OPM 2145/58/1 No. 315

MEMORANDUM FOR THE CABINET

BY THE HON. MINISTER OF JUSTICE

Hague Convention on the Conflict of Laws Relating to the Form of Testamentary Dispositions

1. The Hague Convention of 1961 on the Conflict of Laws relating to the form of Testamentary Dispositions seeks to establish in the countries acceding to the Convention a uniform system of provisions affecting the validity of wills.

2. Our Civil Code, besides prescribing the form and the conditions for the validity of wills made in Malta, further provides under section 719 that a will made outside Malta shall be valid only if "it is made in the form prescribed by the law of the place in which the will is made".

3. The Convention above referred to upholds the validity of a will in any of the following cases, that is to say, if the will is made in the form prescribed by the law of -

(a) the place where it is made; or

(b) the nationality of the testator, either at the time when he made the will or at the time of his death; or

(c) the domicile of the testator, either at the time when he made the will or at the time of his death; or

(d) the place of habitual residence of the testator, either at the time when he made the will or at the time of his death; or

(e) the place where the immovables disposed of by the will are situated, but limitedly to the disposition

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anent such immovables.

4. By far more reaching in their effect are the implications ensuing from Article 5 of the said Convention which lays down that "any provision of the law which limits the permitted forms of testamentary dispositions by reference to the age, nationality or other personal conditions of the testator, shall be deemed to pertain to matters of form. The same rule shall apply to the qualifications that must be possessed by witnesses required for the validity of a testamentary disposition."

5. The principle enunciated in the first part of the said Article 5, in fact, implies that the law governing the capacity of the testator shall be the same law governing the form of the will. There is no provision in our Civil Code as to which law is to govern the capacity of the testator and we follow, in this matter, the general rules of private international law as accepted in the United Kingdom. That country, by the Wills Act, 1963, has now adopted the new principle laid down in the said Convention, but, before the enactment of that law, the general principle was that "with regard to wills of immovables the rule of the common law is that it is the lex situs, and the lex situs exclusively, which decides whether the testator has capacity", and with regard to wills of movables "the capacity of a testator is determinable by the law of his domicil" (Cheshire's Private International Law).

6. The general legal doctrine in the matter of "testaments" is that, since they represent the free expression of one's will regarding the disposal of

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one's property after death, their validity should be upheld as much as possible and, also, that it should not be made difficult for one to express such will. The Convention under reference, by providing that a will may be validly executed in more than one form, goes a very long way to fulfill the requirements of the said legal doctrine and, consequently, the reaction to that part of the Convention which makes it possible for an individual to execute a will in any one of the forms mentioned in paragraph 3, above, cannot be other than favourable. But that part of the Convention which makes the capacity of the testator depend on the law of the place governing the form of the will causes some apprehension, since its acceptance would enable a person domiciled in Malta, not having the capacity to make a will, to go in a country where that person would have such capacity and to make a valid will even with regard to immovable property situate in Malta. Thus, while under section 634 (e) of our Civil Code a person who is interdicted on the ground of prodigality would be unable to make a will in Malta, a Maltese citizen domiciled in Malta, who is so interdicted, would be able to make a valid will in a country in which interdiction for prodigality as a cause of incapacity to make wills does not exist: such a country is Italy whose Civil Code, under section 591, establishes incapacity in regard to those persons who "sebbene non interdetti, si provi essere stati, per qualsiasi causa, anche transitoria, incapaci d'intendere o di volere nel momento in cui fecero testamento" but considers interdiction as a cause of incapacity to make a will only where it is due to infirmity of mind.

7. Article 11 of the Convention allows a Contracting State to reserve the right to exclude, in its own legislation, the validity of a will made abroad if such will would be valid as to form only because of the place where it was made, if it was made by a testator having the nationality of, and being domiciled or having his habitual residence in, the State making the reservation and if the testator did not die in the State where he made the will: moreover, such exclusion is allowed by the said article 11 limitedly to the property situated in the State making the reservation.

8. The said right of reservation permissible under article 11 of the Convention, if exercised, while defeating to some extent the scope of the Convention, would have the effect to reduce considerably, but not altogether, the objectionability to that part of the Convention which links the matter of the capacity to make wills with the matter of the form of wills.

9. In the light of the aforesaid considerations, having special regard to the points raised on the capacity to make wills but also to the fact that the Convention under reference has been acceded to by such countries as the United Kingdom, Austria, Belgium, Denmark, Spain, Finland, France, Greece, Italy, Japan, Luxembourg, Norway, the Netherlands and Portugal, Hon. Ministers are required to state whether they approve that the said Convention be acceded to by the Government of Malta and, in the affirmative, whether the right of reservation allowed under article 11 should be exercised. On the other hand, Hon. Ministers, while not approving the introduction into

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our Civil Code of the principle rendering the capacity to make wills a matter of form and while, therefore, deciding that the Convention should not be acceded to, might consider it advisable to agree that the provisions of the Convention extending the number of cases where a will would be valid by reason of its form should be introduced into our Civil Code through the appropriate amendments.

10. Should Hon. Ministers decide that the Convention is to be acceded to by the Government of Malta, besides deciding whether the reservation mentioned under para. 7, above, should be made, they will have also to decide whether any of the following reservations are also to be made, viz:-

(a) In derogation of a provision in Article 1 of the Convention which lays down that "the determination of whether or not the testator had his domicile in a particular place shall be governed by the law of that place", a reservation is allowed whereby a Contracting State may choose to have the matter of domicile determined in accordance with the law of the country of the court deciding upon such issue ("lex fori"). It may be advisable to make this reservation not only in order to maintain what appears to be the present position in Malta but also because it is easier for our Courts to apply our own rules on domicile than to have to apply the rules on such subject of another country, say, of Sweden or of Brazil, as the case may require.

(b) A reservation may be made to the effect that testamentary dispositions made orally by a Maltese

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citizen possessing no other nationality would not be valid. It seems advisable to exercise this right of reservation.

(c) By another right of reservation, which it appears advisable to exercise, a contracting State may reserve the right to exclude from the application of the Convention any testamentary clauses which do not relate to matters of succession.

(d) In derogation to Article 8 of the Convention which provides that the Convention shall be applied in all cases where the testator dies after its entry into force - which means that the Convention would apply also to wills made in the past - a reservation is allowed whereby the Convention would apply only to testamentary dispositions made after its entry into force. The making of this reservation appears also to be desirable.

11. While deciding on whether the Government of Malta should accede to the Convention or not, Hon. Ministers may also bear in mind that in accordance with Article 6 of the Convention "the application of the rules of conflicts laid down in the present Convention shall be independent of any requirement of reciprocity. The Convention shall be applied even if the nationality of the persons involved or the law to be applied by virtue of the foregoing Articles is not that of a Contracting State".

12. The last point to be considered, in the event of Hon. Ministers deciding that the Convention should be acceded to, is whether it is proper on the eve of

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independence that the Convention be extended to Malta by a declaration made to that effect by the United Kingdom as the country responsible for Malta's international relations or, rather, whether it would not be more appropriate that the Convention be acceded to directly by the Government of Malta after independence date.

18th August, 1964.