

The Hague Marriage Convention

The *Hague Convention of 14 March 1978 on Celebration and Recognition of the Validity of Marriages* may be seen as implementing, for international and in particular cross-border situations, the provision of Article 23 of the *United Nations International Covenant on Civil and Political Rights*,¹ which places the right of marriage of men and women of marriageable age in the foreground, and bases marriage on the free and full consent of the intending spouses. To that end, the Hague Convention does two things: it facilitates the **celebration** of marriages, and it ensures the **recognition** of the validity of marriages across national borders. Part I of the Convention deals with celebration of marriage; Part II with the recognition of foreign marriages.

The international aspects of the celebration of marriages

Part I, on celebration, makes the law of the place of celebration, the *lex loci celebrationis*, the primary reference. This applies first of all to the **formal** requirements for the marriage: formalities, witnesses, etc (Article 2). This is hardly surprising, because this is one of the few questions of choice of law on which most systems of private international law agree. But it also applies to the **material or substantive** requirements of the marriage (Article 3, paragraph 1). This is in accordance with the approach some countries, in particular immigration countries, have taken, but is new to many countries of the civil law, and some of the common law tradition, which tend to apply the personal law of each future spouse to determine the substantive requirements of the marriage.

The law of the celebration approach of Article 3, paragraph 1, is simple and has **three major advantages**: (1) local authorities can apply the requirements of their **own law** in respect of consent of the parties or age and degree of prohibited relationship (*e.g.*, uncle and niece), and not the requirements of the law of the domicile, nationality or community of foreign marriage candidates; (2) it **avoids characterisation problems**, for example, the problem of determining whether a parent's consent is a matter of form or of substance, because the applicable laws will coincide; and (3) it allows **unusual or oppressive requirements** of a foreign law (*e.g.*, any requirements based on race or colour) **to be ignored**.

¹ Article 23 of the International Covenant on Civil and Political Rights of 16 December 1966 reads as follows:

- "1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
2. The right of men and women of marriageable age to marry and to found a family shall be recognized.
3. No marriage shall be entered into without the free and full consent of the intending spouses.
4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children."

It should be noted that Articles 3-6 apply a technique which leaves Contracting States a certain flexibility. On the one hand, they may, under Article 6, reserve the right to maintain certain exceptions to the reference rule in Article 3 (1) (*i.e.* that of applying the *lex celebrationis* to the substantive requirements for the celebration of marriages). None of the States Parties to the Convention, however, has made the reservation of Article 6.

On the other hand, Contracting States may **extend** the *lex loci celebrationis* to **all** marriage celebrations. This is what Australia has done when it ratified the Convention.² Accordingly, a marriage must be celebrated in that State where the future spouses meet the substantive requirements of its internal law. This approach also works as a simplification of Articles 3-6, because the only law applied will be the internal law, not any foreign law.

Recognition of the validity of foreign marriages

While Part I of the Convention, on celebration, is optional and may be excluded, Part II, on the recognition of the validity of marriage, in contrast is mandatory. The question of the recognition of the validity of marriages is critical in an age of exponential growth of mobility. The basic rule of the Convention is a simple one: the State of celebration – it is important to note that this may be **any** State, not just another *Contracting* State – determines the validity of the marriage, and the Contracting States are bound, subject to a limited number of exceptions and subject of course to the mandates of their *ordre public*, to recognise the validity of the marriage **if valid according to the law of the State of celebration** (Article 9). This has the great advantage of avoiding the need to review the applicable law under the conflict of laws rules of the recognising State. Special provision is made for marriages concluded by diplomats or consuls. Where a competent authority of the State where the marriage was celebrated has issued a marriage certificate, the marriage shall be presumed to be valid until the contrary is established (Article 10).

A limited number of exceptions are allowed (Article 11): a Contracting State *may* (not *must*) only refuse to recognise the validity of a marriage where at the time of the marriage under the law of the requested State, (1) one of the spouses was **already married**; or (2) the spouses were **related to one another, in the direct line** or as **brother and sister**; or (3) one of the spouses had **not attained the minimum age** required for marriage; or (4) if one of the spouses **lacked the capacity** to give their consent or (5) did **not freely consent** to the marriage. In addition, *ordre public* may be invoked by the requested State, for example, when in a concrete case the marriage certificate, or the underlying marriage itself, is a fake or is otherwise fraudulent. So, while the Convention favours the recognition of marriages, it avoids the possibility of resorting to “marriage heavens”.

The rules on recognition of the validity of a marriage also apply where the recognition question arises in the context of another question, *e.g.*, in the context of a re-marriage: the validity of the previous marriage is then referred back to the law of the place of celebration.

Although the Convention has not yet been ratified by many States (currently Australia, Luxembourg and the Netherlands are States Parties), it is very modern in its approach. It has been a model for recent work by the International Commission on Civil Status. The Convention is simple, straightforward, and, in many ways ahead of its time. It deserves to be looked at more closely than has perhaps been the case thus far.

² The Australian Marriage Act Amendment Act (1985) chose not to maintain the preexisting rule requiring the application of the law of the domicile of the future spouses to questions of material validity, and streamlined the Australian choice of law rule entirely according to the *lex loci celebrationis*.