

10-1-1954

## Conflict Law in United States Treaties

S. A. Bayitch

Follow this and additional works at: <https://repository.law.miami.edu/umlr>

---

### Recommended Citation

S. A. Bayitch, *Conflict Law in United States Treaties*, 9 U. Miami L. Rev. 9 (1954)  
Available at: <https://repository.law.miami.edu/umlr/vol9/iss1/4>

This Article is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact [library@law.miami.edu](mailto:library@law.miami.edu).

## CONFLICT LAW IN UNITED STATES TREATIES

S. A. BAYITCH

*Consular judicial powers.* — Treaties accord to consular officers, as a rule, limited judicial powers to adjudicate, within the territory of the receiving country, certain classes of disputes between their own nationals.<sup>87</sup> Such powers may be exercised by consular officers or by consular courts,<sup>88</sup> the latter almost a thing of the past.

When acting as a judge, the consular officer is a quasi-judicial officer of the sending state. Thus, he is bound to observe, first of all, his country's conflict law and procedure.<sup>89</sup> By virtue of provisions enacted in the sending state, it may occur that these general rules are modified in certain respects and adapted to their extraterritorial exercise.<sup>90</sup> Such modifications

---

\*This is a continuation of an article, the first portion of which appeared in 8 MIAMI L.Q. 501-529 (1954).

87. 4 HACKWORTH, *op. cit.* 876 (1942); 1 HYDE, *op. cit.* 739 (1945).

88. Consular courts survived under the treaty with Morocco (1836), 8 STAT. 484, Art. XX; Cheng, *Rights of United State Nationals in the French Zone of Morocco*, 2 INT'L & COMP. L.Q. 354, 360 (1953); CAILLE, ORGANIZATION JUDICIAIRE ET PROCEDURE MAROCAINE, 130 (1948); Laubadere, *Les Obligations Internationales du Maroc Modern*, 1 LA TECHNIQUE ET LES PRINCIPES DU DROIT PUBLIC 315, 322 (1951); *Remarques sur le Fondament Juridique des Capitulations Americaines au Maroc*, GAZ. TRIB. MAR. Oct. 25, 1948. Cf. the decision of the International Court of Justice, August 27, 1952, 47 AM. J. INT'L L. 136 (1953). For a local case, see 47 AM. J. INT'L L. 722 (1953). Consular courts exercise jurisdiction over disputes between American nationals except in criminal cases involving assaults against Morroccans; in these cases local courts retain jurisdiction (Art. 21) and local law applies (2 HACKWORTH, *op. cit.* 504).

Consular courts in Ethiopia previously acting under the most-favored nation clause contained in the 1914 treaty (invoking Art. 7 of the treaty between Ethiopia and France, 1908), have been abolished by the recent treaty with Ethiopia (1951, Art. XVIII). Nevertheless, by an exchange of letters it was agreed that "all American citizens shall have the right to demand that one of the judges sitting shall have had judicial experience in other lands." In addition, there is a possibility of removal of any such proceeding, on motion, to the Ethiopian High Court.

According to the Agreement with Ethiopia concerning the utilization of defense installations (1953, TIAS 2964) Ethiopian courts will retain civil jurisdiction over members of the United States forces, except in matters arising from the performance of their official duties (Art. XVII, 3); outside of this, United States military authorities will have the right to exercise within Ethiopia all jurisdiction over its armed forces "conferred on the United States military authorities by the laws and regulations of the United States" (Art. XVIII, 2).

As to Iran, see 12 Stat. 78 (1860), 22 U.S.C. § 183 (1952).

As to jurisdiction and law applicable, see 12 STAT. 76 (1860), 22 U.S.C. § 141 *seq.* (1952), On the problem of the law applicable, *Dored v. Wells*, 11 N.Y.S.2d 258 (N.Y. City Ct. 1939); *In re Blanchard's Estate*, 29 N.Y.S.2d 359 (Surr. Ct. 1941); impact of the Constitution, *United States v. Archer*, 51 F. Supp. 708 (S.D. Cal. 1943); full faith and credit, *Newman v. Bash*, 89 Misc. 622, 152 N.Y. Supp. 456 (1915).

89. Treaties are silent on this point. It seems only reasonable that consular officers follow the law of their country, starting from its conflict law. As to constitutional aspects, it may suffice to indicate that such questions may come up where a foreign consul applies to local authorities for the enforcement of his award 36 STAT. 1163 (1911), 22 U.S.C. § 258(a) (1952).

90. See 12 STAT. 73 (1860), 22 U.S.C. § 145 (1952).

by the sending country may be motivated by the need to comply with requirements set up by the receiving country as a condition for the privilege of exercising there some of the sending state's sovereign powers. Such a condition may be established unilaterally by the receiving country, or, it may have been referred to or agreed upon in a treaty. Finally, rules of general international law must be observed.

It follows that three sets of laws come into play whenever consular judicial powers are exercised. First, the treaty establishing the basis for such adjudication,<sup>91</sup> including general principles of international law; second, the law of the sending state which determines, within the limits of such treaty, the scope of the consular jurisdiction and the manner in which it is to be exercised;<sup>92</sup> and third, the law in force within the receiving country which will come into operation whenever it applies according to the treaty, in consequence of a reference or a reservation.

The most important class of disputes cognizable by consular officers contains *disputes on board ship* flying the flag of the sending country. The first group of these disputes concerns the internal order representing, in fact, a limited exercise of police powers by consular officers on board ship during their stay in ports of the receiving country.<sup>93</sup> The other class of disputes are justiciable controversies arising out of seamen's contracts for work. In older type treaties the power to adjudicate such disputes is granted to consular officials<sup>94</sup> to the exclusion of local judicial or administrative authorities.<sup>94</sup> However, this exclusiveness of consular juris-

91. *The Betsey*, 3 Dall. 6 (U.S. 1794); *in re Ross*, 140 U.S. 453 (1891); *The Belgenland*, 114 U.S. 355 (1885); *Dainese v. Hale*, 81 U.S. 13 (1875); *In re Aubry*, 26 Fed. 848 (E.D. La. 1885). Wright, *Treaties and the Constitutional Separation of Powers in the United States*, 12 AM. J. INT'L L. 64, 71 (1918).

92. See 22 CODE FED. REGS. § 128.6 (1951).

93. 4 HACKWORTH, *op. cit.* 878; *Wildenhuis's Case*, 120 U.S. 1 (1886); *Ex parte Anderson*, 184 Fed. 114 (D. Me. 1910).

94. E.g., Art. XI of the treaty with Norway (1827, 8 STAT. 346) that consuls "shall have the right, as such, to sit as judges and arbiters in such differences as may arise between the captain and crews... without interference of local authorities," *The Marie*, 49 Fed. 286 (D. Ore. 1892). The treaty with France (1853), Art. VIII provides that consuls "shall alone take cognizance of differences which may arise, either at sea or in port, between the captain, officers or crew, without exception, particularly in reference to the adjustment of wages and the execution of contracts. The local authorities shall not, under any pretext, interfere in these differences, but shall favorably aid... the consuls." Similar examples may be multiplied (e.g., in the treaty with Italy, Art. XI, 1878; with the Netherlands, Art. XII, 1855; with Greece, Art. XIII, 1902).

It is interesting to note that territorial sovereignty apparently motivated the provision of the early treaties limiting such activities to board ship; e.g., in the treaty with France (1788, 1 MALLOY 494) in the sense that consular officers have "all the power of jurisdiction in civil matters in all disputes" only "on board the said vessels" (Art. VIII).

Where consular jurisdiction is declared by the treaty to be exclusive, local courts are without jurisdiction; *The Cambitsis*, 14 F.2d 236 (E.D. Pa. 1926); *The Bound Brook*, 146 Fed. 160 (D. Mass. 1906); *The Marie*, 49 Fed. 286 (D. Ore. 1892); *The Burchard*, 42 Fed. 608 (S.D. Ala. 1890); except there is no consular officer in the respective jurisdiction; *The Amalia*, 3 Fed. 652 (D. Me. 1880). But see *The Ester*, 190 Fed. 216 (E.D.S.C. 1911). *Admiralty Suits Involving Foreigners*, 31 TEXAS L. REV. 889, 893 (1953).

See 13 STAT. 121, 22 U.S.C. § 256, (1946).

diction has been modified in part, within the United States, by a statute (Section 4 of the Seamen Act of March 4, 1915, 38 Stat. 1164, 46 U.S.C. Section 597)<sup>95</sup> with regard to a specified class of disputes.<sup>96</sup> These disputes, therefore, will be adjudicated by municipal courts having jurisdiction in the matter, and treaty law inconsistent with this amendment is considered abrogated.<sup>97</sup> In a few instances, treaty articles involved have been terminated by diplomatic notes,<sup>98</sup> while subsequent treaties are held to supersede Section 4 of the Seamen's Act.<sup>99</sup>

Of late the exclusiveness of consular jurisdiction was further relaxed by reservations in favor of local jurisdiction. Consular officers are authorized to exercise their judicial powers "provided local laws so permit" (e.g., treaties with Cuba, 1926, Art. XII; El Salvador, 1926, Art. XXI; Finland, 1934, Art. XXV).<sup>100</sup> According to the most recent formula, consular officers exercise judicial powers subject to the proviso that local authorities do not take jurisdiction in a particular case (e.g., treaties with Great

95. *Strathearn S.S. Co. v. Dillion*, 252 U.S. 348 (1920).

96. The requirement of reciprocity is imposed in 13 STAT. 121, 22 U.S.C. § 256, (1946), by providing that the President "shall have been satisfied that similar provisions have been made for the execution of such treaty by the other contracting party and shall have issued this proclamation to that effect, declaring this act to be in force as to such nation." *Dallamagne v. Moisan*, 179 U.S. 169 (1906); *Petition of Georgakopoulos*, 81 F. Supp. 411 (E.D. Pa. 1948), 171 F.2d 886 (3rd Cir. 1948); *The Wind*, 22 F. Supp. 883 (E.D. Pa. 1938). The effect on treaties of this statute was never squarely put before courts.

97. The amendment "provides the abrogation of inconsistent treaty provisions," *Sanberg v. McDonald*, 248 U.S. 185, 196 (1918), which rule was followed by a majority of courts; *Heros v. Cockinos*, 177 F.2d 570 (4th Cir. 1949); *Lakos v. Saliaris*, 116 F.2d 440 (4th Cir. 1940); *The Menas*, 35 F. Supp. 661 (E.D.N.Y. 1940); *The Rindjiani*, 254 Fed. 913 (9th Cir. 1919). *Contra*: *The Leonidas*, 32 F. Supp. 738 (D. Md. 1940), holding that inconsistency between Art. XII of the treaty with Greece and § 597 resulted in concurrent jurisdiction (741), all this in spite of the express abrogation of the treaty, 3 U.S. FOREIGN REL.: 1916 at 41; reliance on *The Estrella*, 102 F.2d 736 (3rd Cir. 1938), *cert. denied*, 306 U.S. 658 (1939), is misplaced since in the latter case the situation was different: the treaty with Norway (1932) was subsequent to the 1915 statutory amendment, and, in addition, the treaty itself established concurrent jurisdiction (Art. XXII, "shall not exclude the jurisdiction conferred on local authorities under existing and future laws") *c.f.* *The Roseville*, 11 F. Supp. 151 (W.D. Wash. 1935).

Wage claims not within the purview of § 597, or "where treaty stipulations exist . . . with regard to the rights of the consul and the crew or other matters occurring on the ship, exclusively subject to foreign law, such stipulations are the law of the land and must be fairly and faithfully observed," *The Taigen Maru*, 73 F.2d 922 (9th Cir. 1934).

98. E.g., in relation to France (3 U.S. FOREIGN REL.: 1915 at 3; 1916 at 39, Greece see note 97, *supra*). Treaty articles concerning consular jurisdiction have been abrogated in toto without taking into consideration that § 597 applies only to a part of all disputes covered by this type of consular jurisdiction.

99. *The Estrella*, note 97 *supra*.

100. The draft for the treaty with Norway (1932) contained the proviso "provided the law of the vessel's flag be observed." This point was widely discussed and, finally, the following formulation adopted: ". . . shall not exclude the jurisdiction conferred upon the local authorities under the existing or future law" (Art. XXII: U.S. FOREIGN REL., 1928 at 610, 623, 637). An identical formula was adopted in treaties with Liberia (1938, Art X), the Philippines (1947, Art. XI, 1), Costa Rica (1948, Art. X, 6), etc.

Britain, 1951, Art. 21, TIAS 2494; Ireland, 1950, Art. 22).<sup>101</sup> In one treaty, consular jurisdiction in seamen's disputes even is deprived of its power of adjudication and reduced to a mere "conciliatory power, without authority to settle disputes" (convention with Mexico, 1942, Art. X, 57 Stat. 800).

*Consular notarial functions.* — For reasons of convenience, a different type of consular function exercised abroad shall be discussed here. Generally, treaties give consular officers the privilege to perform, within the receiving country, notarial functions.<sup>102</sup> Limiting our discussion to the question of the law controlling such activities, we find treaties declaring that the law "of their own country" shall apply. This means that the *extent* and the *manner* of such notarial activities will be controlled, primarily, but not exclusively, by the law of the sending country.<sup>103</sup> However, the applicability of the *lex patriae* is modified, in many instances, by treaties limiting the extent of such functions not only in regard to the notarial law of the *lex patriae* but also by that of the receiving country; the latter as a consequence of possible reservations in favor of local law.<sup>104</sup> The most common limitations are that both or, at least, one of the parties to the transaction is a national of the sending country, that the transaction is to be performed, or that the property involved is located within the sending country.<sup>105</sup> Some treaties even contain a general reservation in favor of local law to the effect that consular notarial acts must not be prohibited by the *lex loci actus* (e.g., treaty with Costa Rica, 1948, Art. VIII, 1,b).<sup>106</sup>

101. "The consular officer may, provided the judicial authorities of the territory do not take jurisdiction in accordance with the provisions of Art. 22, decide disputes between the master and members of the crew, including disputes as to pay and contracts of service, arrange for the engagement and discharge of the master and members of the crew..."; "the judicial authorities may, however, exercise any jurisdiction which they may possess under the law of the territory with regard to disputes as to wages and contracts of service between the master and members of the crew," which would preserve, at the pleasure of our courts, the applicability of § 597.

102. 4 HACKWORTH, *op. cit.* 838 (1942); 2 HYDE, *op. cit.* 1361 (1947); Harvard Research in International Law, *Legal Position and Functions of Consuls*, 26 AM. J. INT'L L. 257 (Supp. 1932).

103. E.g., treaties with Austria, 1928, Art. XVIII; Belgium, 1880, Art. X; Costa Rica, 1948, Art. VIII; Cuba, 1926, Art. XI; El Salvador, 1926, Art. XXI; France, Art. VI, 2; Germany, 1923, Art. XXII; Great Britain, 1951, Art. XVII; Greece, 1902, Art. IX; Mexico, 1942, Art. VII; the Philippines, 1947, Art. VIII; Spain, 1902, Art. XXII; Yugoslavia, 1881, Art. X.

104. See 22 CODE FED. REGS. § 136.4 a (1952).

105. "... or the property involved is situated within the territory of the sending state" (Art. XXII, 3 of the treaty with Spain, 1902; Art. XXII of the treaty with Germany).

106. The recent treaty with Costa Rica is an example of the trend toward increased limitations; in addition to the requirement that such acts may be requested only by nationals of the sending country to be used outside of the receiving country, such functions may be performed only if required "by any person for the use in the territory of the sending state or are rendered in accordance with procedures, not prohibited by the laws of the receiving state, established by the sending state for the protection of its nationals abroad or for the proper administration of its laws and regulations" (Art. VIII, 1, b).

According to Art. XVII (3) of the convention with Great Britain (1951) consular officers may exercise certain notarial functions "in any case where these services are required by a person of any nationality for the use in the sending state or under the law in force in the sending state." The treaty with the Philippines (1947) adds the proviso that such documents "are intended to have application, execution and legal effect principally in the territory" of the sending country (Art. VIII, 1 d); similar proviso in the treaty with Mexico (1942, Art. VII, d).

The performance of consular notarial activities is, as a rule, limited to the consular premises except where treaties allow such activities to be conducted in some other place (e.g., treaty with Greece, 1902, Art. X;<sup>107</sup> with Cuba, 1926, Art. XI).<sup>108</sup>

All these limitations must be read into the statutory provision that United States consular officers are "required...to perform any notarial act which any notary public is required or authorized by the law to do within the United States" (22 U.S.C. Section 1195).<sup>109</sup>

What law will determine the effect of consular notarial acts presents a different question. The rule generally adopted by treaties is that such acts "shall have the same force and effect as if drawn by and executed before a notary public or other public officer<sup>110</sup> duly authorized in the country by which the consular officer was appointed" (e.g., treaty with Spain, 1902, Art. 22; Sweden, 1910, Section 10; Germany, 1923, Art. XXII; Cuba, 1926, Art. XI, 2; Norway, 1928, Art. XVII). Consequently, consular notarial acts are granted, within the receiving country, the effect of notarial acts executed in the sending country and not the effect of local notarial acts. Thus, a locally executed consular notarial act will retain in the receiving country, in spite of the treaty privilege authorizing such activities, the stain of alienage. Their intrinsic effect will be, consequently, determined according to "the laws and regulations of the country where they are designed to take effect" (treaty with Cuba, 1926, Art. XI, 2)<sup>111</sup> which includes the law of the receiving country as well. This complete reservation in favor of the law of the country where the act is "designed to take effect" is, with respect to the receiving country, modified only insofar as additional privileges are granted by the treaty. For example, in the receiving country, consular notarial acts will be recognized as notarial, and as such are admissible in evidence.<sup>112</sup>

Consular officers may execute notarial acts "for the use elsewhere," outside of the sending country; *i.e.*, in the receiving or even in a third

107. "...at their offices, at their private residences, at the residences of the parties, or on board ship."

108. "...at any appropriate place."

109. See 22 CODE FED. REGS. §§ 136.4, 9 (1952).

110. In some countries acts required to be in notarial form may be validly executed by court officers in non-contentious proceedings, e.g., authentication of signatures, execution of wills, etc.

111. See 22 CODE FED. REGS. § 136.6 a (1952). The rule discussed is expressed in the treaty with the Netherlands (1878, Art. IV) that such "acts shall be... subject to the provisions of the law on this subject, however, in the two countries."

The treaty with Cuba (1926) contains a clear formulation, namely that "such documents shall have been drawn and executed in conformity to the laws and regulations of the country where they are designed to take effect" (Art. XI, 2); a similar provision is inserted into the treaty with Philippines (1947, Art. VIII, 2), but it is omitted in the convention with Costa Rica (1948).

112. "...shall be received as legal documents in the courts of justice throughout the United States and Greece" (treaty with Greece, 1902, Art. X 2); "...shall be received as evidence...as original documents and shall have the same force and effect as if drawn by and executed by a notary..." of the sending country (treaty with Cuba, 1926, Art. XI, 2).

country. "But it is understood," reads a recent treaty (with Great Britain, 1951, Art. XVII, 2), "that this provision (concerning consular notarial functions in connection with documents required by a national of the sending state for the use elsewhere) involves no obligation on the authorities of the receiving state to recognize the validity of notarial acts performed by a consular officer in connection with documents as required under the law of the receiving state."

*International commissions.* — The settlement of private claims by internationally created bodies invested with adjudicating powers is a matter to be discussed in international law. Nevertheless, a few remarks seem to be appropriate at this point of the present discussion to indicate jurisdictional questions and problems of the law applicable.<sup>113</sup>

In peace treaties, commissions have been set up to adjudicate private claims arising in connections with such treaties. After 1919, Mixed Arbitration Tribunals went into action according to peace treaties of 1919, in relation to the United States called *Mixed Claims Commission* (agreement with Germany, 1922, TS 655).<sup>114</sup> Similar provisions are contained in the treaties of peace concluded in Paris (1947), e.g., the Conciliation Commission according to Art. 83 of the treaty of peace with Italy.<sup>115</sup>

An important international commission with powers to adjudicate private claims was established in the General Claims Convention with Mexico (1923, 43 Stat. 1730).<sup>116</sup> The Commission adjudicated claims of American nationals "according to the best of his judgment and in accordance with international law, justice and equity" (Art. I). Such method of settling private claims against a foreign government complies with the general principle proclaimed in the Convention for the arbitration of pecuniary claims (Buenos Aires, 1910, 38 Stat. 1799), where contracting countries agreed "to submit to arbitration all claims for pecuniary loss or damage which may be presented by their respective citizens and which cannot be amicably adapted through diplomatic channels..." the decision to be "rendered in accordance with the principles of international law" (Art. I).

Treaties entered into under the authority of the Economic Cooperation Act, 22 U.S.C. Section 1501 *et seq.* (1948), contain provisions regarding jurisdiction over claims by American nationals for compensation for "governmental measures affecting his property rights, including contracts with

113. Lipstein, *Conflict of Laws Before International Tribunals*, 27 TRANSACTIONS OF THE GROTIUS SOCIETY (1942).

114. Laves, *The United States — German Claims Settlement 1921-1927*, 20 ILL. L. REV. 787 (1927); KIESSELBACH, PROBLEMS OF THE GERMAN-AMERICAN CLAIMS COMMISSION (1936); Bludorn, *Le Fonctionnement et la Jurisprudence des Tribunaux Mixtes Créés par les Traités de Paris*, 41 RECUEIL DES COURS (HAGUE) III, 141 (1932).

115. Domke, *Settlement of Dispute Provisions in Axis Satellite Peace Treaties*, 41 AM. J. INT'L L. 911 (1947).

116. See 63 Stat. 972 (1949), 22 U.S.C. § 661 *seq.* (1952); note also the second 1923 treaty as well as agreements entered into later (1934, 1938); FELLER, THE MEXICAN CLAIMS COMMISSION (1935).

or concessions from such country" (Sec. 1513, 6, 10). Insofar as espoused by the Government, such claims shall be decided by the International Court of Justice or by "any arbitral tribunal agreed upon" (*id.*). Subsequent treaties extended this provision to treaty aliens. In the Economic Cooperation Agreement with France (1948, TIAS 1783), for example, the rule has been made applicable to analogous claims by French nationals after they have "exhausted the remedies available to (them) in the administrative and judicial tribunals of the country in which the claim arose" (Art. X, 2). Claims arising out of *nationalizations* are now handled according to the International Claims Settlement Act of 1949 (64 Stat. 12, 22 U.S.C. Section 1621 *et seq.*).<sup>117</sup>

Finally, brief mention should be made of private claims against foreign governments or its nationals espoused by the Government and settled by *international agreements*. These agreements become the law of the land and claims are settled by an act in the nature of legislation.<sup>118</sup>

*Private arbitration agreements.* — Some of the recent treaties<sup>119</sup> introduced a new topic into our treaty law: rules concerning agreements to arbitrate and the effect to be given arbitral awards.<sup>120</sup> All these treaties have one requirement in common. In order to benefit from treaty law, arbitration agreements must show *diversity of nationality* of parties involved, in the sense that these agreements have been entered into between nationals or

117. Surrey, *Arbitration under the Marshall Plan*, 4 ARB. J. 8 (1949); Benoits, *Accord Bilateral de Cooperation Economique Franco-Americaine et Adhesion de la France à la Disposition Facultative Reconnaissant la Jurisprudence de la Cour Internationale de Justice*, CHRONIQUE DALLOZ 21 (1949).

Rode, *The International Claims Commission of the United States*, 47 AM. J. INT'L L. 615 (1935).

118. In *Hennevig v. United States*, 84 F. Supp. 743 (1949), the Court of Claims dismissed the claim of a national of Norway of the ground that its jurisdiction "has been effectually withdrawn." Since the claim was settled by the Claims Convention with Norway (1940) the provision of 28 U.S.C. § 1502 (1952), applies that "claims growing out of or depending upon a treaty entered into with foreign nations" are outside of the Court's jurisdiction. *Cf. Insurance Co. of North America v. United States*, 121 F. Supp. 649 (1954).

119. Treaties containing provisions on private arbitration: with China, 1946, Art. VI, 4, TIAS 1871; with Italy (Supp. treaty, 1951, Art. VI, 25 Dept. State Bull. 568, 1951); Ireland, 1950, Art. X; Colombia, 1951, Art. V, 2; Greece, 1951, Art. VI, 2; Denmark, 1951, Art. V, 2; Israel, 1951, Art. V, 2, and Japan, 1953, Art. IV, 2, TIAS 2863. As it appears now, only three treaties have been ratified (with China, Israel, Greece and Japan).

120. Lorenzen, *Commercial Arbitration: International and Interstate Aspects*, 43 YALE L.J. 716 (1934); Nussbaum, *Treaties on Commercial Arbitration, a Test of International Private Law Legislation*, 56 HARV. L. REV. 219 (1942); Macassey, *International Commercial Arbitration, Its Origin, Development and Importance*, 24 TRANSACTION OF THE GROTIUS SOCIETY 179 (1938); Balladore-Pallieri, *L'Arbitrage Prive dans les Rapports Internationaux*, 52 RECUEIL DE, COURS (HAGUE) I, 291 (1935); Carabibier, *Le Developpement de l' Arbitrage Commerciale Internationale*, 3 REVUE HELLENIQUE DE DROIT INTERNATIONAL 205 (1950); Schonke, *Der Gegenwartige Stand und der Weitere Ausbau der Internationalen Schiedsgerichtsbarkeit in Zivil- und Handelssachen*, 3 SUDD. JUR. ZTG. 186 (1948); RIEZLER, *INTERNATIONALES ZIVILPROZESSRECHT* 595 (1949).

For documentation, NUSSBAUM, *INTERNATIONAL YEARBOOK ON CIVIL AND COMMERCIAL ARBITRATION* (1928); *INTERNATIONAL CHAMBER OF COMMERCE, COMMERCIAL ARBITRATION AND THE LAW THROUGHOUT THE WORLD* (1951).



corporations of "either Party and nationals and companies of the other Party". The important question of *susceptibility to arbitration* (arbitrability) of the claim involved is not settled by treaty law; only one treaty (with China) makes a mention of "any controversy susceptible of settlement by arbitration" without indicating the controlling law. It would follow that the question remains controlled by the applicable municipal law. The same rule applies with regard to formal requirements, for example, that the agreement to arbitrate be in writing. It is again the treaty with China where the question is not only touched upon but answered. According to this treaty, a "written agreement for arbitration" is required. This can only mean that a mere oral agreement to arbitrate, even if sufficient under the *lex loci actus*, will not bring such agreement within the coverage of the treaty.

Whether or not an *agreement to arbitrate* will be specifically *enforced*, depends upon the law of the court where such remedy is sought. It is to be pointed out, however, that the prevailing majority of treaties imposes no duty upon contracting countries to assure such enforcement. On the contrary, in all these treaties (with Ireland, Colombia, Greece, Denmark, Italy, Israel, Japan, and excepting only China) municipal law on this point remains unaffected, except for two rather unimportant grounds which may justify denial of such enforcement under municipal law. One of these grounds, intended to be eliminated by treaty law, is the fact that the arbitration proceedings should take place abroad,<sup>121</sup> while the other ground to be removed is based upon the fact that "the nationality of one or more of the arbitrators is not of such other Party,"<sup>122</sup> *i.e.*, of the country in whose courts the agreement is sought to be enforced, a ground unknown to our law. It follows, that all other grounds against granting specific performance, as in force under the applicable municipal law, will remain available under this type of treaty, including the common law doctrine of revocability. There is, however, one treaty where a different attitude has been adopted; the treaty with China prescribes that "such agreements shall be accorded full faith and credit by the courts within the territories of each High Contracting Party", *i.e.*, in the country where the agreement to arbitrate was entered into as well as in the other contracting country.

#### Whether or not an *arbitral award* rendered in one contracting country

121. Maybe a reflex of *The Silverbrook*, 18 F.2d 144, (E.D. La. 1927), holding that federal courts are "... without jurisdiction to direct parties to proceed to arbitration... because the place and the manner of arbitration prescribed by the contract are beyond the jurisdiction of this court..." "This court cannot direct and otherwise supervise an arbitration to be held in London." Recent statutory changes prompted the court (*International Refugee Organization v. Republic S.S. Corp.*, 93 F. Supp. 798 (D. Md. 1950)), to declare that "the law is well established that a provision for arbitration outside of the United States... is valid... (which) follows directly from the United States Arbitration Act, 9 U.S.C. § 3 (1952).

122. "The Committee (on Foreign Relations of the Senate) was informed that there have been cases in which courts have been unable to give effect to arbitration provisions because of domestic requirements relating to the nationality of the arbitrators (and) of the place where the arbitration occurs" (Report of the Committee Concerning the Treaty with Ireland, 1951, 81st Congress, 2d Sess., Exec. Rep't 8).

will be entitled to enforcement in the other, depends upon the law applicable according to the other country's conflict rules. Treaties, with two exceptions to be discussed later, do not endeavor to change this state of municipal law. The only change introduced by treaties consist in abolishing, within the coverage of treaty law, two possible grounds for denying such enforcement. Those two grounds we already have encountered as grounds to be eliminated with regard to the enforcement of agreements to arbitrate, namely the fact that the arbitration took place abroad and that one or more of the arbitrators were aliens (treaties with Ireland, Colombia, Denmark and Israel). As in the previous situation, only these two grounds to deny enforcement of awards are declared ineffective, provided, of course, they are part of the controlling municipal law. Consequently, all other grounds preventing the enforceability of foreign arbitral awards will remain in force unimpaired, even in situations where such foreign awards are "final and enforceable under the law of the place where rendered" (treaties with Ireland and Colombia).<sup>123</sup> Such finality under the municipal law of the place where the award was rendered will be taken into consideration only insofar as this fact is decisive under the applicable municipal law.<sup>124</sup>

Two treaties (with Greece and Japan) go one step further and impose upon contracting countries the duty to enforce arbitral awards rendered in the other contracting country. This duty is conditioned upon the fact that that awards are "final and enforceable under the laws of the place where rendered." Then, they are "entitled to be declared enforceable by such courts" (*i. e.*, of competent jurisdiction of the other contracting country), unless, "contrary to public policy." When all these conditions are complied with, the award rendered in the other contracting country will have the effect of "awards rendered locally," except in the United States. Here, arbitral awards rendered in Greece or Japan "shall be entitled in any court in any State only to the same measure of recognition as awards rendered in other States thereof," a treatment comparable to the internal foreigner treatment discussed above.<sup>125</sup> All by itself, in this respect, stands

123. The supplementary treaty with Italy, 25 DEP'T STATE BULL. 568 (1951), repeating the reference to the place of arbitration and alienage of arbitrators, adds: "It is understood that nothing herein shall be construed to entitle an award to be executed within the territories of either High Contracting Party until after it has been duly declared enforceable therein" which only restates that law as it is according to treaties of this type. The provision apparently takes into account the strict provisions of Italian law (Art. 806 *seq.*, Code of Civil Procedure). Spertl, *Die Bürgerlichen Schiedsgerichte nach dem Rechte der Italienischen Zivilprozessordnung vom 28. Oktober 1940*, 16 ANNUARIO DI DIRITTO COMPARATO 52 (1943); Marmo, *Gli Arbitrati Stranieri e Nazionali con Elementi di Estranietà*, 19 ANNUARIO DI DIRITTO COMPARATO 1 (1946); Vassia, *International Commercial Arbitration from the Italian Viewpoint*, 4 ARB. J. 27 (1947); Racca, *Enforcement in Italy of Awards between Americans and Italians*, 6 ARB. J. 235 (1951).

124. Which cannot surprise in view of the fact that arbitral awards are, with respect to recognition, still better off than foreign judgments, treaty-wise.

125. Lorenzen, *Commercial Arbitration, Enforcement of Foreign Awards*, 45 YALE L. J. 39 (1935); Domke, *On the Enforcement Abroad of American Arbitration Awards*, 17 LAW & CONTEMP PROB. 545 (1952); Stern, *The Conflict of Laws in Commercial Arbitration*, *id.* at 567 (1952); Heilmann, *The Enforceability of Foreign Awards*, 3 ARB. J. 183 (1939).

the treaty with China. There, an arbitral award within the coverage of the treaty is given "full faith and credit by the courts within the territories of the High Contracting Party in which it was rendered." At a glance, it appears that this provision refrains from granting arbitral awards any effect in the other contracting country. At the most, it would seem that this provision will supersede local law if it should discriminate against arbitral awards because of diversity of nationality of the parties involved, a rule without any significance in this country.<sup>126</sup>

A different aspect of arbitration is regulated in the Warsaw Convention (1929), namely the arbitrability of claims arising out of *international air transportation* in the sense of Art. 1 of the Convention. In a general way, Art. 32 denies any effect to "clauses contained in the contract and all special agreements... altering the rules as to jurisdiction,"<sup>127</sup> including agreements to arbitrate. This prohibition, however, is qualified by two far reaching exemptions. On the one hand, it does not affect claims arising out of international transportation of goods, regardless of the time when the agreement to arbitrate was entered into (before or after "the damage occurred"), provided such arbitration "is to take place within one of the jurisdictions referred to in the first paragraph of Art. 28", *i.e.*, first, within the territory of one of the contracting countries, and second, at the option of the plaintiff in one of the jurisdictions there enumerated.<sup>128</sup> On the other hand, agreements to arbitrate claims arising out of transportation of persons will be "allowed," provided such agreements have been entered into after the "damage occurred." The same limitations on jurisdictions as to where arbitration of claims involving transportation of goods is "allowed" to take place, probably apply also to claims arising out of transportation of persons. All arbitration is, according to an express provision, "subject to this Convention". Thus, the arbitrators cannot deviate from the law laid down by the Convention. Consequently, an award rendered in violation of the liability provisions of the Convention will be open to attack in court as "null and void."

An important share in settling private disputes is allotted to private

---

126. Art. 70 of the first draft for an interamerican convention on international law of sales (see note 86, *supra*) provided, in its "procedural article" (70), that courts shall have jurisdiction "in all controversial questions resulting from the application of this law . . .", unless the parties have agreed "to submit their differences to the courts of a specific country" (Pan American Union, DRAFT UNIFORM LAW ON THE INTERNATIONAL SALE OF PERSONAL PROPERTY, 1953). The "Provisional Draft of Buenos Aires" (1953) adopted, however, a different formulation: "... provided parties have not, by mutual consent, stipulated the judges, courts or arbitrators at some other place" (*i.e.*, outside of the place of performance, see note 86, *supra*), thus throwing together, in a rather casual way, prorogation, venue and agreements to arbitrate.

Note, *Comite Juridico Interamericano*, PROYECTO DE LEY UNIFORME SOBRE ARBITRAJE COMERCIAL INTERNACIONAL (1954).

127. GOEDHUIS, *op. cit.* 312.

128. See 8 MIAMI L.Q. 527.

arbitration under the Agreement concerning *German external debts* (London, 1953, TIAS 2792).<sup>129</sup>

It remains only to mention that the *interamerican system of arbitration* established according to the Resolution XLI of the VIIIth International Conference of American States (Montevideo, 1933) is "entirely independent of official control."<sup>130</sup> Its proceedings and awards are, therefore, governed entirely by the municipal law applicable.

## VIII

### LAW IN THE U.N. HEADQUARTERS DISTRICT

Conflict problems of a particular nature arise out of the fact that the United Nations maintains its seat in this country. They are regulated in the Agreement between the United States and the United Nations regarding the headquarters of the United Nations (1947, TIAS 1676).<sup>131</sup> In evaluating this Agreement, it is to be kept in mind that the United States did not renounce its sovereignty (nor the sovereignty of the State of New York) over the headquarters district (Art. I, Sec. 1, a). The United Nations Organization has been granted only what is cautiously termed "control and authority . . . as provided by this Agreement" (Art. III, Sec. 7, a), meaning that the United States retains the plenitude of powers inherent in its sovereignty minus powers specifically conferred upon the United Nations under the Agreement. In principle, the only constitutional and legislative powers to

129. For disputes under Annex IV parties may agree to submit their disputes to an arbitral tribunal (Court of Arbitration) which will determine its own procedure; in absence of such determination the "Arbitration Code of the International Chamber of Commerce shall apply" (Art. 32, 7 of the Agreement). Arbitral tribunals are provided also in Annex II (Art. IX) and in Annex III (Sec. 20); Annex IX contains a charter for such tribunals.

Arbitral awards are enforceable, irrespective of reciprocity, through German courts and authorities (Art. 17, 3, a, of the Agreement), provided the claim involved falls under the Agreement. A German court may refuse to enforce an arbitral award (except if rendered by an arbitral tribunal established in accordance with the Agreement) if the arbitral tribunal proceeded without an agreement of the parties concerned, if defendant was not afforded the opportunity to defend his case, or where the award "would be contrary to public policy in the Federal Republic of Germany" (Art. 17, 4 of the Agreement).

Regarding the validation of dollar bonds of German issue, arbitration boards will be set up (Art. 6 of the Ordinance, annexed to the Agreement with Germany, 1953, TIAS 2793; Art. 35 of the German law for the validation of foreign currency bonds, 1952), the United States consenting that these boards "exercise their jurisdiction within the territorial jurisdiction of the United States" (Art. 3 of the Agreement).

130. Domke and Kelor, *Western Hemisphere System of Commercial Arbitration*, 6 UNIV. TORONTO L.J. 307 (1946); Domke, *Inter-American Commercial Arbitration*, 4 MIAMI L.Q. 425 (1950); Goico, *Evolucion del Arbitraje Comercial en America*, 21 REVISTA DE LA SECR. DE ESTADO . . . (Dominican Republic) 14 (1952); Barrios de Angelis, *El Arbitraje en America*, 3 REVISTA DE LA FACULTAD DE DERECHO (Montevideo) 767 (1952).

131. Liang, *The Legal Status of the United Nations in the United States*, 2 INT'L L.Q. 577, 595 (1948); Brandon, *The Legal Status of the Premises of the United Nations*, 28 BRIT. Y.B. INT'L L. 1951, 90, 96 (1952); JENKS, *THE HEADQUARTERS OF INTERNATIONAL INSTITUTIONS* (1945).

Brandon (*loc. cit.* 97, 98) calls the Agreement "extremely important", "unique" and "unprecedented."

be exercised within the headquarters district remain those belonging to the United States (including powers of the State of New York and municipalities); federal, state and local courts retain their jurisdiction, and federal, state and local laws apply within the district, except "as otherwise provided by this Agreement."

Restricting our discussion to the choice-of-law problem involved, it is to be observed that conflicts of this kind may arise only insofar as the United Nations Organization is authorized to create its own law binding also upon the courts of the land. This privilege was granted by the Agreement as the "power to make regulations" (Art. II, Section 8).<sup>132</sup> Consequently, the United Nations may enact rules supplementing or even modifying the otherwise applicable municipal law. In the latter situation, the courts will be faced with the question as to what law, the municipal law or rules enacted by the United Nations, shall control. To cope with such situations, the Agreement prepared a carefully edsigned scheme intended to guarantee to the United Nations the privilege to create legal rules within the United States and, at the same time, to have such rules applied in the courts of the land. The obligation to follow rules made by the United Nations is imposed upon the courts of the land by specific provisions of the Agreement (courts "shall take into consideration" such regulations, Art. III, Section 7, d; regulations "shall apply" and local law "shall be inapplicable", Art. III, Section 8).

To be binding upon the courts of the land, state as well as federal and local, regulations enacted by the United Nations must be made "for the purpose of establishing therein (within the headquarters district) conditions in all respects necessary for the full execution of its functions" (Art. III, Section 8) as these functions are defined by the Charter or expressly conferred upon the United Nations under the Agreement (Section 13, f).<sup>133</sup> It follows that in order to be binding upon the courts of the land as rules of law, regulations of the United Nations must be justified by the scope of the United Nations in general, and by necessities imposed upon the United Nations in its actions within the headquarters district in particular. Therefore it is understandable that the applicability in the courts of such enactments is, under the Agreement, limited to "cases arising out of or relating to acts done or transactions taking place in the headquarters district", over which matters, it may be added, domestic courts retain complete and

132. According to a resolution passed by the General Assembly of the United Nations (1950), all regulations under § 8 of the Agreement must be submitted to the General Assembly for approval except in specific instances (YEARBOOK OF THE UNITED NATIONS 179 (1950). According to the Yearbook for 1951 (at 855), three such regulations are in force: first, concerning social security; second, regarding qualifications for professional and other special services within the district; and third, a regulation concerning operation of services within the district.

133. Giving the United Nations the "exclusive right to authorize or prohibit entry of persons and property into the headquarters district and to prescribe the conditions under which persons may remain or reside therein", with no 'residuary' powers for the United States.

exclusive jurisdiction<sup>134</sup> ("...shall have jurisdiction over acts done and transactions taking place in the headquarters district, as provided in applicable federal, state and local law," Art. III, Section 7, c, except, of course, "as otherwise provided in this Agreement", e.g., with regard to service of process, seizure of property, etc.).

It appears that not only is the regulation-making power of the United Nations itself limited to effects to be achieved within the headquarters district ("regulations operative *within* the headquarters district, for the purpose of establishing *therein* conditions...", Art. III, Section 8), but their applicability in the courts of the land in relation to the otherwise applicable municipal law is likewise restricted to *matters situated* in the headquarters district ("operative *within* the headquarters district", "applicable *within* the headquarters district"; vice versa, local law shall be "inapplicable *in* the headquarters district", Art. III, Section 8) insofar as such facts constitute the respective cause of action. It follows that the United Nations regulations, even if not *ultra vires* in the sense of the Charter, will not be enforced by the courts of the land where the facts of the case arise out of occurrences outside of the headquarters district.<sup>135</sup> Outside of the district the control of municipal law remains exclusive and complete.<sup>136</sup>

134. The United Nations Organization has no power to establish, within the headquarters district, its own judicial system to adjudicate cases arising there, insofar as such cases are, according to the applicable federal, state and local law, within the cognizance of the courts of the land. Therefore, no conflict of judicial jurisdictions may arise between the United Nations and domestic courts. Where certain classes of disputes, cognizable by domestic courts, may be settled, in accordance with the applicable federal, state or local law, out of court by private settlement of any kind, such settlements by instrumentalities of the United Nations will probably be held legal and given the effect they have under municipal law.

135. The statement by Brandon (*loc. cit.* 98) that "although the *locus contractus* of transaction made within the premises and the *locus delicti* committed therein, is indeed the United States, the law applicable thereto will depend upon the existence of a (United Nations) regulation" appears to be questionable since the controlling law is, in principle, the municipal law, the applicability of which does not depend upon a United Nations regulation.

136. Brandon (*loc. cit.* 98) takes the position that the limitation "to apply within the headquarters district" does not exclude "the power to make regulations in respect to transactions having the *situs*, but not necessarily to be performed within the premises", i.e., within the headquarters district. It is quite correct to say that the United Nations Organization is entitled, being an independent entity of international law, to issue regulations (or any other type of commands) to be observed anywhere. The duty of observance, including sanctions for violations, are limited to persons who consented to be bound by this type of rules. However, the point discussed here is a different one, namely, whether or not such United Nations regulations will be binding upon the courts in the United States as rules of law superseding the otherwise applicable municipal law. As it was stated above, the courts will apply to all occurrences outside of the district the normally applicable municipal law since, according to an express provision of the Agreement, municipal law may become inapplicable only "in the headquarters district," the word 'in' meaning not that courts will have to refrain from applying municipal law when sitting in the district, but in the sense as defined in § 7 (d), Art. III of the Agreement, i.e., to cases "arising out of or relating to acts done or transactions taking place in the headquarters district." It follows that the contact established by the fact that a transaction originated in the district will not become an exclusive contact indicating the law applicable making the United Nations regulation the perpetual *lex causae* to control exclusively the relationship so initiated and its later developments.

Thus the area of possible conflicts between United Nations regulations and municipal law is restricted in two respects: by the scope of the United Nations to be effectuated within the headquarters district<sup>137</sup> and by the strict territorial contact determining their applicability in the courts of the land. In case of a conflict between both bodies of law, United Nations regulations are given, according to the Agreement, precedence over municipal law to the extent that the otherwise applicable "federal, state or local law or regulation of the United States" will become "inapplicable" insofar as it is "inconsistent with a regulation of the United Nations authorized by this section" (Art. III, Section 8). In this situation, three preliminary questions will have to be decided: one, whether the case arises out of an occurrence within the headquarters district; second, whether the United Nations regulation is "authorized by this section"; and lastly, the fact and extent of the inconsistency between the otherwise applicable municipal law and the United Nations regulation. The power to try and decide the first question remains with the courts of the land, while the second and the third issue cannot be adjudicated by a domestic court having jurisdiction of the case. The power to decide whether or not the United Nations has the authority to make such a regulation and whether or not such regulation is inconsistent with municipal law, is conferred upon an *arbitral tribunal* provided in Section 21 of the Agreement.<sup>138</sup> On these two points its decision will be conclusive upon the domestic courts (Art. 21, b). "Pending such settlement", i.e., before the arbitral tribunal gives its opinion, the position taken by the United Nations will be binding upon the courts in the sense that municipal law cannot be applied, to the extent as claimed by the United Nations to be inconsistent with its regulations. This also implies the additional presumption, in favor of the United Nations, that the regulation involved is authorized by the Agreement.

## IX

### JUDICIAL PROCEDURE

It is generally accepted that questions of judicial *procedure* are governed by the *lex fori*. This rule is restated in a few conventions, e.g., in

137. In *United States v. Kenney*, 111 F. Supp. 233, 235 (D.C. 1953) the court stated, "Manifestly, this is a limited authority (of the United Nations) to legislate for the area within the geographic boundaries of the seat of the United Nations, or, as it is called in the treaty, the headquarters district. . . . This authority, of course, cannot affect any activities or any matters that occur outside of this area" since the United Nations "is not clothed with the power to legislate on matters in the realm of municipal law of the United States. This proposition is axiomatic and may be stated without disparaging or detracting from the tremendous importance and vital significance of this international organization."

138. A similar method of deciding preliminary questions is adopted in the Agreement between the parties to the NATO regarding the status of their forces (1951). According to Art. VIII (8) the question whether an act was done in the performance of official duty (including use of any vehicle) will be submitted to an arbitrator (Art. VII, 2, b) whose decision will be final. *vide*.

the Convention concerning trade-marks and names (Santiago, 1923, 44 Stat. 2494, "in any civil, criminal or administrative proceeding ... the precepts of the procedure of that State shall be observed." Art. V, Section 1), and in the Warsaw Convention (1929), "questions of procedure shall be governed by the law of the courts to which the case is submitted", (Art. 28, 2).<sup>139</sup>

The question of access to courts, already discussed, is to be distinguished from the question as to who is entitled to bring an action, a question to be decided according to the conflict law of the forum. In this connection it may be noted that the Warsaw Convention (1929) intentionally refrained<sup>140</sup> from adopting a specific rule in this respect. The Convention only stipulated that any action for damages (Art. 17, 18 and 19) may only be brought "subject to the conditions and limits set out in this convention," but "without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights" (Art. 24), thus reserving all procedural and substantive issues involved to the law applicable according to the *lex fori*.<sup>141</sup>

On *powers of attorney*, there is for the most part only uniform substantive and procedural law to be found in the inter-american Protocol on uniformity of powers of attorney (1940, 56 Stat. 1376); powers issued according to the Protocol shall be given "full faith and credit" (Art. V); as to the attestation of such powers "the law of the respective country" is declared controlling (Art. I, 1).<sup>142</sup>

139. As to the jury, *Ulen v. American Air Lines*, 7 F.R.D. 371 (1947).

At the present time, minimum procedural standards are established by treaties only for criminal proceedings, e.g., Art. V (1) of the treaty with Italy (1948); Art. II of the treaty with Uruguay (1949); Art. II (2) of the treaty with Ireland (1950); Art. III (2) of the treaty with Denmark (1951); Art. III (2) of the treaty with Israel (1951). Minimum procedural guarantees are assured also in Art. II (9) of the Annex of the status of the United States personnel and property in Iceland (1951, 2 UST 1534) and by Art. VII (9) of the Agreement between the parties to the NATO (1951).

140. The reporter on the draft of the convention stated (GOEDHUIS, *op. cit.* 269): "The question has arisen of whether it should be determined who are the persons who may bring an action. . . . It has not been possible to find a satisfactory solution to this double problem and the CITEJA has considered that this question of private international law should be regulated independently of the present Convention."

141. In *Komlos v. Compagnie Internationale Air France*, 111 F. Supp. 393 (S.D. - N.Y. 1952), *rev'd on other grounds*, 209 F.2d 436 (2d Cir. 1954), the court found that "the Convention has left open the question as to whether the *lex fori* or the *lex loci delicti* should determine which person or persons has the right of action created by the Convention, if there is a conflict of law between the *lex fori* and the *lex loci* in that respect" and applied the *Klaxon* doctrine, 313 U.S. 487 (1941).

142. Treaties grant litigants expressly the right to appear in courts by their representatives to be chosen freely (e.g., treaties with Bolivia, 1858, Art. 13; Paraguay, 1859, Art. II, 3; China, 1946, Art. VI, 4), assuring national (e.g., treaty with Haiti, 1864, Art. 6) or most-favored-nation treatment (e.g., treaty with Italy, 1948, Art. V, 4).

As to counsel acting within leased areas, see Art. VII of the Agreement providing for lease of naval and air bases (1940, 54 STAT. 2405), and Art. VIII of the Agreement concerning the Bahama long range providing ground (1950, TIAS 2099), both with Great Britain. In relation to Canada, the admission of attorneys to practice before patent offices is settled in an Arrangement (1937, 52 STAT. (1475)).

Eder, *Powers of Attorney in International Practice*, 98 U. OF PA. L. REV. 840 (1950).



Like procedure, rules of *evidence* are part of the *lex fori*. This rule is followed in the Convention for protection of submarine cables (Paris, 1884, 24 Stat. 989); according to Art. IX (1), evidence "may be obtained by all methods of securing proof that are allowed by the laws of the country of the court before which a case has been brought."<sup>143</sup>

*Lex fori* also governs compliance with *letters rogatory*.<sup>7</sup> In relation to the United States only two international agreements are in force at the present time. One is in force with regard to the Soviet Union (exchange of notes, 1935, 49 Stat. 3840)<sup>144</sup> advising that such letters be presented to the Soviet Union through diplomatic channels while Soviet letters rogatory will be submitted through their consuls in the United States. A strong reservation in favor of the Soviet *lex fori* is made to the effect that Soviet courts "shall give effect to them (letters rogatory) in accordance with the procedural rules obtaining in the U.S.S.R." (p.6) and that compliance may be denied "if the execution thereof would affect its sovereignty or safety." A similar reservation is incorporated in the Agreement regarding pecuniary claims with Yugoslavia (1948, 62 Stat. 2658) stating that the Yugoslav government will "permit in a manner consistent with the Yugoslav law, the taking of such witnesses as may be requested by the Government of the United States" (Art. 9).<sup>145</sup>

According to common law the *statute of limitations* is part of the procedural law of the forum. This rule appears not to be affected by treaty law, and the *lex fori* remains undisturbed except where treaties create uniform rules regarding the period required, as, for example, according the Convention establishing uniform rules with respect to assistance and salvage at sea (Brussels, 1910, 37 Stat. 1658), or the Warsaw Convention

143. The Warsaw Convention contains additional provisions concerning prima facie evidence (in the authentic French text "jusqu'à preuve contraire" or "sauf preuve contraire") in Art. 11 (1, 2) and Art. 26 (1). The question of burden of proof is regulated in Art. 20 (1) and 21, the latter allowing the defense of contributory negligence. In consequence, local law requiring the plea of freedom from contributory negligence will be superseded by treaty law; the effect to be given such defense, if successful, will be governed, according to the Convention, by local law, since the court may "exonerate" the carrier wholly or partly "in accordance with the provisions of its own law" (Art. 21).

144. Taracouzio, *International Cooperation of the U.S.S.R. in Legal Matters*, 31 AM. J. INT'L L. 55 (1931); The Signe, 37 F. Supp. 819 (E.D. La. 1941) involving testimony to be taken in Estonia.

145. Direct intercourse between judicial and administrative authorities is established in Art. XIV of the Convention of the international recognition of rights in aircraft (1948; see XIII, 1, b, *infra*), "subject to any contrary provision in their national law," a complete reservation in favor of local law.

On judicial assistance, Jone's, *International Procedure in Civil and Criminal Matters, Recent Developments in the United States*, THIRD CONFERENCE OF THE LEGAL PROFESSION, LONDON 1950, 257 (1952); same, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 YALE L.J. 515 (1953); same, *International Judicial Assistance*, 2 AM. J. COMP. L. 365 (1953).

For recent developments, Pan American Union, REPORT ON UNIFORMITY OF LEGISLATION ON INTERNATIONAL COOPERATION IN JUDICIAL PROCEDURES (1952); draft convention in HANDBOOK OF THE SECOND MEETING OF THE INTER-AMERICAN COUNCIL OF JURISTS, BUENOS AIRES, 25 (1953).

(1929) where an equal period of two years is established after which "the right to damages shall be extinguished" (Art. 29, 1).<sup>146</sup> Closely connected are provisions dealing with the question of what law governs *suspensions* and *interruptions* of this period. The Brussels Convention provides that the *lex fori* controls the "grounds upon which the said period of limitations may be suspended or interrupted are determined by the law of the court where the case is tried" (Art. X, 2).<sup>147</sup> The same rule applies according to the Warsaw Convention (1929) that "the method of calculating the period shall be determined by the law of the Court seized of the case" (Art. 29, 2), as well as under the Convention on the international recognition of rights in aircraft (Geneva, 1948, TIAS 2847) providing that as to the period to bring an action under Art. IV, the "law of the forum shall determine the contingencies upon which the three months period may be interrupted or suspended" (Art. IV, 4, b).<sup>148</sup>

Treaties of peace (1919 and 1947) contain provisions concerning prescription; however, the United States refrained from ratifying them.<sup>149, 150</sup>

146. *Sheldon v. Pan American Airways*, 74 N.Y.S.2d 578 (Sup. Ct. 1947).

147. "That article gives the United States as the forum of this controversy the right to determine grounds upon which the two year period of limitations may be suspended; and it permits but does not require the United States to provide for extension of the period where it has not been possible to arrest the salvaged vessel. . . .", *United States on behalf of Lord Comm'r for Executive Office of Lord High Admiral v. The James L. Richard*, 82 F. Supp. 12, 14 (D. Mass. 1949).

148. An interesting provision is contained in the Agreement concerning German external debts (London, 1953, TIAS 2792). Debtors cannot invoke "the expiration of a period of prescription or of a preclusive period of limitation" which provisions (with added qualifications) apply regardless of whether "the periods have been established by German or other law, by order of a court, of an arbitral body or of an administrative authority, by contract or other legal act" (Art. 18, 1, 5). Germany promised to apply this rule in its courts "even though the obligation is one which, as to its content, is governed by foreign law." It appears that, in this way, German courts will be prevented from following their established practice of characterizing statutes of limitations as part of the substantive law applicable as *lex causae* (let us say: of the proper law of the contract) and not as part of the procedural *lex fori*. Consequently, German courts will apply, for the purposes of this Agreement, the treaty provision concerning statutes of limitations as if it were a generally applicable rule of the *lex fori* superseding any other *lex causae*.

149. *Salvoni v. Pilson*, 181 F.2d 615 (D.C. Cir. 1950).

150. Regarding the United States, there is no treaty law in force concerning bankruptcy; thus, municipal conflict law controls. Nadelmann, *The National Bankruptcy Act and the Conflict of Laws*, 59 HARV. L. REV. 1025 (1946); same *Revision of Conflict Provisions in the American Bankruptcy Act*, 1 INT'L & COMP. L. W. 484 (1952); Bursler, *Bankruptcy Reciprocity, a Study as to a Treaty with Canada*, 33 A.B.A.J. 1026 (1947). On international cooperation in this matter, Nadelmann, *Bankruptcy Treaties*, 93 U. OF PA. L. REV. 56 (1944); same, *International Bankruptcy Law: Its Present Status*, 5 U. TORONTO L.J. 324 (1950); Plaisant, *Los Tratados en Materia de Quiebras en Derecho Internacional Privado*, 5 REVISTA ESPAÑOLA DE DERECHO INTERNACIONAL 13 (1952); GIULIANO, *ILL FALLI-MENTO NEL DIRITTO PROCESSUALE CIVILE INTERNAZIONALE* (1943). For Great Britain, Lipstein, *Jurisdiction in Bankruptcy*, 12 MOD. L. REV. 454 (1949).

## X

## FOREIGN JUDGMENTS

*Recognition.* - Dicta in *Hilton v. Guyot*, 159 U.S. 113 (1895), indicate that the requirement of reciprocity may not apply where there is an international treaty on recognition of foreign judgments.<sup>151</sup> However, treaties of this kind, with the United States as a party, are rare indeed.

One group of treaty provisions concerning recognition of foreign judgments is contained in treaties of peace of 1919 and 1947. Only one such provision originally inserted in the *Treaty of Versailles* was in force with regard to the United States (according to the treaty restoring friendly relations, Berlin, 1921, 42 Stat. 1939)<sup>152</sup> namely Art. 302 (1), obligating Germany to recognize as final all judgments rendered by the courts of Allied countries which, under the present treaty, they were competent to decide, and enforce them without "necessity of any executory decree." As to judgments rendered during the war, by German courts against Allied nationals, such nationals were entitled, in case they had "suffered prejudice" in consequence of such judgments, to a compensation to be determined by the Mixed Arbitration Tribunals (Art. 302, 2). If possible, such compensation was to be given by securing a *restitutio in integrum*; i. e., "replacing parties in the situation which they occupied before the judgment was given by the German court" (Art. 302, 3).<sup>153</sup>

In the *Paris treaties of peace*, this strict rule imposing unilateral recognition of judgments was abandoned. It will be enough, for the present purposes, to mention the treaty with Italy (1947, 61 Stat. 1245). It provides (Annex XVII, B) that the Italian government "shall take the necessary measure to enable nationals of any of the United Nations ... to submit the appropriate Italian authorities for review any judgment given by an Italian court" provided such national was "unable to make adequate presentation of this case either as plaintiff or defendant." The Italian government, on its part, undertook to provide in cases where such national "has suffered injury by reason of any such judgment" that he shall be "restored in the position in which he was before," or "shall be offered such relief as may

151. Reese, *The Status in This Country of Judgments Rendered Abroad*, 50 COL. L. REV. 782 (1950); Lorenzen, *The Enforcement of American Judgments Abroad*, 29 YALE L.J. 188 (1919); Sperl, *La Reconnaissance et l'Execution des Jugements Etrangers*, RECUEIL DES COURS (Hague), II, 385 (1931). On treaty law, Verbeek, *Die Staatsverträge über die Vollstreckung ausländischer Zivilurteile*, 45 NIEM. ZTSCHR. INT. RECHT 1 (1931); JELLINEK, *DIE ZWEIFSEITIGEN STAATSWERTURTEILE ÜBER ANERKENNUNG AUSLÄNDISCHER ZIVILURTEILE* (1953).

Cooper, *Recognition of Foreign Judgments under Art. XV of the Proposed Revision of the Rome Convention*, 17 J. AIR L. & COMM. 212 (1951). Nadelmann, *Los Estados Unidos de America y los Acuerdos sobre Ejecucion Reciproca de Sentencias Extranjeras*, 4 REVISTA DE LA FACULTAD DE DERECHO DE MEXICO 47 (1954).

152. Department of State, *THE TREATY OF VERSAILLES AND AFTER* (1947).

153. Mowitz, *The Execution of Foreign Judgments in Germany*, 81 U. OF PA. L. REV. 795 (1933); Gernsheim, *Art. 302 V.V. und die Vollstreckbarkeit Ausländischer Urteile in Deutschland*, 58 J.W. 417 (1929); Feller, *die Vollstreckbarkeit von Urteilen Amerikanischer Gerichte in Deutschland*, 60 J.W. 112 (1931).

be just and equitable in the circumstances."

Another provision in the nature of treaty law dealing with recognition of foreign judgments, this time rendered by courts within the United States, appears in the *Litvinov Assignment* (November 16, 1933).<sup>154</sup> According to this Assignment the Soviet government agreed not to make any claims with respect to certain classes of judgment as specified in the Assignment.

*Enforcement.* — The procedure of enforcing judgments, domestic as well as foreign, is governed by the *lex fori*.<sup>155</sup> This rule is adopted by the Convention on the international recognition of right in aircraft (Geneva, 1948, TIAS 2847) by providing that "The proceedings of the sale of an aircraft shall be determined by the law of the Contracting State where the sale takes place" (Art. VII, 1). The same *lex fori* will determine the "consequences of failure to observe the requirements" as established by the convention regarding the notice of such sale, the documents to be submitted by the creditor and the required notifications (Art. VII, 3) as well as the costs legally chargeable to the proceeds (Art. VII, 6).<sup>156</sup>

Questions relating to *seizure* are dealt with in the convention for the protection of industrial property (London, 1934, 53 Stat. 1748) regarding goods illegally bearing a trade-mark.<sup>157</sup> Such seizure may be effectuated in the country where the mark or name was illegally applied, or in the country to which the article has been imported; if the municipal law of such country does not allow seizure at this point, it shall be replaced by prohibiting the importation or by seizure within the country.<sup>158</sup> Where these measures are not available under municipal law, they will be "replaced by the remedies assured in such cases to nationals by the law of such country" (Art. 9).<sup>159</sup>

The privilege of *exemption from seizure* is considered in the Convention on international civil aviation (Chicago, 1944, TIAS 1591). Aircraft registered in one of the contracting countries engaged in international nav-

154. See *United States v. Pink*, 315 U.S. 203 (1942).

155. Foreign judgments concerning debts within the Agreement on German external debts (London, 1953, TIAS 2793) will be enforced through German courts and authorities (Art. XVII, 1), regardless of reciprocity, except in situations listed in paragraph (4) of the same Article (see note 129 *supra*).

In situations not involving enforcement of foreign judgments ("in any other proceeding respecting a debt which has been the subject of a final decision rendered by a court... in a creditor country...") German courts are bound by findings of facts by foreign courts, unless the debtor introduces evidence to the contrary. In this case the creditor is entitled to present "rebutting evidence including the transcript of evidence in the former proceeding" (Art. XVII, 3, b of the Agreement).

156. For a full discussion, see *infra* XIII.

Treaties concerning technical cooperation contain provisions exempting funds granted under such agreements from local "garnishment, attachment, seizure, or other legal process by any firm, agency, corporation, organization, or government" (e.g., with Saudi Arabia, 1953, Art. 4, TIAS 2845).

157. LADAS, THE INTERNATIONAL PROTECTION OF INDUSTRIAL PROPERTY 574, 581 (1930); the infringement to be decided "by the law of the country where the act takes place."

158. See 22 U.S.C. § 1124 (1952).

159. See Art. 5 *ter.* of the 1925 Convention.

igation and passing through the territory of another such country are exempt from seizure or detention if such seizure is to be made on the ground of an infringement of patent, provided both countries are also parties to the Convention for the protection of industrial property, or both have patent laws which recognize and give adequate protection to inventions made by nationals of the other parties to the Chicago Convention (Art. 27).

Lastly, a treaty provision prohibiting the enforcement of an otherwise effective judgment should not be overlooked. According to the Agreement between the parties to the NATO regarding the status of armed forces (London, 1951) a member of a force or civilian component "shall not be subject to any proceedings for the enforcement of any judgment given against him in the receiving state in a matter arising from the performance of his official duties" (Art. VIII, 5, g).<sup>160</sup>

## XI

### TORTS

*Personal injuries.* — It appears that one of the frequent provisions to be found in treaties is the one promising to treaty aliens "the most constant protection and security ... of persons and property" referring, sometimes, to general principles of international law, or granting treaty aliens national treatment ("... shall enjoy in this respect the same rights and privileges as are or shall be granted to natives on their submitting themselves to the conditions imposed upon the natives", treaty with Italy, 1871, 17 Stat. 845, Art. III, 1). This treaty with Italy is significant since it served for decades to come as the proving ground for testing old and drafting new formulations. It all started when the Supreme Court, construing Art. III (1) of the treaty rather narrowly, found that the protection under the treaty is not available to claimants residing abroad.<sup>161</sup> This ruling brought

160. Compared with foreign judgments, foreign tax claims are, according to treaty law, better off by far; *International Enforcement of Tax Claims*, 50 COL. L. REV. 490 (1950).

161. *Maiorano v. Baltimore & Ohio R.R.*, 213 U.S. 268, 275 (1908): "If an Italian subject sojourning in this country, is himself given all the direct protection afforded by the laws to our own people, including all rights of action for himself or his personal representatives to safeguard the protection and security, the treaty is fully complied with, without going further and giving to his nonresident alien relatives a right of action for damages for his death, although such action is afforded to native resident relatives, and although the existence of such action may indirectly promote his safety."

Later, in *McGovern v. Philadelphia & Dearing Ry.*, 235 U.S. 389, 399 (1919), the Supreme Court pointed out that in the *Maiorano* case it applied local law as construed by the highest state court [*Deni v. Pennsylvania R.R.*, 181 Pa. 525, 27 Atl. 558 (1897)]. The *Maiorano* doctrine was followed in *Funco v. Schuylkill Stone Co.*, 169 Fed. 98 (3rd Cir. 1909), and in *De Biaso v. Normandy Water Co.*, 228 Fed. 234 (D.N.J. 1915). The majority of courts, however, preferred to follow *Mulhall v. Fallon*, 176 Mass. 266, 17 S.E. 387 (1900); *cf. Burgess v. Gilchrist*, 17 S.E. 2d 804 (W.V. 1941).

*Andrews, Discrimination Against Non-resident Dependents*, 13 AM. LAB. LEG. REV. 232 (1925); Comment, *Position of Aliens under the Modern Compensation Laws*, 11 MINN. L. REV. 57 (1927); Hyde and Watson, *The Equities of Nonresident Alien Dependents under Workmen's Compensation Laws*, 7 ILL. L. REV. 414 (1931); Tellier, *Right to Maintain Action for Wrongful Death for the Benefit of Nonresident Aliens*, 138 A.L.R.A. 684 (1942).

about an amendment to Art. III of the 1871 treaty (1913, 38 Stat. 1669)<sup>162</sup> providing, on the one hand, that rights "shall not be restricted on account of nationality" of claimants (without expressly eliminating the requirement of residence), and introducing, on the other hand, new difficulties by limiting the cause of such "civil responsibility" to cases of "negligence or fault." This restriction was held controlling in another Supreme Court decision.<sup>163</sup>

Out of such trial and error method, a third version emerged which became the standard provision for treaties entered into in the between-the-wars period (1923-1941). The provision reads:

With respect to that form of protection granted by National, State or Provincial laws establishing civil liability for injuries or for death, and giving to relatives or heirs or dependents of an injured party a right of action or a pecuniary benefit, such relatives or heirs or dependents of the injured party, himself a national of either High Contracting Party and within any of the territories of the other, shall regardless of their alienage or residence outside of the territory where the injury occurred, enjoy the same rights and privileges as are or may be granted to nationals, and under like conditions. . .

and is now adopted, among others, in treaties with Germany (1923, Art. II), El Salvador (1926, Art. II), Estonia (1925, Art. II), Honduras (1926, Art. II), Norway (1928, Art. II), Liberia (1938, Art. II) and China (1946, Art. XIII).

In analyzing this type of treaty law, it should be noted at the outset that it creates no new liabilities nor does it extend benefits to persons not already entitled, at least in a general way, to such benefits under municipal law. The only change to be effectuated by this type of treaty law is to secure to persons claiming under an injured or dead, a non-discriminatory treatment regardless of their alienage or lack of residence in the country the law of which they invoke. In order to secure such treatment, treaties plug their provisions into one of the contacts<sup>164</sup> used in municipal law to describe its own coverage. One such contact is the in-

162. Discrimination against a resident alien was held in violation of the treaty with Italy and the XIVth Amendment in *Vietti v. Geo. K. Mackie Fuel Co.*, 109 Kan. 179, 197 Pac. 881 (1921).

163. *Liberato v. Royer*, 270 U.S. 535 (1926), followed in *Modonna v. Wheeling Steel Co.*, 28 F.2d 710 (4th Cir. 1928); *Frasca v. City Coal Co.*, 116 Atl. 189 (Conn. 1922); *Norella v. Maryland Casualty Co.*, 216 Ky. 29, 287 S.W. 18 (1926). Distinguished in *Antosz v. State Compensation Com'r.* 43 S.E.2d 397 (W.Va. 1947); *cf. Micaz v. State Compensation Com'r.*, 13 S.E.2d 161 (W. Va. 1941).

It may be added that the 1871 treaty with Italy, as amended in 1913, was terminated by mutual consent in 1937. Now, Art. XII, of the 1948 treaty is in force; for the intermediate period, *Burgess v. Gilchrist*, 17 S.E.2d 804 (W. Va. 1941).

164. In *Miller Bros. Co. v. State of Maryland*, 74 Sup. Ct. 535, 539 (1954) the Supreme Court added to the already accepted terms of 'contact' (*International Shoe Co. v. State of Washington*, 326 U.S. 310, 320, 1945) and connecting factor, (*Lauritzen v. Larsen*, 345 U.S. 571, 582 1953) a new one: 'conductor' ("... some jurisdictional fact or event to serve as a conductor.").

jured himself through his nationality or residence; the second is the place of injury; and the third is the nationality or residence of the claimant. As to the *injured*, treaties require generally that he be "a national of either High Contracting Party and within the territory of the other."<sup>165</sup> The last provision, however, appears obscure. It may be interpreted to mean that the injured must be a resident of the 'other' country, or it may be construed that the *place of his injury* must be within the 'other' country. If we read the addition in the sense that it contains a mere reference to self-evident circumstances, then it will appear that no new requirement as to the place of injury has been added. If, on the other hand, we interpret this addition to mean that the injury must have taken place within the 'other' country, then only injuries suffered by treaty aliens within the 'other' country will be covered by this type of treaty law. If the first submitted construction is followed, then the applicability of the law of the 'other' country will be the decisive factor, and not the place of injury, as long as the same law controls (as a consequence of its extraterritorial application).<sup>166</sup> Additional support in favor of this construction may be seen in the fact that in a few recent treaties (*e.g.*, with Liberia, 1938, Art. II; China, 1946, Art. XIII) an express limitation has been introduced requiring that such "national was injured within the territories of the other (country)." This support will be, of course, effective only if it can be shown that the newly adopted language is intended to be at variance with the previous formulation. At least, it may be safely stated that under the newly styled provision, there will be no doubt that treaty law does not apply in cases where the injury occurred outside of the territory of the 'other' country, regardless of the fact that its law still may be applicable. Insofar as the *claimant* is concerned, it is surprising to find that he may be of whatever nationality and reside in any place outside the 'other' country.

Lately this type of treaty law underwent four important changes: one assures the injured himself of the most-favored-nation treatment (*e.g.*, Art. XII, 1 of the treaty with Italy, 1948, regarding "laws and regulations... that (a) establish civil liability for injury and death, and give a right of action to an injured person, or to the relatives, heirs, dependents or personal representatives as the case may be"); the second requires that claimants must be of the same nationality as the injured (*id.*); the third extends national treatment to injuries or death on account of occupational diseases;

165. Under this type of treaty law, the injured himself may be discriminated against under the applicable municipal law. This was changed, as it will be shown, in the treaty with Italy (1948, Art. XII).

166. The place of injury is referred to in connection with the residence of the claimant. However, this cannot decide the question discussed above since such reference merely indicates that such claimant may invoke the law of the 'other' country even if he is not personally, *i.e.*, in the territorial sense, subject to such law.

In addition, it may be pointed out that there is no ground for the argument that this type of treaty is intended to curtail the extent to which the law of the 'other' country applies; this would mean that the law of the 'other' country will be applied extraterritorially, even in situations controlled by this type of treaty law, in situations analogous to *Pacific Employers Insurance Co. v. Industrial Accident Commission*, 306 U.S. 493 (1939).

and the last to be noted grants national treatment with regard to benefits flowing from an "established system of compulsory insurance" (e.g., treaty with Italy, 1948, Art. XII, 2; Ireland, 1950, Art. IV).<sup>167</sup>

It is interesting to note that the traditional treaty rule regarding civil liability is rapidly fading away. In the treaty with Uruguay (Art. III) the rule is reduced to one covering occurrences arising out of and in the course of employment or due to the nature of employment, including, of course, benefits under social insurance (followed in treaties with Denmark, 1951, Art. IV; Israel, 1951, Art. IV; Colombia, 1951, Art. IV; Greece, 1951, Art. XI; Japan, 1953, Art. III).

Brief mention should be made of two treaties containing additional conflict rules on torts. One is the Convention on the international recognition of rights in aircraft (Geneva, 1948, TIAS 2847) dealing with injuries or damages caused on surface within the country where the forced sale of the aircraft takes place (Art. VII, 5); the other is the Agreement with Great Britain concerning the Bahamas long range proving ground (1950), reaffirming the *lex loci damni* rule.<sup>168</sup>

*Damage to property.*—There are but a few scattered provisions in point.<sup>169</sup> One of them is to be found in the Declaration (1886) related to the Convention for the protection of submarine cables (Paris, 1884, 24 Stat. 989). The notion of what is "civil responsibility" as between owners of cables for damages caused by cables to cables (Art. IV of the Convention)

167. According to Art. XI of the Convention concerning the liability of shipowner in case of sickness, injury, or death of seamen (International Labor Conference, 1936, 54 STAT. 1693) reads that "... national laws or regulations relating to benefits under this Convention shall be so interpreted and enforced as to ensure equality of treatment to all seamen irrespective of nationality, domicile or race." Cf. *United States v. Robinson*, 170 F.2d 578 (5th Cir. 1949); *Robinson v. United States*, 177 F.2d 241 (5th Cir. 1949).

Leroque, *International Problems of Social Security*, 66 INT'L LAB. REV. 1 (1952).

168. See 8 MIAMI L.Q. 510, *supra*. The Agreement with the Philippines concerning military bases (1947, TIAS 1775) has no conflict rules as to the law applicable in connection with civil liability established in Art. 23.

In Art. 19 (3) of the Agreement with Ethiopia (see note 88, *supra*) the United States agreed to pay compensation for claims "cognizable under United States foreign claims laws, of inhabitants of Ethiopia for damage to, loss or destruction of property, or for injury or death, caused by members of the United States. All such claims will be processed and paid in accordance with the applicable provisions of the laws of the United States." See 31 U.S.C. § 224(d) *seq.* (1954).

169. Art. 28 of the Convention on commercial aviation (Havana, 1928, 47 STAT. 1901), now superseded (Art. 80 of the Chicago Convention, see note 209, *infra*), provided expressly that damages "to persons or property located in the subjacent territory shall be governed by the law of each State," probably the *lex loci damni*.

For a discussion of conventions in preparation, see Shelley, *The Draft Rome Convention from the Standpoint of Residents and Other Persons in This Country*, 19 J. AIR. L. & COMM. 289 (1952); Wilberforce, *Convention on Damages Caused by Foreign Aircraft to Third Parties on the Surface*, 2 INT'L & COMP. L.Q. 9 (1953); Davis, *Surface Damage by Foreign Aircraft, the United States and the New Rome Convention*, 38 CORNELL L.Q. 570 (1953).

Claims arising out of torts not connected with the performance of official duties are regulated in Art. VIII (6, 7, and 8) of the Agreement between the parties to the NATO (1951).



will be decided by courts "conformably to their laws," *i.e.*, according to the law applicable in the court where such case is tried.<sup>170</sup> Another provision is contained in the Convention for the recovery and return of stolen or embezzled motor vehicles, trailers, airplanes or component parts of any of them (with Mexico, 1936, 50 Stat. 1333) stating that a request for recovery must be accompanied by documents "legally valid" in the United States (Art. I, 1) and vice versa (Art. II) meaning that the validity of such documents will be tested according to the law of the issuing country. Finally, *lex loci damni* controls according to the Convention with Canada concerning questions of indemnities arising from operation of the smelter at Trail (1935, 49 Stat. 3245). The tribunal adjudicating such claims "shall apply the law and practices followed in dealing with cognate questions in the United States of America as well as international law and practice" (Art. IV), the United States being the place where the impact occurred.<sup>171</sup>

*Damage to intangible goods*—A few treaties contain conflict rules regarding infringement of patents and trade-marks, as well as rules relating to unfair competition.<sup>172</sup>

The Convention for the protection of patents, inventions, designs and industrial models (Buenos Aires, 1910, 38 Stat. 1811) declares that the *lex loci delicti* and the *lex loci damni* controls prosecution of such infringements by providing that they "shall be prosecuted and punished in accordance with the laws of the country wherein the offense has been committed or damage occasioned" (Art. IX). The *lex loci delicti* with regard to trade-marks is controlling according to Art. VIII of the Convention concerning the protection of trade-marks (Buenos Aires, 1910, 39 Stat. 1675). The owner of a protected trade-mark has the right, according to Art. 7 of the Convention for trade-marks and commercial protection (Washington, 1929, 46 Stat. 2907) "to employ all the means, procedure or recourse provided in the country in which such interfering is being used or where its registration or deposit is being sought."

*Unfair competition*, defined as "every act of competition contrary to honest practice in industrial or commercial matters" (Art. 10 *bis*, Convention concerning protection of industrial property, Hague 1925, London,

170. The Convention for the unification of certain rules relating to collision at sea (Brussels, 1910) was signed, but not ratified by the United States, and is now withdrawn from the Senate; *United States v. Farr Sugar Corp.*, 191 F.2d 370, 374 (2d Cir. 1951). The applicability of the Convention as part of the Belgian law is considered in *Black Diamond Steamship Corp. v. Robert Steward & Sons, Ltd.*, 336 U.S. 386 (1948).

171. Kuhn, *The Trail Arbitration*, 32 AM. J. INT'L L. 785 (1938), and 35 AM. J. INT'L L. 665 (1941); Department of State, *Trail Smelter Arbitration between United States and Canada* (Arbitration Series, No. 8, 1941). Note additional agreements (1949, 1950, TIAS 4635); GREEN, INTERNATIONAL LAW THROUGH CASES 830 (1951).

172. Regarding infringement of copyright, the treaty with China (1946) should be mentioned. Art. IX imposes upon contracting countries the duty to provide for an "effective remedy... by civil action," which provision shall not be construed, according to the Protocol (5, 6) to "preclude remedies by other than civil action" provided such remedies are available under municipal law.

1934) makes it an obligation on the part of the countries signatory to the Convention to establish "legal remedies to repress effectively" such practices. As to the right to bring an action, the Convention imposes upon countries the obligation to permit "syndicates and associations" to prosecute such practices "so far as the law of the country in which protection is claimed permits it" (Art. 10 *ter*).

Many recent bilateral treaties contain provisions concerning *monopolies and competition*,<sup>173</sup> but no conflict rules are annexed (*e.g.*, with Uruguay, 1949, Art. XIV, 3; Ireland, 1950, Art. XV, 1; Denmark, 1951, Art. XVIII, 1; Israel, 1951, Art. XVIII, 1).<sup>174</sup>

## XII

### CONTRACTS

*Commercial transactions.*—Treaties of friendship, commerce and navigation contain, as a rule, a provision granting "freedom of commerce."<sup>175</sup> The right of treaty aliens to engage in commercial activities in the other country may be unqualified or it may be limited to commerce between the two countries.<sup>176</sup> In both cases, such treaty aliens may enter into contracts of any kind connected with this type of business,<sup>177</sup> especially sales contracts, complying with the local law applicable.<sup>178</sup> Such reference to local law is contained in many treaties, *e.g.*, in the treaty with El Salvador (1926) permitting treaty aliens "to carry on every form of commercial activity which is not forbidden by the local law... submitting themselves to all local laws and regulations duly established" (Art. I). In some treaties the

173. Lubin, *United States Proposes United Nations Action on Cartels*, 25 DEP'T STATE BULL' 590 (1951); Wilson, *Methods of Inter-American Cooperation in the Control of Monopolies*, 10 FED. BAR. J. 290 (1948).

174. In the Economic Cooperation Agreements (*e.g.*, with France, 1948, TIAS 1783) the respective foreign countries undertake to take measures "to prevent, on the part of private or public commercial enterprises, business practices affecting international trade which restrain competition, limit access to markets or foster monopolistic control," which practices are listed in the Annex to the Agreement (3), patterned after Art. 46 of the Havana Charter for an International Trade Organization (1948).

174. Wilson, *Postwar Commercial Treaties of the United States*, 43 AM. J. INT'L L. 262 (1949).

175. See note 177, *infra*.

176. Lorenzen, *Uniformity Between Latin-America and the United States in the Rules of Private International Law Relating to Commercial Contracts*, 15 TULANE L. REV. 165 (1941).

177. The word 'commercial' is defined in the minutes of interpretation of the treaty with Ireland (1950) as not extending to the "field of navigation, aviation, communications or public utilities. It relates, though not exclusively, to the buying and selling of goods and activities incidental thereto."

178. The long history to unify the law of international sales cannot be recounted here (RABEL, *INTERNATIONAL SALES LAW*, IN *LECTURES ON THE CONFLICT OF LAWS AND INTERNATIONAL CONTRACTS* 34, 1951). However, a few remarks relating to the recent Provisional Draft of Buenos Aires (1953, see note 86, *supra*) seem to be advisable. The Draft contains, of course, mostly uniform substantive law designed to regulate international sale of movables, provided two conditions are met: one, in the nature of a territorial diversity of parties to the sale ("located, at the time they reach agreement, in the territories of different

right to engage in commerce is granted treaty aliens according to national treatment (Art. 3 of the treaty with Brazil, 1828, "submitting themselves to the laws, decrees and usages, there established, to which native citizens or subjects are subjected") or under the most-favored nation clause (treaty with Costa Rica, 1851, Art. III). Furthermore, in some treaties the right to undertake specific transactions connected with commerce is secured, e.g., the right to *manage businesses* personally (treaty with Bolivia, 1858, Art. 7: "it shall be whole free to all merchants...to manage themselves their own business", Brazil, 1826, Art. 6; Costa Rica, 1851, Art. VII; Paraguay, 1859, Art. IX), declaring treaty aliens engaged in commerce legally capable of entering into commercial transactions without the need of any local go-betweens. There are even provisions securing the right of free *bargaining for prices*, tied in with a reference to local law ("absolute freedom shall be allowed in all cases to the buyer and seller to bargain and fix the price of any goods...as they shall see good, observing the laws and established customs of the country," e.g., treaty with Argentina, 1853, Art. VIII; Costa Rica, 1851, Art. VII; Paraguay, 1859, Art. IX, 3). In some cases, treaties guarantee imported goods nondiscriminatory treatment, mostly according to the most-favored-nation clause. Such treatment is to be given not only with regard to customs, taxes and similar administrative matters, but generally "with respect to all laws and regulations affecting the sale or use of imported goods within the country" (e.g., treaties with Guatemala, 1936; Switzerland, 1936; Venezuela, 1939).

One treaty, moreover, contains a restatement of the time honored rule 'pacta sunt servanda' (with Ethiopia, 1951, Art. VIII, 1), imposing upon the contracting countries the duty to "assure that their (nationals') lawful contractual rights are afforded effective means of enforcement, in conformity with the applicable laws," the last phrase containing a reference to the law applicable according to local conflict rules.<sup>179 180</sup>

---

States"; query; signatories to the Convention?), and the other, in the nature of territorial diversity of goods or payments involved ("the goods sold or the price thereof will be transferred...from the territory of the State in which they are located, to the territory of another State"; query the same). Treaty law as created by the Convention is intended to supersede local law ["the application of the general laws of each State in those matters it (the Convention) expressly governs" . This leaves, among others, one important question unanswered, i.e., may parties, in accordance with the law of the forum, choose some other law to apply? Bayitch, *La Autonomia de las Partes en la Eleccion del Derecho Aplicable...*, 7 BOLETIN DEL INSTITUTO DE DERECHO COMPARADO DE MEXICO 41, 55 (1954). Cf. *Conference de la Haye de Droit International Prive*, 1 ACTES DE LA 7e SESSION . . . (1951), 16 seq. (1952).

179, 180. The Agreement concerning German external debts (London, 1953, TIAS 2792) contains elaborate provisions on renegotiating certain classes of German prewar contracts. Within the framework of the Agreement the law governing such contracts remains the law applicable according to the conflict rules of the forum, except where the Agreement prescribed creates its own conflict rules. This is the case where the debtor invokes hardship (Art. 11 of the Annex IV); then relief should be "in accordance with the concessions where the debtor has been or may be granted by a German creditor on similar grounds under German Law, especially under the legislation for the Relief of Debtors (Vertragshilferecht)." This means that the otherwise applicable *lex causae* will be superseded by German law. For another similar provision, see note 148, *supra*.

*Financial transactions.*—Financial transactions in the sense of "international payments and transfers of funds effected through the medium of currencies, securities, bank deposits, dealings in foreign exchange or other financial arrangements, regardless of the purpose and nature of such payments and transfers" (Art. XV, 5 of the treaty with Uruguay, 1949), are gaining in importance since 1945. However, no conflict rules are added; instead, general standards are set up, as, for example, national most-favored-nation, or equitable treatment.<sup>181</sup>

There is, however, one specific treaty provision concerning *exchange contracts* (Art. VIII, 2, b of the International Monetary Fund Agreement, 1945, 60 Stat. 1401) which reads as follows:

Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member, maintained or imposed consistently with this Agreement, shall be unenforceable in the territory of any member.

Almost every term used in this provision is open to doubt; this makes courts cautious in applying this rule,<sup>182</sup> and writers prone to discuss all possible implementations.<sup>183</sup> Difficulties start with the term of "exchange contract" and are aggravated by the added qualification that the contract has to "involve" the currency of a member to the Agreement. Once it is established that the contract is an exchange contract and it does involve the currency of a member country, then the law of such country (*lex monetae*) relating to its exchange restrictions will become, according to the Agreement, the *lex causae specialis* of the contract, superseding any other contract, decisive under the conflict law of the forum. Thus, every contract in the nature of an exchange contract involving the currency of a member country to the Agreement, will be, as to its *enforceability* in any of the

181. Schwarzenberger, *The Province and Standards of International Economic Law*, 2 INT'L L.Q. 402 (1948).

182. *Kraus v. Zivnostenska Banka*, 64 N.Y.S.2d 208 (Sup. Ct. 1946); *Cermak v. Bata Akciova Spolecnost*, 80 N.Y.S.2d 782 (Sup. Ct. 1948); *Perutz v. Bohemian Discount Bank*, 304 N.Y. 533, 111 N.E.2d 6 (1953); *In re Sik's Estate*, 129 N.Y.S.2d 134 (Surr. Ct. 1954). Cf. *Kahler v. Midland Bank Ltd.*, 1 All. E.R. 811 (1948), *aff'd* 2 All. E.R. 621 (1949); *Frankman v. Anglo-Prague Credit Bank*, 2 All. E.R. 671, 1025 (1949).

Friedman, *Foreign Exchange Controls in American Courts*, 26 ST. JOHN'S L. REV. 97 (1951); Comment, *Use of Bretton Woods Agreement on Enforcement of Foreign Currency Restrictions by American Courts*, 53 COL. L. REV. 747 (1953).

183. For a comprehensive discussion, Meyer, *Recognition of Exchange Contracts After the International Monetary Fund Agreement*, 62 YALE L.J. 867 (1953); also Campenhout, *International Monetary Fund Agreement and Foreign Exchange Control Regulations*, 2 AM. J. COMP. L. 389 (1953); MANN, *THE LEGAL ASPECT OF MONEY* 378 (2d ed. 1953); same, *Private International Law of Exchange Controls under the International Monetary Fund Agreement*, 2 INT'L & COMP. L.Q. 97 (1953); Nussbaum, *Exchange Controls and the International Monetary Fund*, 59 YALE L.J. 395 (1950); same, *MONEY IN THE LAW, NATIONAL AND INTERNATIONAL* 449 (1950); Comment, *The Treatment of Foreign Exchange Controls in the Conflict of Laws*, 34 VA. L. REV. 497 (1948); Gold, *L'Application des Statuts de Fond Monetaire par les Tribunaux*, 40 REVUE CRITIQUE 511 (1951). For comparative materials, see I.M.F., Staff Papers (from 1951 on); on Germany, Domke, *Zur Auslandsanwendung Deutschen Devisenrechts*, *Juristenzeitung* 484 (1954).

member countries, tested against the exchange controls enacted in the country whose currency is involved.<sup>184</sup> It follows that exchange contracts will be denied enforceability if found to be contrary to the exchange controls of the country whose currency is involved, provided, such unenforceability is decreed by the law of the same country.<sup>185</sup>

*Employment contracts.*<sup>186</sup>—One group of treaty provisions concerning labor law assures treaty aliens of the *right to hire* personnel for their business "regardless of nationality" (treaty with China, 1946, Art. II, 2; Italy, 1948, Art. I, 1, c, etc.). In some of the recent treaties this rule is spelled out in more detail, e.g., in the treaty with Uruguay (1949, Art. V, 4) which permits the engagement of "technical experts, executive personnel, attorneys, agents and other specialized employees of their choice, regardless of nationality." This exemption from the municipal law imposing restrictions as to employment of aliens is pointed out expressly in the treaty with Colombia (1951), declaring inapplicable, with regard to identical classes of employees, "laws regarding the nationality of employees" (Art. VII, 3). Much stricter in this sense seems, for example, the treaty with Greece (1951) permitting the hiring of similar classes of employees only "among those legally in the country and eligible to work" (Art. XII, 4), a provision probably intended to constitute a reservation in favor of local law.

From early times, there are a few treaties still in force providing that there is no obligation upon treaty aliens to employ other employees than those employed by nationals and not for different salaries (e.g., treaties

184. Same result was reached in the official interpretation, I.M.F., ANNUAL REPORT 82, 1949; 14 FED. REG. 5208 (1949), "... such contracts will be treated as unenforceable notwithstanding that under the private international law of the forum, the law under which the foreign exchange controls are maintained or imposed is not the law which governs the exchange contract or its performance."

185. The question as to whether or not official interpretations of the Agreement, 14 FED. REG. 5208 (1949) (see note 184, *supra*), are conclusive upon courts in private litigations involving some provision of the Agreement, is to be found in a proper reading of Art. XVIII of the Agreement referring only to disputes "arising between any member and the Fund or between any members of the Fund;" which language does not extend the power of such 'authentic interpretation' by the Executive Directors to cases not involving relations between the Fund and its members or members of the Fund. *Contra*, International Bank for Reconstruction and Development v. All American Cables and Radio, F.C.C. Docket # 9362.

186. GIBSON, ALIENS AND THE LAW 119 (1940); Kohler, *Legal Disabilities of Aliens in the United States*, 16 A.B.A.J. 113 (1930); Comment, *Constitutionality of Legislative Discrimination against the Alien and His Right to Work*, 83 U. OF PA. L. REV. 74 (1935); Fellman, *The Alien's Right to Work*, 22 MINN. L. REV. 137 (1938).

In *Courant v. International Photographers of Motion Pictures, Local 659*, 176 F.2d 1000 (9th Cir. 1949) plaintiff invoked the treaty with Poland (1931) and the U.N. Charter to substantiate his claim for damages caused by defendant's denial to accept him as a member. The court held that both international agreements "have nothing to do with the problem here presented", finding that "the union activity involved was not governmental in character" (1002), which position, taken alone, seems doubtful since the interpretation of treaty law does not necessarily follow rules of construction as developed in regard to the Constitution which admittedly affects only relations between citizens on one side and the government on the other.

with Costa Rica, 1851, Art. VII; with Argentina, 1853, Art. VIII).<sup>187</sup>

Conventions adopted by the International Labor Conference and ratified by the United States<sup>188</sup> contain uniform labor law<sup>189</sup> except one anti-discriminatory provision already mentioned and a saving clause in favor of local law where the latter "ensures more favorable conditions than those

187. Independent *professions* available to treaty aliens are listed in treaties as are limitations upon this privilege. The profession of merchant is open to treaty aliens in some treaties generally, while in others the privilege is limited to commerce between the contracting countries. In some instances a general standard is set up, e.g., national treatment (e.g., treaty with China, 1946, Art. II, 2), most-favored-nation clause (e.g., treaty with Greece, 1951, Art. VI, 2; Ethiopia, 1951, Art. VI, 1; Ireland, 1950, Art. I, 1); or both standards combined (e.g., treaty with Austria, 1928, Art. I, 1). Some treaties contained an express reservation in favor of local law ("... carry on every form of economic activity which is not forbidden by local law," treaty with Germany, 1923, Art. I, 1, repeated in treaties with El Salvador, 1926, Art. I, 1, and Honduras, 1927, Art. I, 1). No standard is established in treaties with Colombia (1951, Art. II, 1), Denmark (1951, Art. II, 1), Israel (1951, Art. II, 1) while the treaty with Uruguay (1951, Art. II, 1) contains the rule formulated differently ("... shall not engage in gainful occupations in contravention of limitations expressly imposed, according to law, as a condition of their admittance," Art. V, 3). The recent treaty with Japan (1953, Art. I, 1) adds to the list of permitted commercial activities the development and direction of enterprises in which such treaty aliens "have invested." Wilson, *Treaty-Merchant Clause in Commercial Treaties of the United States*, 44 AM. J. INT'L L. 145 (1950).

In regard to the so-called *liberal professions* some treaties contain a general permission in favor of treaty to aliens (e.g., with Ethiopia, 1951, Art. VI, 3; Uruguay, 1949, Art. V, combined with national treatment; Colombia, 1951, Art. VII, 1). Another group of treaties excepts certain professions from such general permission, e.g., with respect to practice of law (treaty with Italy, 1948, Art. I, 2; Ireland, 1951, Art. VI, 1a); practice of law, dentistry and pharmacy (treaty with Greece, 1951, Art. II). The third group of treaties exclude professions reserved, according to municipal law, to nationals (e.g., treaty with China, 1946, Art. II, 2; Denmark, 1951, Art. VII, 3, granting national treatment except to professions which are state licensed and "reserved by statute exclusively to citizens of the country"). In some treaties even this impediment of aliengage is removed, e.g., in the treaty with Israel (1951, Art. VIII, 2) which all other requirements as applicable to nationals, remain in force in regard to treaty aliens, *Cf. Hearings before a Subcommittee of the Committee on Foreign Relations*, 82nd Cong., 2nd Sess. 38 (1952). The same rule is adopted in the treaty with Japan except that the privilege does not extend to the professions of notary public and port pilot (Protocol 5) and, according to a United States reservation, shall not extend to professions "which... are state-licensed and reserved by statute or constitution exclusively to citizens"; on the other hand, Japan reserved the right to impose prohibitions or restrictions to the same extent as States "to which such national belong, impose prohibitions or restrictions on nationals of Japan with respect to practicing such professions."

Finally, it should be mentioned that activities of *commercial travellers* are regulated by special treaties (e.g., with Guatemala, 1918, 41 Stat. 1669; El Salvador, 1919; Panama, 1919; Venezuela, 1919), or these provisions are included in treaties of friendship, commerce, etc. (e.g., Art. X of the treaty with Uruguay, 1949).

Comment, *International Law - Reservations to Commercial Treaties Dealing with Alien's Right to Engage in the Profession*, 52 MICH. L. REV. 1184 (1954); Brause, *Legislation Restricting the Participation of Aliens in the Professions and Occupations*, IMM. & NATUR. REP. 45 (April, 1953).

188. 54 STAT. 1683, 1693, 1707. DILLON, INTERNATIONAL LABOR CONVENTIONS (1942); WEINFELD, LABOR TREATIES AND LABOR COMPACTS (1937); Ray, INTERNATIONAL REGULATION OF LABOR RELATIONS, 2 LAB. L.J. 647 (1951). For Convention No. 74 (Certification of able seamen, 1946), see TLAS 2949.

189. Cases involving these Conventions: *Fatrell v. United States*, 336 U.S. 511 (1949); *Aguilar v. Standard Oil Co.*, 318 U.S. 724 (1943); *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 36 (1943); *Smith v. United States*, 176 F.2d 550 (1948); *Smith v. United States*, *The Robert Jordan*, 167 F.2d 550 (4th Cir. 1948). Two additional cases are cited in note 176, *supra*.

provided by this Convention" (Art. 12 of the Convention concerning ship-owners' liability). The same Convention contains additional reservations in favor of local law in regard to exceptions to coverage (Art. 1, 1), medical examination (Art. 2, 3), period of care (Art. 4, 2), compulsory social insurance (Art. 4, 3), wages (Art. 5, 2), burial expenses (Art. 7, 2), safeguard of property (Art. 8) and settlement of disputes (Art. 9).

Moreover, conflict rules are included in international arrangements concerning *migratory workers*, especially in relation to Mexico.<sup>190</sup> A similar convention with Costa Rica (1944) has been referred to above and its conflict rule discussed.<sup>191</sup> In the Agreement with Mexico concerning migration of Mexican agricultural workers (1948, 62 Stat. 3887) the rule of non-discriminatory treatment is repeated (Executive Order of the President, no. 9346, 6 Fed. Reg. 3109, 1943) guaranteeing such treatment with regard to wages, occupational diseases and accident benefits "as enjoyed by domestic agricultural workers under applicable state or federal legislation of the United States" (15). On the contrary, this does not include minimum wages because of lack on the part of federal authorities (i.e. the Department of Labor), of "statutory authority" (24). The recent Bracero treaty (1951)<sup>192</sup> contains, with regard to working conditions of Mexican migratory workers the undertaking by the United States to "exercise special vigilance and its moral influence with state and local authorities, to the end that Mexican workers may enjoy impartially and expeditiously the rights which the laws of the United States grant to them" (Art. 35).<sup>193</sup>

It appears from the foregoing provisions that, in most instances, treaty law follows the rule that employment contracts are governed by the *law of the place where work is done*. This rule is also adopted with regard to "conditions of employment and work, in particular wages, supplementary payments and conditions for the protection of workers" in the Agreement between parties to the NATO regarding the status of their forces (1951) by providing that legal conditions of work "shall be those laid down by the legislation of the receiving state," i.e., of the country where work is performed (Art. IX, 4).

It only remains in this chapter to mention that during the last war, entrepreneurs, domestic and foreign, were required, in order to qualify for *foreign procurement contracts* (especially in Mexico, Peru, Bolivia and Guatemala), to agree that they will comply with all local laws and regulations affecting labor relations, hours of work, wages, unemployment; pay locally prevailing wages, safeguard against accidents, etc.<sup>194</sup> A similar

190. Goot, *Employment of Foreign Workers in United States Agriculture*, 21 DEP'T STATE BULL. 43 (1949); *United States - Mexico Agreement on Farm Labor*, 30 DEP'T STATE BULL. 467 (1953).

191. See 8 MIAMI L.Q. 510, *supra*.

192. 2 U.S. CODE CONG. & ADMIN. NEWS 2713 (1951). Cf. *Goodwill Industries of El Paso v. U.S.*, 218 F.2d 270 (5th Cir. 1954).

193. See 65 STAT. & 501 (1949) as amended, 119, 7 U.S.C. § 1461 *seq.*

194. Mathews, *Labor Standards Provisions in Government Foreign Procurement Contracts*, 42 ILL. L. REV. 141 (1947).

method is used in our municipal law in connection with foreign investments; the Act for International Development (1950, 64 Stat. 204, 22 U.S.C. Section 1557) provides that "investors... will observe local laws and will provide adequate wages and working conditions for local labor."<sup>195</sup>

*Transportation: By land.* — The United States stayed away, for obvious reasons, from important international agreements concerning transportation by railways. As to transportation by *road*, a provision contained in the Convention on the regulation of interamerican automotive traffic (Washington, 1930, TIAS 1567) may be noted; operators of motor vehicles are "subject to the traffic laws and regulations in force in that state or subdivision thereof," meaning the *lex loci*.

*By sea.* — The Convention for unification of certain rules relating to bills of lading (Brussels, 1924) enacted as the Carriage of Goods by Sea Act (1936, '49 Stat. 1207) contains uniform substantive law.<sup>196</sup>

*By air.* — The Warsaw Convention (1929)<sup>197</sup> created, for the most part, uniform substantive law concerning liabilities of carriers engaged in international air transportation. In a general way, it is to be put forward that these rules apply regardless of what cause of action is pleaded, in contract or in tort, since the convention, in order to prevent any kind of legalistic jockeying for a more advantageous position, has flatly stated that any action for damages "however founded" (Art. 24, 1) is subject to "conditions and limitations" (Art. 17, 18, 19) as established by the convention. The specific cause of action may be important only where, according to the convention, municipal law controls; e.g., in situations where the carrier is not entitled to invoke limitations of his liability; because he has accepted passengers without regular ticket, or if the ticket lacked the prescribed reference to the convention.<sup>198</sup> One of these grounds, namely wilful misconduct or default (Art. 25), is tied in with a conflict rule prescribing how to characterize this notion (*i.e.*, which "in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct").<sup>199</sup>

Another conflict rule inserted into the convention relates to contributory negligence. As it was already pointed out, the court may, in such a

195. On problems of social insurance, see *supra* XI, 1; note the Agreement with Canada (1942, 56 STAT. 1770).

196. KNAUTH, THE AMERICAN LAW OF OCEAN BILLS OF LADING (1947).

197. GOEDHUIS, LA CONVENTION DE WARSOVIE (1933); same, NATIONAL AIRLEGISLATION AND THE WARSAW CONVENTION (1937); Sullivan, *Codification of Air Carriers Liability by International Convention*, 7 J. AIR L. 1 (1936); Lathfors and Fennel, *The International Conventions on Private Aerial Law*, 8 J. AIR L. 298 (1938); De Vischer, *Les Conflict des Loïs en Matière de Droit Aerien*, RECUEIL DES COURS (Hague) II, 279 (1934).

198. Grein v. Imperial Airways, 1 K.B. 50 (1937).

199. American Airlines v. Ulen, 186 F.2d 529 (D.C. Cir. 1949); Goepp v. American Overseas Airlines, 117 N.Y.S.2d 276 (1st Dep't 1952), also comment, 1 MCGILL L. REV. 231 (1953); Froman v. Pan American Airways, 1953 U.S. & Can. Av. Rep. 1; Horabin v. B.O.A.C., 2 All E.R. 1016 (1952), see note 269, *infra*, (next issue).



case, deny or mitigate damages "according to its own law", *i.e.*, the law applicable *lege fori*, which may or may not allow such denial or mitigation (Art. 21). The *lex fori* will also decide whether or not damages may be awarded in periodical payments (Art. 22, 1). The question of who may bring an action is left, according to the Convention (Art. 24, 2), to the law applicable under the *lex fori*.<sup>200</sup> On the contrary, the Convention expressly authorizes that an action may be brought against the representative of the carrier's estate in case of his death (Art. 27).

It may be added that parties (passengers and carriers) cannot 'contract-out' the Convention. According to an express provision (Art. 32) "any clause contained in the contract and all special agreements... by which the parties purport to infringe the rules laid down by the Convention... by deciding the law applicable... shall be null and void."

In conclusion, a general conflict rule, included in a considerable number of treaties, may be registered making the law of the territory over which the aircraft flies applicable ("The aircraft, their crews and passengers and goods carried thereon, will, while within or over a territory to which this Convention applies, be subject to the laws in force in that territory, including all regulations relating to air traffic... the transportation of passengers and goods, and public safety and order, as well as any regulation concerning immigration," treaties with Belgium, 1946, Art. V; Canada, 1938, Art. IV; Denmark, 1934, Art. 5; France, 1939, Art. 5; Great Britain, 1935, Art. 4; Portugal, 1945, Art. VI; Switzerland, 1945, Art. 5, etc.). This provision would indicate that, in relation between the contracting countries, the principle of territoriality will prevail over that of the quasi-nationality of the aircraft.

*Note:* This present study will be concluded in the next issue of the Miami Law Quarterly.

---

200. See note 140 *supra*.