Conférence de La Haye de droit international privé
Hague Conference on private international law

Convention sur la loi applicable aux successions à cause de mort

Convention on the law applicable to succession to the estates of deceased persons

Texte adopté par la Seizième session
Text adopted by the Sixteenth Session

Rapport explicatif de Explanatory Report by

Donovan W. M. Waters

Tirage à part des Actes et documents de la Seizième session (1988)
Tome II, Successions – loi applicable

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Avertissement

1 *Le contenu de la présente brochure est repris des* Actes et documents de la Seizième session (1988), tome II, Successions – loi applicable.
Cette dernière publication contient en plus des pages ci-après reproduites, les documents préliminaires, rapports et procès-verbaux, relatifs aux travaux de la Deuxième commission de la Seizième session. Ce volume pourra être commandé par l'intermédiaire des librairies ou du Bureau Permanent de la Conférence ou, directement, à l'Imprimerie Nationale des Pays-Bas: Editions SDU, Boîte postale 20014, 2500 EA La Haye.

2 *Le Rapport explicatif de M. Donovan W. M. Waters commente la Convention adoptée par la Seizième session et figurant dans l'Acte final du 20 octobre 1988. Ce Rapport a été traduit en français par M. Robert Daumières, ancien premier secrétaire à la Cour internationale de Justice.*

3 *La pagination entre crochets est propre au présent document, l'autre pagination est celle du volume susmentionné des Actes et documents de la Seizième session.*

4 *La Convention a reçu sa première signature, celle de la Suisse, le premier août 1989 et porte donc cette date.*

5 *Le Bureau Permanent de la Conférence, 6, Scheveningseweg, 2517 KT La Haye, Pays-Bas, télécopie (70) 360 48 67, fournira très volontiers aux intéressés tous renseignements sur les travaux de la Conférence.*

La Haye, août 1990.

Preface

1 *The contents of this pamphlet have been drawn from the* Proceedings of the Sixteenth Session (1988), Tome II, Succession to estates – applicable law.
This latter publication contains in addition to the pages hereinafter reproduced the preliminary documents, reports and summaries of discussions relating to the work of the Second Commission of the Sixteenth Session. The full volume can be ordered either through booksellers or from the Permanent Bureau of the Conference or, directly, from the Netherlands Government Printing Office: SDU Publishers, Postbox 20014, 2500 EA The Hague.

2 *The Explanatory Report of Professor Donovan W. M. Waters serves as a commentary on the Convention adopted by the Sixteenth Session, which is set out in the Final Act of 20 October 1988. This Report was translated into French by Mr Robert Daumières, formerly First Secretary at the International Court of Justice.*

3 *The page numbers placed within brackets refer to the pages of this document, the other page numbers being those of the bound volume mentioned above of the Proceedings of the Sixteenth Session.*

4 *The Convention was first signed on 1 August 1989 by Switzerland and therefore will bear that date.*

5 *The Permanent Bureau of the Conference, 6, Scheveningseweg, 2517 KT The Hague, Netherlands, telefax (70) 360 48 67, will be glad to furnish interested persons any information desired concerning the work of the Conference.*

The Hague, August 1990.

Convention

Extract from the Final Act of the Sixteenth Session signed on the 20th of October 1988*

CONVENTION ON THE LAW APPLICABLE TO SUCCESSION TO THE ESTATES OF DECEASED PERSONS

The States signatory to this Convention,

Desiring to establish common provisions concerning the law applicable to succession to the estates of deceased persons,

Have resolved to conclude a Convention for this purpose and have agreed upon the following provisions –

CHAPTER I – SCOPE OF THE CONVENTION

Article 1

1 This Convention determines the law applicable to succession to the estates of deceased persons.

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.

Article 2

The Convention applies even if the applicable law is that of a non-Contracting State.

CHAPTER II – APPLICABLE LAW

Article 3

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 that State applies.

3 In other cases succession is governed by the law of the State of which at the 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.

Article 4

If the law applicable according to Article 3 is that of a non-Contracting State, and if the choice of law rules of that State designate, with respect to the whole or part of the succession, the law of another non-Contracting State which would apply its own law, the law of the latter State applies.

Article 5

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.

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 For the purposes of this Article, 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.

Article 6

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.

* For the complete text of the Final Act, see *Proceedings of the Sixteenth Session (1988)*, tome I, *Miscellaneous matters*

Article 7

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 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 favour 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.

3 Paragraph 2 does not preclude the application in a Contracting State of the law applicable under this Convention to other matters which are considered by that State to be governed by the law of succession.

CHAPTER III – AGREEMENTS AS TO SUCCESSION

Article 8

For the purposes of this Chapter an agreement as to succession is an agreement created in writing or resulting from mutual wills which, with or without consideration, creates, varies or terminates rights in the future estate or estates of one or more persons parties to such agreement.

Article 9

1 Where the agreement involves the estate of one person only, its material validity, the effects of the agreement, and the circumstances resulting in the extinction of the effects, are determined by the law which under Article 3 or 5, paragraph 1, would have been applicable to the succession to the estate of that person if that person had died on the date of the agreement.

2 If under that law the agreement is invalid, it is nevertheless valid if it is valid under the law which at the time of death is the law applicable to the succession to the estate of that person according to Article 3 or 5, paragraph 1. The same law then governs the effects of the agreement and the circumstances resulting in the extinction of the effects.

Article 10

1 Where the agreement involves the estates of more than one person, the agreement is materially valid only if it is so valid under all the laws which, according to Article 3 or 5, paragraph 1, would have governed the succession to the estates of all those persons if each such person had died on the date of the agreement.

2 The effects of the agreement and the circumstances resulting in the extinction of the effects are those recognized by all of those laws.

Article 11

The parties may agree by express designation to subject the agreement, so far as its material validity, the effects of the agreement, and the circumstances resulting in the extinction of the effects are concerned, to the law of a State in which the person or any one of the persons whose future estate is involved has his habitual residence or of which he is a national at the time of the conclusion of the agreement.

Article 12

1 The material validity of an agreement valid under the law applicable according to Article 9, 10 or 11 may not be contested on the ground that the agreement would be invalid under the law applicable according to Article 3 or 5, paragraph 1.

2 However, the application of the law applicable according to Article 9, 10 or 11 shall not affect the rights of anyone not party to the agreement who under the law applicable to the succession by virtue of Article 3 or 5, paragraph 1, has an indefeasible interest in the estate or another right of which he cannot be deprived by the person whose estate is in question.

CHAPTER IV – GENERAL PROVISIONS

Article 13

Where two or more persons whose successions are governed by different laws die in circumstances in which it is uncertain in what order their deaths occurred, and where those laws provide differently for this situation or make no provision at all, none of the deceased persons shall have any succession rights to the other or others.

Article 14

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. Conversely, the application to a trust of its governing law does not preclude the application to the succession of the law governing succession by virtue of the Convention.

2 The same rules apply by analogy to foundations and corresponding institutions created by dispositions of property upon death.

Article 15

The law applicable under the Convention does not affect the application of any rules of the law of the State where certain immovables, enterprises or other special categories of assets are situated, which rules institute a particular inheritance regime in respect of such assets because of economic, family or social considerations.

Article 16

Where under the law applicable by virtue of the Convention there is no heir, devisee or legatee under a disposition of property upon death, and no physical person is an heir by operation of law, the application of the law so determined does not preclude a State or an entity appointed thereto by that State from appropriating the assets of the estate that are situated in its territory.

Article 17

In this Convention, and subject to Article 4, law means the law in force in a State other than its choice of law rules.

Article 18

The application of any of the laws determined by the Convention may be refused only where such application would be manifestly incompatible with public policy (*ordre public*).

Article 19

1 For the purposes of identifying the law applicable under this Convention, where a State comprises two or more territorial units, each of which has its own system of law or its own rules of law in respect of succession, the provisions of this Article apply.

2 If there are rules in force in such a State identifying which law among the laws of the two or more units is to apply in any circumstance for which this Article provides, the law of that unit applies. In the absence of such rules the following paragraphs of this Article apply.

3 For the purposes of any reference in this Convention, or any designation by the deceased pursuant to this Convention,

a the law of the State of the habitual residence of the deceased at the time of designation or of his death means the law of that unit of the State in which at the relevant time the deceased had his habitual residence;

b the law of the State of the nationality of the deceased at the time of designation or of his death means the law of that unit of the State in which at the relevant time the deceased had his habitual residence, and in the absence of such an habitual residence, the law of the unit with which he had his closest connection.

4 For the purposes of any reference in this Convention, the law of the State of closest connection means the law of that unit of the State with which the deceased was most closely connected.

5 Subject to Article 6, for the purposes of any designation pursuant to this Convention whereby the deceased designates the law of a unit of the State of which at the time of designation or of his death

a he was a national, that designation is valid only if at some time he had had an habitual residence in, or in the absence of such an habitual residence, a close connection with, that unit;

b he was not a national, the designation is valid only if he then had his habitual residence in that unit, or, if he was not then habitually resident in that unit but was so resident in that State, he had had an habitual residence in that unit at some time.

6 For the purposes of any designation under Article 6 with regard to particular assets whereby the deceased designates the law of a State, it is presumed that, subject to evidence of contrary intent, the designation means the law of each unit in which the assets are situated.

7 For the purposes of Article 3, paragraph 2, the required period of residence is attained when the deceased for the five years immediately preceding his death had his residence in that State, notwithstanding that during that period he resided in more than one of the units of that State. When the period has been attained, and the deceased had an habitual residence in that State at that time, but no habitual residence in any particular unit of that State, the applicable law is the law of that unit in which the deceased last resided, unless at that time he had a closer connection with another unit of the State, in which case the law of the latter unit applies.

Article 20

For purposes of identifying the law applicable under this Convention, where a State has two or more legal systems applicable to the succession of deceased persons for different categories of persons, any reference to the law of such State shall be construed as referring to the legal system determined by the rules in force in that State. In the absence of such rules, the reference shall be construed as referring to the legal system with which the deceased had the closest connection.

Article 21

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.

Article 22

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.

Article 23

1 The Convention does not affect any other international instrument to which Contracting States are or become Parties and which contains provisions on matters governed by this Convention, unless a contrary declaration is made by the States Parties to such instrument.

2 Paragraph 1 of this Article also applies to uniform laws based on special ties of a regional or other nature between the States concerned.

Article 24

1 Any State may, at the time of signature, ratification, acceptance, approval or accession, make any of the following reservations –

a that it will not apply the Convention to agreements as to succession as defined in Article 8, and therefore that it will not recognize a designation made under Article 5 if the designation is not expressed in a statement made in accordance with the requirements for a testamentary disposition;

b that it will not apply Article 4;

c that it will not recognize a designation made under Article 5 by a person who, at the time of his death, was not or was no longer either a national of, or habitually resident in, the State whose law he had designated, but at that time was a national of and habitually resident in the reserving State;

d that it will not recognize a designation made under Article 5, if all of the following conditions are met

– the law of the State making the reservation would have been the applicable law under Article 3 if there had been no valid designation made under Article 5,

– the application of the law designated under Article 5 would totally or very substantially deprive the spouse or a child of the deceased of an inheritance or family provision to which the spouse or child would have been entitled under the mandatory rules of the law of the State making this reservation,

– that spouse or child is habitually resident in or a national of that State.

2 No other reservation shall be permitted.

3 Any Contracting State may at any time withdraw a reservation which it has made; the reservation shall cease to have effect on the first day of the month following the expiration of three months after notification of the withdrawal.

CHAPTER V – FINAL CLAUSES

Article 25

1 The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Sixteenth Session.

2 It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention.

Article 26

1 Any other State may accede to the Convention after it has entered into force in accordance with Article 28, paragraph 1.

2 The instrument of accession shall be deposited with the depositary.

Article 27

1 If a State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall extend to all of its territorial units or only to one or more of them and may alter this declaration by submitting another declaration at any time.

2 Any such declaration shall be notified to the depositary and shall state expressly the territorial units to which the Convention applies.

3 If a State makes no declaration under this Article, the Convention is to extend to all territorial units of that State.

Article 28

1 The Convention shall enter into force on the first day of the month following the expiration of three months after the deposit of the third instrument of ratification, acceptance or approval referred to in Article 25.

2 Thereafter the Convention shall enter into force –

a for each State ratifying, accepting or approving it subsequently, or acceding to it, on the first day of the month following the expiration of three months after the deposit of its instrument of ratification, acceptance, approval or accession;

b for a territorial unit to which the Convention has been extended in conformity with Article 27, on the first day of the month following the expiration of three months after the notification referred to in that Article.

Article 29

After the entry into force of an instrument revising this Convention a State may only become Party to the Convention as revised.

Article 30

1 A State Party to this Convention may denounce it, or only Chapter III of the Convention, by a notification in writing addressed to the depositary.

2 The denunciation takes effect on the first day of the month following the expiration of three months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

Article 31

The depositary shall notify the States Members of the Hague Conference on Private International Law and the States which have acceded in accordance with Article 26 of the following –

a the signatures and ratifications, acceptances, approvals and accessions referred to in Articles 25 and 26;

b the date on which the Convention enters into force in accordance with Article 28;

c the declarations referred to in Article 27;

d the reservations and withdrawals of reservations referred to in Article 24;

e the denunciations referred to in Article 30.

In witness whereof the undersigned, being duly authorized thereto, have signed this Convention.

Done at The Hague, on the ..... day of ..... 19....,* in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the States Members of the Hague Conference on Private International Law at the date of its Sixteenth Session.

The Convention was signed on the first of August 1989 and thus bears that date.

Rapport
Report

Explanatory Report by Donovan W.M. Waters

Contents of the Report

INTRODUCTION

THE PROGRAMME OF WORK UNDERTAKEN BY THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

1 The Hague Conference on private international law when it met at its Fifteenth Session in 1984 decided to include the law applicable to decedents' estates in its agenda for the Sixteenth Session in 1988.

2 The preparatory work consisted of a Questionnaire and Commentary on Succession in Private International Law drawn up by the Secretary General, Mr Georges A.L. Droz, being an extract from the Acts and Documents of the Twelfth Session of 1972. It was accompanied by an Update to 1986 of the Commentary prepared by Mr Hans van Loon, First Secretary at the Permanent Bureau of the Conference (Preliminary Docnment No 1). The Governments of Australia, Argentina, Canada, China, Cyprus, Portugal, Turkey, United Kingdom and the United States of America offered additional replies to the Questionnaire (Preliminary Document No 3). These very valuable documents ware later followed in September 1986, by a Prospective Study of Succession in Private International Law (Preliminary Document No 2), again prepared by Mr Hans van Loon. This background study should be consulted by all those who wish to understand thoroughly the task which the Commission was then taking up.

3 A Special Commission was convened which held three sessions. The first took place between 17 and 21 November 1986, the second between 30 March and 10 April 1987, and the third between 28 September and 8 October 1987. The Special Commission elected as its Chairman Mr A.E. von Overbeck (Switzerland). The Vice-Chairman appointed was Mr A. Boggiano (Argentina), and Mr D. W. M. Waters (Canada) was appointed Reporter. Messrs von Overbeck, Boggiano and Waters served in these offices throughout the period of the Special Commission.
Experts participated in the Special Commission from the following countries: Argentina, Austria, Belgium, Canada, Czechoslovakia, Denmark, Federal Republic of Germany, Finland, France, Greece, Hungary, Ireland, Italy, Japan, Luxembourg, Mexico, Netherlands, Norway, China, Poland, Portugal, Spain, Sweden, Switzerland, Turkey, United Kingdom and the United States of America. Also participating were observers from the International Institute for the Unification of Private Law, the Commonwealth Secretariat, the International Commission on Civil Status, the International Union of Latin Notaries, the International Bar Association, and the *Association internationale des jeunes avocats*.

4 At the second session of the Special Commission a Drafting Committee was appointed. This Committee was presided over by Mr A. Boggiano (Argentina) as Chairman, and included as members Mr A. Duchek (Austria), Mr P.G.L. Lagarde (France), Mr A. Philip (Denmark), and the Reporter, Mr D.W.M. Waters (Canada). A Federal State Clause Committee was also formed with Mr E.F. Scoles (United States) as Chairman, and comprising as members Mrs A. Borrás Rodriguez (Spain), Mr D.J. Hayton (United Kingdom) and Mr J.A. Talpis (Canada).

5 The Special Commission adopted on 8 October 1987, a 'preliminary draft Convention on the law applicable to succession to the estates of deceased persons'. The preliminary draft and a report were submitted to the governments in March 1988.

The Governments of Denmark, Finland, Federal Republic of Germany, Israel, Italy, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States of America offered written comments (Preliminary Document No 13) on the preliminary draft Convention and Report.

6 The Sixteenth Session of the Conference was held at The Hague from 3 to 20 October 1988. It appointed as its President Mr J.C. Schultsz (Netherlands). General affairs of the Conference were entrusted to Commission I, while the preparation of a Convention on the law applicable to succession to the estates of deceased persons was entrusted to Commission II. This was the only Convention on the agenda for definitive treatment. Commission II appointed as its Chairman Mr A.E. von Overbeck (Switzerland) and as its Vice-Chairman Mr A. Boggiano (Argentina). Mr D.W.M. Waters (Canada) was invited to act as Reporter.
The number of States represented at the Sixteenth Session was greater than that which had been represented at the Special Commission, because delegations were present from Australia, Chile, Cyprus, Israel and Venezuela. The following countries were represented by delegates: Australia, Argentina, Austria, Belgium, Canada, Chile, Cyprus, Czechoslovakia, Denmark, Finland, France, Federal Republic of Germany, Greece, Hungary, Ireland, Israel, Italy, Japan, Luxembourg, Mexico, Netherlands, Norway, China, Poland, Portngal, Spain, Sweden, Switzerland, United Kingdom, United States of America, and Venezuela. The observers participating in the work on succession were from the International Institute for the Unification of Private Law, the Commonwealth Secretariat, the Organization of American States, the Council of Europe, the International Union of Latin Notaries, the International Bar Association, the *Association internationale des jeunes avocats* and the Inter-American Bar Association. They brought to the proceedings once again the valuable contribution of their knowledge and experience.

7 A Drafting Committee was appointed, with Mr A. Boggiano (Argentina) as Chairman. The other members appointed were Mr A. Duchek (Austria), Mr P.G.L. Lagarde (France), Mr A. Philip (Denmark), and the Reporter, Mr D.W.M. Waters (Canada).

8 A Federal State Clauses Committee was then appointed with Mr E.F. Scoles (United States) as Chairman, the other members being Mrs A. Borrás Rodriguez (Spain), Mr D.C. Edwards (Australia), Mr D.J. Hayton (United Kingdom), and Mr J.A. Talpis (Canada).

9 Commission II held nineteen meetings, and the Drafting Committee and Federal State Clauses Committee met as required on numerous occasions throughout the Sixteenth Session between meetings.
The work of the Permanent Bureau throughout the Session was indispensable to the success of the proceedings, and in particular Mr J.H.A. van Loon and Mr C.A. Dyer gave invaluable support to the meetings of the Commission, of the Drafting Committee, and of the Federal State Clauses Committee. All delegations also derived great benefit from the consistent and accurate work of the *ad hoc* Recording Secretaries, Mrs W.A. Allwood, Miss M.-C. de Lambertye, Miss S.E. Roberts, Miss K.S. Williams, and Messrs P. Blaquier-Cirelli, K. Morrison, and P. de Vareilles-Sommières. With such a large gathering of delegates reliance upon the accuracy and patience of the interpretation service was considerable, for nothing that was said could be missed and nuance must always be captured. Such a quality of service was given by Mrs M. Misrahi, Mrs M. Rühl, Mr P.A. Bosman-Delzons, and Mr P. Spitz.

10 The draft Convention in its entirety was adopted with no contrary votes and one abstention during the Plenary Session of 19 October 1988 and the Final Act, containing the draft Convention, was signed on 20 October 1988.

THE PURPOSE AND CHARACTER OF THIS REPORT

11 This Report is intended primarily to explain the provisions of the Convention to all those who were not present at The Hague during the Special Commission and the Sixteenth Session, and who choose or are called upon to understand the meaning of, and the intention behind, those provisions. As a consequence the Report furnishes an explanation of the text, article by article, having previously described the main characteristics of the Convention. It aims to reveal meaning also by giving some account, when discussing each article, of the course of the deliberations of Commission II and the final Plenary Session which led to the adoption of the chosen language. From time to time reference will be made to the work of the Special Commission, but the Report on that Commission's preliminary draft should be consulted for an exclusive study of that draft. While that Report also constituted a critical assessment of the preliminary draft for the benefit of governments, the present Report is essentially an explanatory document. For the rest it is an account of conclusions reached.

THE ORIGINS OF THE CONVENTION

12 The reasons for the Hague Conference on private international law embarking on the study of succession to the estates of deceased persons lay in the effects of the ever increasing mobility between jurisdictions during the last forty years of people of all income groups and ages.

13 Airline travel at economy prices has become a commonplace, so that vacations can be taken in the sun or the snow in places that formerly could only be imagined by the ordinary man or woman, while the modern media, especially television, has broadened the horizons of all those who seek economic betterment for themselves and their families. The traveller who acquires a second home in the favoured vacation spot, and the migrant worker who with or without his immediate family acquires assets including home and bank accounts in the country where he or she labours, have become familiar. Some countries have a significaut number of their nationals or habitual residents leaving temporarily, sometimes permanently, for foreign territories and shores, and other countries have substantial numbers of persons arriving as immigrants seeking ultimate citizenship in the new country, or definite or indefinite periods of employment in the better economic circumstances.

14 The European Common Market has meant that large numbers of professional people are 'on the move'. They are often under contract and working in countries other than those where they would otherwise have lived. Indeed people engaged in business and commerce today,

especially those in the employ of large corporations or international agencies and institutions, may find themselves for long periods of time living and making a home in any part of the world. And where countries are geographically small, as in Europe, movement across borders and the owning of assets in different countries are much more likely.

15 The result of all this is that, as we approach the last decade of the twentieth century, it is much more common than it used to be for ordinary men and women, the wealthy aside, to die leaving personal, investment, or business assets in more than one country. Their intended will beneficiaries may also be dispersed throughout a number of countries, or that ordinary man or woman simply dies without a will with next-of-kin similarly living in two or more countries. Spouse and infant children may be accompanying the migrant worker in the foreign country, or they remain in the worker's country of origin awaiting the return of that worker. So there are problems with assets in one or more countries, and family members dependent upon the traveller or the worker, members who may be with him or elsewhere, when death comes to him.

16 The notary in civil law countries, and the solicitor or attorney in common law countries, must deal with this situation. Snch a lawyer will not only confront different taxation systems, which is likely to be one of the first concerns of the deceased's family, but he will find the will or intestacy involves him in dealing with different systems of law or different succession laws.

17 Some countries will use one connecting factor, and other countries another, in order to determine which is the applicable law to apply to the succession to the deceased's estate. That is, some countries use the nationality of the deceased as the connecting factor, others the domicile, and very different results can flow from this. For example, suppose a Mexican national who lives and makes his home in London, England, has at his death assets in the Netherlands and Denmark. To the Netherlands assets the Netherlands will apply Mexican law as his national law, and to his Danish assets Denmark will apply English law as his domiciliary law. Now suppose that the assets include a house in Amsterdam. The Netherlands, being a 'unitarist' State, would apply Mexican law to this asset, but the United Kingdom is a 'scissionist' State (*i.e.*, it applies one law to movables, and another law – the situs – to immovables) and therefore for English succession purposes the law of the Netherlauds applies. At this point the lawyer needs to know whether the United Kingdom applies renvoi in matters of succession, and consequently would apply Mexican law as the law which the situs would apply. In addition to these conflict problems the lawyer must recall that the concept of 'succession' in the Netherlands and Denmark means the devolution, the transmission and – to the extent that this is not dealt with by the law of the last domicile, as is the case in the Netherlands – also the administration of assets; in England it means only the devolution of assets, administration and transmission being subject to the *lex fori*.

18 It is clear, therefore, that, while nothing could be done at the conflict of laws level to deal with the differing concepts of 'succession' between the civil law and common law countries, something could be done about the diversity of connecting factors and also the existence of both unitary and scissionist States. A single approach in both these areas would both simplify the winding up of deceased persons' estates and also reduce costs and the chances of error.

19 On the death of a family member each legal jurisdiction will have a response to the issue of provision for the immediate family; some jurisdictions will do nothing for the family, even though the surviving spouse and children be dependents of the deceased, but the majority do have some compulsory distribution among family members. The trouble is that among the latter jurisdictions techniques of determining the quantum and modus of distribution differ, as well as decisions as to who within the family should qualify for distribution. By choosing carefully the situs for his assets, such for instance as some of the tax havens, the testator can avoid the family protection laws of the system that would otherwise apply to his estate on death. But it is probable that most people do not fall into this category; the real problem will be that two or more different systems of law apply to the deceased's world assets, and each of those systems (if it provides at all) provides differently for the family.

20 As the law stands, without this Convention, can anything be done for the testator with worldwide assets or even assets in two countries who wishes to avoid these problems for his family? The response of the lawyer in both civil and common law jurisdictions is to embark upon some form of 'estate planning' for his client. That is, he can arrange for the distribution of the client's assets to the next generation of the family not only on the occasion of the client's death but at various times and in various ways during the continuing lifetime of the client. Since the lawyer and the client can select precisely the time for this *inter vivos* transfer of assets or of interests in assets, they can together ensure that the maximum tax advantages and provision for the family come about for the client. Family provision and protection is not only a matter of ensuring that family members have a reasonable quantum of the deceased's assets; provision and protection today are also concerned with the way in which, and the time at which, each acquires his or her share. For these reasons many practitioners so situate their clients that very little property passes on the client's death. Indeed, in common law jurisdictions today, because of the concept of joint ownership with right of survivorship, it is a familiar occurrence for persons even of modest possessions to die with little passing on the death. One of the difficulties is that one never knows with a testamentary disposition when the instrument is going to take effect. 'No man knoweth the number of his days', as holy writ has it. Assets within the estate will change through investment during the testator's lifetime, he may take employment or his retirement in another country, and/or he may acquire another or a new nationality. Changes in tax laws, not only in one but the two or more jurisdictions involved, can be frequent, far-reaching and deleterious to the plans of the testator. All that the lawyer can do about this is warn the testator to have his will reviewed every two or three years in the light of the circumstances that then exist. Even multiple wills – that is, a will for each country or jurisdiction in which there are assets – can be overtaken by events.

21 If it were possible to determine at the time of execution of the will the law or laws that are to govern that will on the death of the testator, *inter vivos* and testamentary dispositions in common law jurisdictions, and *pactes successoraux* and wills in civil law jurisdictions, could be harmonized. Estate planning for persons with an international estate, that is, would be much assisted. It is not likely that tax considerations would be any easier since each jurisdiction is likely to have independent tax laws and rules, but it would be possible to ensure that the maximum asset advantage adheres to the family on the testator's death because the lawyer knows what law or laws are going to apply to the estate.

22 These were the circumstances, and the questions that were circulating, when the Special Commission first met in November 1986.

THE MAIN CHARACTERISTICS OF THE CONVENTION

23 The Convention responds to these problems by introducing changes as to choice of law rules. It does not make any reference to issues concerning jurisdiction; the Special Commission and the Sixteenth Session were both of the view that jurisdiction is sufficiently complex that it had to be left to another occasion. The subject does in fact appear on the agenda of the Conference as a possible topic for the future. Nor does the Convention make any provision for the recognition and enforcement of foreign judgments.

What the Convention does is aim to produce *unity* by ending scission, and by introducing a *single objective connecting factor* for choice of law. It also introduces a limited *choice of law* for wills and *pactes successoraux*.

24 The Convention terminates scission by taking a 'unitarist' position, *i.e.*, it applies one law to both movables and immovables in the deceased's estate. Though many States today already are unitarist, a few States of the civil law tradition as well as the common law States – scission is general to the common law jurisdictions – follow the scission principle. Many people, including authors on the conflict of laws, regard the connecting factor of situs in the case of immovables to be practically inevitable, but it has been widely recognized in the scissionist jurisdictions that the rule of the situs is open to serious criticism. Since situs governs for the purposes of both testacy and intestacy, unintended injustice can occur in the distribution among close family of the deceased's international estate. Also the arguable distinction between movables and immovables, and the ease with which one can be converted into the other, make scission today much less defensible than in the days of land and interest on bonds. Indeed, it is interesting that the proposed move to the unitarist position by the Convention was welcomed in the early sessions of the Special Commission, and never questioned again.

However, the Convention was only able to adopt a meaning for 'succession' which was agreed by all States, and, since common law jurisdictions regard devolution alone as properly governed by the *lex successionis*, the Convention had perforce to adopt this definition. It is mandatory that Contracting States apply the provisions of the Convention to the subject-matter that falls within *the devolution of assets* (Article 7), but the transmission and administration of estate assets may be made subject to the rules of the Convention as part of the conflict rules of the forum, if the forum chooses. Of course, any such voluntary act by the forum Contracting State does not impose any obligation upon any other Contracting State. Given the broad civil law definition of 'succession', however, only time will tell how far scission in the administration remains in those civil law jurisdictions that do now follow the scission principle but who ratify the Convention. Ratifying common law States will abandon it entirely within their understanding of 'succession'.

25 The main unifying provision of the Convention is a formula (Article 3) which determines the sole law that is to apply to the succession. Commission II, like the Special Commission before it, took great pains to fashion a compromise solution which was acceptable to both those States that support the nationality of the testator or intestate as the connecting factor in matters of succession, and those States that support the domicile of the *de cujus*. This is an issue where agreement is not easy to find, because nationality as an easily ascertained fact means to those who espouse it reliable and inexpensive notarial estate administration where the courts are not involved, while domicile for its proponents means a flexible and sensitive concept with which to discover the real centre of life of the person whose succession is in question. To the advocates of domicile (or habitual residence, to follow the preference of the Hague Conventions) nationality is arbitrary and too often is not at all the place where the *de cujus* has made his home. To those who support nationality, on the other hand, domicile (or habitual residence) is a 'weak' connecting factor because it involves the weighing of evidence concerning the life, if not the intentions, of the *de cujus*, and such a process is thought to lend itself to controversy and appeal to the courts.

26 Article 3 is at the heart of the Convention; the objective connecting factor which determines the law that governs the succession is the basic general provision of the Convention, and applies whether the deceased died with or without a will. Article 3 is supported by Article 5 which goes a stage further and allows the testator a limited choice as to the law which shall govern his succession. This is the subjective connecting factor. Unlike the situation in contract or with the *Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition* (the Trusts Convention), however, the testator may not designate any law he wishes; his choice is restricted to the law of his nationality or the law of his habitual residence. These two connecting factors were agreed by the Conference to be those which today to the exclusion of others (save for domicile) are employed for succession purposes, and, since the principle of a *professio juris* for wills is a novel proposition for almost all jurisdictions (Switzerland is a notable exception), it was felt that the limitation of testators to the choice of one or the other was both wise and practicable. Both factors stress a 'belonging' of the *de cujus*, which is appropriate for the personal and family nature of succession. It is also a central aim of the Convention that family protection laws against disinheritance of the sur-

viving spouse or children be honoured, and to allow the testator to depart from both of those laws which reflect his natural association would be to encourage such disinheritance. However, Commission *II* felt that the Special Commission had been too restrictive by permitting the testator the law of his nationality or habitual residence at death only. Commission *II* was persuaded by the argument that the testator should be able to know when he makes his will what law will govern it, and that he can only be assured of this if he may also choose the law of his nationality or of his habitual residence as that nationality or habitual residence is at the time of the execution of his will. Article 5 therefore allows the testator to choose one of four potentially applicable laws – nationality at the time of designation or death, or habitual residence at the time of designation or death.

27 A novel feature of the Convention which may well become of real practical significance is the specific provision (Article 6) that the testator may designate any law to govern the succession to any particular assets in his estate, subject only to the mandatory rules of the applicable law as determined under Article 3 or Article 5(1). This principle of incorporation of a foreign law into the parties' instrument (the substantive law reference; *materiellrechtliche Verweisung*) is not new either to civil law or to common law jurisdictions, but in some jurisdictions its application hitherto has apparently been restricted to contract. Though it is a substantive law principle which some delegations would have said was in any event impliedly capable of invocation without mention of it in the Convention, there is no doubt that it will serve the purpose of those who wish or need expressly to designate the law of the situs for assets of the testator located there.

Incorporation usually means the inclusion of otherwise omitted matter in an *instrument* of agreement (or disposition). That is not the meaning here. The incorporation may take the form of an agreement as to succession, a testamentary instrument, or an intestacy. An intestacy will arise when the deceased has made a will for particular assets in a particular jurisdiction, designating therein, under authority of Article 6, a law to govern that particular act, but as to the remainder of his assets, which are elsewhere, he dies intestate. Article 3 may lead to another law as the applicable law governing the succession as a whole including the Article 6 designation included in the will.

During the Special Commission several delegations made a concerted effort to persuade that Commission to permit the *lex situs* as another law that might be designated, because for estate planning purposes testators are particularly anxious to have the local law apply in that place where their foreign assets are located. Multiple wills are a direct product of this desire to have local law apply to local assets. Administration is then more swift, more inexpensive, and much more likely to be free of error. Notaries, solicitors and attorneys know best their own local laws. The effort, however, was not successful, so keen was the majority of delegations to secure unity (*i.e.*, a single law governing the whole of the succession), and renewed situs proposals at the Sixteenth Session were again being rejected by majority votes when it was realized by a number of pro-situs delegates that that position was attainable through the doctrine of incorporation by substantive law reference. A proposal (Work. Doc. No 57) that the Convention expressly adopt this doctrine as an article of the Convention (now Article 6) received overwhelming support from the delegations when it was put to a vote.

28 The general provisions of the Convention contain several articles that are significant and will later be fully discussed, but it is probably fair to say that a main feature of the Convention is that 'succession' expressly includes *pactes successoraux*. This term of art is translated in English as 'agreements as to succession', bnt, since the concept of *pacte successoral* is unknown as such in common law jurisdictions, that is a literal translation which cannot convey very much to the English reader except that these are contractual arrangements involving the disposition of future property at the time of the death of the transferor.

'Succession' is neither defined nor described in the text of the Convention. For the purposes of the Convention it would appear to include (1) a 'disposition of property upon death' (Articles 1(2)(*a*), 1(2)(*b*) and 14), *i.e.*, a voluntary act of transfer whether in testamentary form or that of an agreement as to succession, and (2) the transfer of property upon death that occurs by provision of law, when (a) there is no such voluntary act, or (b) the voluntary act is wholly or partly invalid, or (c) the law compels the distribution of assets belonging to the deceased to family members.

The *pacte successoral* also was not defined or described in the preliminary draft Convention, but the Sixteenth Session thought some broadly descriptive clause was necessary (Article 8), and it was also of the opinion that 'disposition of property upon death', which, it will be recalled, includes the disposition that is made by way of a *pacte successoral*, had to be carefully distinguished from other dispositions including those which are known in common law terminology as '*inter vivos* dispositions'. This is by no means an easy task. Not only in civil law jurisdictions is there diversity between jurisdictions as to the substance of permissible *pactes successoraux*, but in common law jurisdictions there are several legal institutions, of very considerable significance in practice, where the dispositive act (as opposed to an agreement) is *inter vivos* giving rise to immediate full property rights and it is possession rights only that vest in the transferee on the transferor's death. These institutions are not regarded in their home jurisdictions as 'dispositions of property upon death'. It was only after much effort that the Commission was able to agree on language that embraces the exclusion from the Conventiou of all dispositive acts which are not dispositions of property upon death, and that language is now contained in Article 1(2)(*d*).

To tackle the inclusion within the Convention of *pactes successoraux* was a courageous act, if to some delegations it seemed a time-consuming venture and one which justified treatment in a separate convention. On the other hand the majority of delegates agreed with the argument that a Convention on choice of law for succession transmissions could not ignore *pactes successoraux*, even if in many civil law jurisdictions they are totally or partly prohibited. By bringing them within the Convention a more complete unity of law in matters of succession was achieved, and the practitioner could more effectively assist his property-disposing client. In particular it could be ensured that those who gain by reason of *pactes successoraux* do not also take again unfairly on the death of the agreement transferor.

29 In summary then this Convention is concerned with harmonizing the choice of law rules of succession, to protect the inheritance expectations of the deceased's immediate family, to simplify and render less costly the distribution of the deceased's assets when they are in several jurisdictions, and, where possible, to assist the testator's orderly distribution of his assets upon death (*i.e.*, estate planning). The Convention therefore ends scission, it introduces a single objective connecting factor through a scale of applicable laws, it permits a limited but significant *professio juris* for testamentary dispositions and it concedes to estate planning concerns the opportunity for foreign law to be incorporated into wills in order to govern estate assets in jurisdictions other than that of the otherwise applicable law.

It was remarked during the Sixteenth Session that the law is a reflection of life rather than logic. The Convention pursues logical consistency when it carries through its efforts to secure unity, something which is particularly evident in Article 4, but unity also means restricting the testator and the maker of a *pacte successoral* to the family protection laws of the countries or jurisdictions with which he is probably most closely associated, namely, his country or jurisdiction of nationality or of habitual residence. Here logic and life go hand in hand. Logic leads the Convention to reject situs as a third possible applicable law, despite its attractiveness to the testator whose interests are estate planning, because situs reintroduces scission; life leads the Convention nevertheless to permit by express provision the incorporation of foreign law (the *materiellrechtliche Verweisung*), though that doctrine might be said to introduce a scissionist element in the Convention. However, the doctrine does leave in place the mandatory rules of the applicable law which thus maintains the enforceability of the family protection rules most closely associated with the testator or agreement maker. Logic favours a connecting factor, whether subjective or objective, as of the time of death, where wills are concerned, and as of the date of execution, where *pactes successoraux* are concerned. Life allows an alternative connecting factor as of the execution date in the case of wills, and as of death in the case of *pactes successoraux* when only one estate is involved. Life and logic combine to produce a reasonable compromise, a rational accommodation, of aims and considerations.

THE STRUCTURE OF THE CONVENTION

30 The Convention is divided into five chapters. The first is concerned with the scope of the Convention. It emphasizes what the Convention aims to do, namely, determine the law applicable to succession to decedents' estates, and then it makes clear what related issues are not included within the Convention. Finally, it describes the universal application of the Convention.

31 The second chapter is concerned with the applicable law, and the choice of law rules which allow one to discover in any fact situation what that law is, or what law may be selected. In other words, it covers intestacy and those circumstances where the deceased has made no choice of law or no valid choice, and it also covers the situation where the testator chooses a law or wishes to choose a law. It provides for a particular situation where the applicable law is that of a non-Contracting State, and for the situation where the testator wishes to incorporate into his will the provisions of a law other than the applicable law. Finally, thus completing the core of the Convention, this chapter sets out those matters within the subject of succession that a Contracting State is obligated to submit to the applicable law (or to a validly incorporated other law). It also authorizes the Contracting State (though no authorization is really necessary) by way of its own conflict of law rules to submit other matters, which that State considers to be matters of succession, to the applicable law under the terms of the Convention.

32 The third chapter is exclusively concerned with *pactes successoraux* or 'agreements as to succession'. It describes what constitutes such an agreement for the purposes of the Convention, and it then provides for the determination of the applicable law for all such agreements, both where the parties make no choice and where they do select or wish to select such a law. Finally, it protects the entitlements of the family to inherit the deceased's property by preventing those who would unfairly claim twice from doing so, and those who are strangers to such agreements from losing their entitlements as a consequence of an agreement.

33 The fourth chapter consists of the 'general' or immediate support provisions of the Convention. These articles cover a variety of topics in the conflict of laws, and explain how the core Chapter II and the first and third chapters of the Convention are to take effect when the questions posed in this chapter arise. The topics covered in this Convention include simultaneous deaths, the existence of trusts in wills or agreements, particular successoral rules of the State where certain special categories of assets are situated, State rights to *bona vacantia*, renvoi, *ordre public*, the applicable law within States with two or more areas (or units) where different succession laws apply or with two or more personal systems of law, transition agreements on the Convention coming into force in any State, relationship of this Convention with other conventions, and permitted reservations to the applicability of parts of the Convention.

34 The fifth and final chapter contains the diplomatic requirements and facilities in connection with the signing, ratification, acceptance or approval of the Convention by the several Member States of the Hague Conference on private international law and in connection with the accession by non-Member States. The chapter also covers under this heading the manner of carrying into force of the Convention, notification of Member States of the acts of other Members in implementing the Convention, and provisions for denunciation of the Convention by States Parties to it.

COMMENTARY ON THE CONVENTION

PREAMBLE AND FIRST CHAPTER – SCOPE

35 The title of the Convention, the second paragraph of the preamble, and paragraph 1 of Article 1 are uniform in the language they employ – 'the law applicable to succession to the estates of deceased persons'. The

title describes what subject the Convention is addressing, the preamble states that the States participating wish to establish common provisions on the subject, and paragraph 1 of Article 1 states that the Convention provides means for the judge or the practitioner to work out which is the applicable law in the circumstances of the case.

36 Paragraph 2 of Article 1 describes those subjects (formal validity, capacity, and matrimonial property) and those property transactions and dispositions (Article 1(2)(*d*)) which are excluded entirely from the scope of the Convention. Commission II was anxious that the effect of the express exclusion of a subject or a transaction or property disposition from the Convention should be clearly understood. Excluded subject-matter is expressly not to be regarded as brought within the Convention. However, a Contracting State (or a jurisdiction within that State) may of course adopt the Convention's articles *as part of its own conflict rules* on any matter it thinks fit that is not within the Convention. Article 7(3) emphasizes this. On the other hand such a State does not bind other Contracting States when it chooses to apply the Convention to matters outside Article 7(2). Those matters include the Article 1(2) subjects, namely, formal validity, capacity, matrimonial property issues, and the 'property rights, interests or assets' described in Article 1(2)(*d*).

37 It follows that, if the Convention is silent on an issue, such as it is on the interpretation or construction of the meaning of wills and agreements as to succession, then the Convention simply makes no provision for that issue, and, again should a Contracting State either through its legislature or its courts decide that the issue falls within its own concept of succession, it can then apply the applicable law under the Convention to that issue, involving, should it wish, Article 7(3) as an authorization in the text to that end.
The meaning of the language employed in any particular will or succession agreement, and the problems this raises, were discussed at some length by Commission II. It is a good example of the significance of a silence in the Convention, because some delegations, for reasons to be explained, wanted the matter referred to in the text. In common law countries, where in each case linguistic phraseology is 'construed' and legal terms of art are 'interpreted' in order to determine intended meaning, the time looked to for construction is the moment of execution of the instrument. The question asked is this: what were the circumstances of the testator, known to him, at the time he made his will? Common law delegates were anxious not to be required by the Convention to apply the *lex successionis* at the time of the death for matters of construction. However, it soon became apparent to the Commission, as a number of delegations spoke, that there is a variety of approaches taken by legal systems to the 'interpretation' of meaning in instruments. Some jurisdictions regard the issue as one simply of fact and make no rules of law to bind their courts, others see the issue as involving both fact and the 'interpretation' of rules of law. Indeed, most civil law countries would see the whole matter as involved with 'succession', and would therefore apply to any doctrinal matter their law of succession at the death. The conclusion to which the Commission came was that the question of determining the testator's meaning, or the meaning of an agreement as to succession, was subject to so much diversity of classification and approach that each jurisdiction was best left to its existing solution – and the Convention therefore remains silent.

38 The relationship between Article 1, in particular paragraph 2, and Article 7, in particular paragraph 3, is close, and the two articles with commentary should be taken into consideration at the same time.
Commission II had in mind that the court or other authority in the Contracting State would proceed by asking two questions: (1) what matters are expressly covered under Article 7(2)?; and (2) on what matters is the Convention silent? Commentary to Article 7 will pursue these questions further. Suffice it to say at this point that questions of procedure, fiscal concerns, and the insolvency of estates, together with the administration of estates, clearly fall outside the Convention, but are matters on which the Convention remains silent. It is obviously undesirable even for the Report, let alone the text, to attempt to list the subject-matter that falls outside the Convention. The impression may be given that a topic not mentioned may therefore in some way be included. For this reason also the approach of the two questions, above, recommends itself.

Article 1

Paragraph 1

39 The word 'succession' is not defined in the Convention. Its meaning and scope for the purposes of the Convention is discovered by consulting Article 7(2) which lists and details five subjects in letters *a* to *e*. These subjects concern *devolution* of the estates of deceased persons, and will be seen not to include the transmission of assets in the estate or the administration of the estate.

'Successiou to the estates of deceased persons' refers to all forms of succession, whether through testacy or intestacy or as a consequence of an agreement as to succession (*pacte successoral*). It follows that the Convention covers a situation where there is partial testacy and partial intestacy, and the circumstance where the deceased has entered into an agreement as to succession, but otherwise dies wholly testate or intestate, or partly testate and therefore partly intestate. Also included is the situation where succession occurs to the estate of a person who is judicially declared to be dead; for instance, where that person is missing presumed dead. Renunciation or disclaimer by the beneficiary of a will or agreement, whether or not this act occurs further to the provision of the local matrimonial property law, is not within the subject-matter of 'succession' as that term is employed by the Convention. This is further explained later (see *post* paragraph 77).

The 'estate' of a deceased person, in the English text, means all the property owned by the deceased or in which he has a proprietary interest at his death.

This paragraph makes clear that the purpose of the Convention is to 'determine the law applicable'.

Paragraph 2

40 This paragraph contains the subjects and describes the property expressly excluded from the Convention, as previously explained.

Sub-paragraph a

41 The Convention excludes formal validity (or form) from its scope, but as the Contracting State understands the concept of 'form'. Since 'material validity' is included as an aspect of 'succession' in Article 7(2)(*e*) for the purposes of the Convention, formal validity is therefore excluded expressly.

The *Hague Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions* is the Hague Conference's response as to wills. The forum decides as an act of characterization whether the issue is one of formal or material validity.

'Disposition of property upon death' is primarily following the neat French phrase '*disposer à cause de mort*', but both phrases are employed in order that the sub-paragraph embrace both the will and the agreement as to succession. Other Hague Conventions employ the words 'testamentary disposition', but not only does this phrase fail to include the agreement, it also assumes a will in writing. To many civilians it would immediately suggest a notarial will. This present Convention is not concerned with whether the will is written or oral; both are included (and it is for the forum to decide under its own rules whether an oral will is valid). 'Disposition of property upon death' excludes *inter vivos* dispositions having immediate proprietary effect; it is upon the death of the person so disposing, and not in any respect at any earlier time, that the disposition (or transfer) takes place. This is a very important distinction, because, while a *pacte successoral* gives rise to a disposition and also an obligation to dispose only upon the death, the common law is very familiar with dispositions, usually by way of a trust, where the property right arises *inter vivos*, and merely the right to possession arises on the disposer's death. This was previously said (paragraph 28), and is here underlined. It is also the case in common law jurisdictions that, if X breaches an agreement to transfer to Y on his (X's) death and does so by transferring the property in question to a third party during X's lifetime, the beneficiary of the agreement, Y, is entitled to bring an action for damages against X in the latter's lifetime. This is known as 'anticipatory breach'. In neither of these cases, the trust or the agreement, is there in common law terms 'a disposition of property upon death'.

Sub-paragraph b

42 'Capacity to dispose' embraces the capacity to make a will or any other testamentary instrument, and the capacity to enter into an agreement as to succession. 'Capacity to dispose' also covers the capacity to make a *professio juris*, whether that choice be made in a testamentary instrument or by way of a 'statement' (Article 5(2)) in any non-testamentary form. Under Article 11 the parties to an agreement as to succession may 'agree by express designation' on a choice of law. The question of capacity to agree on this choice of law is also expressly excluded from the Convention.
Exclusion extends to general capacity, that is, the capacity of a person who has been declared 'incapable' by judicial decree because of insanity or other mental inability, and a person who is under the age of majority. It would also extend to the particular person, such – where it still exists – as the married woman who may have less than full capacity, and it would also appear to apply to specific capacity, such as the inability of members of a religious community to make wills.

43 On the other hand questions of mistake, fraud, duress or undue influence are not matters of capacity in a strict sense; they are matters of consent (*vices de consentement*). In these instances the testator may have capacity in the sense discussed above, but because he is mistaken or deceived or physically compelled to sign (duress), or he is overborne by the pressures of a person, such as a priest, doctor, lawyer, or an attendant relative (undue influence), he does not in fact freely intend one or more of the benefactions which his will confers. The same distinction can be made in the case of the making of an agreement as to succession. If consent is lacking on the part of the testator or party to an agreement then the will or agreement is or will be declared invalid. However, it is for the forum to characterize the issue, and to determine whether *vices de consentement* are to be regarded as 'capacity' issues, in a broader sense of that term as defined by the forum (and therefore fall outside the Convention, Article 1(2)(*b*)), or as consent issues falling under the applicable law determined by the Convention (Article 7), the law governing the formal validity of the will, or the personal law.

The same task of characterization arises with regard to persons who are suffering from illness, such as senile dementia or Alzheimer disease, from the effects of alcohol or drugs, or from other mentally impairing factors, a condition which may be temporary or permanent, but who have not been declared mentally incompetent by judicial decree. Generally such mental impairment, short of judicially decreed mental incompetence, would be characterized as issues of consent.

44 Capacity to dispose is also excluded from the Convention because capacity is always judged at the time when the will is made or the agreement concluded. A designation is validated under Article 5(1), however, at alternate times, namely, time of designation or death, and an agreement as to succession, where only one person's estate is involved, can also be validated either at the date of the agreement or at the date of death. Without exclusion other conflict problems might occur, just because capacity must exist at the time of the making of the will or the conclusion of the agreement.

Sub-paragraph c

45 Matrimonial property rights and all issues of any kind concerning matrimonial property are expressly excluded from the scope of the Convention. This means that whether rights arise in the lifetime of the deceased under a regime, or they are rights to fixed shares or amounts determined by judicial decree but only on the termination of the marriage (in this instance by death of the deceased whose estate is in question), such rights are outside the Convention. It follows that the Convention does not cover the situation where a judicial decree awards assets in the ownership and estate of the deceased spouse to the surviving spouse as matrimonial property to which the survivor is entitled as such.

Though the Sixteenth Session took this position, and there is no doubt about the total degree of express exclusion from the Convention, there was considerable, indeed exhaustive, discussion on this subject. The ques-

tion was whether the Convention should provide either a conflicts rule or a substantive rule to deal with the imbalance of benefits that may befall the surviving spouse and the children of the deceased spouse as the result in any jurisdiction of the ill-matched substance of the matrimonial property law and the succession law. This is a problem evidently experienced in many jurisdictions, and a number of proposals were put before Commission II. No one denied that injustices can thereby come about, not only to those married couples who move from one jurisdiction to another (the matrimonial property laws of each being different), but to those who remain within the same jurisdiction all their married lives. At the conflicts of law level the *dépeçage* between the matrimonial property law and succession law may itself produce injustices of result.

However, delegations were divided as to whether the Convention should attempt to deal with this undoubted problem. Some delegations were decidedly of the view that the Convention should confer a discretion upon the court of the Contracting State, enabling the judge to adjnst the property distribution produced by his matrimonial property and succession laws where and to the extent that equitable adjustment is needed to produce fairness. Others would have gone further and given the judge snch a discretion, however the injustice results.

For example, gifts by the deceased in his lifetime and the impact of *inter vivos* trusts were cited. On the other hand, the majority of delegations appeared persuaded by the arguments that among the countries and jurisdictions there is a very large amount of diversity in matrimonial property laws, and that, given this diversity, the interrelationship of those laws with succession laws was not something which the Convention could usefully assist. Indeed, the Convention might give rise to added difficulties, were it to contain provisions on the subject. In any event, it was felt, this is a problem which jurisdictions can and do deal with in their own way. For instance, the French delegation gave a most interesting presentation to the Commission describing the adjustment, compensation, and other techniques employed in France, and the United Kingdom delegation reported that England as a common law country gives its courts extensive powers to look into *inter vivos* gifts and the effects of actual or potential marital property distributions when making provisions for the surviving spouse and family on the death of the deceased.

It was noted that the Commission could (1) exclude matrimonial property laws from the Convention, (2) give priority to the applicable succession law or to the matrimonial property law, or (3) devise a rule of its own. It was also a reflection made by one delegation that, if the unity principle behind the Convention was to be effective, solutions should not be left to each individual State. The impact of Articles 6 and 15 of the Convention in possibly producing unjust imbalances among heirs was also canvassed. However, while deciding not expressly to exclude the co-ordination of matrimonial property laws and succession laws from the Convention, the Sixteenth Session rejected a number of written proposals bringing the relationship of the two into the Convention, and decided to leave the exclusion as it is now worded.

Sub-paragraph d

46 This sub-paragraph did not exist in the preliminary draft Convention, because the Special Commission, though recognizing that the article needed further refinement, attempted in then Article 9 to exclude the agreements giving rise to property rights during the lifetime of all the parties involved. During Commission II the decision was made to integrate Chapter III, Agreements as to Succession, fully into the body of the Convention, and as a consequence the Drafting Committee (Work. Doc. No 69) was able to recommend moving the exclusion article out of Chapter III into Chapter I, Scope of the Convention. Thereafter Article 1(2)(*d*) was consistently and continuously refined until the present text was reached towards the close of Commission II. The text commenced as: '[The Convention does not apply to – ... *d*] assets or interests owned jointly with right of survivorship, or to pension plans or insurance contracts, or arrangements of a similar nature.' (Work. Doc. No 69). This was changed to: 'interests, property rights or assets, arising under or transferred by contract or otherwise than by succession, such as in joint ownership ...' (Work. Doc. No 80). In other words the first five lines of Working Document No 69 were insufficiently comprehensive of the *inter vivos* transactions that some delegations were very anxious to see excluded from the Convention.

The language of Working Document No 80 was retained in Working Document No 85, but when Working Document No 85 was under discussion it was felt that that language was ambiguous because 'contract' exceptions to 'agreements' lacked the necessary clarity as to the intended distinction, and it was observed that 'assets' can hardly be said to 'arise'. Working Docnment No 103 changed the order of the first three nouns, and the text, as it now is, appeared in Working Document No 2 of the Plenary Session.

Nevertheless, while some delegations stated that their systems knew nothing of the kinds of *inter vivos* transactions that were under debate, other delegations considered that, despite the langnage changes already mentioned, there continued to be some doubt for their States as to the possible future validity of transactions entered into by members of the public with banks, insurance companies and other financial institutions. This was because of the lack of greater particularity in Article 1(2)(*d*), and these delegations proposed that the transactions in question be specifically excluded. However, though that was not done, it is the clear and evident intention of the text that all transactions with financial institutions of all kinds are now expressly excluded by sub-paragraph *d*. To put the matter beyond any possible doubt, this means that, for instance, multiple banking accounts – where the payor retains an interest for his life, and X is earmarked as the one to take the balance on the payor's death – are outside the Convention, and that financial institutions in the performance of their undertakings are not affected by the Convention.

It must be underlined that the word 'interests' does not mean or necessarily refer only to 'equitable interests', a term familiar in the common law system. 'Property rights' cover the one or more such rights that may be brought into existence or disposed of other than by way of succession, while an 'interest' refers to any recog-

nized combination of property rights that may be so created or transferred.

The essential difficulty which confronted the Commission was that the *pacte successoral* is a civil law concept, and the common law approaches this area in terms solely of testamentary and non-testamentary dispositions. See further paragraph 92, *post*. In common law jurisdictions there is a number of so-called 'will substitutes' or non-testamentary transfers of assets that constitute *inter vivos* dispositions, and they are of ever greater financial significance in all common law developed countries. They are the *inter vivos* trust, joint bank accounts where the survivor takes the balance, life insurance and the designation of a beneficiary to take the benefits of the policy on the death of the insured (and payor of the premiums), and pension provision accounts where the designated beneficiary takes the benefit of the account proceeds, by way of a joint lives and survivor annuity, in the event of the prior death of the pensioner. There is a fifth 'will substitute' and that is the joint tenancy (typically spousal and concerning the matrimonial home) with right of the survivor to take the whole. None of these devices gives rise to a 'disposition of property upon death', and should not be understood to do so. Article 1(2)(*d*) is designed to be embracive of these will substitutes, and to underline that the Convention is not concerned with them in any way. Of course, Article 1(2)(*d*) having a very broad scope covering all *inter vivos* dispositions including gifts, such gifts may give rise to an obligation to restore or account when determiniug the shares of beneficiaries under the law applicable under Article 7(2)(*c*). But even so the Convention does not in any way determine the validity of such gifts nor their effect or the extinction of those effects.

Article 2

47 The Special Commission concluded without too much difficulty that the Convention should be universal in its scope, and this was reflected in the preliminary draft text. The Sixteenth Session maintained this decision. As a result the Convention applies whether or not the law applicable under the Convention is that of a Contracting State.
It is the Convention itself, as Working Document No 7 underlined, not the law governing the succession, which determines that the law of a non-Contracting State, if designated by Article 3, may be the applicable law. Moreover, since the Convention itself brings the laws of non-Contracting States within the scope of the Convention, the maker of a will, a *pacte successoral*, or a declaration, may designate the law of a non-Contracting State as the applicable law under Article 5(1).
Working Document No 7, a proposal of the French delegation, was adopted by Commission II, and its substance appears in Article 2 of the Convention. It was discussed against the background and merits of what is now Article 4 (see paragraphs 57-59, *post*).

CHAPTER II – APPLICABLE LAW

48 This chapter sets out the means by which the applicable law is to be determined, and the consequences of that determination. Article 4 in one particular circumstance applies the choice of law rules of the applicable law when the latter is that of a non-Contracting State, and Article 7 lists matters which are required to be governed by the applicable law (unless for certain assets in the estate – the assets being decided upon by the testator – that testator has selected another law under authority of, and subject to the conditions of, Article 6). Other matters not listed in Article 7(2) may be subjected by the forum to the governance of the applicable law if the forum as a Contracting State characterizes those other matters as matters of 'succession'.
As previously stated in outline (see, *supra*, paragraphs 25-26), Article 3 puts in place the objective factor for determining the applicable law, and Article 5 the subjective connecting factor. The latter is subjective in that it is the testator's choice; the former is objective because it is put in place by the Convention in the absence of a choice or a valid choice, or when there is a mere partial choice under Article 6.

Under Article 3 the factual circumstances are always those 'at the time of [the deceased's] death', never at any other time. This is to be contrasted with Article 5(1) (the subjective connecting factor) and Article 9 (agreements as to succession and where only one estate is involved).

Article 3

49 The Special Commission in its preliminary draft of the Convention provided an objective counecting factor which, subject to one important exception, remains very much as it was then designed. Article 3 is a delicate fabric resulting from a compromise, but the compromise itself is sufficiently persuasive that Commission II made only one change to it. The change is the exception; it is contained in paragraph 2 of the article (see paragraph 53, *post*).
It is important to note that the exception in Article 3(2) only lets in the law of the nationality. This should be contrasted, as will be shown, with Article 3(3) where the 'unless' clause allows the more closely connected State to be any other State. The reason for the difference is that Article 3 as a whole provides a scale of laws and Article 3(3) was seen as au ultimate reference for the marginal case. When Article 3(3) is invoked, Articles 3(1) and 3(2) have failed to supply an answer to the question in hand. For this reason Article 3(3) is more comprehensive thau precise, precision being a feature of the earlier paragraphs of the article.

50 Three connecting factors are employed in the formula that is Article 3, and the formula provides a single connecting factor for each of the sequence of situations described. The three are the law of the nationality, the law of the habitual residence, and the law of 'more close connection'.
In paragraph 2 of the article the exception invokes the law of the nationality if it is the closer connection, but in paragraph 3 the reference in the 'unless' clause is to any *law* provided it is more closely connected with the deceased. In paragraph 3, therefore, closer connection is used as an independent connecting factor.

51 Nationality hardly needs definition or description, and, like habitual residence, it receives neither from the Convention. The Special Commission and Commission II were both of the view that these words of art should not be delineated in the Convention. It is for the forum to decide whether the deceased has a nationality (or is a stateless person), and, should it determine that the

deceased was without a nationality at his death, whether a nationality can and should be deemed to be his. The Convention does not give a specific rule for dual nationality, Commission II being of the opinion that this too is a matter that should be left to the forum. In fact Article 3(1) does provide a rule for the case where a dual uational dies habitually resident in the couutry of one of his nationalities, and this will probably meet most of the dual nationality situations (see also paragraph 61, *post*). However, in response to the proposal that the Convention expressly deal with the questions of dual nationality and statelessness, particularly for the purposes of Article 3(2), attention was drawn to the fact that Hague Conventions have traditionally left these two issues to the forum. Reference to the United Nations Conventions on dual nationals and stateless persons may usefully be made.

So far as habitual residence is concerned, it has become the practice of Hague Conventions to prefer this term to 'domicile' with its admitted oddities like revival of the domicile of origin. While 'domicile' is predominantly a question of the intent of the *de cujus*, habitual residence is determined by a more equal weighting of a range of elements. Essentially it is the place of belonging of the *de cujus*. A person can have only one habitual residence, because it is the centre of his living, the place with which he is most closely associated in his pattern of life. For the purpose of determining this place, his family and personal ties are particularly important elements. Intention appears to play a more muted role as an element in habitual residence than it traditionally has done in domicile, and this is why lawyers who are accustomed to working with domicile as a connecting factor hesitate before accepting the term, habitual residence, as an equivalent, but finally accept it as a possible alternative. It is a regular physical presence, enduring for some time, and a clearly stronger association than 'ordinary' or 'simple' residence, of which the *de cujus* may have had two or more. However, the manifest hopes and plans of the *de cujus* are also elements that may be legitimately considered by the person who would have to know which State is the habitual residence.

'More close connection' of a law is discovered by examining these same elements with a view to discovering whether the centre of the personal and family life of the *de cujus* was in one place more than another. Once again the considerations are his nationality, the location of his immediate family, his personal ties, the nature and location of his employment or business, the permanence of his place of residence (his apparent home), the principal situs of his personal assets, and his journeying and the reasons for the same.

Paragraph 1

52 If the nationality and habitual residence of the deceased (the *de cujus*) are the same at the death, the law of that State is the applicable law. For example, a testator at the date of his death was habitually resident in, and a national of, State A. State A is the forum and a Contracting State. At his death the testator had assets in State B, a Contracting State, and other assets in State C, a non-Contracting State. Five per cent of his assets at death were in State A. The law of State A is the applicable law. The answer is the same whether the deceased made a will but no choice or valid choice of law, or he died intestate. It will be seen that the connecting factor in paragraph 1 leads straight to State A; it is irrelevant that the deceased had assets in another State.

Had State A been a non-Contracting State, and the forum had been in State B (a Contracting State), the law of State A would again be the applicable law.
It should be noticed that Article 3(1) applies not only in cases where the nationality and the habitual residence of the *de cujus* have always coincided, but at the other extreme where a national, who has made his home abroad for all his previous life, goes to his country of nationality and acquires an habitual residence there just prior to his death.
Paragraph 1 provides a rule for many cases of dual nationality; see paragraph 51, *supra*.

Paragraph 2

53 This paragraph and paragraph 3 are concerned with situations where the nationality and habitual residence on the date of death do not point to the same State.
Paragraph 2 provides that where the deceased has been resident in a State for five continuous years preceding his death, and he dies habitually resident in that State, the law of that State is the applicable law. This means that for the purpose of this article the five years of habitual residence commence from the time when unqualified residence (to be determined by the forum) began. However, where though the above is satisfied there are 'exceptional circumstances' and it can 'manifestly' be established that the deceased was 'more closely connected' with his national State, the law of his nationality is the applicable law. In its discussions Commission II conceived of this exception as an 'escape clause' to be used in genuinely unusual circumstances.

For example, the deceased at his death was a national of State F, but he had been resident continuously for six years in State E prior to his death. Though the first five years of that residence were markedly equivocal as to whether the deceased was or was not habitually resident in State E, there is no doubt at his death that that place was then his habitual residence. The law of State E is the applicable law. However, let it now be imagined instead that there are other circumstances to be considered. Though the deceased lived in State E during that period of time, nevertheless it was his business in State E which led to his being there in the first place and in remaining there. He has no cultural links with State E and cannot in any way be said to be integrated in that State. He has business ties with his first homeland, State F, the country of his nationality, his children go to school in State F, and upon completion of his contract will return to that State. A court might very well conclude in this case that the application of the solution prescribed by the first sentence of Article 2 is inappropriate, that the law of his national State was 'more closely connected' with him than the law of State E.
It shonld be noticed that, if State F were not the State of the deceased's nationality but nevertheless the place with which he had had the same associations, the law of State E is the applicable law. No 'escape clause' is available. Commission II considered this situation very carefully, and made its decision deliberately in order to maintain the balance of nationality and habitual residence within the article.

Paragraph 3

54 Where the deceased dies a national of a State, but is resident in another State at his death without having an habitual residence there or without that ordinary residence having endured for five years or five continuous years prior to his death, the law of the nationality applies. However, if it can be shown from the evidence that the deceased at his death was 'more closely connected' with any other State, the law of that State is the applicable law.
We will first take instances of when the nationality law would apply, and then show how that result may be changed by the 'unless' clause. For example, the deceased died a national of State G, and a resident – ordinary or simple residence – of State H. He was not habitually resident in State H at his death. The number of years of his ordinary residence in State H is irrelevant, the law of State G is the applicable law. Alternatively, let it be supposed, as commonly occurs in immigration countries, that the deceased died shortly after his arrival in State H, but with an habitual residence in State H. If that short period is less than five years, paragraph 2 will not apply, and under paragraph 3 the law of his nationality, State G, applies. As another alternative, let it be supposed that the deceased spent a first year in State H (his immigrant country), and then returned for a year to his country of nationality in order to care for an elderly parent, leaving his spouse, children, and new home in State H for this time. Thereafter he returned to State H, but after four years died in State H, being then habitually resident there. The one year and the four years cannot be added together to make the necessary five. The applicable law will be the law of State G, his nationality. We may assume, in order to add credibility, that the deceased when he died was not yet eligible to obtain the nationality of State H; he died, for instance, intestate, a younger man, in an industrial accident.

The Special Commission and Commission II considered both these alternative situations and the results that would come about, and this explains the provision of the 'nnless' clause. The Sixteenth Session, as previously noted, was anxious throughout this article to maintain a balance between nationality and habitual residence as familiar connecting factors, but on this occasion, because of the nature of paragraph 2, it was not possible to fall back on the habitual residence as the law of otherwise 'more close connection'. Consequently the 'unless' clause invokes the 'more close connection' with any other State and its law. In each of the above three examples if the deceased can be said on the evidence (looking to personal and family ties, etc., as previously discussed) to be more closely connected with State H than State G, the law of State H is the applicable law.

What happens, however, if there are two laws (or more) which are 'more closely connected' with the deceased at his death than the law of his nationality? For instance, the *de cujus* leaves his national State, State I, in northern Europe to live in the gentle climate of the Mediterranean. He sets up his home in State J, where he is joined by his wife and youngest child who is still living at home. Here he becomes part of the community and builds himself ultimately the home of his dreams. However, he is an author, and his publisher carries on business in State K in North America. He often visits his publisher in State K, and has a *pied à terre* there where he spends long periods of time and he and his wife have many friends in authorship and the arts. He has no family in State I at his death, and never goes there. It would seem there is a 'more close connection' with either State J or State K. The Convention does not employ the term, the closest connection, bnt that is what it must be interpreted to mean in the example just given. That was Commission II's intention.

55 The words 'law of the State', in all three paragraphs of Article 3, when used in relation to a federal country or a country with two or more systems of law or with areas having different succession law rules, are to be interpreted in accordance with Articles 19 and 20.

56 It is also possible for Article 3 to apply to part only of the estate assets. This will happen as a consequence of the operation of Article 6, and will be dealt with in the commentary on that article.

Article 4

57 This article provides that, if the law made applicable by Article 3 is the law of a non-Contracting State, and that law's choice of law rules would refer to the law of a second non-Contracting State, which would accept the reference, then the law of that second non-Contracting State shall apply. This is a renvoi to the second degree. For example, the forum, being a Contracting State, applies Article 3; the law of the nationality of the deceased is intimated by that article, and the nationality of the *de cujus* leads to State L. State L is a non-Contracting State, and under its choice of law rules would refer the governance of the whole estate to the domicile of the *de cujus*. The domicile, according to State L, is State M, another non-Contracting State. State M under its rules will accept the reference, and apply its internal law. Under the Convention the law of State M for this estate is therefore valid and enforceable among all Contracting States.
It was emphasized in the debates of Commission II, wherein this article originated, that the article does not apply in any other circumstances than those specified in the article. That is to say, if State M in the example given were to refer the matter to State N, that would not be within the scope of Article 4 and State N's law would not be recognized as validly applied by the Convention. There cannot be a reference to yet a further State; and this must mean whether that further State be a Contracting or a non-Contracting State. Secondly, if State M were to refer the matter back to State L (creating a circular reference), that also would be outside Article 4 (see paragraph 58, *post*). In both these instances (reference further on and reference back) Article 4 simply does not apply.

58 However, Article 4 does apply – and this should be noted – even when the applicable law under the Convention is that of a non-Contracting State which would refer the matter on to another non-Contracting State so far only as part of the estate or its assets is concerned. For example, the likely most common example, State L as the non-Contracting State whose law is the applicable law under Article 3 follows the principle of scission. Scission is also the law adopted by State M, to which State L refers. Since the immovables in question in the deceased's estate are situated in State M, the law of State L refers the matter of those assets to State M which accepts the reference and applies its own law to the immovables. However, State L would apply its own law to the movables in the estate. The forum will there-

fore apply the law of State M to the immovables (Article 4), and the law of State L to the movables in the estate.

This article should be read together with Article 17 which represents the now familiar response of the Hague Conventions to renvoi, which is to exclude it. Article 4 is an exception to the Article 17 rule. It operates only to the extent of reaching to the second non-Contracting State. If the law of the first non-Contracting State (State L) is the applicable law under the Convention, and it refers the matter in question to the law of another non-Contracting State (State M), but the law of State M refers the issue back to the law of State L, the law of State L applies. This is not because of Article 4 which is *functus* once it has referred the issue to State M. The law of State L applies because that is the applicable law under Article 3. The object of Article 4 is to recognize the harmony that may exist between State L and State M. If no harmony exists (States L and M do not agree that the law of State M applies), then Article 4 has no further role to play.

59 There was keen debate in Commission II on this article. Some delegations wished to see Article 17 removed and Contracting States be given the opportunity to develop their renvoi response in their own several ways and in their own time, particularly in this area of succession where traditionally renvoi has played a significant role. On the other hand other delegations were totally opposed to renvoi, and wished to maintain the now usual Hague response. Particularly were these delegations concerned that the then proposed Article 4 allowed a partial renvoi. It will be seen from the scission example, above, that partial renvoi in those circumstances is the outcome. Anti-renvoi delegations considered that the unity aimed for by the Convention was deliberately destroyed in the circumstances where Article 4 came into effect.

The approach taken by Article 4 prevailed, it would seem, because most delegations – and a substantial majority of delegations supported the proposed article – recognized it as an attempt not to destroy unity where it already exists. If two non-Contracting States are able to reach a point where there is unity between them as to which law shall apply, why destroy that unity in the name of the Convention which proclaims unity as its object? It was also felt that, as more States become Contracting States, the use of the article will decline; meanwhile, States will be attracted by the 'out-reach' of the Convention as here demonstrated. Good relations will be created.
Support for the idea that the principle of Article 4 should be extended from objective connecting factor circumstances involving the non-Contracting State to the subjective connecting factor (Article 5) as well, was not forthcoming. Where the testator has chosen his applicable law, to give it effect together with that law's choice of law rules might actually be to defeat the testator's expectations.

Article 5

60 This article enables a *professio juris* to be made. See, *supra*, paragraph 26, for a description of the article as a 'main characteristic' of the Convention. Article 5 should also be considered together with Article 6, for both are concerned with the designation of laws to govern matters of 'succession' under the Convention.

At first sight Article 5, paragraphs 1 and 4, may seem to be contradictory. Paragraph 1 provides that a person may designate one of four laws to be the applicable law governing 'the whole of his estate', and paragraph 4 states that 'for the purposes of this Article' the designation governs 'the whole of the estate' but only 'in the absence of an express contrary provision'. Commission II was well aware of and discussed at length this apparent contradiction, but it has a perfectly rational explanation. Paragraph 1 is the first and primary provision as to the *professio juris*. It sets out the main principle of the Convention, namely, that a choice between the stated laws may be made to govern the succession to all the deceased's assets at his death. It does not matter whether he dies testate or intestate, the selection of a law to govern his estate is valid by force of the conflict rule of Article 5 of the Convention. Paragraph 1 having identified the laws one of which may be designated, paragraphs 2 and 3 are concerned with the mode of creation and revocation of the designation. Paragraph 4 is a binding rule of construction (or interpretation), complementing paragraph 1, which requires as a matter of evidence that the designated law is to govern 'the whole of the estate' for succession purposes, whether the deceased dies wholly testate, wholly intestate, or as a third possibility partly testate and partly intestate. The qualification 'in the absence of an express contrary provision by the deceased' is a reference to Article 6 which permits the deceased to incorporate into his succession the laws of one or more other States or jurisdictions to govern the succession to particular (or specified) assets in his estate, subject to mandatory provisions of the law applicable under Article 5(1).

That being the function of the paragraphs within Article 5, and the relationship of that article with Article 6, the task is now to examine the meaning and operation of each of the paragraphs in Article 5.

Paragraph 1

61 This paragraph empowers the estate owner to designate one of four laws. He may designate either the law of his nationality at the time of designation or of his death, or the law of his habitual residence at the time of designation or of his death. In this article, unlike Article 3, no residence period is required before a person may choose his habitual residence law. Provided only that habitual residence can be established, if the habitual residence at the time of designation is chosen, the designation is valid. Subject to the operation of Article 6, however, no other law is permitted. Change by the testator of his designated law is discussed later. As was earlier mentioned, Commission II considered very closely, and against the background of a number of working document proposals, whether the law of the situs should be another permitted designation, but finally rejected all the proposals made.

As to whether the designation might be of the nationality or habitual residence law at the time of death only, or of designation or either death or designation, the Special Commission had taken the view that the time of death was alone tolerable. It was felt by the majority in that Commission that the issue of 'succession' arises at the death, that problems might arise if the time of designation were permitted, and that, if maximum unity among Contracting States was to be obtained, there must be a single time for both testamentary and intestate successions among those States. Commission II revealed a shift in the majority's viewpoint, and the most liberal position (Work. Doc. No 3) was early adopted which permits the *de cujus* to designate his nationality law or

his habitual residence law at the time of designation, or his nationality law or habitual residence law at the time of his death. One consideration entertained was that the designation adopted in the Convention for *pactes successoraux* is the law as of the date of the agreement, and another was that changes in habitual residence in particular might occur without the *de cujus* realizing what had occurred. But the primary cause of this shift of opinion seems to have been the realization that, if the date of designation were permitted, the *de cujus* might plan his matrimonial property arrangements and his provisions for succession to his estate freely, knowing which law will apply to each and being able to have the same law apply to both. In the nature of things a designation of the law that will be the nationality law or the habitual residence law (particularly the latter) on his eventual date of death is not conducive to the best estate planning for the *de cujus*. This is one reason why *inter vivos* dispositions, with perhaps the reservation of life interests to the disposer, are so very popular and increasingly used in lieu of will disposition in the common law jurisdictions. When taxation considerations are also taken into account, the preference for *inter vivos* transfer becomes even more marked.

It is important to note that by designating the law of one of his or her nationalities under Article 5(1) a person with more than one nationality can eliminate any question as to which of his or her nationalities should be taken into account in order to determine the applicable law. It will be the law of the nationality so designated by that person.

62 Some particularities should be given. Paragraph 1 does not require of the *de cujus* that he state something like, 'The law of State N, being my national State at the time of my making this written statement, is to govern my succession.' He can state his choice in that way, if he wishes, and most practitioners will instruct their clients to use wording like this because it is precise as to what is intended. However, the wording of the paragraph seems to ensure that, as long as the *de cujus* makes it clear whether it is the nationality law or the habitual residence law he is choosing, and whether it is the chosen law at the time of the designation or at the time of his death, that designation will be effective. Though it is preferable that he designate the law of the chosen State by the name of that State, because this makes the designation paramountly clear, paragraph 1 does not make that requirement. Provided it is clear which law he is designating, that is enough.

An example will show how the paragraph operates. If he says in his statement that 'I elect the law of my nationality to govern my succession', and he has one nationality at the time of making the designation, but another at the time of his death, there is a problem as to which he is choosing. Let it be supposed that the law of his nationality at the time of designation would regard those dispositions as valid. The forum cannot give him the benefit of the situation and apply the law of the last nationality. He has simply not made it clear which State's law he intended to choose. The designation is invalid and the Article 3 law will apply. That result is confirmed as inevitable if one assumes alternatively that both laws of nationality would regard the provisions as valid. In actual fact it is unlikely that a capacitated person will do nothing about his earlier designation when he changes his nationality, though the testator can never overlook the fact that loss of capacity means that the will and a designation are no longer revocable, but it is possible to imagine this problem arising with designation of the habitual residence. Habitual residence is not ordinary (or simple) residence, and it is not likely in the great majority of cases to provide problems, but it can happen that a person recently arrived in the jurisdiction declares himself to be an habitual resident or domiciliary of the jurisdiction, when a court is most unlikely to uphold that opinion on the facts. Nevertheless, such a person, making a designation to the effect that 'the law of my habitual residence shall govern my succession', may derive no advantage from the fact that, though he did not have the habitual residence of that jurisdiction at the time of designation, he did have it at the time of his death. The designation is invalid; it does not point to a chosen law, a result which would follow even if he were an habitual resident first of the former jurisdiction and then successively of the latter jurisdiction. A *de cujus* who retires to the sunbelt may continue to think of himself as part of the State from which he has come, but have so much by way of personal and immediate family ties with the new State that this is his habitual residence in law. In his designation it must be clear which law he has chosen, and he must be an habitual resident of the State whose law he has chosen.

However, it should be noted that the law of the forum may possess rules not within the scope of the Convention, but which render the above two examples nevertheless valid and effective. For instance, in common law jurisdictions it is a traditional rule of construction of meaning that a testamentary disposition speaks from death. Consequently in those jurisdictions the statement containing the designation may be understood to refer to the nationality or habitual residence at the death of the *de cujus*, though his language did not make it clear whether he intended the time of the designation or the time of his death.

Yet another situation may arise concerning Article 5(1). It is conceivable that the *de cujus* does not specify the choice of his 'nationality' or of his 'habitual residence' to identify the law of the State he has chosen, but his statement refers merely to the law of a certain State. For example, he writes, 'I designate the law of Arcady to govern my succession'. The State of Arcady is not his nationality or his habitual residence at the time of the designation, but at his death it is his habitual residence. Provided the designation can be found by the forum to be 'express', paragraph 1 gives the benefit of any ambiguity as between the times of designation and death to the *de cujus*.

63 Designations are not to be made lightly, and professional advice is obviously an advantage, particnlarly for an institution like this which is so new. Long passages of time should never be allowed to pass before a will is reviewed, but applicable law designation is now another instance of where review is very important. For instance, a testator designates in his will the law of State N, his nationality, to govern his succession. Twenty years later, habitually resident for many years in a neighbouring State, he dies leaving the will of twenty years ago as his last will and testament. The law applicable remains the law of State N.

64 The *de cujus* designates under paragraph 1 the law of which *jurisdiction* is to apply to govern his succession. He does not designate the *law* of Arcady, as that law

substantively is at the time of designation or of his death. If the law of Arcady is the applicable law, whatever language of designation he uses the substantive law of Arcady that will apply to govern his succession will be that which prevails at his death. It would follow that, if the State of Arcady at the time of designation would regard the will as invalid (by way of example) for reasons of lack of consent, but the State of Arcady has changed its substantive law by the time of the death of the *de cujus* so that the will would then be valid, the benefit of that validity is accorded to the will under the language of paragraph 1 of Article 5.

Paragraph 2

65 This paragraph deals with issues concerning the form of the designation and the existence of the designation maker's real consent to the making of a designation. The first sentence requires the designation to be 'expressed' in a 'statement', and it is provided via this neutral language that the designation may be made in a will or other testamentary act, in a *pacte successoral*, or in a declaration whose sole content is the designation of an applicable law to govern the succession. That is, the declaration disposes of nothing, as a will would be expected to do, nor does it constitute or record any agreement as to succession. The Special Commission and Commission II were both involved in discussion over what degree of clarity should be required for the expression of a designation. The implied designation is rejected by the Convention, but the Sixteenth Session finally concluded that whether the designation had to be 'clearly expressed' or be 'expressed' made little difference, since all that is being said is that the judge, the notary or the solicitor or attorney must have no difficulty in seeing that a designation was made. 'Expressed in a statement' is intended to have that meaning; the 'statement', it would appear, may be oral if the law governing the formal validity will permit that. If the forum conflict rules iucorporate the *Hague Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions*, the formal validity of wills and codicils will be assessed in light of the Convention, but, as to *pactes successoraux* and States where the last mentioned Hague Convention has not been adopted, the conflict rules of the forum will decide what law governs form. The meaning of 'formal validity' is, as previously noted, for the forum.

Commission II also discussed the utilization of '*à cause de mort*' in French to embrace all types of disposition having their force aud effect on the death of the *de cujus*. It necessitated the adoption of the phrase in English 'dispositions of property *upon death*' (emphasis supplied), a term which is more embracive than 'testamentary dispositions', and gives rise to a consequent question as to what interpretation those jurisdictions which decide to make a reservation on *pactes successoraux* should put upon Article 5(2). The Commission decided that it was much preferable to retaiu the comprehensive phrase ('dispositions of property upon death'), and the apprehensions of reserving States on Chapter III are met in the terms of the Chapter III reservation (Article 24(1)(*a*)). Whether the concerns of Chapter III denouncing States are also met by the reservation is discussed iu the commentary on that article. It should therefore be noted that Article 5, paragraphs 2 and 3, make reference to all dispositions of property upon death, whether in the form of wills or agreements as to succession. Hence the importance attaching to the express exclusions of Article 1, and why this article also should be read together with Article 1.

66 It is important to note that, though the 'existence and material validity' of the will or agreement (or any other disposition upon death) concerning the understanding and consent of the *de cujus* to what he is doing in making a designation is governed by the law chosen, 'existence and material validity' does not include the material validity of the *professio juris* itself. The chosen applicable law has no power to refuse material validity to the choice of the *de cujus* who adheres to the terms of the Convention, whether the applicable law is that of a Contracting or of a non-Contracting State. The *professio juris* is materially valid by the authority of the Convention.
Paragraph 2 of Article 5 is concerned with issues such as mistake, fraud, duress and undue influence, all of which attack the free willingness of the *de cujus* in entering upon the designation. The question asked of the chosen law is this: was the designation a voluntary act on the part of the *de cujus*? This is the solution of Article 10 of the *Hague Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods*, where distinction is drawn between the permissibility of party choice of law and the validity of the particular choice, and Commission II thought the precedent should be followed in the present Convention also.
In some civil law jurisdictions a codicil to a will is permitted to contain only minor dispositions, and therefore need not be in a notarial form. Whether a codicil in other than notarial form as a 'disposition of property upon death' can be regarded as an acceptable vehicle for a designation, or it should not be available for so significant a matter as a designation of the applicable law for the whole estate, is for the Contracting State as the forum to decide.

Paragraph 3

67 Revocation of a designation must (1) be made by the maker of the designation, and (2) be in a form approved by the law referred to by the conflict rules of the forum for the revocation of a disposition of property upon death. Clearly included within the paragraph are revocations by act of the maker, as, for example, (a) the incorporation of a revocation clause in a later will, (b) the execution of an instrument which is wholly incompatible with an earlier testamentary instrument, but which does not expressly revoke that earlier instrument, (c) in some jurisdictions the burning, tearing or other physical destructiou of the will by its maker (hence the words 'as to form' instead of 'formal'), and (d) a revocatory instrument of an earlier agreement as to succession disposing of property upon death.

However, it should be observed that the paragraph does not exclude revocation by other occurrences, such as operatiou of law ('*ex lege*').
The conflict rules of the forum as to the requirements for form will lead to a determination as to whether a revocation may take the character of an act by the maker or an occurrence by operation of law. If the revocation may be of either character, the forum will also have an answer as to whether such an act or operation has occurred in auy particular instance. It is clearly arguable that marriage and divorce are each acts of the *de cujus* in a particular setting having legal connotations. In some jurisdictions marriage revokes a will, and in some juris-

dictions divorce also revokes a will. Commission II discussed the matter of revocation *ex lege*, and a proposal was initially put forward, later to be withdrawn, that the material validity of the revocation *ex lege* should be subject to the chosen law. However, it appeared that there is no known instance where revocation *ex lege* has affected a *professio juris* in a will, and the Convention has therefore remained silent on the matter. In these circumstances, were questions to arise, the forum will decide how they shall be answered. As to whether there is a revocation of the choice of law clause, experience may show that reference is made to the *lex successionis*, or perhaps to the matrimonial law or the personal law of the *de cujus*. There is a variety of ways in which the jurisdictions might handle this matter.

This paragraph makes no requirement that the revocation be 'expressed', as paragraph 2 requires the designation to be 'expressed', and the absence of this langnage iu paragraph 3 is explained by the fact that many legal systems allow implied revocation of a disposition npon death, and the Convention provides for implied revocation. This would not appear to be a denial by the Sixteenth Session that problems of a similar nature to those that would be posed by implied designations could not arise with implied revocations; it is merely a recognition of existing rules.
Revocation is made nnder the terms, and therefore by authority, of the Convention. The dispositions to which the Convention applies are those transfers of assets that occur at the death of the *de cujus* and not before. Conseqnently, and assnming the disposer retains his capacity, the instrument of disposition is therefore revocable by the party or parties (unilaterally in the case of wills, bilaterally or multilaterally in the case of *pactes successoraux*) until the moment of death. As a result, and the Convention implies this, a designation is revocable and a new designation may be made as often as the testator or the parties to the succession agreement desire.

May a *pacte successoral* include a term authorizing the parties by consent to change the Article 5(1) designated applicable law? They intend, and so provide, that in exercising the term in the *pacte* they will revoke the designation and at once re-designate another law. It would seem that there is nothing in the Convention to invalidate such a term, provided any change of the applicable law is to another law also permitted by the Convention. The re-designation must also occur before the death of the person whose estate is involved, or, where two or more estates are involved, before the first death among the persons whose estates are so involved.

Paragraph 4

68 This is a rule of construction (or interpretation in civil law terms) complementing paragraph 1. It was introduced by Commission II in order to make it clear that once a designation is made it covers the whole estate even though that estate be partly testate and partly intestate. For instance, if a testator in his will designates the law of State P to govern his succession, and disposes of all his assets in that will, but later one of his legatees predeceases him leaving a situation where no other legatee takes by way of substitution, so that there is partial intestacy on the testator's death, the law of State P will continue to govern the whole succession. It is not the case that a designation in a testameutary form extends to that part of the estate only which is testate. By way of another example a *de cujus* may originate a statement making a choice of law to govern his succession, never make a dispositive act to take effect upon death, and die, of course, intestate as to his entire estate. The chosen law will govern that whole intestate succession.

Though the *de cujus* may have more than one applicable law at a time to govern his assets at death (*e.g.*, the law of his habitual residence at the time of the agreement to govern his *pacte successoral*, and the law of his habitual residence at death to govern his later executed will), there might be a question wheu two such designations occur as to whether both can take effect, or the later designation revokes the earlier designation. The law pointed to by paragraph 3 of Article 5 will make the decision whether the form of the later designation meets the requirements for formal validity of a revocation, but the applicable law under paragraph 1 of Article 5 will determine whether as a matter of material validity a later designation revokes an earlier designation, in whatever instrument (*i.e.*, will, *pacte successoral*, or declaration) either desiguation is made. See further on two applicable laws, paragraph 95, *post*.

The words 'in the absence of an express contrary provision by the deceased' were explained earlier (see paragraph 60, *supra*). They provide for the fact that the *de cujus* may choose another law, the provisions of which are to goveru particular assets within the estate, and to that extent the law chosen under Article 5(1) will not govern 'the whole of his estate' (paragraph 1). For example, a testator makes a will and later enters into a *pacte successoral* with another in which he designates the law of State Q, his habitual residence, to govern his entire succession. This designation will not only govern the *pacte successoral*, but constitute the *lex successionis* to the earlier drawn will. At a yet later date the testator executes another will – his third will – in which he revokes part of his second will, leaves the property in question (immovables in State R) to another person, and designates the law of State R to govern the succession to the immovables devised by the second will. The authority to make this incorporation of the law of State R is Article 6 (in the context of this Convention; otherwise it might be said to be implied), and this paragraph (4 of Article 5), the interpretational rule, is acknowledging the existence of Article 6 in its 'absence of' clause.

Article 6

69 Article 6, though it was demanding of time, emerged as a catalyst at the end of the first week of the Sixteenth Session. It was the final bond in the structure of Chapter II, The Applicable Law, the core of the Convention, a chapter which begins with a finely balanced compromise and thereafter seeks to continue the accommodation in the structure of Article 5(1). Article 6 was the outcome of a protracted effort of a significant number of delegations to secure recognition of the *lex situs* as a third possible applicable law, in addition to the laws of the nationality and of the habitual residence. Their position in the main was that testators with assets in two or more jurisdictions want to invoke the local law for local assets, because lawyers know best their local law, and the whole process of administration is consequently quicker, more reliable, and less expensive. Multiple wills are popular in common law jurisdictions for this reason. Soundings in their own jurisdictions demonstrated to certain delegations that some concession to the situs law as part of the *professio juris* was necessary if

the Convention was to have a real chance of ratification. Their opponents were equally persuaded that situs could not be conceded. In the first place scission would return, and it was one of the central objects of the Convention to produce a unified law, and in the second place it meant that the protection of the family, another object of the Convention, would in fact suffer, because the unscrupulous could site their assets in States with no family protection laws.

As was the case in the Special Commission, however, the majority of the delegations were not persuaded to agree to the situs law recognition position, and proposal after proposal, each slightly less ambitious than its predecessor and exploiting yet another window on the subject, fell by the wayside (Work. Doc. Nos 5, 27, 41, 42, 43). Finally, during debate on a very modified proposal to allow separate laws to govern particular estate assets, provided those laws are either the nationality law or the habitual residence law at death, and provided also the family protection laws of the generally applicable law prevail, it became apparent to both schools of thought that a solution (of sorts) was already in hand (Work. Doc. No 44). This was the *materiellrechtliche Verweisung* or substantive law reference, a doctrine which as noted by several delegations was already capable of being invoked under existing law. A person who under the Convention had the Article 5(1) right to make a *professio juris* would also be able to make a substantive law reference.

70 Substantive law reference is otherwise known as incorporation of foreign law. Whereas Article 5(1) introduces a party reference to a chosen law, Article 6 expressly adopts into the Convention incorporation of a chosen law or of chosen laws. The Article 3 or Article 5(1) law is the applicable law in the sense of the dominant or superior law, and the Article 6 law or laws are incorporated into the substantive institution (*e.g.*, a will) or legal concept (*e.g.*, a contract) which is governed by the dominant law. In the context of contract, for instance, the incorporation of foreign law 'presupposes a proper law different from that to which the reference is made and derives its validity from the provisions of the proper law, ... not from the conflict rules of the fornm' (*International Encyclopedia of Comparative Law*, Vol. III, Private International Law, Ch. 24 (Contracts), para. 25, p. 13). It was not the intention of Commission II to do other in Article 6 than recognize a substantive law reference. Hence the deletion from the Drafting Committee's Working Document No 85 of the required application by analogy of what are now paragraphs 2 and 3 of Article 5. Therefore, despite the existence of Article 6 in the Convention, it would appear that, though the applicable law under Articles 3 or 5(1) must accept a substantive law reference, the incorporation, as described above, 'derives its validity from the provisions of' the Article 3 or 5(1) law. The validity is not derived from the conflict rules of the forum.

As appears from Article 6, any designation under that article is without prejudice to the application of the mandatory rules of the Article 3 or Article 5(1) law. This is the central feature of the substantive law reference doctrine; the mandatory rules of the dominant or superior law must prevail over any foreign law which is incorporated into the institution, in this instance the disposition of property upon death. It follows that any mandatory rules of the incorporated law must give way to the mandatory rules of the dominant law and the dominant law determines what are those mandatory rules.

The substantive law reference is not restricted in any way to situs references. The provisions of any law foreign to the dominant law may be introduced (or incorporated), subject, of course, to the mandatory rules of the dominant law, and any number of foreign laws may be incorporated, subject to the same qualifications. Nor is there any kind of quantum limit. The incorporated law or laws may in fact govern ninety-nine per cent of the acts contemplated by the particular institntion or legal concept invoked, but that is no valid objection, provided the mandatory rules of the dominant law prevail.

71 In the present Convention incorporation is expressly permitted to govern the succession 'to particular assets in [the deceased's] estate'. It is very likely that the predominant use of this article will be to allow the local law, the situs law, to apply to assets situated in jurisdictions other than the principal place of the estate administration, which will itself in many cases be the habitual residence or national home of the deceased. This limitation to 'particular assets in the estate' will not therefore be factually significant. However, one thing is clear. Since the substantive law reference doctrine itself places no limitation ou the subject-matter that may be subjected to the provisions of incorporated law, Article 6 permits the substantive law reference to be made for all kinds of assets, whether immovables or movables. Moreover, in view of the fact that the Convention has a broad scope including both intestacy and 'dispositions of property upon death', this would make the scope of substantive law reference as broad as the scope of the Convention itself. There was no evidence that the Sixteenth Session intended any qualification upon the operation of the doctrine.

72 The following examples will attempt to demonstrate how Article 6 operates.

	Main Law	*Express contrary Provision* (Art 5(4))	*Result*
1 Will	Main law of State A (Art 5(1))	Subsidiary law for assets in State B and assets in State C	Laws of State B and State C applicable (Art 6)
2 *Pacte successoral*	Main law of State D (Art 11)	Subsidiary law for will assets in State E	Law of State E applicable (Art 6)
3 Intestacy	Main law of State F (Art 3) (no will ever made for whole estate)	Will and subsidiary law for assets in State G *pacte* for particular assets but not all intestate's assets in State H	Laws of State G and State H applicable (Art 6)
4 Will	Main law of State J (Art 3) (the will invalid under *lex fori* for incapacity)	Subsidiary law for assets in State K (law of State J would not hold the testator incapacitated)	Will invalid (Art 1(2)(*b*) *juncto lex fori*)
5 Partial intestacy	Main law of State L (Art 5(1)) (testate and intestate estate)	Subsidiary law for assets in State M	Law of State M applicable (Art 6)

The invalidity of the substantive law reference is brought about by the invalidity of the will in the forum due to the testator's incapacity under the *lex fori*
Without prejudice to the application of the mandatory rules of the main law

73 Article 6 itself merely says that a person may 'designate', and it was earlier noted here that Article 5 does not apply by analogy to Article 6 because Article 6 is a substantive law reference, not a conflict of laws rule. However, Article 5(4) states that the Article 5(1) law ('for the purposes of this Article') will govern the succession to the whole estate 'in the absence of an express contrary intent'. This means that, if the forum rules that a would-be Article 6 reference is not 'express' (in most cases, one suspects, it would be because the reference does not particularize that it is to apply to assets or the particular assets in the particular situs only) an Article 5(1) law designation would also govern those assets or particular assets. Alternatively, the would-be Article 6 designation constitutes a new Article 5(1) law, replacing the otherwise designated Article 5(1) law. In other words, there would be no effective Article 6 designation.

A different situation arises on the other hand if there is an intestacy of the 'whole estate', save for a will disposing of particular assets. If the testator makes a will but only for his assets in a situs other than his place of nationality or habitual residence, and does not make an 'express' statement (*i.e.*, does not make it clear) to the effect that the chosen law is to govern the assets in that situs only, that chosen law may become an Article 5(1) law (if its making satisfies Article 5(2)) for the whole estate. If the making does not satisfy Article 5(2), then either the chosen law will nevertheless govern the particular assets (for reasons next explained) or the Article 3 law will apply to the whole estate.

It will be seen that the requirement of 'express contrary provision' does not apply if the main (dominant or superior) law is an Article 3 law. There is now merely the requirement under Article 6 of a 'designation'. This can reasonably be understood to mean that, if the testator makes a will disposing of assets in a particular jurisdiction only (*e.g.*, the situs), and in that will he also designates a law (but not making it clear the designation is for that will only), there is an implied intention that the designation shall be for that will only where, as is here the case, he is intestate with regard to the remainder of his estate. And there seems no persuasive reason for denying effect to the substantive law reference, subject to the mandatory rules of the Article 3 law, of course, when the *de cujus* dies with a will disposing of the remainder of his assets, but that will is invalid. If that is correct, and it seems it must be, then the forum may hold that there is sufficient evidence that the Article 6 law is to govern the testate assets, and the Article 3 law will then govern the remainder of the estate.

It is clear that, because Article 6 is not a conflict rule, questions concerning what is a 'designation' for the purposes of that section have to be decided by the Article 5(1) law, or in the absence of such a law the Article 3 law. Reference was made earlier (see paragraph 70, *supra*) as to the respective roles of the forum and the Article 3 or Article 5(1) law further to the terms of the Convention.

Article 7

74 This article is concerned with the meaning of 'succession'. It supplies the meaning of 'succession' for the whole Convention, of course, but it is particularly in relation to Articles 3, 5 and 6 that it is important. Each of those articles deals with the designation of a law to 'govern the succession'; Article 7(2) describes the substantive legal topics that a Contracting State must regard as falling within the scope of the Convention, and Article 7(3) goes on to confirm that, for the purposes of its own conflict of law rules, a Contracting State may bring any topic not included within Article 7(2) within the scope of 'succession'. Article 7(3) recoguizes the right of any Contracting State to do this, but of course a Contracting State cannot impose its broader definition of 'succession' upon other Contractiug States. That is, the Convention does not require other Contracting States to recognize the application of the Convention's provisions to subject-matter that is outside the Convention.

However, it should not be overlooked that the forum will determine the meaning of the terminology in Articles 1(2) and 7(2), such as 'capacity' (Article 1(2)(*b*)), 'matrimonial property' (Article 1(2)(*c*)), and 'material validity' (Article 7(2)(*e*)). Only 'succession to the estates of deceased persons' (Article 1(1)) is in part delineated in the Convention, as including, *e.g.*, by inference the 'disposition of property upon death' (Article 1(2)(*a*) and Article 1(2)(*b*)).
The difficulty faced by the Special Commission and Commission II was that there is a considerable diversity of uuderstanding between civil law and common law countries as to the meaning of 'succession'. Within that concept civil law countries (and units within a State, like Québec) include devolution, transmission and administration (to the extent that the latter is not governed by the procedural law of the forum). Common law countries (and units within a State, like England and Wales) include devolution only; they assign transmission and administration to the law of the forum. There are also significant differences between jurisdictions as to classifications; a topic may be classified as substantive in some jurisdictions, and procedural in others. The distinction between matrimonial property law and succession has no agreed line, and the same is true of the distinction between the marriage contract and succession.

The Special Commission therefore decided to list 'core' matters that all jurisdictions would regard as succession; this would be the 'positive' list. Other matters, also recognized by some jurisdictions as succession matters, fall within the 'grey area' (Article 7(3)). The so-called 'grey area' is made up of those substantive topics which may additionally be included within 'succession', depending on the jurisdiction. The Special Commission recognized that for civil law jurisdictions a large terrain of what in their classification constitutes succession is omitted from Article 7(2), and that this is a severe limitation upon the harmonization that the Convention is able to produce, in particular as between civil law Contracting States. Nevertheless, it was felt to be a considerable advantage to have harmony in the area of devolution, and Article 7(2) mandates the itemized topics with harmonization in view.

The Sixteenth Sessiou adhered to these judgments, aud very little change was made to the Special Commission's preliminary draft. Paragraph 1 directs attention to the designations of Articles 3 and 5(1) (the applicable law) and of Article 6 (the subsidiary law or laws for specified assets). Each of those designations is to 'govern the succession'. Paragraph 2 lists a definitive list of substantive law topics that *must* be regarded as falling within 'succession'. Paragraph 3 is a reminder to Contracting States that each *may* bring in further succession topics (other

than Article 1(2) matters) and thereby subject those topics for its own purposes to the control of the Convention.

Paragraph 1

75 This paragraph directs primary attention to the articles that determine the applicable law to the whole of the estate. It refers not only to Articles 3 and 5, which are true conflict rules, but also to Article 6 which is a substantive law reference. The reason is that, to the extent that the mandatory provisions of Articles 3 and 5 so permit, an Article 6 law designated by the *de cujus* may also 'govern the succession' (Article 7(2) applies). Together Articles 3, 5(1) and 6 apply to all the assets in the estate, and to all testamentary dispositions and all *pactes successoraux*.

This is the only article in the Convention which refers to the unity principle. This principle implies among other things that a jurisdiction which has hitherto applied only its own law with regard to immovables within that jurisdiction will under the Convention have to apply a foreign law. This poses the requiremeut of proof of foreign law.
The Convention does not deal with proof of foreign law, and the following remarks are introduced solely for the guidance of those jurisdictions (mostly common law) which as Contracting States will be abandoning the application of the *lex situs* to land and interests in land. Proof of foreign law is left implicitly to the forum, and the forum will draw on its own rules for that purpose. This is particularly important for immovables that are subject for Article 7(2) purposes to an applicable law under Article 3 or 5(1). The Convention makes no provision regarding the proof that, for example, public offices and title insurers within the situs are to require in order that they may be sure the substantive Article 7(2) law of the applicable law has been correctly established in evidence. Of course, a *bona fide* transferee is often already protected under generally accepted law in all jurisdictions. Nothing in the Convention interferes with the power of the situs to protect the third party transferee. The purchaser in good faith without notice will always acquire a good title to immovables. However, States already applyiug the unity principle usually require and are satisfied with a notarial certificate as to the provisions of the foreign law. The notary certifies the heirship rights in his jurisdiction. The situs could require also that the certificate be notarized before a consul of the situs State resident in the foreign State, and this would surely render the certificate recordable plus giving protection under the recording statutes of the situs. A court order in the foreign law State, declaring the heirship law of that State, is likely to be more costly and creative of delays than notarial certification, but would be available as a last resort in a difficult case. See further 65 *Texas Law Review* 585 (1987).

Paragraph 2

Sub-paragraph a

76 This first sub-clause is concerned with the ascertainment of the *persons* who are entitled to inherit, what it is they inherit, and on what terms, if any. They will take as heirs or legatees, and in the common law system as heirs or testamentary beneficiaries of realty (devisees) or personalty (legatees). 'Respective shares' means the quantum of the estate, or particular assets from the estate, to which the heir, legatee or devisee is entitled; 'share' would include the *réserve*, '*légitime*', and forced share entitlement, to the extent that that entitlement does not relate to specific assets. 'Obligations imposed upon them [*i.e.*, the heirs, devisees and legatees] by the deceased' would refer to conditions or personal duties which the deceased attaches to the particular right of inheritance, that is, imposed on the described beneficiary taking under the will or *pacte successoral*. 'Other succession rights arising by reason of death' refers to rights to specific assets or a quantum of assets under the concept of 'forced shares' (*i.e.*, shares dictated by State authority) and homestead, again regardless of the terms of the will or *pacte* and whether the deceased dies testate or intestate.

However, this sub-paragraph is emphasizing the persons who have such rights, and who are thus enforced heirs or inheritors to the deceased's estate.
'The provision by a court or other authority' refers to the power of the court in common law jurisdictions, or of an administrative tribunal in some other jurisdictions, to make inheritance awards at the discretion of the court or tribunal. Outside the USA, where in most jurisdictions there is a statutory right of the surviving spouse to one-third of the deceased's estate, this is the approach of the great majority of common law jurisdictions to family protection, and takes the place of reserve and '*légitime*' in civil law jurisdictions. Regardless of the terms of the will and, in some jurisdictions also, where there is an intestacy, the 'court or other authority' will award assets from the estate, thus varying the testate succession or the order and quantum of intestate succession, to persons in the immediate or one-time close family of the deceased or who were dependents of the deceased. Some jurisdictions include a former spouse, and the cohabitee at the death of the deceased (or a past cohabitee) and issue of such cohabitation relationships. Courts in Contracting States (or in units of such States), which are familiar with fixed proportions as the modus of family provision, will be called upon to exercise this judicial discretion if such is the modus adopted by the applicable law.

This sub-paragraph is not intended to include emergency provision which may be made by the executor or administrator in some jurisdictions for the relief of need in the case of certain persons, *e.g.*, the surviving spouse and children. In those jurisdictions this is a facet of estate *administration* which lies outside Article 7(2). However, as Commission II noted, such emergency provisions would be the subject of an accounting by the recipients, and therefore for the purpose of accounting fall under sub-paragraph *c*. Where alimentary provision for persons is in lieu of or by way of a succession right, however, it would seem to fall within paragraph *a*. Unpaid alimony and maintenance, whether the obligation to make payment arises from a separation agreement or from a court order, and alimony and maintenance awards or settlement obligations which are to continue after the death of the obligated person, would give rise to a creditor claim by the unpaid person against the deceased obligated person's estate. Creditor claims clearly fall outside this sub-paragraph, and Article 7(2) as a whole.

Sub-paragraph b

77 The emphasis of this sub-paragraph is upon persons who would be the beneficiaries of the estate of the deceased, bnt who for reasons set out in the sub-paragraph lose the right of inheritance. 'Disinheritance' refers to any circnmstance under which the beneficiary (using that term to embrace any person who in whatever capacity 'succeeds' to the estate of the deceased, whether on testacy or intestacy or by way of a *pacte successoral*) is deprived of the succession he would otherwise have enjoyed. 'Disinheritance' in this sub-paragraph refers to forcible deprivation of inheritance rights. 'Disqnalification by conduct' includes such circumstances as the beneficiary who criminally takes the life, or aids and abets the taking of the life, of the deceased. In civil law jurisdictions an heir may be exclnded from the succession on the grounds that he is unworthy to succeed to the deceased. This will be so, for instance, because he has been guilty of cruelty towards the deceased, or he has sought to hinder the testator in making, varying or revoking his will, or he has in bad faith concealed or tampered with the will of the deceased.

Disclaimer, renunciation, and election against the will – disinheritance by choice – is not included within the sub-paragraph. The sub-paragraph also excludes the option of the heir to accept or renounce the succession. See for a further reference paragraph 39, *supra*. It was discussed at length by Commission II, and the consensus was that, since many jurisdictions consider this subject as a matter of administration of the estate rather than of succession, it is better excluded from the 'positive list' of Article 7(2). Delegations noted that it is a phenomenon that most often occurs after the death, that is, after the succession; even if renunciation occurs during the lifetime of the *de cujus*, and is valid in the jurisdiction, it still is not clearly seen as a matter of succession.

What would be the position, nevertheless, if a dispute were to arise as to whether disclaimer by a member of a class of testate beneficiaries or intestate heirs causes an increase in the shares of the other members of the class, or gives the State the right to claim the share? Does this fall within or outside the Convention? 'Shares' are expressly mentioned in Article 7(2)(*a*), and the claim of the State is the subject-matter of Article 16. It would seem, therefore, that it is the *act* of disclaimer, renunciation or election which is not included within the Convention, while the consequences of the act, should they fall within Article 7(2), will be subject to the Conventiou.

Sub-paragraph c

78 The purpose of this sub-paragraph, once a qualified beneficiary is established or entitled to a share or to assets in the estate, is to render subject to the applicable law of succession all questions concerning whether, and, if so, in what circumstances and to what extent the beneficiary has to account or has to restore or to reimburse. For the purposes of the determination of what the beneficiary is to receive from the estate, he may be required to list, for the benefit of the deceased's estate, gifts received from the deceased during his lifetime, and to bring into account, or restore or reimburse, such gifts or other lifetime transfers by the deceased to the beneficiary, or other legacies in the will. The right of the estate administrator to compensate those with family inheritance entitlements can reasonably be understood to fall within this notion of accountiug. Provisions requiring compensation out of assets in the forum makes up for that which is lost to the family by non-protective or less protective policies of other laws, *e.g.*, in the situs, and prevents those persons who would take forum assets, while defeating protection provision under the applicable law, from being so enriched. The sub-paragraph is solely concerned with issnes involving the calcnlation of the size of the deceased's estate for the purposes of distribution to beneficiaries.

The Report on the preliminary draft Convention (paragraph 38) stated that 'excessive gifts', as that term is understood in civil law jurisdictions, do not result in the donee being liable to acconnt. Nevertheless, the position appears to be well taken that the obligation to restore or to reimburse, or to have the excess imputed to a portion to which the donee is otherwise entitled, does indeed fall within the Convention. As an example of an issue that would fall within the sub-paragraph, a son may have received substantial sums from his father during the father's lifetime to assist the son in his business or chosen profession, and in his will the father, a widower, divides his estate equally between his three children. The applicable law (or the Article 6 law in the case of 'particnlar assets') will determine whether, and, if so, to what degree the son must account for his lifetime receipts when the quantum of each child's share is being determined.

The gifts referred to in this paragraph may include gifts to which the Convention does not otherwise apply because they are excluded by Article 1(2)(*d*). This will depend on whether, first of all, the applicable law requires accounting for, or reimbursement of such gifts in the relevant case, and, secondly, on whether the relevant disposition made by the deceased during his lifetime is to be characterized as a 'gift'.

The applicable law would also determine the validity of a clause in the will requiring a beneficiary to bring into account gifts made by the testator during the testator's lifetime.

However, if the donee of an *inter vivos* gift would not have had to account under the *lex successionis* as that law was at the time of the gift, but is required to account by the *lex successionis* as it is on the death of the donor, there is a problem because of a change in the law. The Convention leaves to the conflict rules of the forum the effect of a change in the substance of the law. If the gift is not a *pacte successoral* under the *lex successionis* at the time of execution of the agreemeut, but is such a *pacte* under the *lex successionis* at the date of the relevant death, another problem arises. In this instance, however, the Conveution applies if only one estate is involved and no designation or valid designation was made (Article 9(2)), and it requires an accounting. The actual *lex successionis* is the applicable law under the Convention.

Sub-paragraph d

79 This sub-paragraph is concerned with issues involving freedom of testation, and succession rights which, as was previously said (paragraph 76, *supra*), are determined by law or by legal process, these being rights which the testator by his will cannot deny. The emphasis is upon the inalienability of a portion of the estate property, or specific assets within the estate. It clearly is not intended to cover creditors' rights, which are not covered in the 'positive list', but it does cover issues as to what part of the estate the deceased is free to distribute to whom he will, and attempts by the deceased – in his lifetime or by his will or agreements as to succession – to avoid reserve, *légitime*, forced shares, or judicial discretionary allocation of assets to immediate fami-

ly members. This would include a situation where the deceased in his lifetime responds to an advertisement from a tax haven (a non-Contracting State) that he deposit assets in an investment device in the haven, and thereby avoid family protection legislation in his home jurisdiction. It is here supposed, of course, that other assets of the deceased remain subject to the control of the forum in a Contracting State.

It is clear that questions concerning matrimonial property would be determined by the appropriate law governing such questions, and only thereafter would the quantum of the testator's disposable estate be known. The Convention concerns that disposable estate. It is also clear that whether dower rights, homestead rights, and other rights of this kind, pertain to 'succession' or matrimonial property law is for the forum (a Contracting State) to determine, and the same holds true for divorce and separation agreements that allocate assets of one spouse at the death of that spouse to the other.

Sub-paragraph e

80 This sub-paragraph is concerned with the material (or essential) validity of testamentary dispositions only, because Chapter III deals with the material validity of *pactes successoraux*. In this instance therefore the phrase 'dispositions of property upon death' is not appropriate. The forum defines material validity.

Paragraph 3

81 It was previously explained (paragraph 74, *supra*) that this paragraph is introduced into the Convention primarily to complete the 'tripartite' structure of the thinking behind this article. Paragraph 1 is the link between Articles 3, 5(1) and 6 on the one hand and Article 7 on the other. Paragraph 2 lists the 'positives', that is, those topics that a Contracting State must regard as falling within 'succession'. And paragraph 3 underlines that the list in paragraph 2 is indeed definitive of topics that a Contracting State is obligated to regard as 'succession' matters.
Another reason for paragraph 3 is that it allows courts and other authorities in States, whose constitutions provide for the direct applicability of the self-executing provisions of treaties, to apply the conflict rules of the Convention to matters of succession outside the Convention, and do so without express authorization by the legislature.

As previously explained, there is a 'grey area' of topics that are eligible for voluntary introduction into the scope of the Convention. Since the Convention conceives of 'succession' solely as a matter of devolution, it is clear that any matter a civil law State characterizes as transmission or administration may be brought by that State within the Convention, though with effect only within its own borders.
It was in this respect – should it properly be brought within Article 7(2), or should it remain in the 'optional' or 'grey area'? – that the interpretation of wills was discussed by Commission II. The Special Commission had decided that this subject could not be included in Article 7(2) because of the diversity of approach among the jurisdictions to this issue, and had left it in the 'grey area' of this paragraph. Commission II considered the matter at greater depth, but came to the same conclusion. One possible course of action was an express exclusion under Article 1, another was an express inclusion in the 'positive list', and the third was to leave the subject in the 'grey area' where each Contracting State could deal with the matter as it was persuaded.

Though jurisdictions of both the civil law and the common law tradition would have welcomed inclusion in Article 7(2), it became apparent that they had different views on what should be the nature of that inclusion. For civil law countries the meaning of a will is a question which may or may not involve the application of legal rules (there was a difference of opinion on that subject), but it is determined at the death of the testator and is necessarily therefore a matter for the *lex successionis*. However, common law jurisdictions take another approach. The common law regards the meaning of the testator as something that must be judged by looking at what the testator must have meant at the time when he made his will. When that meaning is clear, the common law practitioner or judge applies it to the factual circumstances at the time when the testator died. The common law delegations would have chosen only the latter task – 'interpretation' – as for the *lex successionis*, and been insistent that the former task – 'construction' – is to be determined at the date of execution and the law then intended by the testator. It was also evident in debate that the use of the term 'interpretation' itself differs among lawyers from different backgrounds.

The Commission had no desire to exclude the subject of interpretation of wills from the Convention (this subject was different from the matters that had been excluded), but on the other hand the Commission concluded that it was not a subject that could go into the 'positive list'. Whatever the juridical nature of rules that may be employed in interpretation, the majority felt that it was a matter where the judge was simply looking for the deceased's intention, and the less this task was complicated the better. A judge should be left to do it in the way his system favours.

CHAPTER III – AGREEMENTS AS TO SUCCESSION

82 This chapter is concerned, not with the unilateral revocable will, but with (1) the agreement between parties as to a future succession (*pactes successoraux*) and (2) the wills of different parties which are reciprocal.

To speak first of reciprocal wills, reciprocity takes the form in most jurisdictions that each will confers a succession benefit on the other testator, but in other jurisdictions, uniformly so in common law jurisdictions, there is the added element that the conferment of benefit by each testator is in expectatiou that a third person will benefit from both wills (mutual wills or *testaments mutuels*). Such wills may either be made in one instrument or in two (or more) separate instruments. The terms 'joint wills', 'mutual wills' and 'reciprocal wills' are employed differently and often interchangeably, in the literature and the judgments of courts. Commission II had to contend to some extent with this problem.

Pactes successoraux include (1) the unilateral contract, namely, the gratuitous promise to leave property to another by way of a disposition on death, and (2) the bilateral contract, namely, a promise for reciprocal value to do the same thing. The Special Commission had the advantage of a paper on the subject of *pactes successoraux* (Preliminary Document No 11) prepared by the Permanent Bureau at the request of that Commission, and this paper remained at the conclusion of the Sixteenth Session a valuable resource document, demonstrating among other things the diversity of approach to this snbject that exists between jurisdictions, particularly in substantive law but also in conflict of law rules.

83 Without Chapter III of the Convention *pactes successoraux* (literally translated as 'agreements as to succession'; see further paragraph 28, *supra*) and mutual wills (*testaments mutuels*) would fall into the so-called 'grey area' of Article 7(3). As to their permissibility and validity, they would be 'dispositions of property upon death' not included in Article 7(2). As to their determination of the heirs and legatees, however, that is matters that directly fall within Article 7(2)(*a*), the position was by no means so clear. The Special Commission recommended that the Convention could not remain silent on the subject, so integral are *pactes* within the law of succession and of practical importance in a number of jurisdictions. Consequently, it was decided, the Convention should contain rules for the determination of the applicable law governing these agreements and also mutual wills, providing additionally a reserve for those Contracting States which prohibit the use of *pactes successoraux*, which do not know of this particular legal concept, or which regard any Convention's provisions on the subject as too limited in value for them. Some civil law States (*e.g.*, Norway and the Federal Republic of Germany) give a significant recognition to *pactes*, but others a limited recognition only (*e.g.*, France), while others (*e.g.*, Greece) give none. For common law jurisdictions the conceptual approach to 'lifetime arrangements' of this kind has been very different. The historic doctrine of *pactes successoraux*, and also the prohibition of such *pactes* by classical Roman Law as an impairment of testamentary freedom, a prohibition which has so heavily influenced succession law in systems of the Roman tradition, especially the codes of the Latin countries, is no part of the history and therefore of the contemporary attitudes of common law jurisdictions. On the other hand for every State, civil or common, there is the problem of how to deal with *pactes* and mutual wills entered into under a foreign law but which come before the courts of the jurisdiction in one way or another.

84 The preliminary draft Convention did not define a *pacte successoral* or *testament mutuel*, but from its provisions concerning conflict rules a descriptiou appears. A *pacte successoral* is an agreement between two or more persons creating, modifying or terminating the rights of one or more of those persons to succeed to the future estate or estates of one or more of the other persons. The crucial words there are 'succeed to the future estate', or as it is more precisely rendered in French, '*droits dans la succession future*'. For many States a 'future estate' is a curiosity as a phrase; it does not mean very much. Here it is a translation. Mutual wills are not necessarily themselves the outcome of an agreemeut; indeed, in some jurisdictions the fact of reciprocity (*i.e.*, benefits flowing from each testator to the other) is enough to give rise to the effects of an agreement. However, if not themselves the evidence of an agreement, mutual wills are usually required to be further to an agreement previously concluded. Strictly, therefore, *pactes successoraux* and mutual wills (*testaments mutuels*) should be distinguished, and this the Convention in Article 8 does.

In fact, at this point it is appropriate to mention the work of Commission II in regard to a definition of the agreement with which the Convention is concerned. The Convention's Article 8 remedies the absence of a defining article in the preliminary draft. It usefully encapsulates the subject-matter with which the chapter is concerned, and it also restricts the Convention's concern to agreements in writing. The Commission was aware that oral agreements are recognized by a few jurisdictions, but was of the opinion that the agreement 'created in writing' because of evidentiary considerations is as far as the Convention should go. However, this is merely a restriction on the scope of Chapter III. The applicable law may indeed choose to accept the validity of an oral *pacte*; the oral *pacte* (or agreement) is simply not included in the Convention.
It is important to recognize that agreements as to succession, that is, to future property, are regarded in the civil law tradition as dispositions upon death, because in the civil law, as Preliminary Document No 11 at paragraph 13 explained, the contract which creates, modifies or terminates succession rights and the rights themselves merge together to bring the *pacte* itself within the Convention as a matter of 'succession'.

85 The preliminary draft Convention constituted the objective connecting factor (Article 3) the applicable law when the parties make no choice of applicable law. Where only one party's future estate is affected, that estate's Article 3 law governs; where two or more estates are affected, the Article 3 law of each of these estates governs, thus creating here a cumulation of laws. The preliminary draft also permitted an Article 5(1) *professio juris* between the habitual residence law or nationality law of the party whose future estate is affected. Where two or more parties' future estates are affected, the parties to the agreement (or mutual wills) might select one of those affected parties' habitual residence law or nationality law. As to the time at which the Article 3 law or Article 5(1) law should be determined, the Special Commission first considered the date of death, because *pactes* and mutual wills take effect at the death. However, it concluded that requiring the parties who are making an agreement to be bound by a law or laws which at the time of the agreement they cannot know (at least, for certain) made little policy sense, even if the Commission had taken a different policy viewpoint (Article 5(1)) so far as designations in or for non-reciprocal wills are concerned. An agreement is binding when made; a will is ambulatory until death. The Special Commission also decided that the applicable law or laws should govern the material validity, the revocability, and the effects of the agreement.

86 Commission II commenced its discussions in a markedly more liberal frame of mind. In Article 5(1) the alternative of the date of designation or the date of death of the testator had been introduced, and this undoubtedly encouraged the Commission to entertain the same thoughts in Chapter III. Secondly, where the Special Commission chose the cumulative approach when

two or more Article 3 laws are concerned, and a cumulative approach for the purposes of material validity, revocability and effects of the agreement, Commission II took a different path. It was initially more attracted by the liberal policy of allowing as many of these agreements as possible to benefit from the Convention. Consequeutly cumulation came under serious question, and the alternative law approach was adopted in a number of votes.

87 It was an early decision of Commission II that, where only one estate is involved, the parties should have the benefit of a second chance, not merely where an Article 5(1) law has been designated, but in the circumstances where no choice of law has been made by the parties. If their agreemeut is not valid when it is made, it will nevertheless be recognized as valid if validity exists under the Article 3 law at death. The Commission was also concerned about the law that should govern the effects, which is a different issue from validity. It decided, however, that as the effects of the contract on the succession are the present concern, and the governing law of such effects is appropriately the *lex successionis*, it is preferable that the material validity, the manner of termination, and the effects should also be subject to the Article 5(1) law or the Article 3 law at the date of the agreement or, alternatively, at the date of death.

88 So far as those agreements are concerned where two or more estates are involved, Commission II initially considered that the same alternative laws (time of agreement, and time of death) should apply in these circumstances as well. If one or more of the laws involved does not validate the agreement when it is made then the questiou would be asked as to whether the agreement is validated by the Article 3 law or the Article 5(1) law, as the case may be, at the death of each of the parties whose estate is involved. In other words, there would be a cumulation of laws for validity purposes at the time of the agreement, and an alternative cumulation for those purposes at the death. The difficulty of course is that validity at death cannot be ascertained until the last of the parties whose estate is involved actually dies. This leaves the whole issue of the validity of the agreement open uutil the death of the last to die, and some delegations had reservations about leaving an agreement 'in the air' for what may be a prolonged period of time.

There was also the problem of whether material validity, revocation, and the effects of the agreement could any longer be treated in the same way. Could the same law apply to all three issues? Material validity is evidently concerned with the time of making of the agreement or alternatively the momeut of the last death; the 'effects of an agreement' raises issues both of contractual effects between the parties (performance, breach, etc.) and effects upon the estates of the parties whose 'succession' is concerned. But which law should decide whether an effect is contractual, as between the parties, or is of a 'succession' character?

The Drafting Committee to whom these issues were consigned reported with a series of possible positions, which ultimately led delegations to the view that cumulation at the time of the agreement for the purposes of material validity, the extinction of the agreement, and the effects, was the only possible solution. Though the more liberal approach wonld lead to the inclnsion of more agreements – and thus assist the move towards unity – the permutations of possible laws that might govern each of the material validity, effects, and revocability (or the circumstances resulting in the extinction of the effects) became far too complex to be practical. The outcome of their application was also doubtful.

Finally, except for paragraph 2 of Article 9, which has already been mentioned, the Sixteenth Session returned to the policy ideas of the preliminary draft of the Convention as it had come from the Special Commission. This included a saving provision (now Article 12) that prevented abuse. No party to an agreement might take a benefit under the agreement, and then later on contest the validity of the agreement on the grounds that it is invalid under the Article 3 or Article 5(1) law that applies to the rest of the 'succession'. Secondly, no person who was not a party to an agreement might lose his or her indefeasible interest under the Article 3 or Article 5(1) law (*réserve*, *légitime*, forced share, or right to a judicial award of estate property) as a consequence of the agreement reached between the parties. The party or parties whose estate or estates are affected could not thus bargain away the rights of a stranger to the agreement.

89 The Special Commission was not fully decided as to how *pactes successoraux* (and mutual wills) should be brought into the Convention. Initially it was aware of the hostility of many States to such *pactes*, and of the wide differences between the States that do recognize them as to their substantive law on the subject. When it did introduce the subject the Special Commission was at first minded to keep Chapter III as a self-contained entity within the Convention, and the exclusion from the chapter of dispositions other than 'dispositions upon death' by way of an article (Article 9) within Chapter III reflected that approach. However, these exclusions were properly exclusions from the whole Convention. Moreover, Chapter III in the preliminary draft drew heavily on Chapter II, aud this was more an approach based on integration than separation.

Commission II for its part decided that the more desirable approach was integration. Consequently Article 9 of the preliminary draft disappeared into Article 1(2)(*d*), and references throughont the English text of the Convention to 'testamentary dispositions' became 'dispositions of property upon death' (save for Article 7(2)(*e*) where the change is not required).

Article 8

90 As has been seen, an agreement as to snccession must be 'created in writing' if it is to be snbject to the Convention. This should be contrasted with 'evidenced in writing', an alternative requirement which Commission II considered but rejected. If an agreement had only to be proved by a writing, it could be orally created and the writing originated at some other time. All the writing would have to do is establish that an agreement was in fact entered into, and at the time alleged. To the contrary, an agreement which has to be 'created in writing' means precisely that the bringing into existence of the agreement must be by way of a document of some kind. Article 8 is not to be understood as encompassing any orally created agreement, even if proof in writing of its creation is available.

Which law determines the form which the 'writing' must or may take is for the forum to decide. The Convention determines only the applicable law. So while some systems require a *pacte successoral* to be in the form of a will, and others require a notarial writing, yet others have requirements of still another kind. The Convention has remained silent on the subject of the form of the written agreement. The Convention speaks as to form in connection solely with the *professio juris*. If the *pacte*

successoral contains a *professio juris*, the written agreement must be in the form specified by paragraph 2 of Article 5.

91 Commission II adopted the phrase 'created in writing or resulting from mutual wills', because it is comprehensive of rather different situations. As explained earlier, mutual wills (normally they arise between husband and wife, or two siblings who share a household where the law in question admits mutual wills in these circumstances) are conceived of rather differently as between civil and common law countries, and also to some extent between civil law countries. They may or may not themselves constitute the agreement, but, if they are not the agreement, they are the outcome of such an agreement. Where the agreement was earlier made, some evidence of it may appear from the wills, and very often it is the case that the will makers have not reduced their agreement to writing. Some, of course, have done so.

In common law jurisdictions the mutual wills are merely a vehicle whereby each will maker confers property of his upon the other for that other's benefit on the understanding that a third person shall enjoy the property in question (together with the inheritor's property) upon the survivor's death. However, though as to the results it produces the common law is not different from the so-called 'Berlin will' of Article 2269 of the German Civil Code (the *Bürgerliches Gesetzbuch*), the approach is altogether different, and in many civil law countries the mere conferment of benefit by each will upon the other, should the other be the survivor, constitutes mutuality of wills, provided that an agreement has gone before that each will should do this. That is, no third party need be a beneficiary. The *Bürgerliches Gesetzbuch* itself goes even further. Article 2270 permits wills to be enforced as mutual wills as long as they confer reciprocity of benefits. Agreement as such is not independently required. It was the intention of the Sixteenth Session to include all these testamentary arrangements, and to embrace them all within the language 'or resulting from mutual wills'. Mutual wills in every jurisdiction involve only the parties to the agreement, and each party's estate, his or her 'succession', is also involved. Unlike the situation in *pactes successoraux*, mutual wills iu civil law jurisdictions are seen rather as unilateral acts brought together, rather than agreements. The succession to each actor's estate is therefore inevitably involved, and non-actors are equally inevitably no part of the mutuality.

92 The distinction between agreements creating, varying, or terminating rights to succeed to the estate of an agreement participant, on the one hand, and *inter vivos* transactions as known in common law jurisdictions, on the other, could be made in the following manner. The agreement as to succession concerns the assets at death of a living person. An *inter vivos* transaction may do the same. But, whereas the agreement gives rise to a future right to those assets, a right which only comes into existence at the moment of death, the transaction *inter vivos* is complete, giving rise to full property rights at the moment of the transaction. The agreements here in question are concerned with existing rights to a compulsory portion (*e.g.*, the German *Pflichtteil*) or to inherit (*e.g.*, *réserve*, *légitime*, etc.), and the transactions in question give rise to property (or contingent ownership) rights upon the completion of the agreement or arrangement, the death of a party to that transaction being the occasion for the mere passing of possession. The distinction between ownership and obligation in the civil law, and ownership being created by a *traditio* or disposition (in this instance '*à cause de mort*'), are features of the civil law that give rise to a clarity in the distinction between contract and succession which conceptually cannot exist in the common law systems. The common law doctrine of estates (or interests) in property allows not only agreements concerning (and gifts of) property rights, but dispositions which are then and there complete, looking to death merely as the moment of physical finalization. This thinking permeates today a considerable number of transactions in common law systems, whether their origins conceptually lie in judge-made law or in contemporary statute. The Sixteenth Session tried to capture this in moving Article 9 of the preliminary draft Convention to Article 1(2)(*d*). As previously mentioned, Article 1(2)(*d*) attempts to express this distinction, necessarily in a very small space. Article 1(2)(*d*), it will be recalled, excludes these *inter vivos* transactions from the scope of the Convention.

93 'Rights in the future estate' or '*droits dans la succession future*' refers to the rights that arise at the time of the death in the assets that will ultimately make up the property of the deceased, *i.e.*, his estate at death or his succession. The reference is to rights to property, not personal claims against the deceased's estate, though since in some systems such a claim is itself property the distinction in any particular circumstance is not easy to make. Nor does Article 8 refer to 'future estate' in the sense only of the technical term 'future property'. 'Future estate' or 'future succession' means property that makes up the estate of the deceased at his death, whether as events prove it consists of assets he owned at the time of the agreement, assets that he only owned at death, or some assets of each category. No common law system permits a person to have an existing proprietary right in 'futnre property', unless the particular jurisdiction has authorized it by statute; he can have only a personal (contractual) right to have the property transferred to him when it comes into existence. There are no exceptions. The peculiar situation of a will beneficiary between the death of the *de cujus* and the completion of the administration (which is a right to assets to be ascertained out of an existing whole) is not under consideration. And in French law, as a civil law example, a gift is valid only if it is of existing property.

It may be appropriate to continue with French law as the example. The *donation entre époux*, being a permitted gift of both present *and future* property, is a deliberate exception to that rule. So far as it is a gift of existing property it is *inter vivos* and falls outside the Convention (Article 1(2)(*d*)). As a gift of future property, however, the Convention would apply to the *donation entre époux* because this gift takes effect only at the death of the donor (as it would to a common law gift, if it were possible to have an immediate gratuitous disposition of future property). The *donation de biens à venir* (C.C. 1084), a gift of future property, is a hybrid of gift, contract and will characteristics. In an antenuptial marriage contract it is a gift by a relative or stranger in blood to the marrying persons and their future children. But in character it is a second exception to the general rule of French law that there can be no present gift of future property. It is also an exception to the rule of the Civil Code that the *pacte successoral* is prohibited. The Convention clearly applies to a *donation de biens à venir*, unless or to the extent that it is characterized by the

Contracting State forum as a '*question relevant du régime matrimonial*' (Article 1(2)(*c*)), and therefore for that reason or to that extent it falls outside the Convention.

The meaning of 'future estate' or future succession can be demonstrated by another institution drawn from French law. The *donation-partage* is a gift *inter vivos* and a simultaneous partition of assets owned by the parent at the time of the gift; the gift is usually among those who have *réserve* rights, and is intended by the parent to be in satisfaction of those rights. However, it is a gift of existing property and the Convention does not include it; there is no 'disposition of property upon death'.
The *pacte successoral* or *pacte sur succession future* is essentially the *donation de biens à venir* and all civil law institutions having the same characteristics, whatever the State or unit of the State (*e.g.*, Québec), are also *pactes successoraux*. The caveat the civil law Contracting State must heed is that any gift of, or agreement as to, future property, though classifiable as a *pacte successoral*, will nevertheless fall outside the Convention if it is characterized by the forum Contracting State as matrimonial property.

On the common law side, given the absence of exceptions to the rule that there can be no disposition of future property other than indirectly through a contract for value between the would-be disposer and the would-be disposee, it seems likely that common law jurisdictions will rarely find that a non-testamentary disposition nevertheless constitutes a 'disposition of property upon death'. The question that will be asked, however, is whether the following is a 'disposition of property upon death': the *de cujus*, X, contracts with Y for value that X will leave an asset that he then owns ('my house called 'Greengables' at Stow-in-the-Wold') by will to Y. X dies intestate, and Y is a stranger in blood who survives X, having given the promised value. It is the opinion of the Reporter that Y claims as a creditor against the estate of X, as has been said elsewhere in this Report. Y seeks specific performance of a contract, and in registration jurisdictions that right as of the date of the contract will be registered against the house. This conclusion has the useful side result that no distinction need be drawn or attempted between property existing at the time of the contract and property that may exist at some future date. The distinction is merely that between testamentary and non-testamentary dispositions, something which has been familiar in common law jurisdictions since the seventeenth century. If H in his separation agreement with W purports to 'give' W 'three-quarters of my net estate at death', he has breached the rule that he may make no disposition of property upon death other than in testamentary form. The so-called 'gift' is invalid.

This would mean that common law States will find the principal value to them of Chapter III of the Convention is that it usefully regulates for them in an internationally accepted form the manner of recognition to be given by them to the *pactes successoraux*, and the designations of applicable law, by *pacte*, of civil law jurisdictions.

Article 9

94 This article deals with the circumstances – and these are the much more usual *pactes successoraux* – where one person, whose present and future property is held by him subject to *réserve* or *légitime* or portion rights of another or others, enters into an agreement with those persons whereby those rights are affected in some way. Alternatively, that one person's present and future property is subject to no such inheritance or portion right of the other or others with whom he enters into a *pacte successoral*. For example, as previously given, the elderly widower and the housekeeper. A right to specific assets may thereby be created, or the extent of the claim of the holder of a *légitime* right at the death of the person whose property is burdened may be modified, or the right at the death may be terminated altogether in return for other benefits. For example, a father may enter into an agreement with his two sons to the effect that one son, in return for certain assets now (a gift), will forego his *légitime* right against his father's estate on the father's death, on the supposition that he will survive his father (the gift being revocable by the father, should the son predecease), while the other at his father's death, if he survives his father, shall have certain described benefits in discharge of his *légitime* right. Alternatively, the person whose estate is affected is a spouse, and that person enters into a *pacte* in the marriage contract or after the marriage that he or she makes a gift to the other spouse of his or her future property. Another example is that of a husband who enters into an agreement with his wife that she shall have a certain type of assets or a quantum out of his future property (*i.e.*, at his death).

95 Because of the reserve to Chapter III that is available (Article 24(1)(*a*)), it is for the Contracting State to determine whether the Convention is to apply to situations like these. In those civil law jurisdictions that recognize *pactes successoraux*, and therefore do not reserve or denounce the chapter, the above situations clearly fall within Article 9(1), and the applicable law under that paragraph (the objectively ascertained law of the *de cujus*, or, if such has been chosen, the subjectively ascertained law) will determine the material validity, the effects of the agreement, and the circumstances which result in the extinction of the effects.

For instance, though under the internal law of Contracting State M the father and son agreement (paragraph 94 above) could not validly be created, the father, a national of State M, enters into the agreement in his habitual residence, State N, where the agreement is valid. The law of State N under Article 3(2) (*i.e.*, no choice of law has been made) is the applicable law of the agreement (Article 9). State M must recognize the validity of the agreement; it would probably also recognize the validity of a matrimonial agreement between the father and his wife governed by the law of State N. Moreover, if the father later makes a will in State M, designating no law to govern that testamentary disposition, the Article 3(2) law that is the applicable law for the *pacte* will also be the applicable law for the will.
However, the conclusion should not be drawn from this example that a person may not have two applicable laws applying to his estate. Article 9 presupposes that a *pacte* may be governed by the law of the nationality or habitual residence of the *de cujus* at the time of the making of the *pacte*, but the successiou is otherwise governed by the law of the nationality or habitual residence of the *de cujus* at the time of his death. Where a *pacte* exists, Article 7(1) must be read together with Chapter III of

the Convention. See further on two applicable laws, paragraph 68, *supra*.

96 In common law jurisdictions, however, the position is different. No one can donate future property, as previously explained. (See further paragraphs 46 and 93, *supra*.) Future property can only be the subject-matter of a contract, *i.e.*, an agreement for value to transfer when the property comes into existence. Value must be actual value, or marriage in return for the promise. Each of the examples above must be capable of characterization as contracts, and this means the effects are seen entirely as contractual effects. If the father or the husband, above, sells the earmarked assets during the joint lives, a breach of contract has occurred.

For example, elderly parents may agree with a child that, if the child cares for the parents until both parents are dead, the child will be left the parents' then house by the will of the survivor. Following this agreement both parents die intestate survived by a number of children and grandchildren. The disappointed child who has given the services has an action in contract. If no terms of a contract can be proved, he will probably have an action in unjust enrichment (quasi-contractual claims and constructive trust claims). Since consideration was given by the child for any award by the court from the survivor's estate, it is unlikely that a court of that jurisdiction would consider that the entitlement of the child as a child to have a 'just and equitable' amount from the parents' estates under a family protection statute is affected by the successfnl contractual or unjust enrichment claim.

In other words a creditor's status is not a matter of 'succession'. There may indeed be an impact upon the 'sncession' in that fewer assets are thereby available for devolutiou to the heirs, devisees and legatees, but no accounting by the child would be appropriate, and though the matter is not free from donbt under the internal law of many common law jurisdictions, it would appear that 'the effects of the agreement' are entirely contractual. The fact that the disposition of the house by the surviving parent's will is a disposition that occurs on that parent's death does not alter the fact that the disposition is not a voluntary act creating succession rights, but the performance by the parent of an enforceable contract (or avoidance by the parent of an unjust enrichment situation).

In common law jurisdictions such arrangements as, 'you shall have my house under the terms of my will, if you will do such and such for me', are entered into by persons who are not legally advised. This is often also true for mutual wills. Legal advice will almost invariably result in the creation of an *inter vivos* trust, whose terms would typically be that both parents retain the enjoyment of the specified asset (or assets) during their lives, and the child or children have an irrevocable right to take possession of the assets on the survivor's death. On that death the trustees will then transfer to the child the title to those assets. See further paragraph 46, *supra*.

Paragraph 1

97 The applicable law under Article 3 or, in the event that the person whose estate is involved or affected by the agreement has chosen a law to govern his 'succession', Article 5(1) will determine the 'material validity' of the agreement as to succession, its 'effects', and 'the circumstances resulting in the extinction of the effects'. Questions of form, other than the requirements for the creation of the *professio juris*, are for the forum, as previously explained (see paragraphs 41, 66 and 90 *supra*). The forum will also determine the meaning of 'material validity'.

The 'effects' of the agreement were a matter of keen discussion by Commission II because in the jurisdictions which permit *pactes successoraux* some of the effects of the *pacte* as an agreement are contractual (and therefore subject to the law governing the agreement as a contract), and others concern the 'succession', creating, varying or terminating indefeasible inheritance rights. A suggestion was made that the effects as between the parties might be governed by contract law, and the effects of the *pacte* upon third parties be governed by the *lex successionis*. However, this distinction cannot always be drawn, and moreover it condones the existence of another scission. In the outcome it was felt that it was better to submit all effects of the *pacte* to the *lex successionis*, which under this paragraph is the *lex successionis* of the person whose estate is affected, as at the date of the agreement. The same 'effects' requirement, as set out in Article 7(1), also applies to mutual wills.

Nevertheless, in jurisdictions where the agreement and mutual wills are respectively cause and outcome, a distinction will have to be made as to those 'effects' which pertain to the agreement aspect and those which pertain to the 'disposition of property upon death'. Mutual wills, that is, are purely dispositions. As wills they contain no element of agreement, though the fact that there was an agreement may be discoverable from the contents of the wills. On the other hand, in the Federal Republic of Germany, where the agreement element does not exist, material validity, effects and extinction are inevitably governed by the applicable law under Chapter III.

The Special Commission had provided for the 'revocability' of the agreement, but this term was not popular with Commission II. In the first place a will as a unilateral act is revocable, but, it was asked, how could there be a unilateral revocation of a bilateral act like a *pacte successoral*? It was pointed out to the Commission, however, that in France a revocation of a *pacte* may not only be unilateral but notice of it be withheld from the other party or parties to the *pacte*. In the Federal Republic of Germany on the other hand *pactes successoraux* and wills with reciprocal provisions, *i.e.*, mutual wills, may be unilaterally revoked in those circumstances where notice has been served on the other party and either the agreement includes a term permitting revocation or such conduct of one party or of the beneficiary of the *pacte* as would result in loss of that person's indefeasible share justifies revocation. In common law countries mutual wills, as has been said, are the implementatiou of an agreement not to revoke wills made in furtherance of an agreed distribution plan for each party's estate assets in favour of the survivor and subject thereto third parties. These can be revoked each by its maker without notice to the other, but during the joint lives only.

Commission II was not in a positiou to embark upon changes to the substantive laws of Member States, aud in any event there was no doubt the applicable law determines whether or not the revocation may be unilateral, but it was felt nevertheless that the word 'revocability' might be changed. There were further difficulties with the term. It might be clear that the applicable law determines what is meant by 'revocation', and that the

applicable law may rule on the form needed for the revocation (though as a 'disposition of property on death' the form of a revocation is excluded from the Convention), but 'revocability' was really felt to be too narrow a term. Revocation is not the appropriate expression for the termination of both contracts for value, and mutual wills. It was in these circumstances that the Commission finally accepted, 'circumstances resulting in the extinction' of the effects.

Paragraph 2

98 Though the policy adopted in this paragraph, namely, a rule in support of the validation of *pactes successoraux*, had earlier been adopted by Commission II, the Drafting Committee put this present paragraph in square brackets. It was concerned that the Commission should think about this matter again. However, by a tie vote (nine: nine) the earlier decision was maintained under the Hague Conference rules. Eleven delegations abstained from voting.

The vote iu favour of the present paragraph was motivated by the desire to facilitate the recognition of these agreements. If the applicable law (reached by Article 3 or Article 5(1)) at the date of execution does not validate the agreement, but the applicable law at the death would have done so, it was felt that allowing the applicable law at the death to have effect was a sound policy. It was noted that persons often make these arrangements (agreements between husband and wife concerning their property, and agreements concerning the succession to business interests) prior to a change of habitual residence, for example, on retirement, and that in any event the succession to only one estate was in question.
The contrary position reflected a point of principle and a practical objection. Some delegations took the view that the only time at which the applicable law of an agreement (a contract) can be determined is the date of the agreement. These delegations were also concerned at the *conflit mobile* which the then proposed paragraph (now paragraph 2) would create. Notarial opinion was offered from the floor that agreements of this kind should only be made once the party or parties whose estates are affected have arrived in their new habitual residence. However, the practical objection to Article 9(2) was that an invalid agreement at the time of execution is kept in suspense until the death of the estate holder in question. What would be the position, it was asked, if the agreement requires of a party that he or she perform certain acts during the lives of all the parties to the agreement? Until the death of the party whose estate is affected, no one knows whether the agreement will ultimately be validated. It was observed that a heavy onus is placed on that party to change his or her habitual residence in order to secure the validation. At the final Plenary Session the Swiss delegation was one of two abstentions from a vote which approved this paragraph, and wished its abstention to be recorded.

Paragraph 2 now being a feature of the Convention, the question posed by the opposition must be answered. It must be the case that, if the applicable law at the date of the death of the estate holder affected would validate the agreement, that law must determine what effect this delayed validation has on the position of the party who was to have performed acts during the lifetime of the person whose estate is involved. The question is whether this innocent non-performing party is to lose his inheritance rights under the now valid agreement, on the grounds that that non-performance is a breach. That law must also determine whether the non-performance of the required acts at the date of the death of the estate holder (including the possible incapacity of the would-be performer at that time) would preclude the agreement from having a material validity that would otherwise exist.
Paragraph 2 appropriately submits the effects of the agreement, and the circumstances resulting in the extinction of the effects, to the succession law of the estate holder at his death, if it is that law which materially validates the agreement.

Article 10

99 Whereas Article 9 is concerned with the situation where only oue estate is affected by the agreement (and it is solely the affected estate or estates with which this Convention is concerned, because those estates involve the issues of 'succession'), Article 10 provides for the situation where two or more estates are affected by the *pacte successoral* or mutual wills.

Paragraph 1

100 This paragraph provides that where two or more estates are involved it is the Article 3 laws and/or the Article 5(1) laws, at the date of the execution of the agreement only, which shall govern the succession. For example, a wealthy father and his independently wealthy wife enter into a *pacte successoral* with their three children concerning the *légitime* each child will have on the death of each parent. The applicable laws at the date of the agreement are alone relevant.

Though the Commission had earlier considered a rule of validation here also, it was realized later that there were serious practical problems once two or more estates are involved. The *conflit mobile* is greater, and one could not know until the last party dies, whose estate is affected, whether the agreement will be validated by all the laws applicable as of the date of death. When two or more estates are affected, there may also be issues of a bilateral contractual nature which arise.

When the Drafting Committee reported back to Commission II with a number of possible alternative proposals for dealing with alternative law validation instead of cumulative law validation, and the impact this would have on revocability and the effects of the agreement, it became clear during discussion that only the cumulative position was possible. Commission II therefore reverted to material validation by the cumulation of laws. However, if validation were to be adopted, it was felt that revocability (or extinction, to take the present term) would also have to be subject to a cumulative laws rule, if one party was not to be free to end the agreement for all the parties because one validating law permitted revocation. Moreover, the effects of the agreement would have to be those which all the applicable laws in question recognized as the effects.

The position under the Convention as it now is, therefore, follows the cumulative laws solution. All the applicable laws, whether under Article 3 or Article 5(1) (and for one party it may be the Article 3 law, for another the Article 5(1) law), of each of the parties whose estates are affected must (1) accept the material validity of the agreement, (2) agree as to the effects of the agreement, and (3) agree as to the circumstances resulting in the extinction (or termination) of the effects.

Paragraph 1 deals with material validity, requiring cumulative validity and permitting the applicable laws to be those of the date of agreement only.

Paragraph 2

101 This paragraph adds that the laws determined by paragraph 1 govern also on a cumulative basis the issues of effects and extinction.

Article 11

102 This article provides a *professio juris* for *pactes successoraux* and mutual wills. It obviously applies to every one of the two or more mutual wills, but as to *pactes successoraux* it applies however many estates are involved in the particular agreement. If a father enters into a *pacte* with his three adult children concerning their *légitime* rights, the four parties may choose the law either of the father's nationality or the law of his habitual residence, in either case that law as of the time of the agreement, to govern the three matters already discussed under Article 9, namely, material validity, the effects of the agreement, and the circumstances resulting in the extinction of the effects. To revert also to the earlier example of the wealthy parents, if a wealthy father and an independently wealthy mother enter into a *pacte* with their three adult children regarding the *légitime* rights of each, the five parties may agree that the nationality law or the habitual residence law at the time of the agreement either of the father or of the mother shall govern those three matters.
This is a very substantial gain to persons entering *pactes*, and also mutual wills, because the parties to an agreement where two or more estates are involved can choose when making their agreements to have one applicable law only to consider, which means they can ensure the validity of the agreement. Moreover, all makers of agreements and mutual wills by this means can provide that one law governs the succession to each estate.

The failure of the parties to make a valid choice could bring Article 3 into operation, whether one or more estates are involved in the agreement. But, if only one estate is involved, there is yet the further chance that, should the Article 3 law at the time of the agreement not validate the agreement, the Article 3 law at the date of death of the *de cujus* will do so. However, no failure of an expressly designated law to validate the agreement, whatever the number of estates involved iu the agreement, permits the parties to designate in the alternative another law, perhaps the nationality law or habitual residence law of the (or a) *de cujus* at the date of his actual death. The reason for this is clear. When under Article 11 the parties choose a law to govern their agreement, they make their own arrangements, and there is no case or need for the agreement to remain in suspense as to its validity until a later date. If they have been ill-advised or taken no advice, the parties have an independent remedy against their advisors or they have only themselves to blame. Suspended contingent validation is not a policy which commends itself in these circumstances where the parties have chosen a law to govern the agreement, even when only one party's estate is involved. A significant majority of voting delegations came to this opinion, while continuing to uphold the policy decision of Article 9(2).

Article 12

103 This article in its first paragraph ensures that no person with *réserve*, *légitime,* forced share, or judicially determined share rights under the Article 3 or Article 5(1) law *at the death* of the person or persons whose estates are involved should be able to benefit from the Article 3 or Article 5(1) law or laws of that person or those persons *at the date of the agreement*, and then claim that under the law at death or one of those laws the agreement is invalid so that this right to the *réserve* or *légitime*, etc., can still be asserted. Its second paragraph ensures that those who are not party to such an agreement do not nevertheless, because of the agreement terms under authority of Articles 9, 10 or 11, lose their reserve or *légitime*, etc., rights under the applicable law (the Article 3 or Article 5(1) law).

The article is something of a necessary protection against those who would attempt to take their indefeasible inheritance benefits twice, and a support in favour of those who would unfairly be deprived by others of having their inheritance benefit at all.
The article remains as it was in the preliminary draft of the Convention, and therefore its provisions need merely be explained on this occasion.

Paragraph 1

104 Articles 9(1), 10 and 11 make it quite clear that the material validity of the agreement, the effects of the agreement, and the circumstances resulting in the extinction of those effects, are determined by the *lex successionis*, objectively or subjectively determined, of the estate or estates concerned, 'as if that person [or those persons] had died on the date of the agreement'. But suppose the applicable law of this person or of one of the persons *at the date of death of that person* would not regard the agreement as materially valid. Can a party to the agreement who took a benefit at the time of the agreement in lieu of his *légitime*, forced share, etc., now claim that indefeasible right to a benefit as if the agreement had never happened? The answer, of course, is that he cannot, and this paragraph is there to make sure no one takes advantage of the situation of the agreement as at the date of death, and benefits from this unconscionable conduct.
Alternatively, it might be in the interests of a general legatee, who has not an indefeasible right of his own, to contest under the actual *lex successionis* at the death that the agreement made *inter vivos* is invalid. Again that is prevented by this paragraph.
In the Report on the preliminary draft Convention (Preliminary Document No 12, paragraph 52), two examples were given of the operation of this paragraph, and may usefully be consulted.

Paragraph 2

105 It is difficult to imagine a legal system which would allow a person who is not a party to a private agreement to have his rights affected deleteriously by it. Nevertheless, the Special Commission and Commission II were anxious that it be underlined that such a situation is not intended by the Convention. Whereas paragraph 1 was concerned with the substance of the *lex successionis* as of the date of death, this paragraph is concerned with the *lex successionis* as of the date of the agreement. The Convention makes it binding on Contracting States that, whatever the substantive provisions of the applicable law at the date of the agreement (the law which validates the agreement) as to the rights of persons who were not

party to the agreement, those rights – if they are rights to a reserve, *légitime*, forced share, etc., under the *lex successionis* at the time of the death of the person or a person whose estate was affected by the agreement – remain enforceable.
For example, suppose H enters into an agreement with W on the termination of their marriage that, in return for property conferred upon her by H, W and the infant child of the marriage, of whom W is to have custody, will forego all claims against the estate of H on his death. Also suppose that that agreement is fully effective under the *lex successionis* of H at the time of the separation agreement. That law does not prevent the child on the death of H from claiming his or her *légitime* rights under H's *lex successionis* on his death. This assumes, of course, that the applicable law at the death is different from that which would have been applicable had H died when the agreement was made.

CHAPTER IV – GENERAL PROVISIONS

Article 13

106 This is a *commorientes* clause. However, it does not attempt to unify internal substantive laws of Contracting States as to their provision (or lack of it) for the circumstances where the order of death between two or more persons is unknown. It is dealing with the very limited circumstances where two or more of those persons have different applicable laws as to their succession, and those laws make different provision for the solution of the problem or make no provision at all.

Attention was drawn in Commission II to Article 2 of the Common Dispositions annexed to the Benelux Convention of 29 December 1972 on *Commorientes*, but this article is a general unifying substantive law for *commorientes*, and a number of delegations considered that the matter was better left to each State or jurisdiction to solve as it considers appropriate. Indeed, many States and jurisdictions already have provisions to meet the problem. However, there is the international element mentioned above, and Commission II concluded that a rule was merited. It noted that there is no need of a provision in the Convention for those circumstances where the succession laws of the deceased persons are in agreement.

It was agreed that what was wanted was a provision that prevented either or any one of the simultaneously dying persons from inheriting from the other or any other among their number. But how to express that most effectively for all legal systems without upsetting substitution (or 'anti-lapse') provisions was the challenge. At first the Commission favoured 'each of the deceased persons shall be understood to have predeceased the other or others', because it clearly set the scene for the substitution of another person for the heir or legatee who has simultaneously died. However, delegations came to feel on a later reading of the text that this language was insufficiently explicit; it did not say that no simultaneously dying person may inherit from another such person. Consequently, the present language of Article 13 was adopted.

107 An example of the operation of the article might be as follows: X and Y are brothers, 45 and 47 years of age. X is married with two children, and is habitually resident in the State of Fantasia, of which he is also a national. Y is married without children, and, though also a national of Fantasia, he is habitually resident in Arcadia, which in a *pacte successoral* he has designated as his applicable law for succession purposes. Both Fantasia and Arcadia are Contracting States. While taking a holiday together in Ruritania, X and Y die in a car accident, both being deceased when the police arrive on the scene. Save for provision for the indefeasible rights of spouse and (in X's case) children, each brother has left his estate in totality to the other. Under the law of Fantasia (X's applicable law) it is laid down that, if a legatee does not survive the deceased for 30 days, the legatee does not inherit from or through the deceased. Under the law of Arcadia (Y's applicable law) the deceased persons are presumed to have died in order of seniority of age. X was older than Y.
X's claim against Y's estate will fail, because under both laws X may take nothing. In Fantasia he is not a 30-day survivor, and in Arcadia he was the elder. The Convention does not apply in any event, because the two laws do not provide differently for this situation. Both reach the same conclusion, albeit by way of a different route; there is no more reason for the Convention to apply to these circumstances than when each legal system not only reaches the same conclusion as the other, but each adopts the same reasoning (*e.g.*, a presumption of the younger surviving) as the other.

Y's claim against X's estate presents problems. Under the applicable law (Article 3) of X's succession Y has no claim because he failed to survive X by 30 days, but under his own applicable law he does take as legatee because he was the younger, and is presumed to have lived longer than X.

The Convention replaces the previous law of both Fantasia and Arcadia in these circumstances of a conflict of laws. Neither brother has succession rights to the other. However, the law of Fantasia has 'anti-lapse' provisions (substitution of legatee), and there being no evidence of X's contrary intent, Y's widow is substituted for her deceased husband as legatee. Under the law of Arcadia there are no 'anti-lapse' provisions. There are no substitutiouary provisions in Y's will to provide for the event of X's predecease, and therefore Y's estate devolves as if X had predeceased Y, and X had also left no spouse or children.

Article 14

Paragraph 1

108 Under the provisions of the *Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition*, it is provided that the law governing a trust which is 'evidenced in writing' is the law expressly or impliedly chosen by the person or persons creating the trust. If no law is chosen, the Trusts Convention provides that the applicable law of the trust shall be the law with which the trust is most closely connected. A 'trust' for the purposes of the Trusts Convention will be found described in Article 2 of that Convention, a description which States that have not ratified that Convention, but are Contracting States to the present Convention, will find of considerable value. It will be seen that the Trusts Convention is concerned with express trusts, whether they be private trusts or public (*i.e.*, charitable) trusts. It is also concerned with resulting trusts arisiug by implied intent (see paragraph 51 of the Report on the Trusts Convention, Hague Conference on private international law, *Proceedings of the Fifteenth Session*, Tome

III, pp. 380-381), but not with constructive trusts. Trusts are very familiar in wills drawn in common law countries, and the Trusts Convention applies to such trusts (Article 2 of the Trusts Convention). Since modern legal systems almost invariably require wills to be in writing, it is also most likely that Article 3 ('trusts created voluntarily and evidenced in writing') of that Convention will be satisfied.

Under the terms of that Convention the will is merely the instrument for the creation of the trust; the trust as a legal concept is distinct from the will. The two are treated separately; the Trusts Convention describes how the trust is to be treated. The separate treatment means that the conflict rules governing the formal and material validity of the will or other disposition of property upon death are not necessarily those which govern the formal and material validity of the trust contained in the disposition upon death.
For instance, if T who is habitually resident in Arcady, a common law State, makes a will, choosing Arcady law to govern his 'succession', and in his will he leaves a number of pecuniary legacies to friends and then the remaining assets of his estate on trust for his wife for her lifetime, and his three children on the wife's death, a number of laws are potentially applicable. The formal validity of the will may be governed by the *Hague Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions*, if Arcady is a Contracting State to that Convention, and material validity of the will is governed by this present Convention, assuming Arcady is again a Contracting State. The formal validity of the trust (the 'trust of the residue') is not covered by the Trusts Convention; such formal validity is more a matter of the instrument setting up the trnst (see paragraph 83 of the Report on the Trusts Convention), which in this example is the will. The formal validity of the will leads to the formal validity of the trust. However, it may be that the residue of T's estate is physically sitnated in the neighbouring common law State of Nirvana, and in his will T has appointed trustees who are resident and intend to administer the trust in Nirvana. Therefore, despite his choice of Arcady law to govern his 'succession' under this present Convention, T's choice does not extend to the trust, if Arcady has ratified the Trusts Convention, nnless it can be established that he intended Arcady law to govern the trnst also. Since he has said nothing about Arcady law governing more than his 'succession', and since he has appointed Nirvana trustees to administer Nirvana-situated trust assets, it is likely that under Article 7 of the Trusts Convention the material validity of the trust will be held to be determined by Nirvana law.

This demonstrates once again how important it is that practitioners drafting dispositions of property on death for their clients do ensure that the client as testator (or party to a *pacte successoral*) makes it clear for what purpose *professio juris* is being exercised. Is it for the whole 'succession', for a particular *pacte* or intended mutual wills, for particular estate assets in a particular situs, for the 'snccession' and the testamentary trnst? These are bnt examples of the questions that may arise for the client.

Of course, if the fornm is a Contracting State to the present Convention, but not to the Trusts Convention, the forum will apply its own law, its internal law and conflict rules, in dealing with the testamentary trust. It is because of this possible situation that Article 14 is careful to say, 'does not preclude the application of another law to the trust'. It is indirectly referring to, and reminding practitioners and State authorities of, the Trusts Convention for those States that have ratified that Convention. Paragraph 1 of Article 14 of the present Convention makes it clear also that the preclusion operates in both directions, *i.e.*, the application of the Convention's *lex successionis* does not prevent another law for the trust being applied, and the application of the Trusts Convention's law governing the trust does not prevent the *lex successionis* otherwise being applied.

Assuming the forum has ratified both Conventions, another point must be noticed. In common law jurisdictions it is not an infrequent occurrence for the testator in his will to dispose of property in the estate to the trustees of an existing *inter vivos* trust as an addition to the property fund of that trust. The *inter vivos* trust is not in any event (the Trusts Convention apart) a 'disposition of property upon death', and is therefore excluded from the present Convention under Article 1(2)(*d*). However, the devise or legacy to the trustees of the *inter vivos* trust *is* a disposition of property upon death, and falls within Article 7(2)(*a*) and (*e*).

Paragraph 2

109 The Special Commission commended this and the previous paragraph, and but for one drafting change – 'a disposition of property upon death' is the new language, since Chapter III is now integrated into the Convention instead of being discrete – the Sixteenth Session changed nothing. 'The same rules', words used in the opening of this paragraph, means that the Contracting State is not precluded from applyiug another law, whatever that State considers that law should be, to 'foundations and corresponding institutions created by dispositions of property upon death'. The Convention recognizes with this paragraph that a trust in the common law tradition does not have a legal *persona*. On the other hand, where the same effect is achieved by incorporation or a statutory grant of *persona*, whether in civil law or common law States, the Convention with this paragraph permits the Contracting State to apply another law than the applicable law of the *de cujus* under this Convention to that *persona*. It was not the intent of the Sixteenth Session with the words 'by analogy' to require the Contracting State to commence an enquiry on each occasion as to whether the *persona* in question does achieve the same effect as a trust. It is merely saying that an *institution* in the French sense may be treated in the same way as a trust. The foundation is singled out among other *institutions* because some delegations to the Special Commission considered that this particularization would make it easier for their States to comprehend the intended application of this paragraph.

Article 15

110 This article provides that where the *lex situs*, with its distinct economic, family or social policies in mind, imposes a special order of inheritance npon particular assets or operations located on its soil, the applicable law, when it is other than the *lex situs*, is to give way to the *lex situs* on that specific area of inheritance. For instance, the situs may legislate that with regard to family-owned farms at or under a given size the farm is to devolve as one unit by way of the male line of proprietor. In another case the concern may be not so much a particular line of descent, but that however the farm is held in ownership, whether by an individual, a company, or a partnership, it shall not be divided whether as

an immovable or as shares or interests as a consequence of two or more persons being entitled to inherit the whole, or a part each, but devolve as a whole. The policy of the article may also extend to other movables.

The distinct characteristics of this article are two in number: it is concerned with succession law in the sense of inheritance by one person from another, and it provides a conflict of law rule. These were the attributes which the Sixteenth Session was particularly anxious should be kept in place, as they existed in the preliminary draft Convention that had come from the Special Commission.

111 The article does not cover provisions of the situs concerning, for instance, the ability of foreigners under the law of the situs to own such property as waterfront land, land on State borders, or interests in operations of great concern to the State such as utility supply units and nuclear power stations. Both at the Special Commission and again during the Sixteenth Session some delegates brought to the attention of the assembled company the concern of their governments that such interests should be protected, and in particular by this article. The Mexican delegation requested in particular that the words 'national security' should be added to the words 'economic, family or social' considerations. It was brought to the attention of the Commission that the Mexican Government attached great importance to these words appearing in Article 15. Though there was considerable sympathy in the Commission for these concerns of the Mexican delegation, the majority view was that this was a matter which really had to find expression as a matter of public policy. Again the great majority of delegates were of the opinion that Article 15 was only justifiable as a successiou law rule concerned with the conflict of laws and that the Commission could not stray from these criteria without losing all control over the manner in which the article might be applied in years to come by courts around the world. It was decided, however, that this Report should underline the interest of the Mexican Government in this matter as a strongly held public policy view.
The article is also not intended to apply to situations where movables associated with the history and life of the State, or with peoples within the State, are subject to the ruling of the situs that they may not be privately traded. That is to say, the State requires that it will approve those persons or institutions which are to be, or become, the owners of such assets.

112 The article requires that the special inheritance regime rules of the situs apply to 'enterprises, immovables or special categories of assets', and that the rules themselves be in place because of 'economic, family or social considerations'. The question now arises as to what those two phrases mean. 'Enterprises' is intended to refer to large operations like the artisan, industrial or commercial operations conducted as enterprises or corporations to be found, for instance, in Poland, the Federal Republic of Germany and Belgium where a community of persons enjoy property by membership of the group, and inheritance is by the group, so to speak, rather than by individuals or operations which are otherwise subject to a special regime for commercial reasons. Were individual inheritance to be permitted the conception of an enterprise would be destroyed. 'Immovables' would refer clearly to such assets as family farms, or interests in family farms less than full proprietorship, where the duration of the interest or the nature and quantum of rights attached to the interest reflect a particular inheritance scheme. 'Special categories of assets' would refer for example to historic articles, such as sculptures, paintings and jewellery within the family which are required by the original act of disposition to pass from generation to generation down the lineal line.

However, it is not the intention that the article or indeed any part of this Convention should apply to the devolution of titles of nobility where land is attached to the title and devolves with the title itself. The Convention is totally silent on this matter.
As to the terms 'economic, family or social considerations', it was not the intention of the Commission that these should imply a wide span of potential meaning which the courts might freely construe as a means of giving effect to what are conceived in the situs as desirable local policies. It was the intention of the Commission that the phrase contained here should be strictly construed, and not be regarded as an invitation to States or courts to bring within situs control any subject having broad economic, family or social connotations. To understand this phrase one has to return to the fundamental concerns of the Convention itself. The Convention is concerned with the protection of the family's indefeasible inheritance rights, with economic wealth that affects people when that wealth passes from generation to generation, such as in the form of small family businesses, and with social concerns such as the well-being of groups of peoples within society. Social concerns would also be reflected in the attempt of the estate to maintain the standards and values of society as those elements are reflected in laws concerning inheritance and the family. Economic concerns, as we have seen, are intended to embrace the enterprises to which reference was earlier made, but there again the concern of the Convention was with groups of persons in the context of inheritance.

The American delegation, concerned with the potential breadth of the phrase 'economic, family or social considerations', proposed in its stead (Work. Doc. No 13) the language, because of 'the particular use, occupancy or development of the asset'. It was intended with this phraseology to give a more precise focus to the object of the article than the more abstract terminology might accomplish. This alternative language was recommended on the basis that it dealt more obviously with developmental and environmental considerations, which were the concerns of the Commission, than did the more expansive terminology employed in the preliminary draft Convention. However, the view was expressed that this meant the loss of the word 'enterprises', something which was regretted, aud otherwise delegates felt that the language of the preliminary draft Convention better suited the intentions of the Convention than the reference to use or occupancy might do. As a result the language of the preliminary draft Convention was retained for the final text of the Convention.

113 Two views were expressed during the Commission as to the nature of the particular inheritance 'rules' to which Article 15 refers. One opinion was that, in order that they be recognized by forum States, the rules in question should be mandatory rules, and the delegation of the Netherlands narrowed this recognition even further when it proposed (Work. Doc. No 58) that they be provisions that must be applied in the State of the situs whatever the law applicable to the succession. The distinction drawn here, of course, was between 'ordinary' mandatory rules, as it were, and what might be called 'super-mandatory' rules. However, the alternative opin-

ion expressed was that it would be deleterious to the interests of the Convention that these rules be characterized as mandatory in so many words. Mandatory rules of the situs inevitably result in a setting aside of the main provisions of the Convention, and it was felt that State authorities should not be encouraged to discern mandatory rules more than where it is absolutely essential. This alternative opinion therefore hewed to the line that, while Article 15 gives scope to the courts and authorities for the recognition of compelling concerns in the situs touching particular inheritance regimes, by not describing them as mandatory it suggests to the situs that time and circumstances change and the compelling nature of a rnle may change with them. These are simply special situations where there are overriding interests at stake. This alternative view, that the character of the rules referred to should not be described in black and white language, but be deliberately left somewhat vague, prevailed by a siugle vote majority, and Working Document No 58 was rejected. Those who prefer a conflict rule to be sharp and clear could not accept this alternative view. Later during second reading of the text, however, this earlier one-vote majority decision was confirmed by an overwhelming majority.

Article 16

114 This article is concerned with the right of the State to take for itself those assets in the estate of the deceased to which there is no testate or intestate heir. Two positions exist as to the nature of these rights. States following the theory of the regalian right take the view that, when there is no designated beneficiary under a will and no physical heir to take on intestacy, the State takes as *bona vacantia* all estate assets whose situs is in that State. States of the civil law tradition are divided; some adopt the contrary position that the State takes as an heir (the *ultimus heres*) in those circumstances where there is no testamentary beneficiary and no physical heir. As Preliminary Document No 7, originated by the Permanent Bureau during the Special Commission, pointed out, these two positions can lead to both positive conflicts and negative conflicts. A positive conflict occurs when the State upholding situs and the State upholding *ultimus heres* both claim to be entitled; a negative conflict will exist when State X (*ultimus heres*) is the situs of the assets, but X designates State Y (the regalian right) as the ultimate heir. So neither claims entitlement.

115 The Special Commission considered three possible positions (1) that the State which is the situs of assets should take those assets, (2) that the applicable law under Articles 3 and 5(1) should determine whether the regalian right or the *ultimus heres* approach is to prevail, and (3) that the State of the situs of the immovables should take assets of that description, while the fate of the movables will be determined by the applicable law under Article 3 or Article 5(1), as the case might be. Towards the close of the Special Commission the solution adopted was to take neither the situs position nor the applicable law position, but to take a median path between those two positions without stating a preference. As a consequence Article 12 of the preliminary draft Convention provided that in the absence of a testate or intestate heir the existence of the applicable law under Article 3 or Article 5(1) 'does not preclude' the State, or an agency in that State, being the situs, from claiming estate assets. It was appreciated during the Special Commission that difficulties could still arise; if State A, an *ultimus heres* jurisdiction, is both the applicable law and the situs of the assets, and it designates State B as the ultimate heir, a designation not accepted by State B which is of the regalian persuasion, the assets would remain unclaimed by any State. However, in practical terms this appeared to the Special Commission to be the best solution obtainable. The Commission rejected the position that the Convention simply say nothing on the subject.

116 At the Sixteenth Session the whole subject was reopened with the introduction of two working papers, one from the Swiss delegation, and the other from the Spanish delegation, seeking new *modi vivendi*. The Swiss delegation proposed three possible solutions. The first provided that when the applicable law acquired by the regalian right and the situs of the disputed assets acquired as *ultimus heres*, the situs law would take assets on its soil according to its own theory of acquisition, namely, as *ultimus heres*. Where the situs State is of the regalian persuasion, however, it would take by regalian right. Finally, if both States adhered to the *ultimus heres* view, the applicable law would determine which State prevails. The second solution proposed was that when assets are situated in a State other than that of the State of the applicable law, the situs law governs. The third solution was that the applicable law would determine whether the *ultimus heres* or the regalian right theory prevailed. The Spanish proposal was very similar to the third Swiss proposal. It was evident to the Sixteenth Session that there were also two other solutions, namely, that Article 12 of the preliminary draft Convention might be adopted, or alternatively the final text of the Convention be totally silent on the subject.

During debate it became apparent that a majority of the delegates were persuaded that Article 12 of the preliminary draft Convention was the preferable approach. It was felt that above all what was required was a solution that was essentially practicable, and for those purposes either Article 12 or the second Swiss proposal commended itself. Althongh there was strong advocacy of the applicable law proposal (the third Swiss proposal) as the logical course for the Convention to follow, the majority of delegates concluded that the decision of the Special Commission was the approach which ought to prevail.

The effect of this decision is that, if the State of the applicable law under the Convention differs from the State of the situs, and the situs State regards itself as the appropriate party to take the assets on its soil, whether in furtherance of the regalian theory or the *ultimus heres* theory, the situs State is permitted so to do. If on the other hand the situs State is prepared, on the basis of the *ultimus heres* theory, to permit the fate of the assets to be determined by the applicable law, then again a solution has thereby become available.

Article 16 therefore follows the Special Commission's preliminary draft with mere '*toilette*' word changing. The result is that when there is no testate or intestate physical heir under the applicable law, the existence of that law does not prevent the situs State (another State) from taking the assets that are unclaimed by any person. However, the manner in which this proposition is expressed in Article 16 does suggest that, if there is but one special legatee entitled to one asset under the will of the deceased, this is enough to prevent Article 16 from applying. In those circumstances it would seem that the article is silent; it appears to say nothing as to whether any State has the right to claim the remainder of the assets in the estate for which there is no testate or intes-

tate physical heir. This possible construction of the language of Article 16 was noted by the Belgian delegation, but as Commission II was then in its closing stages it was not possible for the Drafting Committee completely to reword the article. However, it was underlined in the Plenary Session that it was not the intention of the Sixteenth Session that the article should have this meaning. It is intended that, should there be any assets in the estate for which there is no testate or intestate physical heir, Article 16 will thereupon come into operation.

Article 17

117 As Professor von Overbeck observed in his Report commenting upon the counterpart article in the Trusts Convention of 1984, it is now the traditional response of the Hague Conference to exclude the doctrine of renvoi. Nevertheless, the Special Commission considered three possible positions. The first was to exclude renvoi, the second was to admit a limited renvoi, and the third to allow renvoi to occur as it will. However, both the second and third alternatives were proposed for Article 3 (objective law) situations only. The commendation of the first position was that this is the traditional Hague approach. The second approach sought to recognize harmony between States where it already exists without the intervention of the present Convention, and to this end it was proposed that, if State A, a Contracting State, was taken to B, a non-Contracting State, as the *lex successionis* under Article 3, but that State referred on to C, another non-Contracting State, which State accepted the renvoi, the renvoi should be recognized by the Convention. Exception was taken during the Special Commission meeting by several delegations to the distinction which this proposal drew between Contracting and nou-Contracting States, and as a consequence it was not adopted. The third approach, namely, that renvoi be permitted by the Convention in the area of succession law, was opposed on the basis that the Convention would thereby lose much of its ability to bring about a unified applicable law. It would have handed over to the conflict rules of States, both Contracting and non-Contracting States, all control over the situation. There was also an expression of the opinion that this proposal, even in the area of succession where renvoi has perhaps been most familiar, constituted a complete abandonment of now accepted Hague policy.

118 During the Sixteenth Session the second of these approaches was put once again before the Session, and on this occasion it was successful. It now appears as Article 4 of the Convention, as which it is discussed in this Report, and Article 17 of the Convention takes effect subject to Article 4. The reason for the success of this proposal at the Plenary Session, thereby reversing the previous rejection, appeared to be that this was a limited acceptance of renvoi, and that it also recognized a harmony between States.
There was agreement with the French delegation, which put forward this French/Italian proposal, that, as more States became Contracting States to the Convention, Article 4 as it now is would become less and less important, and its limited application in the early days of the Convention's life when the number of Contracting States were few seemed likely to provide no practical problems. Delegates also accepted the proposition that the principle of Article 4 should not be extended to Article 5 designations, and they did so for the reason that such an extension might defeat the intentions of the testator in making his designation in the first place. While it is clear that a choice of the applicable law under Article 5(1) does not permit the *de cujus* to choose also the conflict of law rules of that chosen law, if the traditional no-renvoi doctrine of the Hague Conventions is followed (see further paragraph 119, *post*), by the act of choosing the *de cujus* selects the internal law that he prefers. The prime attraction of Article 4, limited though its application is, must be that it avoids the creation of conflicts that would not otherwise exist. The importance of Article 4 as an exception to the traditional Hague policy expressed in Article 17, should be noted with some care. This is a novel departure for the Hague Conference.

119 At the Sixteenth Session the American delegation renewed its plea for the deletion of what is now Article 17. The Convention should be silent. It was argued forcibly that, as is the position between the states of the United States of America, so is it likely to be the case internationally that many jurisdictions would refer on the issue of family inheritance rights to the nationality or domicile jurisdiction of the deceased. In those circumstances, it was argued, the principle that inspired Article 4 was in fact capable of general application; States would employ the doctrine of renvoi, each in its own way and at its own level of development, in an attempt to apply the basic tenets of the Convention and thereby achieve the harmony desired. Some support for this position was forthcoming, but in the main other delegations were fearful of the effect of the Convention being silent on the issue of renvoi, especially as other Hague Conventions are very clear in excluding renvoi. It was felt that interpretational problems would be invited were the Convention indeed to remain silent on the subject. As for the character of the article that should appear in the Convention, delegates voted overwhelmingly to retain the existing Hague policy.

120 The meaning of 'choice of law rules' in Article 17 can be stated very succinctly. The intention is to exclude all renvoi, whether to the first or second degree. Article 17 requires reference to the internal law of the relevant State without any reference at all to its choice of law rules. It is to be noted also that the Convention makes no reference to, nor has it any concern with, unilateral or internal conflict rules. Such rules arise, for instance, when the law of the forum provides that no person may perform a particular act unless he is habitually resident in the forum. This is a self-limiting rule which is totally different from conflict of law rules in the sense of those which apply generally to the forum and other States.

Article 18

121 This article is another familiar provision in Hague Conventions. It permits the forum to apply its own public policy considerations in preference to the applicable law in the event that there is a conflict between the two. In the Plenary Session a '*toilette*' change was made in the first line, so that the words 'of a law' became 'of any of the laws'. In making this change the Sixteenth Session was anxious that it be made clear the public policy exception may be invoked whether the law in question is that determined by Article 3, Article 5 or Article 6, or – with regard to agreements as to succession – Articles 9, 10 or 11. However, as on previous

occasions, the Commission was not hereby encouraging States to apply public policy (*ordre public*) exceptions lightly. The application of the otherwise applicable law under the Convention may only be set aside by public policy when that policy is 'manifestly incompatible' with the provisions of the relevant law. It is under this article, Article 18, that Contracting States would have to bring any objection on grounds of national security or political concerns to foreign ownership of waterfront property, border lands, and utilities and other enterprises of great significance to the economy of the jurisdiction. This was previously explained in connection with comment upon Article 15.

So many exceptions in Hague Conventions look to the restraint of Contracting States in the manner in which they invoke those exceptions, and it is to encourage restraint that Article 18, once again, expressly refers to 'manifest incompatibility'. Clearly any extensive use of Article 18 by the forum could ultimately frustrate the achievement of the basic aims of the Convention.

Article 19

122 This is the 'federal State clause'. It provides, in common with all other modern Hague Conventions, for the situation where one national State includes two or more territorial units, each of which has its own legal system, or its own rules of law for the subject area in question. In this instance the subject in question is the law of succession (paragraph 1). However, it is something of a conceit for the federal States to regard this as 'federal State clause' only. The article also applies to those unitary States, like Spain and the United Kingdom, which have distinct geographic areas each with its own system of rules, in this case pertaining to succession.

First, then, one should have a bird's eye view of the article. The present text retains very much the character which it had in the preliminary draft Convention. The change that has taken place is a certain rearrangement of the paragraphs, something of a '*toilette*' arrangement. Paragraph 2 recognizes that the State in question may have its own rules for identifying which unit is to be taken as the unit of reference in any of the situations for which the Convention provides. The State is therefore sovereign in these matters if it chooses to make its mind known through the introduction of its own rules. The remainder of the article applies in those circumstances where no such rules or sufficiently comprehensive such rules apply to the situation in question, for which situation the Convention provides.

Paragraph 3 deals with the sitnation where the Article 3 law, the designated law under Article 5, or the law applicable because of Articles 9, 10 or 11, refer to the nationality or the habitual residence of the *de cujus*, and a decision has to be made concerning which law is meant by 'nationality' and by 'habitual residence'. Paragraph 4 puts beyond question that the reference to the State of closest connection is the unit of most close connection.

Paragraph 5 deals with the situation where the *de cujus*, further to Article 5, but subject to Article 6, has chosen a law of a territorial unit within a federal State or a unitary State with two or more succession systems. It is very important that a testator who has the nationality of, or an habitual residence within, such a State, not be permitted to choose any territorial unit within that State when those units may have very different provisions from each other on family inheritance matters. For example, in the USA different states make very different types of provision for the family out of the deceased's property; some appear very generous, others make little, if any, provision. It would be all too easy for any national or habitual resident to select his applicable succession law with a view to avoiding family inheritance provisions of the unit within which he lives or with which, if he lives there no longer, much of his life with the family has been associated. For this reason paragraph 5 aims to ensure that both the national, and also the habitual resident, of such a State must have had some past or present personal association 'in the manner described by paragraph 5' with the territorial unit law which he has chosen.

Paragraph 6 concerns Article 6. It provides that the choice of the law of a certain State to govern particular assets of the estate in the will or in the succession agreement is presumed to be a reference to the unit of the State in which the assets in question are situated. It is for the person who alleges that the law of another unit was intended to carry the burden of proof of establishing that fact. Paragraph 7 deals with the problem that can arise under Article 3, paragraph 2, further to which, for the purposes of determining the objective law, the place in which the *de cujus* was habitually resident at the close of five years immediately preceding his death becomes relevant. The *de cujus* may have been resident in a number of units within the particular State over the five year period, but have acquired an habitual residence in none of those units during that period. Paragraph 7 therefore provides that the unit of latest residence shall be the unit of habitual residence, unless it can be shown in a particular case that the *de cujus* had a closer association at that time with another unit of the State. In those circumstances the law of that other unit applies.

The article is built up in stages and each paragraph follows logically on the previous paragraph. In its application to any particular set of facts, the article should be worked through from paragraph 1 to paragraph 7 in sequence, until the solution to the particular question is reached. Though it initially appears difficult to follow, particularly for those from unitary States unaccustomed to the unit problem, there should be no difficulty if the article is taken step by step.

Paragraph 1

123 As already stated, this paragraph points out what the article is aiming to accomplish. It is identifying the law within a State when there are two or more laws to which reference might have been made by the reference to the State. The article applies when there are 'two or more territorial units' within the State. This means that it does not apply when different groups of *persons* within the State are subject to different succession systems of law or rules of law. That is a problem of so-called interpersonal conflict (for which Article 20 provides). Article 19 assumes territorial or geographic areas within the State which as territorial or geographic areas possess in each case a distinct system or set of rules. The reference in other words is not persons, but geographical areas. Such a unit will have 'its own system of law or its own rules of law in respect of succession'. This language would embrace the situation where there is one civil law jurisdiction and another common law jurisdiction making up the State. Québec has its own system of law within Canada, which as a State is otherwise of the common law system. Louisiana in the United States has a similar distinction from the mostly pure common law jurisdictions of that country. However, as between two common law jurisdictions of the United States or of Ca-

nada or of Australia, though the system of law is the same, the rules of law in respect of succession may be different. Reference was earlier made to the difference among the states of the United States in terms of statutory provision for the inheritance protection of the family in terms of the estate of the deceased. A European or South American court concerned with units of this kind is distinguishing between the rules of one such unit and the rules of another such unit. It is asking itself which set of rules applies to the case in hand.

Paragraph 2

124 When a State has rules determining to which unit within itself reference is made, when such terms as 'habitual residence' or 'nationality' are used, the authority in question must have had the requisite sovereignty to lay down such rules. In a unitary State sovereignty is not difficult to find; the government of the unitary State will exercise the authority of the State in making such rules. In a federal system, however, it has to be clear that the authority which has issued these rules is competent to bind all the units within the State. For example, British Columbia in Canada has no sovereign authority to lay down rules as to how other provinces within Canada shall interpret the terms 'habitual residence' and 'nationality' of a person living in Canada. It can only make rules as to how it will itself interpret those terms for its own purposes. However, if the federal authority has constitutional power to make such rules binding all the units, and such rules are produced, then the only issue that remains is as to the adequacy of those rules in terms of the particular factual circnmstances that have arisen. Only if the rules (assuming rules exist at all) do not cover the circumstances that have arisen, but which circumstances are provided for by Article 19, will the article be applied.

Paragraph 3

125 Under Article 3 the applicable law is that law as at the date of death of the *de cujus*, and under Article 5(1) it is that law either as at the date of the designation or the date of death. For the purposes of agreements as to succession, Article 9 specifies the applicable law as at the date of the agreement, or, failing validity under that law, as at the date of death. Articles 10 and 11 both refer to the Article 3 or Article 5(1) laws as at the date of the agreement. Fundamental to the operation of all those articles, however, is the concept of 'habitual residence' and 'nationality' within Articles 3 and 5(1). The idea behind the use of the term 'habitual residence' in Hague Conventions is that the definition will be autonomous, and not merely reflect conceptual thinking in the place where the issue arises. It has already been noted that the Convention does not define habitual residence, nor does it deal with the issue of dual nationality.

But what does 'nationality' and 'habitual residence' mean when the nationality or habitnal residence of the *de cujus* is that of a federal State or a unitary State with two or more jurisdictions with separate systems or sets of succession rules? Paragraph 3 responds to this question; it identifies the unit whose law is to govern. Under paragraph 3(*a*) 'habitual residence' means the law of the unit in which the *de cujus* had his habitual residence at the relevant time. Under paragraph 3(*b*) 'nationality' means again the law of the unit in which the *de cujus* had his habitual residence at the relevant time. Where the issue is 'nationality', however, and the deceased has no habitual residence in any unit within the State of nationality at the relevant time, paragraph 3(*b*) permits the forum to interpret 'nationality' as a reference to the law of the unit with which the deceased had his closest connection at the relevant time. This means, as paragraph 4 makes clear, that one looks to the degree of association of the deceased with the units within the national State, and one finds that with which he was most closely associated at the time.

However, paragraph 3(*a*), the paragraph which deals with habitual residence, omits this reference to 'the closest connection', and the question could arise as to what the Convention requires the forum to do when the deceased at the relevant time had an habitual residence in the State, but no habitual residence in any particular unit. For example, he may have been a United States national habitually resident in Canada, but an itinerant unmarried salesman travelling from province to province throughout his time in Canada. He cannot be said to have an habitual residence in any particular province, and yet either the objective law applies under Article 3 and one needs to know what was his habitual residence since, for example, he is a person who had five years of residence in Canada culminating in an habitual residence at the time of his death, or the Article 5(1) law is in question because he has designated 'the law of Canada as the country of my habitual residence'. As has been seen, paragraph 3(*b*) provides for a situation like this. However, the only circumstance in which Article 3 can provide problems in this regard is with respect to the habitual residence after five years of residence, and the problem here is taken care of by paragraph 7 of Article 19. What appears not to have been provided for is the Article 5(1) designation of the State as the State of habitual residence. The itinerant unmarried American salesman in Canada who has designated 'the law of Canada as my State of habitual residence' can only be said surely to have made no valid choice, and therefore the objectively determined law under Article 3 applies.

Paragraph 4

126 This paragraph, as has been noted, makes it clear that the law of closest connection is the closest connection of the individual, the deceased, with a unit within the State. The paragraph emphasizes the reference in paragraph 3 to three laws: habitual residence, nationality, and the closest connection. The elements that go to make up close connection have already been discussed in connection with Article 3, and reference should be made to the commentary on that article for further explanation. Essentially, it is a question of discovering the unit of the State with which the personal factors in the life of the deceased were most closely associated.

Paragraph 5

127 In making his will the deceased can always choose under Article 6 that a law other than the applicable law shall apply to particular assets in his estate, and therefore the substantive law reference under Article 6 is expressly omitted from paragraph 5 of Article 19. Paragraph 5 is designed to prevent the deceased in a federal State, or a unitary State having territories with different systems or sets of rules of succession law, from selecting the unit within the State which is most conducive to his

desire to avoid or limit as far as possible the inheritance rights of the surviving spouse and children. In a State like the United States with 50 jurisdictions, and many conceptions across such a vast country as to the appropriate provision, if it is to be anything, for surviving spouse and children, the opportunity this offers for evasion of family inheritance laws is evident.

Paragraph 5(*a*) provides that if the deceased was a national of the State of which he has designated a nnit, the designation is valid only if at the relevant time he had his habitual residence in that unit or, absent an habitual residence, he had otherwise a close connection, meaning a close personal connection, with that nnit.
Paragraph 5(*b*) provides that where the deceased was not a national of the State, one of whose units he has designated, the designation is valid only if at the relevant time (designation or death, as the case may be), he was habitually resident in that unit. If he did not then have an habitual residence in that unit, but was at that time resident in the State, the designation will still be valid provided that at some time he had had an habitual residence in that unit.
As an example of paragraph 5(*a*), one may snppose an Australian who designates in his will the law of the State of Victoria to be the applicable law governing his will. For most of his life he had lived in New South Wales and Queensland, but in his older years he had visited family in Victoria more and more frequently, and in fact he died there. An Australian court will be able to conclude, if Australia is a Contracting State, that the deceased died having a close connection with Victoria, though his habitual residence remained at his death in New South Wales.

An instance of paragraph 5(*b*) operating might arise in the following circumstances: the deceased was a French national who had lived most of his life in France, bnt for a period of time in his middle years he lived in New York State where he acquired an habitual residence. Later in older years he moved to Connecticut intending ultimately to return to France in order to die in the land of his birth. He had substantial investments in New York State, however, and during his short time in Connecticut he designated the law of New York State as the applicable law to govern his estate. Yet later he returned to France, acquired an habitual residence there, and died in France. This case falls under paragraph 5(*b*) because the deceased at one time had an habitnal residence in the uuit which he has designated as his applicable law. If the forum were to find on the other hand that this particular deceased testator had resided in New York State, but never acquired an habitual residence there, then no valid designation would have been made, and the testator's will would be governed by the Article 3 law.
It will be noticed that paragraph 5(*b*) does not allow for an ultimate fallback on the closest connection link with the unit. It may well be that the deceased Frenchman in the example just given, while he had never had an habitual residence in New York State, could be said to have had a close connection with New York State. However, this is not sufficient for the purposes of paragraph 5(*b*). The reason for the distinction between paragraphs 5(*a*) and 5(*b*) is that in the case of paragraph 5(*a*) the deceased was a uational of the State, the unit of which he had designated. He had a 'belonging' there. In paragraph 5(*b*) his association with the State in question is more remote because at the relevant time he was not a national of the State, one of whose units he has designated.

During the Plenary Session concern was expressed by some delegations, whose States were affected, over the severity which was imposed upon the testator or party to a succession agreement who designates the law of a unit of a State. It was pointed out that there is nothing in the Convention which requires the national of a unitary State with but one succession law to have any habitual residence or close connection with that State at any time in his life. In the case of the person who designated the unit of a federal State or of a unitary State with several territorial units with different succession systems, was it justifiable to impose upon that person another approach just because the designator might possibly choose a law within the State which is more to his liking than another? Whether severe or not, however, the majority of the delegates confirmed that paragraph 5 was necessary. It should not be possible for a person being a national or at one time the habitual resident of a federal State, or unitary State with two or more territorial units having distinct succession laws, to 'shop around' for the law most to his taste in terms of family inheritance rights.

The Spanish delegation also argued that it should be possible in the case of a unit designation under paragraph 5(*a*) for the court to be able to go immediately to the question of whether or not there was a 'close connection' with that unit, rather than have to occupy itself with the preceding and additional question of whether there was an habitual residence. However, it was felt by the Commission that the fine balance between nationality and habitual residence which is maintained throughout the Convention should be maintained at this point also, and that, since Article 19 carries no substantive provision which does not appear in the earlier stages of the Convention, *in toto* a change here of the kind argued for was not desirable.
During the third aud final reading of the text in Commission II it was suggested that paragraph 5(*a*) might be so worded that the provision requiring habitual residence, and only in the absence of habitual residence the unit of close connection, should be deleted. In its place there should be introduced a presumption in favour of the habitual residence, which presumption being rebutted the law of close connection would be adopted. This was an idea which seemed to have the merit of taking a middle position between the Spanish argument in favour of close connection only, and the text which took the position of habitual residence and only in the absence of habitual residence close connection law. However, because the move from nationality to close connection is a significant one from non-domicile jurisdictions unaccustomed to the notion of close connection, and because 90% of the paragraph 5(*a*) cases will be circumstances where in any event there is an habitual residence, it was concluded that it was better to retain the concept of habitual residence between reference to nationality and close connection law rather than sweep unaccustomed jurisdictions immediately into the less precise sector of close connection.

Finally, the question arises as to how the Convention is to be applied in those States where, as might occur in Cauada, some units of the State adopt the Convention, but others do not. It is quite clear, and the Convention so provides in Article 21 that Contracting States are not obliged to apply the provisions of the Convention to any other situation than international conflicts; that is to say, the Convention does not apply as between the units of a State, unless the State or its units, as the case may be,

so choose to apply it. Nevertheless, while without such choice it would not apply where, for example, the applicable law is the law of Ontario in Canada and there is a pnrported Article 6 law for the purposes of particular assets in Nova Scotia, which is another province of Canada, it would apply where the applicable law is again the law of Ontario, but chosen Article 6 law is the law of Illinois, the particular assets being in Nova Scotia. Where the Convention applies, Article 19 must apply.

Paragraph 6

128 As has been noted paragraph 5 is subject to Article 6 because under Article 6 a law other than the applicable law may be imported into the will to govern particular assets in the estate. Paragraph 5 is of course concerned with the designation of the applicable law, and therefore Article 6 designations must be excluded from the operation of paragraph 5. Paragraph 6 therefore deals with the circumstances where the deceased has designated the law of a State as such to govern particular assets within his estate, while the remainder of his estate is subject to the law of another State or unit. If the deceased at the relevant time (designation or death) was neither a national of nor habitually resident in the State whose law he has chosen for the purposes of Article 6, and the State in question is a federal State or a nnitary State with two or more territorial units, Article 19(3) is of no assistance to him. Though the law designated by the deceased under Article 6 may be any law which he chooses to incorporate, paragraph 6 attempts to solve the problem by introducing a presumption in favour of the unit in which the particular assets in question are located. Where the applicable law is the law of State A, and the specified assets are in two or more units of State B, this would mean that in relation to the assets within each nnit of State B the law of the particular unit would apply to the assets in that unit. The presumption is rebuttable, however, by evidence that the deceased had a law other than the situs law in mind.
It should be underlined that no problem arises where for the purposes of Article 6 the deceased has designated the law of a unit of a State to govern particular assets, when, as conld be the case with a designated law of a State with but one system or set of succession law rules, the deceased has no personal association with that nnit. A substantive law reference under Article 6 may be to any law, as has been said, and therefore the deceased need have no connection whatsoever with that nnit jnrisdiction. So a Dane who is an habitual resident in Denmark and makes his will in Denmark, designating the law of Texas to govern immovable assets which he has in that unit of the United States, is perfectly free to select Texas law for his Article 6 purposes.

To be observed also is that in this paragraph the words 'to particular assets' are rendered in French as '*pour certains de ses biens*'. This French text also occurs in Article 6 itself. The reference in both instances is to an estate asset or assets that have their situs in a particular State or a particular unit of a State.

Paragraph 7

129 This paragraph deals with the problem arising from Article 3(2), where the applicable law is determined, in the absence of a choice or a valid choice, by the jnrisdiction in which the deceased was habitually resident at his death, having had five years of continual residence in that jurisdiction prior to his death. Paragraph 7 first provides that it is not of importance that the period of five years of residence occurred in two or more units of that State. Provided the deceased had five years of residence in the State, it is irrelevant that he moved from unit to unit within the State during that five-year period of time. The second problem with which paragraph 7 deals is this: to which law is Article 3(2) referring when, though the deceased had an habitual residence in the State at the close of the five years of residence, he had no habitual residence at any time in any of the units of the State in question? Paragraph 7 provides that in those circumstances the applicable law is the law of the unit in which the deceased had last resided unless at the time of his death (this is for Article 3 purposes) he could be said to have had a closer connection with another unit of that State.

Article 20

130 This article remained unchanged from the preliminary draft Convention, and is familiar in modern conventions. A State may inclnde persons who are subject to, or acknowledge, a personal law system, such as Islamic law, and the State recognizes this law, together with its adherence. If a State itself has no rules for determining which legal system within the State (the general legal system or the personal legal system) is to apply, Article 20 lays down that it shall be the law with which the deceased had 'the closest connection'.

Again there arises the issue of determining which is the closest connection, and for this purpose one looks to the personal and family associations as one would do in connection with the same law in other articles, notably Article 3. However, in most instances persons, such as Hindus, Muslims, Parsees, and Christians, who are adherents to a personal law system, will probably be described as such within the State in question, and the personal law of the testator himself will therefore be discoverable under local law.

For a further remark on this article, see the commentary on Article 27, *post*.

Article 21

131 The object of this article is to distinguish between international and internal conflicts. A conflict of laws between jurisdictions within a Contracting State, where the law of no other State is involved under the terms of this Convention, is beyond the reach of the Convention. This article expressly provides to that effect. The source of Article 21 is Article 18 of the Matrimonial Property Convention and Article 24 of the Trusts Convention. It applies not only when there are different systems of law within the State (personal law systems, or common law and civil law systems) but also when there are different sets of rules of succession law (*e.g.*, common law units within the single State as in Canada, the United States, and Australia). In order to make this clear the words 'territorial units' to be found in Article 17 of the preliminary draft Convention were omitted in the final text.

The word 'solely' was introduced at the suggestion of the Federal Clauses Committee, and is intended to nn-

derline that the article is exclusively concerned with internal conflicts. This leads to a question. When is a fact situation one which is more than internal and have an international character, so that the Convention applies? It is a question whether a fact situation straddles two or more States. It will be governed by the provisions of the Convention if an Article 7(2) matter has factual elements in two or more States. It is clear that, if the assets of the deceased's estate are in State P, save for one asset which is in State Q, the Convention applies, and this is brought about by Article 7(1). However, for the matter to be international it must concern the 'succession'. Where all the assets and the *de cujus* and his close family are in State P, but one child is in State Q, that child may have forced share rights under the law of State Q, but that is of no consequence because the 'succession' is totally contained in State P. The matter is not international.

The question may arise in another context, however, namely, where the facts straddle the units of a federal State and also a unitary State. Suppose the deceased had all his assets save one in New York State, his children live in a house owned by him in New Jersey, and he died habitually resident in the Netherlands. The entire estate is left to a charitable organization in New York State which argues that the matter of whether the children have claims is an exclusively internal matter, being between their domicile jurisdiction, New Jersey, and the situs of almost all of the deceased's assets, New York State. Neither unit recognizes claims by children; it is the surviving spouse only who has a claim. However, because the law of the deceased's nationality or habitual residence could be relevant under the terms of the Convention (*e.g.*, Article 3), the Convention applies. It cannot be said that it applies to issues between the Netherlands and New York State, and the Netherlands and New Jersey, but not to issues between New York State and New Jersey. It applies to all 'succession' issues involving any one or more of the three jurisdictions involved. It seems unreal to argue that 'conflicts solely between the laws of' New York State and New Jersey are internal to the USA, while conflicts involving either of those units and the Netherlands are international. 'Solely' must surely mean that no foreign jurisdiction is involved at all in the whole fact situation, save perhaps for a fact or facts that have no legal significance or do not fall as to subject-matter within Article 7(1) or 7(2).

It should be noticed also that a matter is not international if the *de cujus*, a Canadian national, had assets both in Ontario and Québec, and under Article 6, having an Ontario habitual residence, in his will had designated the law of New York State to govern certain of his assets in Québec. This is because the New York law is merely incorporated by reference into a will governed by the law of Ontario (Articles 3(1) and 19(3)(*a*)). It is not an applicable law under Article 3 or Article 5(1).

Article 22

132 This article provides transitional arrangements. The Convention applies in a Contracting State to the succession of any person whose death occurs after its entry into force for their State.

It follows from paragraph 1 that the Convention will apply in the Contracting State, if a will was executed prior to entry, but death occurred after entry.

Paragraph 2 provides that, if a designation of a governing law is made in a will prior to entry, and death occurs after entry, the designation will be regarded as valid if it complies with the requirements of Article 5(1) and Article 5(2).

Paragraph 3 provides that a designation of a governing law by the parties to an agreement as to succession is valid, even though the designation be at a time prior to entry, but the death of the owner of the burdened estate in question occurs after entry. However, this is only so provided the designation complies with Article 11. Since under Article 8 the agreement must be 'created in writing', the 'express designation' of Article 11 must itself be in writing. The effect of paragraph 3 is that, if the agreement involves the estates of two or more persons (however many parties to the agreement there are), and a death of a party whose estate is involved occurs before the entry into force, the Convention will not apply, but if the death of the other party or parties whose estates are involved occur after entry, the Convention will apply. Similarly, for the purposes of an Article 11 designation, if the maker of a mutual will dies prior to entry, the Convention does not apply. If the death of the other mutual will maker (usually there are two only) occurs after entry, the Convention will apply.

In the circumstances described, therefore, so far as paragraph 3 is concerned, if the forum under its law declares the designation ineffective for the estate involved as a consequence of the first death or for the will of the first to die, different laws may apply to the agreement and the mutual wills before and after entry into force of the Convention in the Contracting State.

133 Once the Convention enters into force, therefore (*i.e.*, three months after the third ratification, acceptance or approval under Article 28), notaries and solicitors of all Member States in particular would be well advised to review all wills and agreements of their clients where designations of governing law are made, whether or not those designations were made in expectation of ratification, acceptance or approval by the State in which the legal practice is conducted. For all wills and succession agreements executed prior to entry where no designation is made, professional review ought to be made for the purposes of determining what effect Article 3 will have, should the death occur after entry. Clearly this ought to be done where the estate is known to include assets in two or more States, whether or not multiple wills are in place, but it surely should be undertaken for all wills against the possibility that at death assets will then be located in two or more States.

134 It should be underlined, however, that paragraphs 2 and 3 were not intended by the Sixteenth Session to render invalid a designation which under the law of the forum (assuming the Convention did not exist) is valid. The Convention is intended to be enabling; paragraphs 2 and 3 state, 'that designation is to be considered valid if it complies with' Article 5 or Article 11, as the case may be. The intent is that these paragraphs may actually validate designations which in the absence of the Convention would have been invalid. It would appear that in bringing the Convention into force a Contracting

State may provide that designations in wills or agreements executed or made prior to entry, when that State is the forum, will continue to be valid, if valid prior to entry, though Article 5 or Article 11 respectively is not satisfied.

Article 23

135 Conflict between the treaties into which States enter is not a new problem; the Hagne Conference has itself included provisions in past Conventions attempting to provide the basis for the reconciliation of such conflicts. Treaties now in force were entered into in some cases well over 100 years ago and their very antiquity has leant them an endurability and respect which in substance they perhaps no longer deserve. Many treaties are now ontdated as to some at least of their provisions; they respond to the issues of yesteryear in a manner which in their day was familiar and accepted. However, States enter into treaties not only for the duration of many years, years during which values and conceptual thinking in international law change, but they enter them for a variety of reasons.

Treaties are both multilateral and bilateral. Multilateral treaties may be universal, like the Hague Conventions which once in force are open to any State to adopt, or involve only the group of States who are party to an association. Yet again there are States whose conventions spring from a common interest which is likely to be location in a geographical region, or cultural or religious affinity. Bilateral treaties are based on reciprocity, and express the desire of the two States in question to deal with a shared problem or interest in a manner agreed between them, whatever the rest of the world's States may be doing in the same or related areas.

136 Several international agencies are engaged in promoting universal treaties, adopted initially by the Member States of the agency in question but open to ratification by any State prepared to contract on the terms of the already existiug treaty in question. Clearly any group of Contracting States or such an agency would like to see primacy given by each Contracting State to the association or agency treaty which those States most recently adopted on a given subject-matter, especially when treaties on that subject-matter are contradictory. But the motivations for contracting are many, and the reasons for remaining party to contradictory treaties may be unrelated to the substance of the treaties which contradict each other. Ratification, acceptance or approval of a universal treaty, when the Contracting State is already party to an existing treaty which contradicts or is otherwise at odds with the new treaty, *prima facie* makes no sense, and later contracting to become party to a universal treaty, which is incompatible with the one-time new, but now earlier treaty, appears equally illogical. Moreover, if Contracting States condone other States entering into ratification, acceptance or approval when the entering State is thus assuming contradictory obligations, or the entering State regards itself as free for its own reasons to assume another but inconsistent treaty obligation at a later time, what is the value of the treaty to the other Contracting States? If all Contracting States have this licence, and even a minority for whatever State reason exploit the opportunity, the treaty is proportionately of less value to the States whose situation is deliberately not contradictory. Unless an issue arises between States each of whose situations is not contradictory, the treaty cannot be relied upon.

At the same time a State may well wish to pursue universally one policy or legal position but entertain another somewhat different policy or legal position towards one other State or a small group of States, of which it is a member, who on a regional or common interest basis wish to depart from the universal policy. This will normally be in order to secure reciprocity or to express shared values in the form of common laws between the regional or common iuterest States. Though they produce the same difficulties for Contracting States not party to such arrangements, these localized or bilateral arrangements in the international milieu are perhaps more readily acceptable, and that is because all States can at least appreciate the reasons for differing accommodations at the local level or as between two States with a common concern.

All in all, however, because its effects can be so profound and the reasons for its existence are so involved with State policy, overt or otherwise, the conflict of treaties (or couventions) poses a difficult and delicate problem. Public international law principles are involved, and the room for significant difference of opinion in how to respond to the problem is considerable.

137 Traditional Hague policy has been to condone Contracting States being parties to other conventions on the same subject, even if there is conflict between the Hague Convention in question and other conventions. Article 19 of the Matrimonial Obligations Convention, 1973, and Article 20 of the Matrimonial Regimes Convention, Article 21 of the Validity of Marriages Convention, and Article 22 of the Agency Conveution, all of 1978, are cases in point. The Hague Conference has expected only that Contracting States will make every endeavour to reduce and, if possible, eliminate the conflict. Denunciation of the Hague Convention in question, if an extreme measnre, is one alternative offered if, despite efforts, conflicts cannot be avoided.

Article 23, though it is in line with previous Hague policy and Conventions, was only reached after considerable debate involving a number of working documents and different proposals as to what should be the approach of the present Convention. Indeed, it was only at the final meeting of the closing Plenary Session of the Sixteenth Session, that the principal provisiou, paragraph 1 of this article, was proposed and adopted. The Permanent Bureau had suggested to the Special Commission in 1987 that it would make alternative proposals to the Sixteenth Session of 1988, proposals that differed from traditional Convention provisions, and during the first reading of the preliminary draft Convention it did so. The Bureau proposed (Work. Doc. No 72) that as between Contracting States to this Convention the provisions of the present Convention shonld replace existing conventions on the subject of succession on death, but that such States might continue to honour existing reciprocal conventions and also enter into new ones. The Finnish delegation proposed (Work. Doc. No 84) that Contracting States which are parties to international conventions between a closed nnmber of States might

also by declaration be permitted to continue with such existing conventions. The Finnish delegation also wanted complete exemption from the proposed article for localized or special interest conventions.

These two proposals clearly took different positions on what type and degree of exemption there might be from a general policy of Contracting States not being party to other conventions on the same subject, and the matter was sent to an *ad hoc* Committee of the Bureau sitting with the Finnish and Italian delegations. It was evident that there might in fact be little difference between the traditional Hague policy of permitting Contracting States to be party to other conventions on the same subject, and a prohibition on such conduct subject to extensive exceptions for reciprocal, regional and even some international conventions.

During the second reading of the new revised preliminary draft Convention the Committee reported and proposed (Work. Doc. No 89) alternative propositions for the main policy to be contained in paragraph 1 of the article. Either the Convention would prevail for Contracting States over all other conventions on succession law, or the traditional Hague position would be followed. Some precedent for the first alternative existed in the *Convention of 2 October 1973 Concerning the International Administration of the Estates of Deceased Persons*, Article 39, and the Bureau continued to prefer this policy. It at least required the Contracting State to make a firm decision to abandon other conventions on the subject. Otherwise it was proposed to permit reciprocal conventions, and regional or otherwise localized conventions, agreements that seek uniformity at the regional or local level. Commission II now seemed poised in a no man's land between two opposed attitudes to the problem of a conflict of treaties, and indeed ultimately a show of hands revealed a majority preference for the traditional Hague position. This position, however, was keenly resisted by some delegations in the minority. Debate on the reciprocal and regional conventions was marked by concern over their potential deleterious effect on the application of the Convention, and on the other hand their value to the States concerned, but this exception seemed generally acceptable.

At the third reading of the revised preliminary draft Convention (the second reading of Article 19, as it then was numbered), the Drafting Committee (Work. Doc. No 105) proposed two alternative classes of qualifying conventions rather than the article which is traditional to Hague Conventions. Each alternative, that is to say, restricted adherence by a Contracting State to other international conventions on the subject of succession; only a narrow class of such conventions was allowed. The first restriction was to those other conventions that are directed at those persons who are nationals or habitual residents of the Contracting State which is party to such another convention. The second, originally a Finnish proposal, was to those other conventions on the subject which are exclusive to and binding only upon States parties to the particular convention. The Drafting Committee was here attempting to recover for the delegates the middle ground through a narrow and precise description of the qualifying other conventions. By a show of hands the first alternative was preferred by Commission II, but a French proposal (Work. Doc. No 106), to have this class of other conventions qualify as co-existing conventions with the Hague Succession Convention only if there is no declaration by the Contracting State to the contrary, ran into difficulties. Was it suggested that one party to a convention (an agreement) by mere unilateral declaration could avoid the Convention, or was approval by all the States Parties assumed? The French proposal needed further consideration.

It was at the final Plenary Session that the language of Working Document No 105, Article 19, was abandoned, and the traditional Hague policy as expressed in earlier Conventions turned to once again. This was felt to be a simply expressed and familiar statement of what Working Document No 105, Article 19, said in a difficult and confusing way. And so the Commission returned to the point from which, previous Conventions would suggest, it had begun.

The issue, as the Italian delegation made clear, is the primacy which is to be given to Hague Conventions by Contracting States over other conventions of universal application. How important is primacy to Member States of the Conference, might have been the question, whether those conventions be universal conventions, capable of adoption by all States or only by Member States of an association, or they be conventions that are regional or bilateral.

138 The object of paragraph 1 of Article 23, as the delegation of the Federal Republic of Germany put it, in introducing Working Document No 12 at the Plenary Session, is not to permit every convention there is to derogate from this Succession Law Convention, but essentially to allow bilateral conventions to co-exist with this Convention. The language used in paragraph 1, however, is that a Contracting State may be a party to any other existing or future treaty on the subject of succession law, provided only that the States that are parties to such another treaty have agreed that the Contracting State is not bouud by that other treaty. If such agreement is not obtainable, and incompatibility is the concern, it is likely that denunciation of the other treaty under its terms for denunciation (if available) is the only course open to a Contracting State that wishes to honour the present Convention.
Paragraph 2 of Article 23 earlier during Commission II was decided to be an acceptable exception to the then proposed policy of primacy for this Convention. It applies, for example, to the Scandinavian countries which are parties to the Helsinki Agreement on Nordic Co-operation of 1962. These countries by way of informal co-operation are currently engaged in harmonizing their legislation, including their succession laws.

Despite the language of paragraph 1, and the tolerance of the entire article, it is surely the intention of the Sixteenth Session that should be honoured – as this long and keenly argued debate shows – and that intention is that Contracting States should give earnest consideration before they place themselves initially or in the future in circumstances where their loyalty to this Convention is imperilled or foregone.

Article 24

139 The permitted reservations to the Convention are set out in this article. The preliminary draft Convention in Article 20 contained one reservation, namely, that a State might exclude the operation of Chapter III, which

concerns agreements as to succession. A Member State of the Conference may enter a reservation on two occasions, either on signature or on ratification, accession or approval. A non-Member State may reserve inevitably on the occasion only of accession. During Commission II of the Sixteenth Session this reservation was expanded, in a manner to be explained here, and three other reservations were added. All the reservations are contained in paragraph 1 of Article 24; paragraph 2 provides that no other reservation is permitted, and paragraph 3 provides for the manner in which a Contracting State may withdraw a reservation and the time at which that withdrawal takes effect.

Paragraph 1

140 The opening flush of this paragraph was worded to the effect that a State might 'reserve the right' to make a reservation. It was pointed out during the discussion in Commission II that these words might suggest that a State is enabled by this language not to make a reservation on one of these five occasions, but to reserve the right to make it at some future time. That of course is not the intention. A reservation must be made at one of these five times – signature, ratification, acceptance, approval or accession – or not made at all. Consequently it was decided that the words of Article 21 of the *Hague Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods* should be adopted as preferable language. The opening flush would then read 'Any State may ... make any of the following reservations'.

Sub-paragraph a

141 This sub-paragraph contains the first of the reserves. It provides two things: first, that a Contracting State may state that it will not apply the Convention to succession agreements as defined in Article 8, and, secondly, that as a consequence of not applying the Convention to succession agreements, it will not recognize a designation under Article 5(1) which is in a form other than that required by the reserving State for testamentary dispositions.
The first aspect of the reserve was discussed in the Special Commission, and is contained in Article 20(I) of the preliminary draft Convention. The language 'as defined in Article 8' is deliberately employed in order that the reservation shall not be purportedly broader than the application of Chapter III itself. Oral succession agreements are valid in some jurisdictions, but, as previously mentioned, are not included in the Convention. A Contracting State which makes this reserve as to Article 8 succession agreements will not, of course, recognize oral agreements as dispositions of property npon death, becanse its overall policy is to recognize only those dispositions on death which take the form of testamentary dispositions. It is for the reason of this policy that such a Contracting State will probably feel the need to protect itself against having to recognize designations under Article 5(1). This leads to the second aspect of Article 24(1)(*a*). By authority of Article 5(1) these designations are effective designations of the chosen law, but are contained in a form other than that which is testamentary because of the existence in the Convention of Chapter III. The language of paragraph 1(*a*) does not obligate the reserving State to refnse to recognize Article 5(1) designations, but the State is free to make clear in its reserve that neither will it recognize a designation of a chosen law to govern the whole of the estate when that designation is in the form of a succession agreement. Such agreement may or may not be in the form of a testamentary disposition, and it is testamentary dispositions alone which the reserving State intends to recognize.
That this second aspect of the reserve is necessary can be seen from the fact that, while the wording of the first aspect refers to succession agreements 'as defined in Article 8', Article 8 commences with the words 'For the purposes of this Chapter'. Article 5(2), however, provides that a designation of an Article 5 law is to be made in accordance with the formal requirements for 'dispositions of property upon death'. If a State recognizes the validity of oral succession pacts, it follows that in that State a 'statement' designating the chosen law may be in oral form, which under the Convention is a valid disposition of property upon death in that State. Therefore, to prevent the difficulty arising of a Contracting State which has reserved as to Chapter III from being faced with either a written or oral designation in succession agreement form but not in testamentary form, the second aspect of Article 24(1)(*a*) permits the reserving State to make it clear that it will not recognize these non-testamentary forms of Article 5 designation.

It might usefully be underlined that, though a Contracting State decides to make a reservation under Article 24(1)(*a*) declining recognition of Chapter III succession agreements, it is not internationally obligated to state also that it will not recognize a designation made under Article 5 that is not in the form of a testamentary disposition. In other words, it can reserve on Chapter III succession agreements, but continue to accept any Article 5 designation even though it be in the form which is not acceptable for a testamentary disposition.

The Mexican delegation wished it to be recorded that it would have preferred to see the two aspects of Article 24(1)(*a*) kept separate, instead of their being included in one sentence. The Reporter undertook to explain clearly the nature and effect of each aspect of this reserve.
In view of the fact that this Convention will create greater international awareness and probable use of succession agreements, and that Chapter III constitutes an orderly international modus for the recognition of these mostly civil law estate planning devices, common law jurisdictions may be well advised not to make this reservation. It may be preferable to come to terms in this way with the succession agreement, as civilians accept through the Trusts Convention to come to terms with the trnst. And for those States who wish later to resile from their decision, Article 30(1) (see *post* for commentary) provides an exit.

Sub-paragraph b

142 A State may make the reservation that it will not apply Article 4 of the Convention. That article, it will be recalled, is to the effect that if the applicable law under Article 3 is that of a non-Contracting State, and that State would refer to another Contracting State, which State accepts the reference, a Contracting State is obligated to apply the law of that second non-Contracting State. This is renvoi to the second degree, and the Danish delegation in requesting this reservation emphasized that it was particnlarly hostile to the possibilities of the partial renvoi that Article 4 permits. The Danish delegation stated that its country was hostile to the whole concept of renvoi, because in the Danish view it

introduces a complexity into the application of laws which is unjustifiable in light of what Denmark sees as the limited value to be had from the renvoi doctrine. Partial renvoi, however, it was pointed out, might well be the common experience with Article 4. That is to say, the applicable law, being the law of the first non-Contracting State, is the law of a scission State, which refers to the second non-Contracting State as the situs of immovables in the deceased's estate. The second non-Contracting State is also a scission jurisdiction, and accepts the reference because it is the situs of the immovables in question. In those circumstances the effect of Article 4 is that the law of the second non-Contracting State applies to the immovables in the estate, and the law of the first non-Contracting State applies to the movables in the estate. The reservation, on the other hand, allows a Contracting State to apply the internal law of the first non-Contracting State to the entirety of the estate, and to have no concern with the laws of the second non-Contracting State.
For example, if (1) State X reserves on Article 4, (2) State X is the forum, (3) the Article 3 law is that of State Y, a non-Contracting State, (4) State Y would refer to State Z, another non-Contracting State, and (5) State Z would accept the reference and apply its own internal law, the result of the reserve is that State X would apply the internal law of State Y. State X therefore makes a point about the partial renvoi doctrine, but in doing so refuses to recognize an harmonious outcome to which States Y and Z would themselves have come. If State Z is the situs of the deceased's assets, the law of State Y will be applied to those assets.

Were Denmark (State X) to reserve on Article 4, and the estate affairs of the *de cujus* are likely to come before the Danish courts, the *de cujus* would be well advised to designate an applicable law (nationality or habitual residence) under Article 5(1), and the Article 6 law for assets in State Z. Alternatively, and if the mandatory rules of his likely nationality and habitnal residence laws at death do not concern him, the *de cujus* could designate the Article 6 law for the assets in State Z, leaving the applicable law of his estate to be otherwise determined by the Danish courts under Article 3.

It would therefore seem that the significance of this reserve in practical terms is simply the inconvenience it causes to those whose estate affairs are likely to be determined in the reserving State. This is assuming, of course, that they are informed of the reserve and its consequences in the first place. The intestate and those lacking professional advice will be the ones who will bear the brunt of this reserve. States will have to determine whether their distaste for renvoi is worth this price.

Sub-paragraph c

143 The French and Italian delegations proposed originally (Work. Doc. No 64) that this reserve would take the following form: 'if the deceased at the time of his death possessed neither the nationality nor the habitual residence of the State whose law he had designated at the time of the execution of his will, the designation can be regarded as invalid by the reserving State'. The United Kingdom (Work. Doc. No 95) suggested narrowing this proposed reserve to the situation only where the deceased died habitually resident and with his nationality in the reserving State.
The United Kingdom proposal was designed to limit the reserve in such a way that it meets the needs of those States who are concerned by the Convention's recognition of Article 5(1) designations of the applicable law as, alternatively, the habitual residence or nationality at the time of designation, while also giving the Convention an opportunity to attract more States into adopting the Convention. The French and Italian delegations in the interests of compromise were prepared to accept this narrower reservation, but it is evident that the effect of the reservation, were it to be made by a number of States, would be to weaken considerably the impact of the Convention. In particular the reservation strikes at that freedom of designation which most commends the Convention to those concerned with planning the disposition by the *de cujus* of his assets, both during his lifetime and on death. Considerable tax saving may be made by such planning, but it is very much assisted by the testator knowing at the time of making his will the law that will apply to it on his death. He does not need to concern himself as to what the courts may have to say about the significance of his later change of residence, *i.e.*, after he had made his will.

However, the reservation does not exclude the value to a testator of Article 5(1). That is to say, a *professio juris* is still possible. Sub-paragraph *c* means that in a reserving State a choice by the *de cujus* of his habitual residence or nationality law at the time of designation will not be recognized if that chosen habitual residence or nationality changed, *and* the deceased later died with his nationality and habitual residence in the reserving State. The designated nationality or habitual residence whose law was chosen to govern his estate will at death no longer exist. Change of the habitual residence or nationality between designation time and time of death is essential before the reserve can come into operation, but also – just to reiterate the point – whatever number of intermediate changes there may have been, at the death of the *de cujus* both his nationality and his habitual residence must be in the reserving State. Moreover, it should very clearly be noted that nothing in this article or the Convention is intended to suggest that a person can have more than one habitual residence. He clearly cannot. He can have dual nationality, but as previously explained (see, *supra*, paragraph 51) the Convention leaves the solution of this matter to the forum under its own law.

An example of how the reserve would work may be of assistance. Snppose the deceased in his will designates State A's law, his then habitual residence, to govern his estate. He dies with the nationality of State B, the reserving State, a nationality which he had at the time of designation, but at death he has changed his habitual residence to State B. State B will not recognize the designated law, and will apply the Article 3 law. Had the deceased died with his habitual residence in State C, possessing State B's nationality at all times, State B as a Contracting State, must recognize the designation in the will of State A because the reserve does not extend to the situation where nationality alone (or habitual residence alone) exists at death in the reserving State. Had the deceased died with his habitual residence in State B, but have changed his nationality and have had the nationality of State D at the time of designation, State B (the reserving State) as a Contracting State must still apply the designated law, the law of State A.

There is no doubt, however, that for the very large number of people who die habitually resident in and a national of the same one State, this reservation, if made by that State, has serious consequences. Suppose a will or succession agreement made by the *de cujus* earlier in life when he was an habitual resident in another State, and in which will or agreement he designated the law of that State as his applicable law, that designation will not at his death be recognized in the reserving State. For instance, if France or Italy were to reserve, a Frenchman or Italian working abroad, acquiring habitual residence and assets there (in State X), and designating the law of State X as his habitual residence to govern his estate, must take care if he wishes in older years to die in the land of his birth, and so returns to Frauce or Italy, as the case may be. He leaves significant funds behind him in State X, and he does this perhaps because exchange control in State X prevents him from taking capital out of the country. If he survives five years in his homeland, he will no doubt under Article 3 have acquired an habitual residence there, and if he dies under five years following his return no doubt the law of his homeland as his nationality law will apply to his estate. The difficulty is that because he has retained throughont his life the nationality of his place of birth, France or Italy, as the case may be, at his death he has neither the nationality of, nor is he habitually resident in, State X. At the same time he has at death the nationality and habitual residence of the reserving State (France or Italy). Irouically enough, had the deceased in these circumstances have been an Irishman or a Belgian, for instance, who had decided to spend his declining years away from the searing summers or the bitter winters of State X in the delights of the South of France or the Isle of Capri, the courts of France or Italy – as the case might be – would be required to accord him recognition of his designation of the law of State X.

It is much to be hoped that States intending to adopt the Convention, in order that their populations have the advantages conferred by the Convention, will hesitate before exercising this reserve. It may well produce more confusion and disappointment for those citizens who at death are habitually resident in and nationals of the reserving State than the reserve is worth. It may be a better course for States to give the Convention a chance, and see how it works out in practice.

Sub-paragraph d

144 The Anstralian delegation was most concerned that the family provisiou laws (*i.e.*, discretionary provision out of the deceased's assets) of Australia's states should be enforceable by and in favour of those family members who are habitual residents or nationals of Australia. Article 5(1) would mean that a *de cujus* who has an habitual residence in Australia, but retains the nationality of his country of emigration, could designate the law of his nationality to govern his will, though the effect of that designation is that the Australian family provision law is replaced by a possibly much less significant, or non-existent, provision in the nationality State. The Commission was informed that over 100 nationalities are represented among Australia's immigrants. This could mean that the surviving spouse and children, habitual residents in or nationals of Australia are compelled to seek social welfare in their home state in Australia.

Though all the three conditions enumerated in Article 24(1)(*d*) must be satisfied before the reserve may be applied by a reserving State, there was concern expressed in the Sixteenth Session that this was not a pure conflict of laws reserve (it is concerned with a particular fact situation), and that it goes to the heart of a Convention that is built upon the recognition that the laws of the nationality or habitual residence at the times both of designation and of death are the laws of States to which the *de cujus* can be said at the time in question to have 'belonged'. The reservation allows the Contracting State to assert at the death of the *de cujus* a hold over its habitual residents, and this denies the 'belonging' to the State of nationality. This escape route, it was said, for a problem such as this might more logically be seen as *ordre public* which is properly invoked in the factual circumstances of a particular case. Moreover, a reserve should be clear and precise as to its application; this one leaves its application to the discretion of the court.

However, there are counter considerations to be kept in mind. It is provided in the second condition of Article 24(1)(*d*) that the family provision of the designated law must 'totally or very substantially' deprive the surviving spouse or child of a family provision or of the intestate inheritance that he or she would have had. This means there is to be no blanket prohibition of the application of foreign family inheritance provision simply because that provision is less than the quantum which would be given by the reserve State as forum. It also has to be noted that the three conditions are cumulative, not alternative. However, of greater importance, delegations considered that adequate family provision is a legitimate concern where *professio juris* is in force, and the point was made that common law jurisdictions give a much more limited scope to public policy invocation than do other jnrisdictions. The intent of this reservation is protection of the provision rights of a dependent family, but in a common law jurisdiction this may be thought by the courts, important though it is, not to justify the heavy hand of public policy intervention. Finally, it cannot be overlooked that the reserve now contained in Article 24(1)(*c*) would not apply to the Australian concern, and therefore, it was thought, some other relief, provided in the Convention, was appropriate.

145 It will be noticed that three out of the four reservations are concerned wholly or in part with Article 5, the article which permits *professio juris*. And of those three, reservations Article 24(1)(*c*) and (1)(*d*) can be said to go to the very foundations of the *professio juris*, if not of the Convention itself. The point was made on a number of occasions during the Sixteenth Session, and should be reiterated here, that reservations are not to be encouraged because they are essentially destructive of decisions reached and compromises made in the Convention-making process. It is very much to be hoped that those States which intend to become Contracting States will consider the practical ramifications of what they are doing for their own nationals and habitual residents, as well as those with citizenship or habitual residence in another State.

146 The articles which make up the Final Clauses of Hague Conventions are now in a fairly settled mould, and are familiar to the worldwide community, as well as Member States. New expressions or revised models of protocol procedures may be found from one Convention to another, and on the occasion of the discussions that led to the Trusts Convention negotiated in 1984, a sub-committee on general and final clauses was set up. Its proposals were topical, and at the Fifteenth Session they led to considerable discussions and new formulations. The proposals concerned the manner in which that Convention might be revised and a revised Convention most appropriately take effect, the procedure for reservations, accession by new Members, limited application of the Convention among units of a State, the entry of that Convention into force, and denunciation of the Convention. Taken as a whole the purpose of these changes, several of which were adopted (see the Von Overbeck Report at paragraphs 181-201), were to further streamline procedures and to meet some difficulties which States had experienced.

On the occasion of the discussions in the Special Commission and the Sixteenth Session that resulted in the present Convention, the earlier formulations and revisions included in the Trusts Convention were in large part adopted once more. No sub-committee on the subject was set up, and in fact the Final Clauses proposed by the Drafting Committee for the Special Commission (Work. Doc. No 95 of the Special Commission), proposals that had been adopted by that Commission without discussion, were taken by the Sixteenth Session into the text of this Succession Law Convention with no more thau occasional drafting amendments.

Article 25

147 The Convention is open for ratification, acceptance or approval by Members of the Hague Conference only who were Members at the time of the Sixteenth Session. This was the form of the article which was preferred by Members at the Fifteenth Session, and it was followed on this occasion also. The preliminary draft Convention was simply taken into the final text. The requirement of deposit of instruments of ratification, acceptance or approval with the depositary of the Convention is also provided for in this article.

Article 26

148 This article provides that any State that is not a Member may accede to the Convention once the Convention has come into force as a consequence of ratification, acceptance or approval by three Members of the Hague Conference and the passage of three months thereafter. Again the instrument of accession must be deposited with the depositary. This article follows the form of Article 28 of the Trusts Convention, but in the present Convention the third paragraph of the Article 28 provision is omitted. That is to say, the present Convention makes no provision for Contracting States to object to accession by non-Member States. This is explained by the fact that in the case of the Trusts Convention non-Member States may wish to accede whose alleged trust provisions only questionably fall within the scope of the concept of trust as set out in that Convention. Clearly the same considerations do not arise in the context of the present Convention. This article also was carried from the preliminary draft Convention into the final text.

Article 27

149 Provision is made in this article for the State with two or more territorial units having different systems of law, and where adoption of the Convention is made by one or more of those units, but not by other units. The State in question by making a declaration at the time is permitted to sign, ratify, accept, approve or accede in this manner. This article is particularly important for States like Canada, in those circumstances where under the State Constitution the legal subject-matter in question falls under unit sovereignty, and the State can therefore become Party to the Convention in question by right only of the unit or units. Paragraph 1 of Article 27 gives the State in question the power to adopt the Convention in this manner.
Paragraph 2 requires notification to the depositary of such an act of adoption, and paragraph 3 makes it clear that a State that makes no such declaration under this article causes all its units to be subject to the Convention.

150 This article follows the pattern of Article 29 of the Trusts Convention. It was first adopted by the Special Commission in its preliminary draft Convention of 1987, and with one word changed it was included in the final text as this article. The Federal Clauses Committee of the Sixteenth Session recommended that the word 'modify' in paragraph 1 be changed to the word 'alter'. This is to overcome the difficulty that some State authorities have construed the word 'modify' to mean 'modify by reduction', whereas of course modification by reduction or expansion is intended. The words 'different systems of law are applicable in relation to matters dealt with in this Convention' in paragraph 1 were questioned during the Trusts Convention (see the Von Overbeck Report, paragraph 196), but they were retained as a consequence of majority opinion on the occasion of the Trusts Convention, and were not questioned on the present occasion.

The question may be raised as to whether a State which has 'two or more legal systems applicable to the succession of deceased persons for different categories of persons' (Article 20) can similarly have the Convention extend to one or more of those legal systems, but not to another or others. For instance, State A may have one system of law for Christians and another system of law for Muslims. It desires to accede to the Convention for the purposes of its Christian community, but not for the purposes of its Muslim community. However, Article 27 does not offer to States with legal systems for different categories of persons the facility available to federal systems and other systems with territorial units.

Article 28

151 It is here provided that the Convention shall come into force after the deposit of the third instrument of ratification, acceptance or approval. The second paragraph, unlike the Trusts Convention, does not put Member States of the Conference on a different basis from acceding States. However, both Member and acceding

States have different coming into force procedures from those provided for territorial units. For the purposes of Member States and acceding States, the Convention enters into force on the first day of the month following the passage of three months after the deposit. On the other hand, in the case of territorial units to which Article 27 applies, the Convention comes into force on the first day following the passage of three months after the Article 27(2) notification by the State in question.

Article 29

152 This article deals with the situation where a State becomes a Party to the Convention after the Convention has been revised. The preliminary draft Convention approved by the Special Commission in 1987 provided in Article 25 for this situation with the following words: 'Any State which becomes a Party to this Convention after the entry into force of an instrument revising it shall be considered to be a Party to the Convention as revised'. It was brought to the attention of the final Plenary Session by the Finnish delegation that this language is misleading and questionably contrary to the principles of the law of treaties. A State appears to be expressing the will to be bound by the original Convention, but instead becomes bound by the revised Convention. The Finnish delegation therefore proposed (Work. Doc. No 6) that the language of the article should instead read 'After the entry into force of an instrument revising this Convention a State may only become Party to the Convention as revised'. After a short discussion this proposal was adopted, and now appears as Article 29.

Article 30

153 Article 30 deals with denunciation of the Convention by States Parties. The denunciation must be by a notice in writing addressed to the depositary, and it is provided that the denunciation takes effect after the expiration of three months from the notification. This is a shorter period than is provided for in Article 31 of the Trusts Convention, where the passage of six months is required. The present article, Article 30, provides that if the denunciation is specified as requiring following the notification, a longer period than three months, this longer period is to have effect.

Paragraph 1 of Article 26 in the preliminary draft Convention had allowed only for denunciation by a State Party of the whole Convention. During Commission II it was proposed by the United States delegation (Work. Doc. No 97) that it should be possible for a State Party to denounce Chapter III of the Convention without denouncing the whole Convention. The State Party would in fact have a choice; it could denounce the whole, or denounce merely Chapter III. It was thought that this might make it easier for States to ratify the Convention, and not have to make a reservation to Chapter III at that time. They would be able to see how Chapter III operated once the Convention was in effect, and only exercise this right of denunciation if it later seemed appropriate so to do. The idea of the proposal is drawn from Article 101 of the United Nations Convention on Contracts for the International Sale of Goods of 1980. The proposal appeared to delegates to be a sound idea, and the proposal was adopted without further to-do. Not only does this procedure have the advantage over a reservation, that is allows a State Party to 'wait and see' the practical effect of Chapter III, but it also means that, if the Hague Conference were at any later time to originate a further Convention on agreements as to succession, States Parties can withdraw from Chapter III of the present Convention and accede to the new Convention, if that is their wish. The adoption of this proposal was reaffirmed in the Plenary Session.

It should be noted that this article, like Article 28, adopts the phrase 'on the first day of the month following the expiration of three months after' the particular event. This language, which was proposed in the preliminary draft Convention, would appear to be clearer to follow than the equivalent language in Article 30 of the Trusts Convention.

Article 31

154 The depositary, that is, the Ministry of Foreign Affairs of the Kingdom of the Netherlands, is required by this article to notify all States which are Members of the Hague Conference on private international law of all acts which have been done further to the authorization of the Convention. The object of this familiar article is of course that every State Party and every State Member shall be aware at each point in time of the status of the Convention and the position of each State Member in relation to it.

THE SIGNATURE CLAUSE

155 It should be noticed in this signature clause that the English and French texts are of equal authenticity.

Victoria, British Columbia
May, 1989