

EXPLANATORY REPORT

A. GENERAL REMARKS

This Convention is a continuation of the work on persons' surnames that the International Commission on Civil Status has been undertaking for nearly half a century. Convention No. 4 (Istanbul, 4 September 1958) on changes of surnames and forenames imposes an obligation on each Contracting State "not to authorise changes of surnames or forenames for nationals of another Contracting State, unless they are also nationals of the first-mentioned State". Convention No. 19 (Munich, 5 September 1980) on the law applicable to surnames and forenames sought to establish common rules of private international law in this area and laid down that the surnames and forenames of individuals were to be governed by the law, including the private international law, of the State of which they are nationals. However, that Convention, which deals only with the conflict of laws and contains no rules on the recognition of surnames, does not provide any solution in cases, increasingly frequent today, of multiple nationality. When the same person's national laws produce divergent results or when, in the equally frequent case of spouses of different nationality, each one's national law regulates differently the effects of marriage or divorce on the surnames of the spouses or former spouses, the individuals concerned encounter problems in establishing their identity, as for example where the passport and the driving licence do not show the same surname. Convention No. 21 (The Hague, 8 September 1982) on the issue of a certificate of differing surnames sought to make it easier for such persons to prove their identity but it left intact the causes of these divergencies.

The International Commission on Civil Status wished to go a step further and reduce the number of situations in which different surnames are attributed to the same person by the various laws with which he or she has a connection. It ruled out any idea of unifying either the States' substantive law or their conflict-of-laws rules on surnames. Taking a more modest approach, it confined itself to laying down rules whereby the Contracting States are to recognise the determination of a surname made in another State if the person concerned has certain links -defined by the Convention- with that State. In such cases, the risk of the same person's bearing different surnames is eliminated, because the obligation to recognise the surname attributed in the State with which he or she has the links defined by the Convention is coupled with a corresponding obligation not to attribute a different surname to him or her and not to recognise any other surnames that might have been attributed to him or her by the law of another State. This will be a matter of importance for States as well, since the same person will be identified everywhere by the same surname.

The surname dealt with in this Convention is the one that has to appear in civil-status documents, to the exclusion of the surname which, in certain States, individuals are, as a matter of usage, allowed in everyday life to substitute for or add to their civil-status surname. The Convention is confined to surnames and does not apply to forenames.

The matters covered are: the effects on a surname of marriage (Art. 1) and the dissolution of marriage (Art. 2), especially when the spouses are of different nationality; the effects on a surname of the conclusion and the dissolution of a registered partnership (Art. 3); the surname attributed to a child having several nationalities (Art. 4); and the change of surname of a person likewise having several nationalities (Art. 5). Article 7 reproduces the usual public-policy exception, Article 8 indicates a consequence of recognition, Article 9 includes a transitional provision and Article 14 affords an option of making a reservation. Articles 11 to 13 and 15 to 17 are the usual final clauses.

B. COMMENTARY ON THE ARTICLES

Article 1

This Article regulates certain effects of marriage on the spouses' surnames. It does not apply to registered partnerships unless, pursuant to Article 3, a Contracting State declares that it does. Its possible application to the marriages between homosexuals that have been provided for in some recent laws is linked to the more general problem, which this Convention does not resolve, of the recognition of such marriages in States where they are unknown.

The Article is confined to the recognition of declarations made by the spouses concerning the surname that they will bear during the marriage or by one of them concerning the surname that he or she will bear during the marriage. Accordingly, it covers neither cases where marriage entails of itself no change in the spouses' surnames nor, conversely, cases where marriage brings about by operation of law a change in the surname of one or both of the spouses.

The rule adopted takes a favourable attitude towards recognition of declarations made by the spouses or one of them. Such recognition is to be afforded if the declaration is made either in a Contracting State of which at least one of the spouses is a national or in the Contracting State where both spouses are habitually resident on the day of the declaration.

For the first case (declaration in the Contracting State of which one of the spouses is a national), the Article applies even if the declarant is also a national of a non-Contracting State and even if the couple are habitually resident in another State, wherever it may be. For the second case (declaration in the Contracting State where both spouses habitually reside), the Article applies even if neither spouse is a national of that State. The Convention does not regulate the case of a declaration made in a non-Contracting State where both spouses are habitually resident, even if one or both of them has or have the nationality of a Contracting State.

The Article does not require that the declaration be made at the time of the marriage in order to be recognised. The State where it is made may allow spouses to choose a married surname without setting a time-limit for doing so; an example would be a choice made when their first child is born.

The Article does not define the notion of habitual residence, any more than do private-international-law conventions in which it is frequently utilised. The phrase "State where both spouses are habitually resident" is to be taken to mean the State in which they have fixed their habitual residence, even if they do not live under the same roof. From the temporal point of view, the habitual residence to be taken into account is the one existing at the time of the declaration.

The reference in the Article to a declaration made in a Contracting State of which the person concerned is a national must be read in conjunction with Article 6 § 1, which assimilates a declaration made abroad before a State's consular authorities to a declaration made in that State.

Some States saw the obligation to afford recognition created by this Article 1 as being too onerous. They were given the possibility, formulated in Article 14, of making a reservation to the effect that they will recognise a declaration referred to in Article 1 that affects the surname of one of their nationals, only if it is made in the State where both spouses are habitually resident and if one of the spouses is a national of the latter State. The object of this reservation is therefore to make recognition dependent on the existence of connecting links that are cumulative (common habitual residence + nationality of one of the spouses) rather than simply alternative (common habitual residence or nationality of one of the spouses). The language employed means that it is open to a State which has made the reservation not to recognise the declaration made by the spouse who is its national if neither spouse possesses the nationality of the State of habitual residence where the declaration was made.

Article 2

Article 2 concerns the effects of dissolution of a marriage on the former spouses' surnames. It applies in all cases of dissolution, whether by reason of divorce, annulment of the marriage or –as regards §1 only- the death of one of the spouses. It would be logical to extend the Article to judicial separation, in so far as it may affect a surname.

Paragraph 1 deals with the case where the effects of the dissolution on the surname of one of the spouses are the subject of a declaration on his or her part, electing either to revert to a surname borne previously (for example, for a woman, her maiden surname or a surname acquired as a result of a previous marriage) or, on the contrary, to keep the surname borne during the marriage. The Convention takes a very favourable attitude towards recognition of declarations of this kind, by laying down that recognition is to be afforded when the declaration was made either in the Contracting State or one of the Contracting States of which the spouse concerned is a national or in the Contracting State where he or she was habitually resident on the day of the declaration.

Paragraph 1 must be read in conjunction with Article 6 § 1, which assimilates a declaration made abroad before a State's consular authorities to a declaration made in that State.

Paragraph 2 deals with the case where a former spouse reverts by operation of law to the surname borne before the marriage that has been dissolved. Recognition of such reversion ought to be allowed only if it corresponds to the presumed wishes of the former spouse concerned, who will most often be the former wife. The text lays down that, unless the former spouse concerned makes a declaration to the contrary, this reversion by operation of law is to be recognised if it is provided for by the law of a Contracting State of which he or she is a national and in which the divorce or annulment of the marriage was pronounced. Such would be the case for a Portuguese woman who had married a German and taken his surname and then obtained a divorce in Portugal. She would, under Portuguese law, revert by operation of law to the surname she bore before the marriage and this reversion will be recognised in the Contracting States. On the other hand, and in the absence of a declaration to the contrary, a Turkish woman habitually resident in Germany, who had married a German and taken his surname as her married surname, would keep that surname, in conformity with German law, after a divorce pronounced in Germany, even though, under Turkish law, she ought to revert to the surname she bore previously.

Article 3

This Article enables Contracting States to extend the provisions of the preceding Articles to registered partnerships. It is drafted as an option, because it presupposes that the partnership is recognised, a matter that is not governed by this Convention.

Article 4

This Article deals with recognition of the surname attributed to a child at or after birth. It applies exclusively to children who possess two or more nationalities at the moment of birth.

Under paragraph 1, the surname attributed in the Contracting State where the child was born is to be recognised if that State is one of those of which he or she is a national. This surname could be obtained,

in appropriate cases and at the request of the parents, in accordance with the law of the State of the child's other nationality (cf. CJEC, 2 October 2003, case C-148/02 Garcia Avello). It is not required that the child's other nationality (or other nationalities) be that of a Contracting State. Neither is it required that the State of the child's birth be also that of his or her habitual residence or that his or her habitual residence be fixed in a Contracting State. Thus, the surname attributed in Spain to a child born in Spain of a Spanish mother and a German father would fall to be recognised in Germany and in the other Contracting States, even if the parents were habitually resident in Germany or somewhere else, even in a non-Contracting State. On the other hand, the situation of a child having two or more nationalities who is born in a State of which he or she is not a national is not dealt with by this paragraph and is accordingly a matter for the private international law of each of the Contracting States.

The text refers to the surname attributed in the State of birth. It must be read in conjunction with Article 6 § 2, according to which an attribution of a surname occurring before a Contracting State's consular authorities shall be deemed to have occurred in that State. It is for this reason that any attribution of a surname made in the State of birth by the consul of the State of the child's other nationality, of his or her own motion and without a request on the part of the parents, would not be recognised, since it is the surname attributed by the local civil registrar that must be recognised by the consul's sending State.

However, paragraph 2 introduces a derogation from this rule, in order to respect the wishes of parents who are unwilling to accept its result. Sometimes parents are not satisfied with the surname attributed to their child in the State of birth. If they then request the authorities of the other Contracting State of which the child is also a national to attribute a surname to the child, the surname so attributed will, under paragraph 2, be recognised in the other Contracting States, including the one where the child was born. The request must be made by both parents, save in cases of recognised unfitness or of incapacity, or by the parent if there is but one. Where the request was made by both parents, the issuing authority must fill in the two spaces provided for this purpose in the last section of the notice; should the notice refer only to a request made by one parent, it will be open to the receiving authority to ask the issuing authority why the other parent was not a party to the request. The utilisation in this paragraph of the words "attributed" and "attribution" is intended to highlight the fact that this new surname will take the place of the surname at birth indicated in the record of birth and will do so with effect from the moment of birth and not, as would be the case for a change of surname, at some later date.

Paragraph 2 must also be read in conjunction with Article 6 § 2. The authorities of the State of the child's second nationality which are asked to attribute another surname may be that State's consular authorities in post in the child's State of birth. The formulation of the text shows that recourse is had to the second State's authorities in order to correct the attribution of a surname made in the State where the child was born and of which he or she is a national. If, contrary to the law of the State of birth, the parents of a child having two or more nationalities were to go to declare the child in the first place to the consular authorities of the State of the child's other nationality in post in the State of birth and then, in the second place, to the civil registrar of the State of birth, the latter State should not accept the surname attributed by the consul. This is because the consular authorities would in such circumstances be exceeding their powers and it would be for the State of birth to remind them that they must not register a birth before it has been registered in that State's civil-status records.

Paragraph 2 stipulates logically that, in cases where it applies, the authority of the State of the second nationality must send a notice of the attribution of a surname which it made at the parents' request to the civil registrar for the place of birth, with a view to rectification of the latter's registers (see Article 10).

Article 5

Article 5, which follows the same philosophy as Article 4, relates to changes of the surname of individuals possessing two or more nationalities, at least one of which is that of a Contracting State.

The first sentence of paragraph 1 lays down the rule that a change of surname occurring in a Contracting State of which the person concerned is a national is to be recognised in the other Contracting States. Like preceding Articles, this provision must be read in conjunction with Article 6 (Article 6 § 2 in this case), in that a change of surname occurring before a consular authority is deemed to have occurred in that authority's sending State and not in the State where it is in post.

Changes of surname authorised by a public authority, which are regulated by Convention No. 4, fall within the field of application of this provision. It is not in contradiction with Convention No. 4, since the changes of surname whose recognition it calls for will *ex hypothesi* have occurred in a State of which the person concerned is a national and since the conditions for and the effects of recognition are practically the same under both Conventions. However, unlike Article 5 of Convention No. 4, the present Convention does not enable a Contracting State to make recognition of the change of surname subject to special conditions concerning publicity or to a right of objection. It thus increases the chances of recognition of changes of surname authorised by a public authority.

The second sentence of paragraph 1 singles out changes of surname that are the consequence of a judicial decision modifying personal status. Examples would be a court declaration of paternity out of wedlock, annulment of an acknowledgment of paternity, a legitimation authorised by a court, an adoption or a decision annulling an adoption or a legitimation. The text adopted allows a Contracting State to refuse to recognise the change of surname if it does not recognise the decision, but does not oblige it to do so. This is because a State may be willing to dissociate recognition of the surname from recognition of the underlying decision, if it considers that priority should be given to the Convention's aim of achieving the widest possible recognition of surnames so that individuals do not suffer the inconvenience of being named differently from one State to another.

Questions of personal status preliminary to a change of surname that result not from a judicial decision but, for example, from a voluntary acknowledgment of paternity are not mentioned in the second sentence of paragraph 1. A Contracting State is accordingly not permitted to refuse to recognise the change of surname on the ground that it would regard the acknowledgment of paternity as invalid. Such a refusal could be founded only on public policy (Art. 7).

Paragraph 2 excludes from the field of application of Article 5 changes of surname resulting either from a marriage or a registered partnership or from the dissolution or annulment thereof. This is because the recognition of those changes of surname is governed by Articles 1 and 2 of this Convention. In particular, refusal to recognise the judicial decision that dissolved or annulled the marriage or the partnership does not entitle the Contracting States to refuse to recognise the changes of surname which result from that decision.

Article 6

The tenor of this Article has already been indicated in connection with Articles 1, 2, 4 and 5.

Article 7

This Article incorporates the usual provision on the public-policy exception. The adverb “manifestly” is an incitement to exercise the maximum moderation in having recourse thereto. Cases in which this Article is applied should be very rare. The example was cited of a surname deriving from a false acknowledgment of paternity that conflicted with the surname deriving from a genuine acknowledgment. Another hypothesis would be the attribution by a State to a married couple’s child of the surname of a third party who acknowledges paternity of the child; it would be open to a Contracting State not to recognise that surname if it regarded the acknowledgment as incompatible with its public policy.

In any event, save for the case of refusal to recognise the judgment from which a change of surname derives (Art. 5 § 1, 2nd sentence), infringement of public policy is the only ground capable of founding a refusal to recognise a surname.

Article 8

This Article fleshes out the obligation to recognise a surname by stipulating that, when appropriate, it must be entered in the Contracting States’ official registers (civil-status registers, population registers, land register, register of charges, etc.). The use of the adjective “relevant” serves to indicate that this is to be done only if the requested State has registers in which the entry asked for can be made.

What is important is that such an entry must be made, without any special procedure being required. An authority requested to enter a surname falling to be recognised under the Convention cannot require the applicant to obtain a judgment ordering it to make the entry. Applicants have merely to append to their request for the entry the documents which establish that the surname they wish to have entered falls within one of the cases covered by the Convention.

Article 9

Paragraph 1 of this Article fixes the temporal application of the Convention. The general rule adopted is that the Convention applies in a State to attributions and changes of surname occurring after its entry into force for that State.

To this rule – whose literal application would delay the effective application of the Convention for a very long time – paragraph 2 introduces an exception. Some retroactivity is permitted, in that attributions and changes of surname resulting from a declaration made before the entry into force of the Convention can, on request by those concerned, be entered in the official registers if they satisfy the conditions for recognition laid down by the Convention. Changes of surname authorised by a public authority and the attributions mentioned in Article 4 § 2 are not covered by this provision.

The text contains no transitional provision on the situation of children, even if they have attained their majority. This is because, given that the Convention lays down no rules providing for the transmission to children of their parents’ surname, it would not be appropriate to touch on this question in a transitional provision. Accordingly, each State will determine for itself whether and in what way any requests made by parents pursuant to Article 9 § 2 will have repercussions on their children’s surname. Changes of the children’s surname that might result therefrom, which changes will *ex hypothesi* postdate the entry into force of the Convention, will be directly recognised in the other Contracting States on the conditions laid down by Article 5.

Article 10

Article 10 concerns the model of the notice mentioned in Article 4 §2. Paragraph 1 of the Article refers to Appendices 1 to 3 which contain that model, the code numbers of the standard entries appearing therein and the formal rules applicable to the notice, respectively. Provision is made for a simplified procedure for revising those Appendices so that a purely technical operation having no effect on the substance of the Convention is not rendered pointlessly complicated. It goes without saying that if the revision were to modify the coding of an entry, it should take account of the code numbers used in the other Conventions of the International Commission on Civil Status.

Under paragraphs 2 and 3 of this Article, the translation in the language of each Contracting State of the terms included in the list in Appendix 2 and of the terms which must, in conformity with Appendix 3, appear in the notice is to be deposited and approved by the Bureau of the International Commission on Civil Status; the same applies to any modifications of that translation.

As regards Appendix 1, it will be noted that, in accordance with the policy followed since the adoption of Convention No. 25 on the coding of entries appearing in civil status documents, the notice is not drawn up on a multilingual form and that – save for the reference to the Convention, which must appear in the notice in the language of all the States which are members of the International Commission on Civil Status at the time of signature of the Convention – the other entries and the summary which the notice must contain have to be written only in the language of the authority drawing up the notice and in French, the official language of the International Commission on Civil Status. However, even though all the translations no longer appear in the form itself, the International Commission on Civil Status considers it appropriate to have available the totality of the translations that may be found in the notices sent from one State to another.

Other articles

Articles 11 to 13 and 15 to 17 are the usual final clauses. Attention is drawn to Article 12, on accession by third States; to Article 13, stipulating that the Convention will enter into force once two member States of the International Commission on Civil Status have ratified, accepted or approved it; and to Article 15, concerning declarations extending the Convention. It should be noted that a declaration extending Articles 1 and 2 to registered partnerships cannot be withdrawn. Article 14 formulates the reservation to Article 1 (see the explanations under that Article).