

EXPLANATORY REPORT

Adopted by the General Assembly in Munich on 3 September 1980

1. GENERAL REMARKS

This Convention is a response to concerns analogous to those underlying the Convention on legitimation by marriage, which was signed at Rome on 10 September 1970. The basic aim is to enable the greatest possible number of acknowledgments to be considered valid at the international level, in order to facilitate the establishment of the filiation of children born out of wedlock. To achieve this objective, the Convention increases – as was done earlier by the Convention on legitimation or, in another field, the Convention of the Hague Conference on testamentary dispositions – the number of laws capable of governing acknowledgments : a declaration of acknowledgment has only to be made in accordance with one or other of these laws in order to be internationally recognised and treated as valid.

The second objective of the Convention is to ensure international publicity for declarations of acknowledgment, by specifying the action that must be taken to this end by civil registrars.

The Convention governs only the substantive and formal conditions for acknowledgments and the conditions regarding capacity. It is not intended to govern the effects of the legal act of acknowledgment, which will be determined by the law designated by the conflict-of-laws rule of each of the Contracting States.

2. COMMENTARY ON THE ARTICLES

SECTION I

Section I groups together the provisions of the Convention which are concerned with conflicts of laws. They are directed to achieving its basic aim of facilitating the establishment of the filiation of children born out of wedlock.

Article 1

Article 1 specifies first, subject to what is said below regarding Article 18, the scope of the Convention: it governs only voluntary acknowledgments, that is legal acts whereby a person declares himself or herself to be the father or the mother of a child. It follows, subject to the same reservation, that the Convention does not apply where filiation is established as the result of a judgment, the sole fact of the birth or the naming of the mother in the record of birth. “Voluntary acknowledgment” should be understood as meaning acts which have the effect of establishing filiation: the Convention does not apply to acknowledgments which do no more than provide for maintenance.

Article 1 then designates the laws capable of governing the substantive conditions for the acknowledgment and the conditions regarding capacity, namely either the national law or the law of the habitual place of residence at the time of the act of the author of the acknowledgment or of the child. Thus, there are four laws which are competent to regulate the conditions of substance and of capacity; an acknowledgment has only to be made in accordance with one or other of these four laws for its effectiveness to be recognised. It should be emphasised that, in the majority of cases, this system will in no way oblige civil registrars or judges to examine all four of the laws capable of governing the acknowledgment; most often one of the four laws will be their own and, if the acknowledgment has

been made in accordance with that law, they will need to make no further investigations. Only if the acknowledgment is not – or has not been – made in accordance with the rules of their law will it be necessary for them to investigate whether it can be accepted on the basis of one of the other laws mentioned above.

The multiplicity of connecting factors adopted by the Convention is to be distinguished from a system giving the author of the acknowledgment a choice between several laws; it in fact appeared that the exercise of such a choice would frequently not be well-informed and might result in the declarant's selecting the law of the place where the acknowledgment is made, which may be only a temporary place of residence. Although it did not seem necessary to specify this point in the text, the conditions regarding capacity relate in practice to the capacity of the author of the acknowledgment, since a child's "capacity" to be acknowledged is generally categorised amongst the substantive conditions. It follows in particular from the rule laid down in Article 1 that if the applicable law permits a minor to make an acknowledgment, it must be considered as valid in the Contracting States.

Two other points should be emphasised:

(1) The facts that several laws are capable of being applied does not mean that one law can be taken as a basis for assessing one of the substantive conditions for the acknowledgment or one of the conditions regarding capacity and another law taken for assessing another condition. On the contrary, what must be established is whether the acknowledgment meets the entirety of the requirements of one of the applicable laws.

(2) By referring to the domestic provisions of the different laws applicable, Article 1 excludes the application of rules of private international law. This solution is the same as the one adopted in the Convention on legitimation (see Article 1 of that Convention): it avoids a reference back, as a result of the operation of *renvoi*, to a single law which might be unfavourable to the validity of the acknowledgment.

Article 2

As regards the formal conditions for the acknowledgment, a further law – that of the place where the acknowledgment is made – has been added as an alternative to the law applicable by virtue of Article 1. This provision does not call for any special remarks in so far as it applies the rule "*locus regit actum*" to the form of the acknowledgment. On the other hand, what constitutes an important innovation is the applicability, as regards the formal conditions, of the laws which are competent to govern the substantive conditions: in particular, it follows from this that an acknowledgment made by a private document will be valid if the law of the author of the act, the law of the child or the law of their habitual place of residence admits of such a form, even if the law of the place of the act forbids it.

Article 3

This Article provides that acknowledgments made in conformity with the provisions of Articles 1 and 2 shall be recognised ipso jure in all the Contracting States. It follows that no judicial procedure is required to this end. However, nothing prohibits a civil registrar from approaching the authority responsible for supervising the civil registration service to seek its opinion on the validity of the act.

Article 4

This Article was the subject of very lengthy discussion between those who favoured a general form of wording which would have permitted non-acceptance of the validity of the acknowledgment in cases of clear-cut conflict with the public policy of the country where it was invoked, and those who favoured a limitative enumeration of such cases. In the end the limitative enumeration was selected because it appeared that recourse to a general form of wording referring to public policy would have the effect of draining the Convention of much of its content; it seemed, moreover, advisable to oblige those States which do not feel able to allow all children to benefit from the Convention to state this clearly.

The provisions of this Article are intended to permit ratification of the Convention by States whose legislation contains rules applicable only to certain categories of children or special procedures for acknowledgments. These provisions seemed to be all the more necessary in view of the fact that the Convention is an open Convention.

It should be noted that the possibility of formulating a reservation is totally excluded as regards adulterine children, and is permitted only for children born of incestuous relationships. The Convention does, however, allow for possible developments, since what is involved is only a reservation, which can easily be withdrawn.

Article 5

The wording of the Article is aimed at ruling out the application of international public policy where this would lead to an acknowledgment being treated as invalid. But it does not preclude recourse to this notion if it would lead to acceptance of the validity of the acknowledgment.

Article 6

Under agreements concluded between certain States, judicial decisions pronounced in the territory of one of them are to be recognised in the territory of other States. Accordingly, in the absence of a special provision in the Convention, the application of such agreements would have resulted in the recognition in some States of judicial decisions pronounced in pursuance of one of the reservations provided for in Article 4, even if the State where the decision in question was invoked had not itself made such a reservation. Article 6 was drafted in order to avoid such a result: the effect of the reservations will thus be confined to the countries which made them.

Article 7

This Article comprises two distinct provisions contained in two paragraphs:

Paragraph 1 states that the Convention shall not apply where the acknowledgment contradicts a filiation which has already been established (an acknowledgment of a legitimate child or an acknowledgment of a natural child who has already been acknowledged, for example). In such a case the Convention rules are excluded and each State will apply its own law, including, if appropriate, its conflict-of-laws rules, in order both to answer the question whether the previous filiation has been really established and to determine the validity or invalidity of the subsequent acknowledgement.

Paragraph 2 provides that the Convention shall not preclude the acknowledgment being contested if the child is not the biological child of the person who acknowledged him or her, that is if there has been a false declaration. The Convention governs only the invalidity (or validity) of the legal act of acknowledgment and not the contestation proceedings.

Article 8

In order to further to the utmost the making of acknowledgments, this Article specifies that the provisions of the Convention shall not preclude the application of any rules in force in the Contracting States which may be more favourable to validity. Thus, even if they do not satisfy the conditions of validity provided for by one of the laws selected in the present Convention, acknowledgments will be accepted in the State where they are invoked if they are valid either under the domestic and the conflict-of-laws rules of that State or pursuant to international Conventions which it has signed. Such cases will probably be very rare, given the liberal character of the Convention, but it seemed opportune to make this reservation.

Article 9

Paragraph 1 of this Article specifies that the Convention shall apply in relation to nationals of all States, even if they are not Contracting States. It follows that, henceforward, the provisions of the preceding Articles constitute uniform rules of private international law, incorporated into the legislation of each Contracting State and applicable to all acknowledgments. As in the case of legitimation (see Article 5 of the Convention on legitimation and the Explanatory Report on that Convention, section I. B. 1), this uniformity was sought on purpose, in order to avoid the illogical situation whereby, in one and the same country, the validity of an acknowledgment may be governed by different laws according to whether or not the child or the author of the acknowledgment is a national of one of the Contracting States.

Paragraph 2 permits the Contracting States to exclude the law of the habitual place of residence, but only where that place is situated outside the territory of the Contracting States, the member States of the International Commission on Civil Status or the member States of the Council of Europe. Thus, the law of the habitual place of residence may be excluded either in a radical manner by application of the reservation at letter (a) of Article 4, or in a more flexible and qualified manner by the application of Article 9, paragraph 2.

SECTION II

Section II groups together the provisions of a technical nature with which civil registrars must comply.

Article 10

With the aim of making the Convention as effective as possible in practice, this Article provides that an authority receiving or transcribing a declaration of acknowledgment of a child shall send a notice to the civil registrar for the place where the record of birth of that child was drawn up or transcribed, so that an annotation may be made referring to the acknowledgment. The notice is to be set out on a multilingual form, a model of which is appended to the Convention (paragraph 2).

Articles 11 to 16

These Articles deal with the entries which have to be made on the appended form, and the symbols and languages which should be used. These provisions are drawn directly from those of the Convention on the issue of multilingual extracts from civil status records, signed at Vienna on 8 September 1976.

Article 16 specifies that notices shall be exempted from any legalisation or equivalent formality in the territory of each of the Contracting States.

Article 17

This Article concerns the duties of civil registrars who receive notice of an acknowledgment: they must make an annotation referring thereto in their registers, without any formality beyond verifying or having verified by the authority to which they are answerable that the conditions laid down by the Convention are satisfied.

SECTION III

Article 18

Under the law of some States, maternal filiation is established solely by the fact of the birth or the naming of the mother in the record of birth.

It was therefore important for this Convention, which aims to further the international validity of acknowledgments, to provide that, in States whose legislation requires a voluntary acknowledgment in order to establish maternal filiation, the maternal filiation of a child born in another State of a woman whose national law accepts the establishment of such filiation without an acknowledgment, should be considered to be established.

Such is the purpose of Article 18.

Article 19

This Article, which is the counterpart of Article 7, paragraph 2, makes it possible for the maternal filiation of the child to be contested if it emerges that the indication appearing on this point in the record of birth is incorrect.

SECTIONS IV AND V

Section IV specifies the conditions of application of the Convention to refugees and stateless persons (Article 20). This Section also provides that the Convention shall govern only acknowledgments made after its entry into force (Article 21).

Section V is devoted to the various final clauses.