law of the state applies.
> 3. In other cases succession is governed by the law of the State of which at the

of a citizen's habitual residence governs the estate of a citizen whose principal place of residence is abroad provided she has lived there for over five years, unless she evidently was associated more closely with the nation of her citizenship.[83] Article 3(3) applies to a decedent who dies subsequent to a short-term foreign residence of less than five years. Under this section, the law of the decedent's nationality is employed, unless the decedent was more closely associated with another state.[84] In other words,

> [i]n the absence of testamentary direction, the basic choice of law rule of the Convention provides that the substantive aspects of a decedent's estate shall be governed by the law of the State of the decedent's habitual residence, if evidenced by five years continuous residence or if the State of habitual residence is also the State of the deceased's nationality.[85]

Article 5 is the most significant provision for estate planners because it empowers the testator with a limited right to choose either the law of the state (*professio juris*) of her habitual residence or of her nationality to administer the major components of succession to her estate.[86] The civil

---

time of his death the deceased was a national, unless at that time the deceased was more closely connected with another State, in which case the law of the latter State applies.

Hague Conference on Succession, *supra* note 2, art. 3.

83. *See id.*

84. *Id.* Generally, this rule seems to contemplate the wishes of most people residing abroad for a short time; at least insofar as it pertains to people who originally are citizens and domiciliaries of the same nation, but who, shortly thereafter, die while abroad. *Id.* An immigrant who is in the process of becoming a United States citizen, however, will have the law of her new domicile apply to administer her estate. *Id.* The exception contained in paragraph 3 is devised so as to accommodate this. Scoles memorandum I, *supra* note 13, at 3.

85. Memorandum from Eugene F. Scoles to Author (October 30, 1989) at 3. (discussing Hague Conference on Succession) [hereinafter Scoles memorandum II]. Although the five-year limitation may not be satisfied, there exists an exception protecting the "true" immigrant. *See supra* note 84 and accompanying text.

86. Article 5 states:

> 1. A person may designate the law of a particular State to govern the succession to the whole of his estate. The designation will be effective only if at the time of the designation or of his death such person was a national of that State or had his habitual residence there.
>
> 2. This designation shall be expressed in a statement made in accordance with the formal requirements for dispositions of property upon death. The existence and material validity of the act of designation are governed by the law designated. If under that law the designation is invalid, the law governing the succession is determined under Article 3.

law countries, where the concept is largely unknown, found this "testator autonomy" difficult to accept.[87] At the same time, testamentary control was important to common law countries that recommended the estate planning necessity of being able to designate the governing law with some certainty.[88] The resulting compromise was that a testator may only designate the law of his nationality or the law of habitual residence to govern the indefeasible rights of family protection in her estate, but is free to designate other law, for example, the situs, to govern aspects of the disposition of particular assets.[89] Mandatory family protection provisions impose rigid restrictions on the testator's authority.[90] Resultingly, the pertinent law under the Convention, or embraced by the testator, distinguishes family members possessing distinct rights; that law is applicable

---

3. The revocation of such a designation by its maker shall comply with the rules as to form applicable to the revocation of dispositions of property upon death.

4. [A] designation of the applicable law, in the absence of an express contrary provision by the deceased, is to be construed as governing succession to the whole of the estate of the deceased whether he died intestate or wholly or partially testate.

Hague Conference on Succession, *supra* note 2, art. 5. By authority of this provision, the indefeasible shares or interests, which members of a testator's family have in his or her estate, can be subjected by the testator to either the law of his citizenship or the law of his habitual residence. *See id.*

Scoles memorandum II, *supra* note 85, at 3; *see* Robertson, *supra* note 1, at 379. The testator's control over choice of law, like control over dispositions by will, is not absolute (it is restrained by the state's view that the testator must be just before he is generous and the law of nearly all jurisdictions provides forced shares for some family members). Scoles memorandum I, *supra* note 13, at 2-3. In the United States, this family protection is most often reflected in the spouse's forced share. *Id.* at 3. It is generally agreed that the state with the dominant interest in providing the spouse's forced share is the state of the decedent's domicile. *Id.* at 3-4. As was stated in the case of *In re Estate of Clark*, 21 N.Y. 2d 478, 485-86, 288 N.Y.S.2d 993, 998-99 (1968) ("As between two states, the law of that one which has the predominant, if not the sole, interest in the protection and regulation of the rights of the person or persons involved should, of course, be invoked."). *See, e.g.*, Matter of Crichton, 20 N.Y.2d 124, 281 N.Y.S.2d 811 (1967). *But see* Estate of Renard, 108 Misc.2d 31, 437 N.Y.S.2d 860 (1981).

87. *See* Scoles, *supra* note 4.

88. *See* Scoles memorandum I, *supra* note 13, at 5.

89. *Id.* at 7. The drafters sought to grant people in international "situations" the right to govern their activities as they saw fit, with some degree of certainty, before they die. *Id.* However, this approach may be seen as controversial insofar as it permits a choice to be made where that individual is "habitually resident in a state which is not that of his or her nationality." *Id.* "A national living in his or her country has no right to designate another law." *Id.* Thus, the designation will be permitted only if it pertains to the testator's whole estate and if the law identified is, in fact, the law of the testator's nationality or habitual residence at the time the designation was made, or, at time of death. *Id.*

90. *See* Scoles memorandum II, *supra* note 85, at 3.

to all assets of the estate, barring, however, the testator's absolute preference as to other affairs relating to specific assets.[91] Accordingly, a choice of law clause in the testator's will will not allow indirectly what is precluded directly. Consequently, article 5(1)[92] was designed to permit the testator to choose the law applicable to the *whole of his estate* only if she was either a national or habitual resident of that state at the time of designation or at the time of death.[93]

Under article 6, a testator may select various laws to apply to different parts of her estate.[94] Article 6 permits an estate owner to designate the law of any state to govern the succession of particular assets, but she cannot override the mandatory rules of family protection that would be applicable via article 3, if no testamentary direction is made, or the law of her nationality or habitual residence as designated under article 5.[95]

Article 7(1) maintains that the relevant law under either article 3 or 5 governs the entire estate notwithstanding the location of the assets, excluding specific assets indicated under article 6.[96] The testator's

---

91. *Id.* This guarantees that the corresponding heirs, spouses, and legatees are selected in all states that are members of the Convention, a critical point in the consolidation of persons interested in the estate. *Id.*

92. *See supra* note 86 and accompanying text.

93. *Id.* Providing the alternative of either nationality or habitual residence is part of the same compromise reflected earlier in article 3 between domicile and nationality. *See supra* notes 82-84 and accompanying text. These alternatives would seem to accommodate essentially all reasonable choices which a testator might wish to make of the law applicable to all assets in the estate. *Id.*

94. Article 6 provides: "A person may designate the law of one or more States to govern the succession to particular assets in his estate. However, any such designation is without prejudice to the application of the mandatory rules of the law applicable according to Article 3 or Article 5, paragraph 1." Hague Conference on Succession, *supra* note 2, art. 6. This right may include a reference to the law of the situs of real property if that is desired by the testator. *See id.*

95. Scoles memorandum I, *supra* note 13, at 4. "This approach is familiar to American lawyers and is reflected in the Uniform Probate Code § 2-602." *Id.* The testator's authority to delineate the law of a specific state simplifies instituting the proposed estate. Scoles memorandum II, *supra* note 85, at 8. "While the *professio juris* will probably be expressed in most instances in a will, it need not be an instrument disposing of property but may be any instrument executed in accordance with the formal requirements for distributions of property upon death. Revocation of such a designation also must comply with the law applicable to the revocation of dispositions of property upon death." *Id.*

96. Article 7 provides:

1. Subject to Article 6, the applicable law under Articles 3 and 5, paragraph 1, governs the whole of the estate of the deceased wherever the assets are located.
2. This law governs -
    a. the determination of the heirs, devisees and legatees, the respective

prerogative, under article 6, to choose the law applicable to certain assets might possibly encompass a reference to the law of the situs of real property, if the testator so prefers.[97] This provision especially is apropos in view of article 7 because it clarifies the breadth of the Convention's operation to assets.[98] This "unity" concept maintains that the same law should apply to the whole estate except as otherwise provided by the testator.[99] This provision facilitates the task of ascertaining the law applicable to the estate assets and to the corresponding parties under the same circumstances, irrespective of the location of the assets[100] for "[t]he fortuity of location of assets should not vary what family members receive in relation to each other."[101] This entails only a slight modification because the Convention only considers the shares family members acquire in the decedent's estate[102] and "does not reach administration of the decedent's estate, rights of creditors, recording statutes, taxes, form of wills or procedural matters. In fact, the only issue of genuine significance under the [C]onvention is the identification of the law governing forced shares, i.e., family protection."[103] In this particular area of succession, the

---

shares of those persons and the obligations imposed upon them by the deceased, as well as other succession rights arising by reason of death including provision by a court or other authority out of the estate of the deceased in favor of persons close to the deceased;
b. disinheritance and disqualification by conduct;
c. any obligation to restore or account for gifts, advancements or legacies when determining the shares of heirs, devisees or legatees;
d. the disposable part of the estate, indefeasible interests and other restrictions on dispositions of property upon death;
e. the material validity of testamentary dispositions.

Hague Conference on Succession, *supra* note 2, art. 7; Scoles memorandum I, *supra* note 13, at 4.

97. Scoles memorandum II, *supra* note 85, at 8.

98. *Id.* at 8-9.

99. Scoles memorandum I, *supra* note 13, at 4.

100. Scoles memorandum II, *supra* note 85, at 9.

101. Scoles memorandum I, *supra* 13, at 4. Such a concept might appear inapposite to common law attorneys who are accustomed to simply assuming that the law of the situs is employed with respect to all matters concerning real property. *Id.*

102. *Id.*

103. *Id.* Furthermore, it may be interpreted to limit the Convention to matters of substance, leaving procedure for the courts. *Id.* For example, the law determines the rights of heirs, devisees and legatees, including whether they may have been disinherited or disqualified by conduct, as well as matters relating to advancements or other accounting for gifts in the determination of their shares. *See supra* note 97 at accompanying text.

Additionally, curiosity may exist as to the Convention's impact on the difficulty of proving foreign law. Scoles memorandum I, *supra* note 13, at 8. However,"[p]roof of foreign

states' primary consideration is to secure any and all indefeasible interests given to family members.[104] Thus, the Convention simply integrates these concerns into the heart of the decedent's family life at either her habitual residence or place of nationality.[105]

This restricted scope of the Convention materializes in article 7(2),[106] which outlines the concerns underlying the law governed by the Convention.[107] It also applies the governing law to limitations on the testamentary power of the deceased and to the material validity of testamentary dispositions.[108] Article 7(3) authorizes the courts to broaden the law under the Convention to encompass additional circumstances that it deems should properly be administered by the law of succession.[109]

B. Chapter 3

The Convention also covers agreements relating to succession, but not limited to the contract to will or contract not to revoke a will, which are not well regarded estate planning tools in the United States.[110] Contracts

---

law is a matter of procedure governed by the forum and *not touched by the Convention.*" *Id.* (emphasis added). Proof of foreign law is varied among the methods employed by the individual states of the United States, however, the distinct tendency is"toward procedures whereby the court, when made aware that a claim is based on foreign law, can take judicial notice or accept any available evidence of the content of the foreign law." *Id.*

If proof of the foreign law is unavailable or fails, the courts of the United States generally have relied upon four presumptions: (1) that the foreign law is based on the common law and is thus the same as the common law of the forum; (2) the foreign law is the same as forum law; (3) the foreign law is based on generally recognized principles of law common to civilized nations; or (4) that the parties acquiesced in the application of forum law in the alternative. *See* E. SCOLES & S. HAY, CONFLICT OF LAWS § 12.19 (1982).

104. Scoles memorandum II, *supra* note 85, at 9.

105. *Id.* This approach is consistent with the legislative trend in the United States in the UNIF. PROB. CODE § 2-201 (1982) and in the N.Y. EST. POWERS & TRUSTS LAW § 5-1.1(d)(8) (Consol. 1986).

106. *See supra* note 97 and accompanying text.

107. Scoles memorandum II, *supra* note 85, at 9.

108. Scoles memorandum I, *supra* note 13, at 4-5.

109. Scoles memorandum II, *supra* note 85, at 10. "This enables a forum to accommodate its view of that gray area between substance and procedure, but not to avoid the application of the Convention to matters which are specifically identified in Article 7, paragraph 2." *Id.*

110. *See* Scoles memorandum I, *supra* note 13, at 5. These provisions are aimed at arrangements originated in writing or those arising from mutual wills which alter the future estate of parties to the contract. Scoles memorandum II, *supra* note 85, at 10.

> The basic approach . . . is to provide that the validity of an agreement relating to succession is, absent contrary direction by the parties, to be governed by the law which would be applicable to the estate of the person involved as if that person had

among family members in civil law countries are more customary and more highly developed in comparison with Anglo-American common law states, and therefore it was notably onerous to formulate this section of the Convention.[111] Estate planning policies further led to a provision authorizing the contracting parties to select the controlling law from the states among which the estate owner(s) are either nationals or habitual residents.[112] Articles 8 through 12 coordinate the law applicable to such contractual arrangements with that identified for succession.[113]

C. Problems Posed by the Hague Convention

Some may insinuate that the Convention depicts a rudimentary change in American law. Nevertheless, the Convention secures considerable improvements in the context of international testation insofar as it unifies the law for American citizens and American attorneys with only nominal modifications in the prevailing law, resulting in clarity of the law.[114] Numerous estate plans hinge on choice of law clauses.[115] The Convention affords extreme international acknowledgment of choice of law provisions in estate plans[116] and while "the choice of law clause is routinely used and enforceable in the United States, it is not so widely accepted in many other countries. The Convention would extend that acceptance. This, alone, is worth the modest concessions to civil law concepts found in the Convention."[117]

---

died on the date of the agreement. If the agreement involves the estate of only one person, it is also valid if it is valid by the law which is applicable to the succession of that person at the time that person actually dies.

Scoles memorandum II, *supra* note 85, at 10. The latter alternative is not applicable to contracts correlated to multiple estates. *Id.*

"The parties may, by express designation, subject the validity and effect of a contract relating to succession to the law of the State in which any one of the persons whose future estate is involved has his habitual residence or nationality at the time the agreement is made." *Id.* These party autonomy provisions are harmonious with the Convention's estate planning approach, insofar as they afford the decedent the opportunity to make a pragmatic, foreseeable identification of the law incident to an *inter vivos* transaction. *Id.* at 10-11.

111. Scoles memorandum II, *supra* note 85, at 4.

112. *Id.*

113. *See* Hague Conference on Succession, *supra* note 2, arts. 8-12.

114. Scoles memorandum I, *supra* note 13, at 7.

115. *Id.*

116. *Id.*

117. *Id.* "Of course, some oppose law improvement simply because of inertia, but inertia in this case is costly and leads to lessened recognition of American law abroad." *Id.*

Article 22 is a transitional clause and provides for the Convention's application by a contracting nation to estates of persons who die after the convention enters into force for that nation.[118] Previously executed choice of law designations either in wills or contracts are valid if consistent with articles 5 or 11, respectively.[119] In view of the alternatives available to the estate owner under the Convention, it is improbable that any adverse effect will occur with existing estate plans which are unchanged.[120]

As stated above, the word "domicile" has a separate meaning in Europe than it does in the United States.[121] The American theory is focused on the counterpart to one's "home."[122] In order "[t]o avoid distasteful problems of English domicile, more recent legislation in the European Economic Community and the Hague Conventions have utilized the term 'habitual residence.'"[123] Although the term has no definite meaning, it is employed in the Convention inasmuch as it distinguishes the core of the decedent's life, as disclosed by an individual's endeavors.[124]

By adopting the single reference to habitual residence, or secondarily, to nationality, for all assets, the Convention declines to accept the scission or dual rule of traditional Anglo-American choice of law.[125] This

---

118. Article 22 states:

1. The Convention applies in a Contracting State to the succession of any person whose death occurs after the Convention has entered into force for that State.
2. Where at a time prior to the entry into force of the Convention in that State the deceased has designated the law applicable to his succession, that designation is to be considered valid there if it complies with Article 5.
3. Where at a time prior to the entry into force of the Convention in that State the parties to an agreement as to succession have designated the law applicable to that agreement, that designation is to be considered valid there if it complies with Article 11.

Hague Conference on Succession, *supra* note 2, art. 22.

119. *See generally* Hague Conference on Sucession, *supra* note 2.

120. *Id.*

121. *See supra* note 16. Anglo-American countries rely heavily upon the deceased person's domicile, which may be changed quickly and easily, while many civil law countries rely on nationality, a concept which is more persistent and difficult to change. Scoles memorandum I, *supra* note 13, at 7-8.

122. Scoles memorandum I, *supra* note 13, at 7.

123. *Id.* (Referring to, for example, Hague Convention on Child Abduction, arts. 3-4, 8, ratified by the United States in 1988.) Notwithstanding this treaty, the term "habitual residence" is not yet customary in United States conflict of laws jargon. *Id.* In the Conference debates, the meaning of "habitual residence" is primarily comparable to that which American attorneys refer to as domicile. *See* Scoles, *Choice of Law in Family Property Transactions*, 209 RECUEIL DES COURS 9, 24 (1988-II); *cf.* E. SCOLES & S. HAY, *supra* note 105.

124. Scoles memorandum I, *supra* note 13, at 8 (citing D. Waters, Report, Succession §§ 10-11, Prel. Doc. 12, HCOPIL Mar. 1988).

125. *See* Memorandum from Peter W. Salsich, Jr. to Max Gutierrez, Jr. & John S.

advancement appears to be quite beneficial. Application of the situs rule is distinctively restricted to instances where there is no conflict, such as the decedent's residence at her domicile, or at other homes elsewhere.[126] Resultingly, inordinate amounts of time are spent handling "non-domiciliary real property" in the decedent's estate, when compared to its actual value.[127] Nevertheless, there is a considerable risk that an unforeseen distortion in current estate planning will arise as a consequence of applying the situs rule to investments because current investments associated with real property take numerous forms.[128] Methods of recording or ascertaining title to land are not dealt with by the members of the Convention.[129] Moreover, the Convention does not consider the taxation or improvement of land, or the purpose for which the land is being used.[130] Rather, the Convention only identifies the law that establishes who takes and in what proportion.[131] For example, "[i]f the estate owner dies testate, the Convention identifies the law, usually of [the decedent's] domicile, which governs [her] will, but the will determines the shares [her] successors take from the estate, including . . . land wherever it may be located."[132] Under the Convention, one law will apply to the inventory of movable

---

Hollyfield, Co-Chairs, Task Force on Succession (March 9, 1990) at 4-5 [hereinafter Salsich memorandum]. The common law courts maintained the traditional scission approach, by which the law of the situs governs issues concerning land, while the law of the decedent's domicile governs all movable assets of the decedent's estate. Scoles memorandum II, *supra* note 85, at 5. In contrast, most civil law countries have typically employed a "unitary" approach, thereby applying the law of the decedent's nationality to all of the decedent's assets, irrespective of whether they are movable or immovable. *Id.*

126. Scoles memorandum I, *supra* note 13, at 9.

127. *Id.*

128. *Id.*; *see infra* notes 137-38 and accompanying text.

129. Scoles memorandum I, *supra* note 13, at 9. This is so because the situs state has a considerable stake in the succession of a decedent's estate, including "establishing a reasonably clear and fair system for resolving conflicts, maintaining the integrity of the public land records system, maintaining a tax base for property taxes that is commensurate with the needs of the state, and exercising police power controls over the use of land." Salsich memorandum, *supra* note 125, at 2.

130. Scoles memorandum I, *supra* note 13.

131. *Id.*

132. *Id.* The law in the United States can best be perceived in this regard. *Id.* If a spouse, for example, has a forced share in a decedent's estate which cannot under any circumstances be nullified, the Convention provides the law to determine that spouse's exact share. *Id.*

This method, according to Professor Scoles, is consistent with the UNIF. PROB. CODE § 2-201. *Id.* Further, it is consistent with the purpose of applying the law of the state predominately concerned with the family to both real and personal property as the estate is treated as a unit. *See* J. SCHOENBLUM, MULTISTATE & MULTINATIONAL ESTATE PLANNING, § 10.03 (2d ed. 1982).

assets, simplifying the lawyer's task.[133] If the decedent dies intestate, the same approach is followed for all assets. In other words, the law of the habitual residence will apply.[134]

As a further benefit, the Convention alleviates the problems of characterizing assets as real or personal, movable or immovable.[135] This so-called "scission" in Anglo-American conflict of laws rules has created much frustration and skepticism, resulting in needless litigation.[136] The question arises, for example, as to whether "an investment in a partnership holding land, oil royalties, land under contract for deed, a condominium, a cooperative apartment, a real estate investment trust, or a mortgage or mortgage pool, should be considered real property, the location of which will determine the spouse's forced share."[137] Under the traditional situs rule, atypical results have occurred in similar cases.[138] Whether one agrees or disagrees with the outcome of the cases, the uncertainty of the results of litigation on this point can simply be avoided by the unified application of the single reference under the Convention.[139] Organizations attempting to maintain uniformity among the states as to conflict of laws rules, however, confront problems with the aforementioned approach.[140] Courts have avoided using the "situs rule," as it is not as monolithic as it is presumed to be.[141] For example, succession is one

133. Scoles memorandum II, *supra* note 85, at 6.

134. *Id.*

135. *See id.*

136. *See* Scoles, *supra* note 4.

137. *Id.* at 58. It is offensive to most spouses and children that their interests may be decided by the law of the place where decedent had business holding, usually arranged by mail or telephone and usually relating to land in a place with which neither the family nor the decedent had any meaningful connection. *Id.* Clearly, most people would expect their interests to be determined by the law of the place where the decedent and family resided and made their home. *See id.*

138. *See* R. WEINTRAUB, COMMENTARIES ON CONFLICT OF LAWS §§ 8.1-8.22 (3d ed. 1986). Even states endorsing the principle of scission have perceived growing complications with the mechanical application of the *lex situs* with respect to immovables and were prepared to move towards applying one single law, as long as precautions were taken so as to maintain the use of distinct policy rules which pertain to immovables. van Loon, *supra* note 1, at 275.

139. *See* Scoles, *supra* note 4, at 58.

140. *See* Reese, *supra* note 1, at 884.

141. *See id.* at 885-86. Each state has its own approaches to and preconceptions of the subject. Few states will be inclined to agree to any complete departure from their existing rules and principles. *Id.* at 884.

> Either the provisions of a convention are likely to be so broad as to afford only a general guide to decisions, and hence to be unsuitable for a convention designed to achieve uniformity of result in some area of conflict of laws, or by reason of their

field in which there has been a notable digression.[142]

A primary objective of the Convention is to reduce the difficulties facing both clients and attorneys who deal with international estates.[143] Because the Convention's provisions closely parallel existing estate planning practices, it should facilitate present planning techniques and make their enforcement more assured.[144] The Convention does not apply to non-probate transfers[145] and does not preclude the application of other law to testamentary trusts.[146] The identified law will safeguard most estate plans.[147] As indicated above, there are no major changes in the tax or procedural aspects of probate administration resulting from the Convention.[148]

Inter vivos transactions are extremely commonplace in the United States because they have important tax consequences. They are not included in the decedent's gross estate and are thus excluded from any tax liability.[149] Significant economic incidents arise at the death of an estate owner.[150] Therefore, in order to protect inter vivos transactions, there was a "forceful and persistent effort by the Anglo-American delegates to the Hague Conference that resulted in the express exclusion of these types

---

precision, it may be feared that the provisions would compel the courts to reach unfavorable results in situations that either are known or, although currently unforseen, would fall within their literal scope of application.

Id. at 885-86.

142. *See* R. WEINTRAUB *supra* note 142; *see also* Scoles, *supra* note 125, at 67. Most scholars have advocated its abandonment in favor of a more functional approach. *See* R. WEINTRAUB, *supra* note 142, at § 8.21A. In an area of choice of law, where the only truly sensitive issue is that of family protection, it is submitted that the unitary reference is preferable to the application of the situs rule. *Id.*

143. *See* Salsich memorandum, *supra* note 125, at 3.

144. *See id.*

145. *See supra* note 11.

146. Article 14 coordinates this Convention on succession with the Trust Convention as follows: "1. Where a trust is created in a disposition of property upon death, the application to the succession of the law determined by the Convention does not preclude the application of another law to the trust." Hague Conference on Succession, *supra* note 2, art. 14, at 151. "Thus, if a testamentary trust is established by a decedent's will, the Succession Convention would apply to those succession issues which would arise under the will but a different law could be designated by the testator to govern administration of the trust." Scoles memorandum II, *supra* note 85, at 11.

147. Scoles memorandum I, *supra* note 13, at 11.

148. *See supra* note 105 and accompanying text.

149. *See* I.R.C. § 2031 (1986).

150. Scoles memorandum I, *supra* note 13, at 11.

of transactions from the Convention."[151] Accordingly, the Convention is limited in scope to assets passing through the decedent's estate by will, intestacy, or mandatory forced share provision.[152] This limitation is important because it maintains the reliance on *inter vivos* transactions, thereby protecting the decedent's intentions.[153] In acknowledging a separate governing law for trusts, article 14 simplifies the employment of *inter vivos* trusts, pour-over wills,[154] and testamentary trusts.[155]

V. ADVANTAGES OF A UNIFORM INTERNATIONAL WILL FORM

The first advantage of a uniform will form, especially to attorneys who practice in the field of international estate planning, is the clarity and simplicity that it offers in handling the estate.[156] Simplicity promotes utilization of the will form, for if it is to be effective it is necessary that it appeal to testators.[157]

With respect to Americans possessing assets abroad, the uniform will immensely reduces the necessity of researching and deciphering foreign choice of law rules or the need to actually draft a will in accordance with a particular country's laws.[158] Multiple wills may tend to minimize the problem of conflict of laws. However, the potential problems that may arise from multiple wills are endless. For example, there may be complications associated with the debts and estate administration duties that result from the requisite separate administration.[159]

The foreign will may raise difficulties vis-a-vis the domestic will if there are inconsistencies or ambiguities between the two or if a court

---

151. *Id.*; *see* Hague Conference on Succession, *supra* note 2, art. I (2)(d), at 150.

152. *Id.*; *see supra* notes 78-115 and accompanying text.

153. Scoles memorandum I, *supra* note 13, at 11.

154. Pour-over is a provision in a will which directs the distribution of property into a trust. BLACK'S LAW DICTIONARY 1052 (5th ed. 1979).

155. Scoles memorandum I, *supra* note 13, at 11. A further consideration of the delegates' attempt to limit the Convention solely to incidents of succession. *Id.*; *see supra* note 148 and accompanying text.

156. Note, *supra* note 26, at 331.

157. *Id.* It seems logical that formal requirements of a will should be minimal if they are to be the "preferred" vehicle for disposing of the decedent's property. *Id.*; *see* Nadelmann, *supra* note 57, at 372.

158. Note, *supra* note 26, at 331; Brandon, *supra* note 73, at 745.

159. Note, *supra* note 26, at 331; *see* Hall, *supra* note 61, at 885; *see also* Lowenthal v. Rome, 57 Md. App. 728, 471 A.2d 1102 (1984).

merely has trouble comprehending the foreign will.[160] This problem could easily be avoided if testators were not required to write more than one will to govern the disposition of their assets. The uniform will form would facilitate the time consuming and intricate task of judges in ascertaining the validity of the terms of foreign will provisions, as well as saving the estate the accompanying expenses.[161]

Foreigners living in this country would also benefit from the uniform international will. Respecting the testamentary wishes of foreigners holding property in the United States is "good policy,"[162] for to do otherwise would impede the foreign investment on which the United States depends.[163] International will uniformity would exist for the first time in the United States since people would rely, with certainty, on the form to be respected in places other than their own domicile.[164]

There would also be fewer will contests as a result of the "certainty of disposition."[165] The foreign character of a foreign will induces parties to challenge it insofar as there is confusion about its terms or the cognizance that a court may distort the instrument in their favor.[166] This has been a perpetual and costly problem, for will contests lead to the diminution of estates.[167] The potential expense of retaining foreign lawyers and, if necessary, foreign expert witnesses is substantial.[168] This cost could be entirely avoided with the adoption of the Uniform International Will.

Time is yet another factor for consideration. As a result of the rapid fluctuations in currency exchange rates in today's world, the speedy administration of estates involving foreign property is critical.[169]

---

160. Note, *supra* note 26, at 331.

161. *Id.* at 331-32; *see* Hall, *supra* note 61, at 854-55.

162. Hall, *supra* note 61, at 854-55.

163. *Id.* Foreigners emigrating to the United States expecting to become United States citizens would also benefit from the uniform will form. *Id.*

164. S. DOC. NO. 385-17, 99th Cong., 2d Sess. 3 (1986).

165. Note, *supra* note 26, at 332. "Because of the simple requirements for validity and the likelihood that the will would be in the native tongue of the testator, the terms of a testator's international will would be much less susceptible to attack than would a foreign will." *Id.*

166. *Id.* There is a strong public policy rationale in favor of reducing the number of potential will contests because they tend heedlessly to exhaust resources. *Id.* Additionally, will contests may strain relations among family members, causing tension where members are aligned against each other. *Id.*

167. *Id.*

168. *Id.*

169. Hall, *supra* note 61, at 851 (commenting that the practice of the rich is to devise

Additionally, the emotional pain that is experienced by the decedent's family while waiting for a will to be admitted to probate can be somewhat alleviated, if not obliterated altogether, by the adoption of a Uniform International Will.

VI. CONCLUSION

Problems in the area of succession of property upon the death of the owners have been a substantial concern of the international community for years. Insofar as succession of family property is intimately tied to local societal views of the family, the substantive laws differ from nation to nation, rendering unification very difficult and improbable. Courts have tended to apply their own domestic law. This has led to many will contests raising questionable jurisdictional theories involving costly and extensive negotiation or litigation.

These problems have become magnified due to the increasing mobility of capital and persons, the ease of communication, and the global economy. The number of estates of deceased persons for which more than one legal system may be applicable is growing and is likely to increase even further in the future.[170] Foreign investment continues to grow and, thus, testators deserve the same testamentary protection for their foreign assets as they receive for their domestic assets. If adopted, the Uniform International Will would encourage, if not ensure, the testator that her wishes would be respected. The adoption of the uniform will provides a way to solve these difficulties because it uses choice of law rules to identify a single law to govern the whole estate as a unit.

The Hague Convention on the Law Applicable to Succession to the Estates of Deceased Persons illustrates the opportunity for a genuine advancement in the private international law governing decedents' estates. The Convention represents a workable compromise between two major choice of law approaches. The general approach of the Convention may prove useful to many United States citizens, insofar as it would establish uniform regulations, virtually assuring testators that their assets will be

---

revocable trusts). Apparently, it is feasible to make, as well as lose, money in currency fluctuations. *See id.* Nonetheless, it is inappropriate to succumb the testator's estate to the vagaries of currency exchange. *See id.*

170. *See* van Loon, *supra* note 1, at 275. This is due to the increased migration of workers, growth in the number of multinational marriages, increased movement of refugees, acquisition of primary or secondary residences in countries with a favorable climate, increasing transnational investment, and a growing number of postings for employment in foreign countries created by multinationals and international organizations. *Id.*

distributed in accordance with their wishes. It provides instructive guidance by which persons and courts can easily identify the applicable law in most cases, without delay or litigation. This ease in determining and predicting the applicable law in international estates and estate planning transactions for both outgoing and incoming members of our population should provide assurance to international itinerants and the attorneys who advise them. United States attorneys in particular should find the Convention valuable because they are constantly faced with perplexing choice of law doctrines and doubt as to predictably reliable means of resolving the issues.

Adoption of the Convention by the United States will not only manifest its seriousness in participating in international agreements, but will also provide a solution to an ever-increasing problem among United States citizens with contacts abroad.

Lisa N. Frankel