

## **EXPLANATORY REPORT**

The purpose of this Convention is first to determine the law with which legitimation must comply in order to be valid in the Contracting States; and secondly, to specify the steps that must be taken by civil registrars as regards the recording of legitimations in their registers and the preparation of extracts from the records of birth of legitimated children.

### **I. SCOPE OF THE CONVENTION**

#### **A. CASES OF LEGITIMATION COVERED BY THE CONVENTION**

The Convention applies only to legitimation by marriage, that is to say legitimation which – either preceded or not preceded by acknowledgment, depending on the relevant legislation – is the direct consequence of the celebration of a marriage; this includes legitimation, occurring after the celebration, which requires a judicial decision establishing merely that the legal conditions for legitimation are satisfied. In the latter eventuality, it is immaterial for purposes of the application of the Convention whether legitimation takes effect from the date of the marriage or from another date, such as that on which the decision is pronounced or transcribed. The Convention applies both to the legitimation of a living child and to the legitimation of a child who has died leaving descendants who, in some countries, might benefit therefrom.

The Convention does not extend to legitimation pronounced by administrative decision. The same applies to legitimation pronounced by judicial decision where that decision is not confined to establishing the existence of a right, but involves examination by the court of questions of appropriateness; this arises, in some States, in cases of “legitimation by adoption” or legitimation pronounced in exceptional circumstances for the benefit of orphans whose parents were not and could not be married, even posthumously.

#### **B. PERSONS AND STATES TO WHICH THE CONVENTION APPLIES**

##### **1. Rules of substance (Articles 1, 2, 3, 4, 5 and 10)**

Article 1 provides that legitimation shall be valid in each of the Contracting States if it occurred under the domestic-law provisions of the father’s or mother’s national law.

Article 10 specifies what is meant by a person’s “national law”, namely the law of the State of which he or she is a national or, in the case of refugees or stateless persons, the law governing their personal status (which is usually the law of their residence). Refugees and stateless persons are persons defined as such by international conventions or by the domestic law or custom of the country of asylum.

Article 5 states that the provisions of the preceding Articles, relating to the circumstances in which legitimations must be treated as valid, are applicable in respect of all States, even if they are not Contracting States. It follows from this text that henceforth the provisions of Articles 1, 2, 3 and 4 of the Convention constitute uniform rules of private international law, incorporated into the law of each of the Contracting States and applicable to any legitimation, irrespective of the nationality, domicile or place of residence of the father, the mother or the child, and wherever the child was born or the parents were married. The character of “uniform law” imparted to the rules contained in Articles 1, 2, 3 and 4 puts an end to the illogical situation whereby the validity of legitimations may be governed by a variety of rules in one and the same country; it is difficult to see why the legitimation of a child having a link with one of the Contracting States should be subject to the national law of his or her father or mother, while the legitimation of a child who has no connection with any of these States might be

governed by other laws, such as the law applicable to the effects of marriage, or again the law applicable to the child, which in some cases may differ from the law of one or the other parent: since a choice-of-law rule appears to be called for, it is advisable for it to be made general in scope.

In order to further legitimation as much as possible, Article 5 specifies that the provisions of the Convention shall not prevent the application of any rules in force in the Contracting States which may be more favourable to legitimation: accordingly, legitimations that are valid under the domestic law or private international law of the State where they are invoked will continue to be accepted in that State, even if they do not fulfil the conditions for validity laid down by the father's and mother's national laws. Thus, where a State's law provides that the conditions for legitimation are governed by the law of the common place of residence of the parents and, in casu, that law accepts the legitimation, it will be regarded as valid, even if it is accepted neither by the father's nor by the mother's law.

## 2. Rules of form (Articles 6, 7, 8 and 9)

These provisions of a technical character have, by their very nature, a more limited scope than the rules of substance. Article 6, which requires civil registrars to make an annotation concerning the legitimation in their registers, presupposes that two conditions are fulfilled: that the registrar is an official of a Contracting State and that the record against which the marginal annotation is to be made was drawn up or transcribed by him or her. Article 7, relating to the sending of notices to enable annotations to be made, applies only if the record of the parents' marriage and the record of the child's birth were drawn up or transcribed in two different Contracting States. Article 8, relating to the contents of extracts from the record of birth of a legitimated child, is binding only on custodians of records performing their duties in the Contracting States.

## II. CHOICE-OF-LAW RULES LAID DOWN BY THE CONVENTION

### A. THE PRINCIPLE (Article 1)

Since the Convention is designed to further the validity of legitimations, a liberal rule was laid down with that aim in view: for a legitimation to be valid, it suffices that it occurred under the national law of at least one of the parents of the child. The national law of one of the parents was preferred to the law governing the effects of the marriage, since it is sometimes difficult on the facts to determine that law; and it seemed pointless to add a third option, i.e. the child's national law, as there are so few cases where the child's personal status differs from both the father's and the mother's.

By referring to "the domestic-law provisions of the national law", the text of Article 1 excludes the application of rules of private international law. This avoids a reference back to a single domestic law, which could be unfavourable to legitimation: it is not uncommon for the law of one of the parents (the domestic provisions of which, let us assume, allow legitimation) to refer the matter back to the domestic law of the other parent (which prohibits it).

Reviewing the validity of a legitimation may entail reviewing first of all the validity of acknowledgments of paternity and maternity (when these are required) and the validity (or at any rate the putative character) of the parents' marriage. It can be inferred from Article 1 of the Convention that these questions too are governed by the father's or mother's national law; it is thus sufficient that under that law the marriage and the filiation meet the conditions required for them to serve as a basis for a valid legitimation. However, because they see these as being preliminary questions, some people may be led to take into consideration national law in the broad sense, that is to say including the rules of private

international law. At all events the object of the Convention is to apply national law in the sense most favourable to legitimation.

It should be remembered that in those countries where acknowledgments, either before or at the time of the marriage, are obligatory for the purposes of legitimation, this requirement constitutes a substantive condition for legitimation. A child would therefore not be legitimated, within the meaning of the Convention, in the absence of such acknowledgments if they were required by both the father's and the mother's national laws. On the other hand, a legitimation would be valid even without express acknowledgments if the father's or the mother's national law imposed no such condition.

The Convention does not contain any particular provision for resolving conflicts relating to formal conditions and the effects of legitimation: the ordinary law will apply. Thus, countries which have recourse to an "instrument of legitimation" will continue to draw it up, according to the "lex loci actus"; similarly, the record of legitimation in the civil status registers for the place of birth will be made according to local practice, that is by transcribing the instrument of legitimation (if any), by a simple marginal annotation on the record of birth, or by transcription and annotation.

## **B. LIMITATIONS (Articles 2, 3 and 4)**

The extremely liberal option offered by Article 1 had to be counterbalanced in some way, and this is done in Article 2.

This provision allows the Contracting States to reserve "the right to refuse to treat the legitimation as valid" in one or more of the four cases listed in the Article, if their domestic law prohibits legitimation in the case envisaged. The significance of this formulation should be explained in detail:

– If the State concerned makes no reservation, its internal authorities (courts, administrative officials, civil registrars, etc.) must recognise legitimations which fulfil the conditions laid down in Article 1, with no other requirement. In such a State, for example, recognition of the legitimation of an adulterine child may not be refused, even on grounds of public policy, if it is valid under the father's or the mother's national law.

– If the State makes one or more reservations, it will not follow that legitimations covered by those reservations must inevitably be rejected out of hand: the text does not say that States may declare that they will not recognise legitimations covered by their reservations, but merely gives them the option of reserving the right not to recognise them.

The cases in which reservations may be made are limited to four:

(a) The child is not in fact the child of the persons who have legitimated him or her.

Some States allow the legitimation of children who are not, biologically speaking, the offspring of the persons who have legitimated them. If the domestic law of a State does not allow such legitimations, recognition of their validity in that State may be refused, even though they fulfil the conditions laid down in Article 1. The question whether the child is or is not in fact the offspring of the persons who have legitimated him or her will be examined and decided according to the domestic law of the State concerned.

(b) The marriage of the parents, whatever their nationality, has been celebrated in the State where the legitimation is invoked, but is null or non-existent in that State.

In some Contracting States, the annulment of a marriage does not affect the validity of a legitimation resulting from the marriage, even when the two spouses were in bad faith; in others, the “legitimizing effect” of the marriage subsists only if at least one of the spouses was in good faith. It was thought necessary to allow the latter States not to recognise a legitimation which has been wiped out on account of the annulment of the marriage, even though, under the father’s or the mother’s national law, such legitimation would remain in being. The same applies when the marriage is deemed to be void ipso iure or non-existent under the law of the country where it was contracted.

(c) The marriage of the parents, at least one of whom is a national of the State in which the legitimation is invoked, is null or non-existent in that State.

If, according to the law of the State concerned, nullity or non-existence of the marriage entails nullity or non-existence of the legitimation, it may, as in the preceding case, be refused recognition by that State even though it subsists under the father’s or the mother’s law.

Unlike the situation envisaged in paragraph (b), at least one of the parents must be a national of the State in question; since the null marriage was celebrated abroad, there is a less direct public-policy interest in the nullity of the marriage entailing nullity of the legitimation; in this case, for the contravention of public policy to be sufficiently serious, the union must involve nationals or at least one national.

(d) The child is adulterine in relation to at least one of his or her parents and that parent is a national of the State in which the legitimation is invoked.

The laws of the individual Contracting States are not equally liberal as regards the possibility of legitimating adulterine children. A legitimation that is valid under the father’s or the mother’s law may therefore be declared non-existent in the Contracting State where it is invoked and which has made this reservation, subject however to the twofold condition (apart from the general condition that the domestic law of that State must prohibit legitimation in the case envisaged):

– that at least one of the child’s parents must be a national of that State (it would not suffice for the parent to be a national of another State which itself prohibited the legitimation);

– that the child must be adulterine in relation to that same parent (thus the legitimation of a child adulterine “a matre” could not be refused recognition on the ground that domestic law, in the legal situation in question, prohibits such legitimation, if the adulterous mother is not a national of the State concerned, even though the father is).

In order to ensure the effective application of the Convention and to prevent any extensive interpretation of the concept of public policy, Article 3 specifies that recognition of the validity of a legitimation that complies with the provisions of Article 1 may not be refused, “even on grounds of public policy”, in circumstances other than those listed in Article 2.

The question whether a legitimation will or will not be accepted in a particular State may arise in the first place during judicial proceedings for a declaration of validity or nullity of the legitimation. However, the question may also arise in the course of a dispute occurring outside any legal proceedings: thus, when a civil registrar who has been asked to make an annotation concerning the legitimation considers that it is manifestly irregular, he or she may refuse to accede to the request, without being obliged to institute court proceedings. Whether it is judicial or extra-judicial, a dispute can, of course, be initiated only if the legitimation does not fulfil the conditions laid down in Article 1 or if the case at issue is one provided for in Article 2 and covered by the “reservation”.

Finally, it should be pointed out that, under Article 4 of the Convention, “decisions pronounced in disputes arising under Article 2” have only a limited scope, since they “may be invoked only in the territory of the Contracting State in which they were pronounced”. This provision is a departure from the customary rule whereby States may recognise decisions pronounced abroad either *ipso iure* or after proceedings for recognition or a declaration of enforceability. Such a departure militates in favour of the effectiveness of legitimations; it conforms to the spirit of the Convention, which seeks to ensure that in principle legitimations satisfying the requirements of the law specified in Article 1 will be recognised in the Contracting States.

### **III. TECHNICAL PROVISIONS OF THE CONVENTION: RULES TO BE OBSERVED BY CIVIL REGISTRARS**

#### **A. MAKING OF ENTRIES CONCERNING LEGITIMATIONS IN CIVIL STATUS REGISTERS (Article 6)**

Article 6 states very clearly that in no case may the making of an entry be made conditional on any judicial proceedings for “recognition” of the legitimation (still less on any decision authorising enforcement). Legitimation is not brought about by a judgment, nor by an administrative decision equivalent to a judgment, but simply by the marriage of the parents of a natural child. Even in a case of a legitimation “post nuptias”, the judgment then given does not bring about legitimation but is confined to establishing its existence by verifying that it fulfils the legal conditions. In that case, no “recognition” of the judgment can therefore be required before the entry concerning the legitimation is made. It should be pointed out that if a civil registrar should refuse to make an annotation concerning a legitimation the validity of which he or she disputes – for a reason to be specified by him or her -, it would be open to the parties concerned to bring an action against the registrar in the competent court, which would then decide whether or not the legitimation should be held valid and entered in the registers.

A legitimation fulfilling the conditions laid down in Article 1 must (subject to Article 2) be the subject of an entry in the civil status registers for the place where the record of the child’s birth was made or transcribed. In the majority of Contracting States, the entry will be made by means of a marginal annotation concerning the legitimation on the record of birth; in others, by transcription of an “instrument of legitimation”; transcription and marginal annotation may also be combined. At all events the Convention is not intended to make any change in the formalities to be observed, which remain governed by the “*lex loci actus*”.

The procedure for making the entry will vary according to the extent of the powers vested in civil registrars by the member States.

In States where civil registrars make entries on their own authority, they must themselves verify that the legitimation fulfils the conditions laid down in Article 1 and is not precluded by virtue of the reservations provided for in Article 2. In most cases, such verification will present no problem (especially when one of the parents is a national of the State in which the entry concerning legitimation is to be made and the domestic law of that State allows such legitimation). If civil registrars are not sure whether the legitimation is valid, they will refer to their supervisory authority (public prosecutor’s department, judge dealing with matters of guardianship, federal authority, etc.). That authority will be in a position to verify – for example, by consulting the ICCS documentation card-index – whether or not the legitimation fulfils the conditions laid down by the Convention; if necessary (but only in exceptional cases), a certificate setting out the legal position could be demanded.

In other member States, prior verification will be effected by an authority other than the civil registrar; in that case the latter will merely make the actual entry. Under the rules of internal procedure, such verification will be the responsibility of a judicial or administrative authority. Its decision will not constitute proceedings for recognition within the meaning of the second paragraph of Article 6, because the authority will be verifying nothing more than registrars themselves verify when acting on their own authority.

## **B. NOTICES TO ENABLE ANNOTATIONS TO BE MADE (Article 7)**

In order to make the Convention more effective in practice, Article 7 provides that if the parents' marriage has been celebrated and the child's birth registered in different Contracting States, the civil registrar for the place of marriage (or any other competent local authority) must as a matter of course send a notice to the civil registrar for the place where the record of birth was made or transcribed, so that an annotation concerning the legitimation may be made.

If the record of birth has been made in one place and transcribed in another, the notice should be sent to both offices.

Article 7 concerns both local and consular civil registration: if the marriage was celebrated at a consulate, the notice in question will be sent by the consul.

The Commission was faced with the question whether the civil registrar who celebrated the marriage should, before sending the notice, verify that the conditions for legitimation were fulfilled. In order to obviate a double check – one on departure and one on arrival -, it was decided that the verification would be made only by the registrar for the place where the record of birth was made or transcribed. After all, it is there that the child's legitimation will be given concrete expression, by an annotation amending the particulars in the record of his or her birth (Articles 5 and 6 taken in conjunction). For the notice to be sent, it will therefore suffice that the spouses (at the request, where appropriate, of the civil registrar) declare at the time of the marriage that they have a child or children in common, the record of whose birth was made or transcribed in another Contracting State.

The notices are normally to be sent directly from one civil registrar (or other competent authority) to another by post or, where appropriate, through diplomatic channels.

The notices are to be set out uniformly on a multilingual form, a model of which is appended to the Convention; in order to avoid the need for two forms, it seemed simpler to use the one multilingual form, even where the same language is spoken in both the sending country and the receiving country. Any Contracting State may add on the forms languages other than those of the member States of the ICCS.

In order to make it easier to check the validity of the legitimation, the civil registrar sending the notice must attach "any available supporting documents". This means an extract from the record of marriage and documents attached thereto (extracts from the record of birth of the spouses, any declarations of acknowledgment of the child, certificates of nationality, certificates setting out the legal position, where necessary). These documents need not be translated, but it would be desirable for extracts from birth and marriage records to be made out on multilingual forms, in accordance with the Convention of 27 September 1956 between various member States of the International Commission on Civil Status. These documents may be sent in the form of certified copies or photocopies, if the registrar is not allowed to part with the originals.

### **C. WORDING OF EXTRACTS FROM THE RECORDS OF BIRTH OF LEGITIMATED CHILDREN (Article 8)**

In many Contracting States, one can obtain either verbatim copies of records of births or extracts therefrom. The former are usually issued to certain persons only (children or near relatives, judicial authorities, etc.) or on authorisation; the latter (giving varying amounts of information and generally not indicating the nature of the filiation) are in principle issued to any interested person. This is because it is not desirable for third parties to be able to discover from verbatim copies of the records that the child was born out of wedlock. The Convention leaves it to the domestic law of each State to decide who is entitled to obtain verbatim copies.

The Convention takes account of this distinction as regards the issue of copies of and extracts from the record of birth of a legitimated child: extracts, unlike verbatim copies, must be made out as if they related to a legitimate child (“X..... the child of Y and his wife Z” and not “X....., the child of Y and Z, who legitimated him/her”).