

Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions - Summary

The 1961 Convention is partially incorporated in Article 31 of the Serbian 1982 PIL Act. However, some very important provisions of the 1961 have never been introduced into the 1982 PIL Act. This shortcoming may be misleading for the practitioners since they are unaware of the international origin of Article 31 of the Serbian PIL Act. Besides, there is no provision in the 1982 PIL Act referring to the application of the 1961 Convention. As a result, the most crucial Convention's provisions stay out of focus of the legal practitioners, such as the provisions: on the revocation of the earlier testamentary disposition (Article 2 of the Convention); on the exclusion of *renvoi* (Article 1 paragraph 1 of the Convention); on the law applicable to determination of the testator's domicile (Article 1 paragraph 3); on the formal validity of testamentary dispositions made by two or more persons in one documents (Article 4 of the Convention); on the characterization of any provision of law which limits the permitted forms of testamentary dispositions by reference to the age, nationality or other personal conditions of the testator as well as qualifications that must be possessed by witnesses required for the validity of a testamentary disposition witness (Article 5 of the Convention); on the possibility of each Contracting State to reserve the right not to recognise testamentary dispositions made orally, save in exceptional circumstances, by one of its nationals possessing no other nationality (Article 10); on the permission given to each Contracting State to reserve the right not to recognise, by virtue of provisions of its own law, forms of testamentary dispositions made abroad when the conditions listed in Article 11 are fulfilled, etc. The application of Serbian law which is envisaged in the Serbian PIL Act does not follow the wording of Article 1 of the Convention since the *lex fori* rule is not listed in the Convention. However, the Convention does not forbid State Parties to include other alternative connecting factors (Article 3 of the Convention). Furthermore, the Serbian PIL Act states in Article 31 paragraph 4 that the testamentary disposition shall be formally valid if it meets the conditions laid down by the law of the State of testator's *residence*. This is a significant derogation from the Convention's conflict-of-laws rule referring to the law of the State of his *habitual residence*. The practical repercussion can be illustrated by the following example: a foreign national (as a prospective testator) whose stay in the territory of the Republic of Serbia was permitted (up to 90 days, as minimum) would establish his residence in the Republic of Serbia if he had the intention to reside in Serbia more than 24 hours (according to Article 74 paragraph 1 of the 2008 Foreigners Act). On the contrary, in order to establish his habitual residence, the prospective testator usually has to reside in one State for a longer period of time (e.g. one year) and he has to have intention to create durable connections with that State. Finally, the Serbian 2014 PIL Act Draft in Article 119 expressly refers to the application of the 1961 Convention in order to avoid the shortcomings of the 1982 PIL Act while keeping the possibility to apply Serbian law as the last solution.