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CONFLICT LAW IN UNITED STATES TREATIES

S. A. BAYITCH*

When a case having contacts with more than one country appears, the forum will first determine whether or not to take jurisdiction. Once this question is answered in the positive the court faces the problem of what law to apply. Whatever course is chosen the courts will be guided in their decisions by rules of conflict law,¹ or, more precisely, first by the law concerning jurisdictional conflicts, and then by rules regulating the "choice of law."

At present, each country establishes for itself its own conflict law. Consequently, rules in force in different countries may lead, under the same circumstances, to different results. Attempts to remedy this situation have been undertaken by means of treaties. Two ways are available: first, to eliminate the need for conflict law altogether by providing for adoption, by the contracting countries, of uniform substantive law. Once the law of sales is internationally uniform, for example, there will be no need for internationally uniform conflict law concerning sales. The second method, much less ambitious, continues the need for conflict law in view of the still different substantive law, but aims at eliminating, or, at least, reducing the differences in conflict law by providing for a more or less complete set of internationally uniform conflict rules for the participating countries.²

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1. "Conflict law" as used here presents a shorter and, in addition, more logical term. "Conflict of laws" may designate the fact of conflicting, not a branch of law, unless the full form is adopted: "law of conflict of laws." I submit a term patterned after some already accepted, as state law, treaty law, bankruptcy law, etc., in the hope that the appearance of the equally inaccurate term of "private international law" is only a passing fancy [cf. 23 Proceedings of the American Society of International Law 43 (1929)1].

2. Cf. Jitta, *The Development of Private International Law Through Treaties*, 29 YALE L.J. 497 (1920); Makarow, *Die Vereinheitlichung des Internationalen*

Turning to the conflict law as in force in these United States, a negative statement seems appropriate; namely, that the United States has refrained from adhering to treaties on such uniform conflict law. This was the attitude with regard to the European undertaking of the Hague conferences,³ and a similar position was taken with respect to the *Codigo*

Bustamante, an inter-american affair.⁴ Nevertheless, important areas of conflict law as in force in this country are controlled by treaty law, and it shall be the purpose of the present study to explore this neglected source of our conflict law.

I

TREATIES AND CONFLICT LAW

Under our constitutional system conflict law is primarily a matter of state law. "States are free to adopt such rules of conflict of laws as they choose . . . subject to . . . constitutional limitations."⁵ While constitutional limitations affect state conflict law as between sister states, state conflict law operating on the international level obtains even in situations where such state law would "have some incidental or indirect effect in foreign countries."⁶ This power reserved to states to regulate conflict law on the inter-state as well as on the inter-national level is curtailed only by powers vested in the national government. Its legislative powers may be exercised as to interstate conflict law (interstate commerce, Full Faith and Credit Clause, etc.) as well as in international conflict situations (commerce with foreign nations). The federal judiciary will not exercise control on constitutional grounds over state created conflict law (statutory as well as judicial) in situations involving international conflict situations, except by enforcing treaty law, if any, as against local conflict law. It will, however, administer federal statutory and treaty law as well as international law, and in this context it will create its own case law.⁷ The most important power of the federal government affecting conflict law is vested in the executive branch; namely, the power of the President to make treaties "with the advice and consent of the Senate . . . provided two thirds of the senators present concur." (Art. II, Section 2 of the Constitution).

Privatrechts durch Staatsverträge, FRIEDENSWARTE 340 (1953); Tucker, *The Conflict of Laws of Laws*, 3 STAN. L. REV. 388, 410 (1951); Nadelmann, *Ignored State Interests: the Federal Government and International Efforts to Unify Rules of Private Law*, 102 U. OF PA. L. REV. 232 (1954).

3. K.H.N., *The United States and the Hague Conferences on Private International Law*, 1 AM. J. COMP. L. 268 (1952).

4. See note 16 *infra*.

5. *Wells v. Simonds Abrasive*, 345 U.S. 515, 516 (1953).

6. *Clark v. Allen*, 331 U.S. 503, 517 (1949).

7. According to views expressed in *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938), no judicial legislation may be exercised by federal courts in areas where there is no corresponding federal legislative power.

This power expanded by the judicial recognition of executive agreements,⁸ is extremely broad, primarily because the treaty-making power is not limited to matters within the congressional legislative powers as listed in Art. I, Section 8 of the Constitution. This means that by exercising the treaty-making power the executive may create conflict law regardless of powers reserved in this respect to states. Moreover, relying upon the treaty-making power the executive may extend, under the Necessary and Proper Clause (Art. I, Section 8), the legislative powers of the Congress.⁹ All treaty law, including law emanating from executive agreements,¹⁰ is given the penetrating effect of the "supreme law of the land; and all judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding" (Art. VI of the Constitution).¹¹

The question still remains to what extent, if any, the executive is limited in the exercise of its treaty-making power by other constitutional considerations.¹² Besides constitutional requirements as to procedure, *i.e.*, advice of the Senate, by now almost completely obliterated by the recognition of executive agreements as having the same dignity as

8. McClure, *INTERNATIONAL EXECUTIVE AGREEMENTS* (1941); McDougal and Lans, *Treaties and Congressional Executive or Presidential Agreements . . .*, 54 *YALE L.J.* 181 (1945); Borchard, *Treaties and Executive Agreements . . .*, 54 *YALE L.J.* 616 (1945). For recent publications, see Hill, *Treaty Making Power of the United States, a Bibliographical Guide*, 9 *RECORD* 72 (1954).

9. *Missouri v. Holland*, 252 U.S. 416 (1920).

10. With limitations as to pre-existing federal statutes, *cf.* *United States v. Guy W. Capps, Inc.*, 204 F.2d 655 (4th Cir. 1953); Sutherland, *The Bricker Amendment, Executive Agreements and Imported Potatoes*, 67 *HARV. L. REV.* 281 (1953).

11. As to the law applicable in federal courts, *cf.* 28 U.S.C. § 1652 (1946), the "rule of decision" referring to the "laws of the several states, except where . . . treaties . . . otherwise require or provide . . ."

12. The Commerce Clause of the Constitution as limiting the treaty-making power in favor of Congress was invoked, without success, to show the unconstitutionality of the Warsaw Convention, in *Indemnity Ins. Co. of North America v. Pan American Airways*, 58 F. Supp. 338, 339 (S.D. N.Y. 1944), the court holding that the "alleged conflict between the treaty and the Constitution . . . in the fact that the treaty professes to regulate commerce, a power entrusted exclusively to Congress" does not exist. "The Warsaw Convention, it is not disputed, was made by the President with advice and consent of the Senate . . . No reported decision has been called to my attention wherein the validity of a treaty duly ratified in the manner prescribed by the Constitution has been challenged on the ground that it conflicts with the power vested in Congress to regulate commerce. While the novelty of an argument is not to be taken against it, nevertheless one cannot fail to observe the uninterrupted uniformity of the practice by which treaties of commerce, from the earliest days of the Republic, have been made in the manner now challenged, without arousing so much as a doubt as to the propriety of the course taken. The broad sweep of the treaty power is in good measure reflected in the absence of any decision holding a treaty unconstitutional." *Cf.* the language used in a case involving an executive agreement, *United States v. Guy W. Capps*, 204 F.2d 655 (4th Cir. 1953) that "The power to regulate foreign commerce is vested in Congress, not in the executive . . . and the executive may not exercise the power by entering into executive agreements and suing in the courts for damages . . ."

treaties,¹³ treaty law remains, of course, subject to fundamental constitutional principles which may be changed only by constitutional amendment. With regard to conflict law created by the exercise of the treaty-making power, one fundamental problem arises: may the executive, relying upon its treaty-making power, include into treaties any matter it pleases? Phrasing the problem differently, may the treaty-making power be exercised indiscriminately over any matter whatsoever or is it limited to matters which are, let us say, by their very nature "international" and, consequently, appropriate to be regulated by international agreements between sovereign countries. In adopting the first alternative, the executive would be authorized, as a matter of constitutional law, to take advantage of this exceptional law-making device and enact law which may have, at least *prima facie*, nothing to do with international relations, *e.g.*, substantive labor law, applicable only in intra-state situations; or enact, by treaty-making, uniform negotiable instrument conflict law, applicable not only in inter-national but in inter-state situations as well. For a long time the Supreme Court followed the second alternative, applying the *proper-subject test*. Consistently it held that treaties may regulate "all those subjects which in the ordinary intercourse of nations have usually been subject to negotiations and treaty . . ." ¹⁴ Regarding treaty conflict law, the Supreme Court held that "The treaty-making power is broad enough to cover all subjects that properly pertain to our foreign relations, and agreement with respect to the rights and privileges of citizens of the United States in foreign countries, and nationals of such foreign countries within the United States, and the disposition of property of aliens dying within the territory of the respective parties, is within the scope of that power, and conflicting law of the state must yield."¹⁵ Under this proper-subject test only treaty law concerned with inter-national situations would have the effect granted to treaties under the Supremacy Clause. The test would, consequently, exclude from this privilege treaty law regulating mere inter-state or intra-state situations. This latter result, however, has never been reached by the Supreme Court since in all cases it was found that the particular treaty passed the proper-subject test.¹⁶

13. Cf. *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

14. *Geofroy v. Riggs*, 133 U.S. 258, 266 (1890).

15. *Santovincenzo v. Egan*, 284 U.S. 30, 40 (1931).

16. In spite of the liberal attitude adopted by the Supreme Court, the executive, especially the Department of State, always acted cautiously. A few examples relating to conflict law shall suffice. In 1851, the presidential message submitting the treaty with Switzerland to the Senate declared that regulations concerning holding of land by aliens "is not supposed to be a power properly to be exercised by the President and the Senate in concluding and ratifying a treaty with a foreign state. The authority naturally belongs to the state within whose limits the land may lay" [5 MILLER, *TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA*, 881 (1937)]. The underlying idea was taken up by J. Cardozo in his elaborate opinion *In re D'Adamo's Estate*, 212 N.Y. 214, 106 N.E. 81, 85 (1914), by stating that the executive has no power to establish by treaties rules concerning the administration of

At the present time, however, this strict rule seems to be relaxed in favor of a more flexible test. At first, the Supreme Court only indicated that "no subject is expressly excluded by the Constitution from treaty negotiation nor any type or form of convention. It is not, in the second

estate left by aliens. "Each state, under our system, has exclusive jurisdiction over the administration of property of persons, whether foreigners or citizens dying within its limits." This reasoning was later declined by the Supreme Court in *Santovincenzo v. Egan*, 284 U.S. 30 (1931); it seems to be still lingering on; cf. *Amaya v. Stanolid Oil & Gas Co.*, 158 F.2d 554 (5th Cir. 1946), cert. denied, 331 U.S. 808, 867 (1946).

Equally noticeable is the care not to compromise by treaty our constitutional principles. The treaties with Italy (1878, Art. IV), with Yugoslavia (1881, Art. IV) and with Greece (1902, Art. IV) contain, in connection with testimony to be given by consuls, the express proviso that "Nothing in the foregoing part of this Article . . . shall be construed to conflict with the provision of the sixth article of the amendments to the Constitution of the United States or with like provisions in the Constitutions of the several states, whereby the right is secured to persons charged with crimes, to obtain witnesses in their favor, and to be confronted with the witnesses against them." To this unilateral reservation in favor of a privilege of an American citizen under the Constitutions (federal and state) the treaties with Italy and Yugoslavia add that such treatment according to the American standards "shall also be granted to the consuls of the United States" in the receiving country.

It may be added that some of our constitutional standards, like the Due Process and the Full Faith and Credit, penetrated into the language of some treaties: the first appears, e.g., in the treaty with Germany (1923, Art. I), with China (1946, Art. VI, 4), etc. and the second, at least the term, was introduced into the treaty with China with respect to arbitration agreements. As to the problems involved, cf. Wilson, *Property-Protection Provisions in United States Treaties*, 45 AM. J. INT'L L. 83, 99 (1951) and *The International Law Standards in Treaties of the United States* (1953).

In both the treaty of Versailles [treaty of Berlin, 1921, 42 STAT. 1939, cf. Department of State, *The Treaty of Versailles and After, Annotations of the Text of the Treaty* (1947)] and the treaties of peace of Paris (1947), the United States expressly declined to adhere to provisions concerning matters of contract law, statute of limitations, negotiable instruments, insurance, including some conflict rules, by stating (Art. 299c of the treaty of Versailles) that "Having regard to the provisions of the Constitution and the laws of the United States of America . . . neither the present Article . . . shall apply." A similar position was taken in the treaty of peace with Italy (1947, 61 STAT. 1648, Annex XVI, part D, 2): "Having regard to the legal system of the United States . . . the provisions of this Annex shall not apply as between the United States . . . and Italy." The recent peace treaty with Japan [1951, cf. Department of State, *Conference for the Conclusion and Signature of the Treaty of Peace with Japan* 421 (1951)] contains similar provisions like the Paris treaties in a separate protocol not signed by the United States.

The same attitude prevailed with regard to the *Codigo Bustamante* on inter-american conflict law, adopted by the Sixth International Conference of American States in Havana (1928). Cf. Lorenzen, *The Pan American Code of Private International Law*, 4 TULANE L. REV. 499, 519 (1930); Bustamante, *The American System on the Conflict of Laws and Their Reconciliation*, 5 TULANE L. REV. 537 (1931); also Kuhn, *Opinion of the Inter-American Judicial Commission on Revision of the Bustamante Code*, 40 AM. J. INT'L L. 317 (1952). The United States delegation considered itself unable to approve the Code "in view of the Constitution of the United States . . . the relation among the States members of the Union and the powers and functions of the Federal government." The problem was discussed by the American Society of International Law [Proceedings, vol. 33, 36 (1929)]. It was emphasized that the above declaration does not represent a "constitutional non-possimus" (37), but only pointed out "certain difficulties in the way of commitments by the United States to certain principles of private international law." "We must recognize," stated one member "that our Federal government . . . will not, as a practical matter, undertake to do things which might conceivably be controversial" (39), recognizing, at the same time, that "reserved powers of states are not such limitations" (40).

Note the Convention for the formation of codes of public and private international law, adopted by the Second International Conference of American States (Mexico, 1902) signed by the United States but not ratified.

place, clear that any such restriction is to be inferred from the Constitution."¹⁷ This negative statement, going beyond the proper-subject test, was implemented later by a new, positive test: treaties and executive agreements will be given the law-of-the-land effect according to the Constitution provided they are "clearly necessary to effectuate *national policy*."¹⁸ According to this doctrine anything may be negotiated and settled by treaties or executive agreements, whether the subject-matter be of inter-national, inter-state or intra-state nature, provided it is justified by necessities of our "national policy." The Supreme Court went even so far as to say that the exercise of the treaty-making power is not subject to judicial control, on the ground that "the conduct of foreign relations (is) committed by the Constitution to the political department of the Federal Government and the property of the exercise of that power is not open to judicial inquiry."¹⁹

This shift in attitude as experienced in a decade is justified,²⁰ if not dictated, by fundamental changes in the methods and objectives of international cooperation. Today, international cooperation between countries is not limited to problems of regulating specific privileges to be granted nationals of the other country in a rather limited number of inter-national situations. On the contrary, it has developed into a world wide legislative program designed to create uniform world law in areas where the demand for security, welfare and happiness, individual as well as national, is most articulate: in labor law,²¹ in human rights,²² in international trade,²³ in land reform,²⁴ in health,²⁵ etc. By now no country may safely withhold its cooperation. As for the United States, the question to be or not to be a member of an active international community, is already decided by its membership in several world organizations²⁶ whose aims include, among others, preparation and adoption of internationally

17. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936).

18. *United States v. Pink*, 315 U.S. 203, 230 (1942).

19. *United States v. Belmont*, 301 U.S. 324, 328 (1937).

20. Cf. Comment, 7 *MIAMI L.Q.* 400 (1953).

21. Cf. *International Labour Office*, *INT'L LABOUR CODE 1951* (1952); also note 28 *infra*.

22. Hyman, *Constitutional Aspects of the Covenant*, 14 *LAW & CONT. PR.* 451 (1949); McDougal-Leighton, *The Rights of Man in the World Community* . . . *id.* at 490; Chaffee, *Federal and State Powers under the United Nations Covenant on Human Rights*, 1951 *WIS. L. REV.* 389; Claudy, *The Treaty Power and Human Rights*, 1951 *WIS. L. REV.* 389 (1951); Claudy, *The Treaty Power and Human Rights*, 36 *CORNELL L.Q.* 699 (1951); MacChesney, *International Protection of Human Rights in the United Nations* 47 *N.W.U.L. REV.* 198 (1952).

23. Cf. MIKESSELL, *UNITED STATES ECONOMIC POLICY AND INTERNATIONAL RELATIONS* (1952); ALEXANDROWICZ, *INTERNATIONAL ECONOMIC ORGANIZATIONS* (1953).

24. Lubin, *Land Reform Problem Challenges Free World*, 25 *DEP'T. STATE BULL.* 467 (1951).

25. Sharp, *The New World Health Organization* 41 *AM. J. INT'L L.* 509 (1947).

26. Cf. Jenks, *The Impact of International Organizations of Public and Private International Law*, 37 *TRANSACTIONS GROTIUS SOCIETY* 29 (1951); ALLEN, *THE TREATY AS AN INSTRUMENT OF LEGISLATION* (1952).

uniform law. One of them, the Organization of American States,²⁷ is expressly authorized to "promote the development and codification of public and private international law," *i.e.*, conflict law, and, also "to study the possibility of attaining uniformity in the legislation of the various American countries, insofar as it may appear desirable." (Art. 67 of the Bogota Charter, 1948, 2 UST 2395). It is to be kept in mind, however, that in all these undertakings such internationally uniform law is to be adopted by countries according to their own constitutional law.^{28 29}

II

APPLICATION OF TREATY LAW

Even if granted the authority of the "law of the land," treaty law does not apply as does statutory law. Its application is limited since it controls, as a rule, only situations within the specific coverage provisions contained in the respective treaty, *e.g.*, because nationals of the contracting countries are involved.³⁰

27. Fenwick, *The Charter of the Organization of American States as the "Law of the Land,"* 47 AM. J. INT'L L. 281 (1953).

28. The United Nations may make to its members recommendations for various types of international cooperation, *e.g.*, economic, social, cultural, etc. (Art. 13, 1 of the Charter); the Economic and Social Council may "prepare draft conventions for submission to the General Assembly" (Art. 62, 3). More articulate is the Constitution of the Food and Agricultural Organization (59 STAT. 529) authorized to make recommendations to be submitted to member states "with a view to their acceptance by the appropriate constitutional procedure" (Art. 14, 3). Similarly, UNESCO submits recommendations to "competent authorities" of its member-states (Art. IV 4). Elaborate provisions, taking into consideration even specific problems facing federal states, are contained in the Constitution of the International Labor Organization (Art. 17, 49 STAT. 2713); *cf.* Hudson, *The Membership of the United States in the International Labor Organization*, 28 AM. J. INT'L L. 669, (1934); Reilly, *Ratification of International Labor Conventions*, 18 B.U.L. REV. 579, (1938); Riesman, *The American Constitution and International Labor Organizations*, 44 INT'L LABOR REV. 123 (1941); DILLON, *INTERNATIONAL LABOR CONVENTIONS, THEIR INTERPRETATION AND REVISION* (1942). On the contrary, a limited regulation-making power is conferred upon the Health Assembly (W.H.O., Art. 21, 22, 62 STAT. 2679) but was blocked by a well aimed reservation (Joint Resolution, June 14, 1948, 62 STAT. 411). As to the International Civil Aviation Organization, see Fuller, *International Civil Aviation Organization . . .*, 21 GEO. WASH. L. REV. 86 (1952) and Lissitzin, *The Legal Status of Executive Agreements on Air Transportation*, 17 J. AIR. L. 436 (1950). *Cf.* Jenks, *Some Constitutional Problems of International Organizations*, 22 BRIT. Y.B. INT'L. L. 11, 47 (1945) and PARKER, *THE AMERICAN CONSTITUTION AND WORLD ORDER BASED ON LAW* (1953).

29. The adoption of Art. 2 of the Bricker amendment [S.J. Res. I, 30 DEP'T STATE BULL. 195 (1954)] containing the now famous "which-clause," aimed at eliminating, with respect to treaties, the effect of the Necessary and Proper Clause would make it necessary to check every conflict rule contained in a treaty against the legislative powers of the Congress (without the benefit of the Necessary and Proper Clause, of course) and of the several states. In view of the sometimes overlapping powers, it might be necessary to enact congressional legislation as well as seek state legislative action with respect to one treaty, even to one treaty provision.

30. Statements like, "It will suffice to say that treaty has no application to the private conduct of individual citizens of the United States," *Rice v. Sioux City Memorial Park Cemetery*, 60 N.W.2d 111, 116 (Iowa 1953), and "We do not

As a rule, *bilateral treaties* control situations where nationals of both, or, at least, of one of the contracting countries are involved. An example of the latter situation is presented by the treaty with Germany (1923, Art. IV) making treaty law applicable in situations where the deceased was a national of either contracting country regardless of the nationality of the beneficiary.³¹ The same rule is adopted in the treaty with Italy (1948, Art. V, 3) providing that it applies to "heirs, legatees, donees being persons of whatever nationality" as long as the deceased was a national of one of the contracting countries. Similar methods are used in determining the applicability of treaty law concerning consular notarial functions: consular officials may act in this capacity provided at least one of the parties involved is a national of their country. In some cases, however, the fact that third country nationals are involved makes treaty law inapplicable. A treaty with Belgium (1880, Art. XII) declares consular officials without authority to settle sea damages in cases where third country nationals are involved, and the case remains with local authorities.

In some treaties the applicability of their rules is made dependent upon *reciprocity*,³² e.g., under the treaty with Italy (1948, Art. VII, 7) granting equal national treatment with respect to interest in land. It may suffice to note that the question of whether such reciprocity is formal or factual is left in most cases to interpretation. In some instances reciprocity is imposed unilaterally.³³ In addition, it seems that our courts are inclined to read into treaties the requirement of reciprocity.³⁴

In determining the coverage of *multilateral treaties* different contacts are used. One of them, of course, is nationality of the countries signatory of such treaties. This contact, however, was reduced, e.g., in the Convention for the protection of industrial property (1934, 53 Stat. 1748), with respect to nationals of countries not signatories to the Convention, provided they are domiciled within a member country (Art. 3), to a mere "real and effective industrial or commercial establishment in the territory of any of the countries" signatory³⁵ (Art. 3). Nationals of member-countries, on the other hand, may enjoy privileges under the Convention in another member-country regardless of their domicile or establishment, since the

understand to be the principle of law that a treaty between sovereign nations is applicable to the contractual rights between citizens of the United States when a determination of these rights is sought in the state courts," *Sipes v. McGhee*, 316 Mich. 614, 25 N.W.2d 638 (1947) are justified only in situations where treaties create exclusive rights and duties between countries or between international entities, e.g., the United Nations, and its member states, etc.

31. Cf. *Clark v. Allen*, 331 U.S. 503 (1947).

32. Lenhoff, *Reciprocity in Function: A Problem of Conflict of Laws, Constitutional Law, and International Law*. 15 U. OF PITT. L. REV. 44 (1953).

33. 13 STAT. 121, 22 U.S.C. § 256, ss. (1946).

34. *Rocca v. Thompson*, 223 U.S. 317 (1912), but see *In re Lis' Estate*, *Austro-Hungarian Consul v. Westphal*, 120 Minn. 122, 139 N.W. 300, 306 (1912).

35. Similar methods have been adopted by the Inter-American Treaty on patents of inventions, etc. (Mexico, 1902, not signed by the United States); cf. LADAS, *THE INTERNATIONAL PROTECTION OF INDUSTRIAL PROPERTY* 757 (1930).

"possession of domicile or establishment in the country where protection is claimed" cannot be required by local authorities. Another objective contact is used in air transportation; to make the Warsaw Convention on international transportation by air (1929, 49 Stat. 3000) applicable the flight must have originated in a signatory country and be "international" (Art. 1, 2). A similar criterion, *i.e.*, employment of a specific kind, is used in most of the conventions adopted by the International Labor Conference (*e.g.*, 54 Stat. 1683, 1693, 1705), some of them expressly stating that the conventions apply regardless of the nationality of the worker involved.³⁶

III

DESIGNATION OF THE LAW APPLICABLE

Ordinarily, conflict rules designate the controlling legal system by pointing out the contact to be followed, *e.g.*, the place of making of a contract, the place where the tort occurred, etc. This technique is adopted, naturally, in most of our treaties dealing with conflict situations.³⁷ A special problem, however, arises where there is more than one legal system in force within the country whose law is declared applicable. Generally, treaties do not elaborate on this point. In some treaties, a routine reference is used, a reference to the "applicable law of either High Contracting Party" (treaty with Italy, 1948, Art. II, 1). Consequently, the law applicable will be ascertained according to the internal conflict law of the respective country referred to, *i.e.*, not only by its inter-state conflict law but also according to rules regulating conflicts between federal and state law. Nevertheless, some treaties contain specific provisions, especially in situations where the determination of such internally applicable law has

36. As to the problem of rights vested under treaty law, *cf.* *Chae Chan Pring v. United States*, 130 U.S. 581 (1889): "The rights and interests created by a treaty, which have become so vested that its expiration or abrogation will not destroy or impair them, are such as are connected with and lie in property, capable of sale and transfer or other disposition, not such as are personal and untransferable in their character"; *cf.* also *Chirac v. Chirac*, 2 Wheat. 259 (U.S. 1817).

37. Regarding the designation of the subject-matter of a conflict rule, treaties frequently use notions developed by international law, *e.g.*, commerce or trade, *Tashiro v. Jordan*, 201 Cal. 236, 256 Pac. 545 (1927), *aff'd*, 278 U.S. 123; *Asakura v. Seattle*, 265 U.S. 332 (1923); *Petersen v. Iowa*, 245 U.S. 170 (1917); *Duns v. Brown*, 245 U.S. 167 (1917); *Cornelius v. Seattle*, 123 Wash. 550, 213 Pac. 17 (1923); *Clarke v. Deckenbach*, 274 U.S. 392 (1917); commerce and industry, *Lukich v. Department of Labor and Industries*, 29 P.2d 388 (1934); property, *Dobrin v. Mallory S.S.*, 298 Fed. 349 (E.D. N.Y. 1924); protection and security for persons and property, *Heim v. McCall*, 239 U.S. 175 (1915); *Crane v. People of the State of New York*, 239 U.S. 193 (1915).

Contacts as used in treaties do not differ from those in municipal law; territorial (*e.g.*, *lex situs* in Art. I, § 7 of the treaty with Thailand, 1937; location of personal property in the treaty with Sweden, 1910, Art. XIV, *locus delicti* in Art. II of the treaty with Liberia, 1938, etc.). Personal contacts include, of course, nationality, domicile, religion, also quasi-nationality of corporations and things (vessels, aircraft). The contact established by parties choice of law is mentioned in Art. 32 of the Warsaw Convention (1929).

immediate effect upon privileges to be granted under the treaty by the other contracting country. To cope with this problem, treaties introduce a new contact in addition to nationality, the contact which makes treaty law applicable in the first place. This *auxiliary contact*, the contact of domicile or incorporation, will determine, in addition to the principle of the reciprocal national treatment (see *infra* V), what legal standard will have to be matched by the other contracting country. This method is now being used in many treaties; for example, under the treaty with Italy (1948), an American national will be entitled to invoke, with regard to interests in real property in Italy, only such rights as are "accorded by the state . . . of the United States in which such national is domiciled, or under the laws of which such corporation . . . is created or organized, to nationals . . . of the Italian Republic" (Art. VII, b, 1). A similar technique is adopted in the treaties with China (1946, Art. VIII, 1), with Uruguay (1951, Art. VII, 2), with Israel (1951, Art. IX, 2).

In some of the treaties the law applicable is not deviously indicated by way of contacts, but by *directly naming* the country, the law of which shall apply. According to the treaty with Iran (1928, 47 Stat. 2652) all non-Moslem, United States nationals are subject in Iran, as to their personal status, to their own national law and Iranian courts "would be obligated to apply American law." Similarly, the Costa Rican labor code is expressly declared applicable in the Agreement respecting temporary migration of Costa Rican agricultural workers (1944, Art. II, a, 1, 59 Stat. 1275). The Agreement with Mexico concerning migratory workers (1943, 57 Stat. 1158) went one step further. It not only declared Art. 29 of the Mexican (federal) labor law to apply, but even incorporated it verbatim into the Agreement. A similar method was followed in the now expired Convention regarding the abolition of the capitulations in Egypt (Montreux, 1937, 53 Stat. 1645) where the Egyptian *Règlement d'organisation judiciaire* referred to by the Convention (Art. 3) is annexed in full.

Similarly, the law applicable is designated in the Agreement with Great Britain concerning the Bahamas long range proving ground (1950, TIAS 2099, 1 UST 545). The Agreement provides, in accord with the *lex loci damni* doctrine, that compensation to be paid by the government of the United States "shall not be less than the sum payable under the laws of the Bahama Islands" (Art. XXII), adding, moreover, that the compensation affecting private property "shall be assessed in accordance with the law of the Bahama Islands" (Art. XXII, 2). In this connection an interesting inter-temporal provision may be noted. While, according to a generally accepted conflict rule, a reference to the law applicable means a reference to the law as in force according to its own inter-temporal provisions, the Agreement introduced a *freezing provision* that "for the purpose of this Article the laws of the Bahama Islands shall be the laws

in force at the time of the signature of this Agreement, provided that any subsequent alteration of the said laws shall have effect if the Contracting Parties so agree" (Art. XXII, 3).³⁸

Some treaties contain, of course, a mere *status-quo provision*, as, for example, the Agreement with Canada concerning leased areas in Goose Bay (1952, TIAS 2730) where the United States recognizes that "the laws of Canada shall continue to apply" throughout the area involved (Art. 17).

Finally, it is to be noted that some treaties refer in a general way to *international law* as controlling.³⁹ The Provisional Agreement with Iran (1928, 47 Stat. 2644) for example, provides that the treatment of nationals shall be governed by the "requirements and practices of generally recognized international law" (Art. 1, 3). The same rule appears, moreover, in some recent treaties, *e.g.*, with Thailand (1937, Art. I, 6), Yemen (1946, TIAS 1535), Nepal (1947, TIAS 1585), China (1946, Art. VI), Ireland (1950, Art. II), etc., as to the protection of persons and property. There can be no doubt that international law so referred to as controlling includes also conflict law applicable in private, especially jurisdictional and status matters. This seems to be indicated by the Judicial Agreement between Great Britain and Iraq (1922) recognized by the United States (47 Stat. 1844) where, in connection with a general reference to international law as applicable, the Agreement contains the following provision: "In matters relating to personal status of foreigners or other matters of civil and commercial nature in which it is customary by international law to apply the law of the country, such law shall be applied in a manner to be prescribed by law . . ." (Art. 4).⁴⁰

IV

TREATIES AND LOCAL LAW

Treaties dealing with conflict problems presume, in most instances, that there is municipal conflict law in force in the contracting countries.

38. These provisions are repeated in the additional Agreement (1952, TIAS 2426) with respect to the Turks and Caicos Islands (Art. XXV, 2).

A similar agreement with the Dominican Republic (1951, TIAS 2425) is less explicit; it contains an undertaking by the United States to pay adequate compensation for injuries (Art. IX) without any reference to local law. This law is affected as to such claims by a freezing provision regarding "laws of the Dominican Republic which would derogate or prejudice any of the rights" under the Agreement (Art. XXIV, 2).

39. WILSON, *THE INTERNATIONAL LAW STANDARD IN TREATIES OF THE UNITED STATES* 89 (1953); *cf.* STEVENSON, *Relationship of Private International Law to Public International Law*, 52 *COL. L. REV.* 561 (1952).

40. "In questions of marriage, divorce, maintenance, dowry, guardianship of infants and succession of movable property, the President of the Court . . . may invite the consular representative . . . of the foreigner concerned to sit as an expert for the purpose of advising upon personal law concerned." *Ibid.*

According to Art. I of the Judicial Agreement "foreigners" refers to any European or national of American states who formerly benefited by capitulations in Turkey and did not renounce such privileges before July 24, 1923, *i.e.*, before the Lausanne treaty

The question arises, however, as to what extent such local law will be superseded by treaty law. In a general way it may be said that the obvious intent of treaties is to eliminate contrary local law completely. Nevertheless, in many instances local law, including conflict law, survives due to express treaty provisions.

Local law is being referred to by treaties in two different ways and, accordingly, with different effect to be given to such references. One, a mere *reference* is intended to be a declaration to the effect that treaty law shall be tied in with local law as it stands, wherever treaty law should be effectuated. The other is a reservation *in favor of local law* denying treaty law any effect upon local law.

1. *Reference to local law.*—A mere reference to local law in a treaty makes it clear that rights and privileges under a treaty may be enjoyed according to general rules contained in the local law. The question whether such privileges may be enjoyed remains with the treaty and is in no way affected by local law.

The privilege of "free access to courts,"⁴¹ is usually accompanied by such a reference to local law. The clause that such access will be granted "in conformity with the applicable laws and regulations, if any" (e.g., treaty with China, 1946, Art. VI, 4) does not make the privilege dependent upon the local law, but intends to state that the access itself, the "how," shall be determined by local procedural law, e.g., appearance, jurisdiction, venue, procedure.⁴² This is expressly pointed out in the Convention for the protection of industrial property (1934, 53 Stat. 1748) granting, within the coverage of the Convention, national treatment also with regard to "legal remedies against any infringement . . . provided they (i.e., claimants) observe the conditions and formalities imposed on subjects or citizens" (Art. 2, 1). This reference is clarified in paragraph 3 of Art. 2 that "provisions . . . relative to judicial and administrative proceedings and competent authority . . . are expressly reserved."

A mere reference to local law is used frequently in connection with the privilege of commercial intercourse which is granted, in most treaties, "subject to general laws and usages of the two countries" (treaty with Argentina, 1852, Art. II) or upon "submitting to all local laws and regulations duly established" (treaty with El Salvador, 1926, Art. I). Likewise, the protection of property and persons is accorded "upon conforming with the laws and regulations, if any" (treaty with China, 1946, Art. VI, 3).

[2 HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES, 867 (1947); Turlington, *The Settlement of Lausanne*, 18 AM. J. INT'L L. 696 (1924); Turlington, *Treaty Relations with Turkey*, 35 YALE L.J. 326, 337 (1925)].

41. See *infra* VII, 1.

42. In *Wyers v. Arnold*, 147 S.W.2d 644 (1941), *cert. denied*, 313 U.S. 389, it was held that under the reference "on conforming to the local law" (treaty with Germany, 1923, Art. I, 44 STAT. 2132) the local rule barring probate of will after the lapse of one year remains applicable.

2. *Reservation in favor of local law.*—Since the very purpose of a treaty is to unify the law in both contracting countries, treaty law will supersede local law except where there is an express reservation to the contrary. One of the reasons for such reservations is the fact that in multi-legal countries certain matters are considered to be without the treaty-making power of the national government, or at least it is felt to be politically unwise to intrude into such areas. In other cases certain local rules are valued so high that they must not yield to treaty law. In some instances the reservation represents a compromise between the two contracting countries, one of them able to fight off the invasion of treaty law and the other unwilling or unable to do so. These considerations account for the fact that a layman, in the sense of a non-diplomat, will find it rather difficult to grasp the real sense of such reservations, especially where they are unilateral. He will read, in one line, a neat and laudable principle of law, while in the next line, he will find it emasculated by a well aimed reservation. Even courts are puzzled by such diplomatic “double-talk;” incapable of “double-think,” or unwilling to approve of it, they refuse to give effect to such carefully drawn legal artifices.⁴³

As already indicated, reservations in favor of local law may be of two different types. One, the *mutual reservation* grants both contracting countries the privilege to keep in force their local law even if contrary to the treaty.⁴⁴ Another type is the *unilateral* reservation affecting only one country and leaving the other with its local law unimpaired. Such limping treaty law relates mostly to interests in real property. Typical in this respect is Art. VII of the treaty with France (1853, 10 Stat. 992) providing that “In all the states of the Union where existing laws permit it . . . Frenchmen shall enjoy the rights of possessing real property . . . as the citizens of the United States.” On the other hand, France undertook the obligation to accord American nationals “the same rights within its territory in respect to real and personal property and inheritance, as are enjoyed by its own citizens,” reserving the “ulterior rights of establishing reciprocity” while the United States promised to “recommend passage

43. Cf. the language in *Geofroy v. Riggs*, 133 U.S. 258, 269 (1890): “To construe the first clause as providing that Frenchmen shall enjoy the rights of possessing personal and real property by the same title and in the same manner as citizens . . . so long as their laws permit such enjoyment, is to give a meaning to the article by which nothing is conferred not already possessed, and leaves no adequate reason for concession by French . . . made in the third clause. We do not think this construction admissible.” Cf. DELAUME, *AMERICAN-FRENCH PRIVATE INTERNATIONAL LAW* 25 (1953); *Application and Interpretation of Treaties by the Internal Courts in Franco-American Relations*, 80 J. DROIT INT’L 584 (1953).

44. Among recent treaties, the treaty with China (1946) abounds with far reaching reservations in favor of local law. Similar elaborate reservations are contained in the consular convention with Great Britain (1951).

An interesting reservation is to be found in the convention between the United States, Great Britain and Iraq (1930, 47 STAT. 1817) formulated as follows: “Subject to the provisions of any local laws for the maintenance of public order and public morale, and to any general educational requirements prescribed by law in Iraq, the nationals of the United States will be permitted . . .” (Art. 4).

of such laws as may be necessary of conferring this right," *i.e.*, to hold interests in land.

Another area where the reservation in favor of local law appears frequently, is treaty law on *devolution upon death of real property*. It is a common feature in our treaties that the right of aliens to inherit real property is limited wherever the applicable local law (*i.e.*, *lex situs*) contains discriminatory provisions. Treaties uphold, as a rule, such local law, offering, at the same time, another alternative by providing that if such property would pass a national of the other contracting country were he not disqualified because of his alienage "by the laws of the country where such property is situated," he is granted, under treaty law, the privilege to liquidate the interests involved and take proceeds out of the country (*e.g.*, treaty with Great Britain, 1899, Art. I,⁴⁵ also with other members of the British Commonwealth; with Guatemala, 1901, Art. I; Germany, 1923, Art. I).⁴⁶ Reservations in favor of local law concerning interests in *chattels* are rather rare. In some recent treaties, however, the general rule guaranteeing free ownership, inheritance and disposition of movable property is qualified by the following reservation in favor of local law, *i.e.*, as to "direct or indirect ownership by aliens or foreign corporations . . . of shares in, or instruments of indebtedness of, corporations . . . carrying on particular types of activities" (treaty with China, 1946, Art. VIII, 4; with Italy, 1948, Art. VII).

Reservations in favor of local law appear, most frequently, with respect to *doing business by foreign corporations*, or, more precisely, their "right to exercise any of their functions" within the other country, declaring these privileges to be "governed by the laws and regulations, national, state or province, which are or may hereafter be established within the territories of the Party wherein they propose to engage in business" (*e.g.*, treaty with El Salvador, 1926, Art. XIII; with Austria, 1928, Art. X, with Norway, 1928, Art. XIII). The recognition of the legal existence of such corporations alone does not include the privilege "to transact its business or industry in the other (country), this permission remaining always subject to the regulations in this respect existing in the latter country" (*e.g.*, treaty with Russia, 1904, Art. 3).

An area where the effect of such reservations was frequently litigated

45. *Sullivan v. Kidd*, 254 U.S. 433 (1920), involving this treaty provision, was decided on the ground that, at the time of the devolution, Canada had not yet adopted the convention, and, consequently, "the law of Kansas was not superseded in favor of British subjects in Canada" (443). It may be added that even if Canada had adopted the convention, local laws of Kansas would still survive because of the reservation.

46. *Cf. Hauenstein v. Lyncham*, 100 U.S. 483 (1879) interpreting Art. V, 3 of the treaty with Switzerland (1850/55) to override local law in spite of a reservation in the treaty that the provision as to free devolution of real property "shall be applicable to real estate within the States . . . in which foreigners shall be entitled to hold or inherit real estate"; see also *State ex rel. Tanner v. Staeheli*, 97 Or. 572, 192 Pac. 911 (1920).

in courts concerns the privilege granted to consular officials to *administer estates* of their nationals. The privilege is granted, in many instances, subject to an express reservation that "the laws of the place where the estate is administered, so permit" (e.g., treaty with Germany, 1923, Art. XXIV). Consequently it was held by our courts that persons entitled under local law to be appointed administrators "have not been divested by the treaty."⁴⁷ The reservation worded "so far as the laws of each country will permit" (treaty with Sweden, 1910, Art. 14) invoked by the Italian consul under the most-favored-nation clause (Art. 17 of the treaty with Italy, 1878) was interpreted⁴⁸ to mean that "both rights, the right of temporary intervention and the right of permanent administration granted in addition" are conditioned upon local law, since the reservation in its favor does not refer "only to special administration but as well to the last clause of the treaty providing for general administration."⁴⁹

Finally, a reservation relating to matters of jurisdiction should be mentioned. Consular jurisdiction in *seamens' disputes* is, in many treaties, conditioned upon local law and consular officials are granted the privilege to exercise such jurisdiction "provided that local law permits" (e.g., treaty with Norway, 1928, Art. XXII; with El Salvador, 1926, Art. XXI; with Cuba, 1926, Art. XII; with the Philippines, 1947, Art. XI, etc.). A similar provision but referring to the actual taking jurisdiction by local authorities, is inserted in the recent consular treaty with Great Britain (1951, TIAS 2949) granting such jurisdiction "provided the judicial authorities of the territory do not take jurisdiction in accord with the provisions of Art. 23" (Art. 22, 3).⁵⁰

47. *Schneider v. Hawkins*, 179 Md. 21, 16 A.2d 961 (1940).

48. *In re D'Adamo's Estate*, 212 N.Y. 214, 106 N.E. 81 (1914).

49. The problem of consular administration will be discussed later.

50. Difficulties in drafting and interpreting reservations will best be illustrated by the 1850/55 treaty with Switzerland (11 STAT. 587, 18 STAT. 748). The treaty as signed in 1850 adopted the principle of "reciprocal equality" [5 MILLER, TREATIES AND OTHER INTERNATIONAL ACTS . . . 876 (1937)] with a qualification that such equality shall be understood to mean the internal foreigner treatment (see *infra* V) granting Americans in Switzerland the treatment enjoyed by Swiss citizens "originating in or belonging to other Cantons of the Confederation," and, vice versa, Swiss citizens in the United States a treatment as accorded to "citizens of the United States born or belonging to other States of the Union." The presidential message to the Senate (1851, 5 MILLER, *op. cit.* 881) expressed doubts as to the rule with respect to interests in land (note 16, *supra*). Subsequently, the Senate deleted, among others, par. 2 and 3 of Art. 1 involved, whereupon Switzerland submitted a new proposal (5 MILLER, *op. cit.* 883). It retained the principle of "reciprocal equality," but added, in order to meet American objections, a stronger worded reservation in favor of local law, namely ". . . where such admission and treatment shall not conflict with the constitutional or legal provisions, as well as Federal and State and Cantonal, of the contracting parties." The treaty, in its final form (1855) adopted a reservation making the enjoyment of treaty privileges "subject to the constitutional and legal provisions aforesaid and yielding obedience to the laws, regulations and usages of the country wherein they reside . . .," and inserting, moreover, in the same Art. I a restrictive reference to Art. V with regard to real property "as explained in Art. V" where a full reservation in favor of local law is contained. So it happened that in trying to clarify the general principle of Art. I as to real property, the drafters not only incorporated an adequate provision in Art. V, but also turned

V

NATIONAL TREATMENT

In designating the law to be applied, treaties often utilize one or another of the *standards* developed in international law. One of them, important in conflict law, is the equal national treatment, or, in short, the *national treatment*. Such treatment grants treaty aliens the privilege that the same law be locally applied as if they were nationals of the country.⁵¹ As a consequence, the contact of alienage will be disregarded

out with a double and general reservation in favor of local law. This latter reservation, however, seems to be inconsistent with the language in some of the following articles of the treaty which remained, apparently, unaffected by the trouble centering around Art. V. These provisions have been taken over from the 1850 text without changes and grant, without reservations, e.g., free access to courts "in the same manner as native citizens," equality of fiscal burdens like "citizens of the country where they reside," indemnities in case of expropriation, etc. In view of all this it is not surprising to find that courts are unable to reach consistent results. Two Swiss cases are significant. In *Instant Index Corporation v. Tribunal of the Canton of Vaud*, BCE 60 I 220 (1934) the Federal Tribunal held that the reservation in favor of local law as contained in Art. I does not make local law requesting an American corporation to post the *cautio judicatum solvi* inapplicable, even if the court considers the 1855 amendments to be "d'ordre rédactionnel." In a later case [*Wolfe v. Frei*, BCE 76 I 111 (1950)] the same court held that "the significance of a reservation in favor of local law . . . is not clear . . . nevertheless such reservation cannot be construed as granting Cantons the right to worsen the position of American citizens by legislation since in such way the equality of treatment of American and Swiss nationals as guaranteed by the treaty would become illusory" and decided that "the law of the Cantons may treat American nationals less favorable than their own citizens only insofar as such treatment of citizens of other Cantons would be upheld under federal law" (120).

It may be added, regarding *Wolfe v. Frei*, that objections by the United States, mentioned above and referred to in the opinion, did not aim at obtaining "eine weitergehende Gleichstellung" (Italics by court) since the President of the Swiss Federation assumed that the removal of par. 2 and 3 of Art. I (1850) has "probably for its purpose the reservation of certain exceptions made in respect of foreigners or those not citizens of the States of the Union by the different constitutions and laws of these States" (5 MILLER, *op. cit.* 886). "Difficulties arising out of this provision" continues the opinion, "have been removed by deleting this paragraph (i.e., par. 2 of Art. I) and revising Art. I. It follows from par. 3 of Art. I that an American national shall have within a Canton at least the position of a citizen of another Canton since the only exception to the general principle of equal treatment—apart from political rights reserved to citizens—concerns the participation in the property of municipalities, communities and foundations unavailable to citizens of other Cantons according to par. 4 of Art. 43 of the Federal Constitution. See also note 56 *infra*."

Cf. Nussbaum, *American-Swiss Private International Law*, 47 COL. L. REV. 186, 188 (1947); Huber, *The Intercantonal Law of Switzerland (Swiss Interstate Law)*, 3 AM. J. INT'L L. 62 (1909).

51. Recent treaties contain a definition of the term "national treatment" meaning "treatment accorded within the territories of a High Contracting Party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals, companies, products, vessels or other objects, as the case may be, of such Party" (Art. XIX, 1 of the treaty with Uruguay, 1949). This rule is qualified in the treaty with Greece (1951) to the effect that the term does not "imply immunity from the laws and regulations of a Party which apply, in a non-discriminatory manner to nationals, companies . . ." (Art. XXIV, 1).

and the law applicable to the country's own citizens will control.⁵²

In a general way, the national treatment is adopted by the Inter-American Convention concerning the status of aliens (Havana, 1928, 46 Stat. 2753) providing that "states should extend to foreigners, domiciled or in transit through their territory, all individual guarantees extended to their own nationals and the enjoyment of essential civil rights without detriment, as regards foreigners, to legal provisions governing the scope and usages for the exercise of said rights and guarantees" (Art. 5). National treatment with respect to *commercium* in the sense of the rights to "enter, travel and sojourn," to engage in various, mostly enumerated activities, is a permanent feature of our treaties of friendship and commerce. Specifically, the national treatment is granted with respect to protection of persons and property (treaty with France, 1853, Art. 7), and only exceptionally (treaty with Argentina, 1853, Art. IX) or with reservations, (treaty with Ireland, 1950, Art. VII) regarding to real property (Art. VIII, 4, 6, of the treaty with Uruguay, 1949). In some recent treaties national treatment is accorded regarding compulsory insurance (treaty with Uruguay, Art. III, 2; with Ireland, 1950, Art. IV, 2, etc.), access to courts (*e.g.*, with Uruguay, 1949, Art. V, 1, c; with Ireland, 1950, Art. VI, 1, c; see also *infra* VII, 1), organization of corporations "controlled by nationals and companies of either Party and created or organized under the applicable laws and regulations within the territories of the other Party" (Art. VI, 2 of the treaty with Ireland, 1950); as to expropriation (*e.g.*, Art. II, 2 of the treaty with Switzerland 1850/55; Art. VIII, 2 of the treaty with Uruguay, 1949; Art. VI, 5 of the treaty with Denmark 1951); as to functions and powers of notaries public (Art. IX of the Protocol on uniformity of powers of attorney, 1941, 56 Stat. 1376); and claims based on death or injury (*e.g.*, Art. III of the treaty with Germany, 1923; Art. III of the treaty with Uruguay, 1949, etc.).⁵³

Multilateral treaties also accord national treatment to nationals of signatory countries, *e.g.*, the Convention for the protection of industrial property (1934) providing that they "shall enjoy . . . all the advantages which are granted or which may later be granted to nationals . . ." (Art. 3).⁵⁴

In multi-legal countries the question arises as to what law is to

52. For a comprehensive list of subjects and treaties, see GIBSON, *ALIENS AND THE LAW* 165 (1940); *cf.* also Cutler, *The Treatment of Foreigners*, 27 *AM. J. INT'L. L.* 225 (1933).

53. In *re Romani's Estate*, 191 Cal. 740, 218 Pac. 421 (1923) the provision of the California Civil Code (Sec. 672) establishing a five year period to bar alien claims against estates was held to conflict with Art. 7 of the treaty with France (1853) providing that "Frenchmen shall enjoy . . . in the same manner as the citizens of the United States."

54. *Cf.* Roubier, *Le Droit Unioniste de la Propriete Industrielle*, 78 *CLUNET* 676, 714 (1951).

be applied under the national treatment clause, federal, state or both. The argument may be advanced that aliens may be granted privileges only insofar as such privileges are within the federal legislative power. This position, however, is untenable as to the United States in view of the treaty-making power being independent from the national legislative powers. It was held in *Tashiro v. Jordan*⁵⁵ that "there is nothing in the language of the treaty (with Japan, Art. 11, 1911) to indicate that the words 'native citizens' were employed in any limited sense." Consequently, the court construed the national treatment clause "to extend to such foreign subjects all the rights that the native citizen enjoyed irrespective of the source of such rights." Recent treaties, moreover, contain, in connection with national treatment, an express provision to the effect that every type of law in force in the respective country shall apply, as for example in the treaty with Austria (1928, Art. II, 47 Stat. 1876), where national treatment with respect to "civil liability for injuries or death" includes privileges "as granted by National, State or Provincial laws."

An indiscriminate extension to aliens of privileges enjoyed by nationals may lead to startling results, namely that nationals of the same country, being citizens of some other political subdivision thereof (e.g., of another State), let us call them *internal foreigners*, will be worse off than treaty aliens. It is therefore understandable, that, since the Swiss 1850/55 treaty,⁵⁶ our international agreements have adopted more and more a qualified type of the national treatment, at least unilaterally with respect to the United States. In these treaties the clause according national treatment is to be understood as to confer upon treaty aliens the treatment given by States to *internal foreigners*, i.e., to citizens of sister-states or to corporations incorporated therein. This type of a qualified national treatment is now formulated (e.g., in Art. III, 3 of the treaty with China) as to corporations in the sense that the language "on the same terms" will be construed to mean "such rights and privileges, in any state of the United States of America, upon the same . . . accorded therein to corporations . . . created or organized in other states . . . of the United States." Similar provisions are to be found in treaties with Italy (1948,

55. 201 Cal. 236, 256 Pac. 545, 549 (1927), *aff'd on other grounds*, 278 U.S. 123 (1928).

56. The original reciprocal national treatment as contained in the 1850 text of the treaty (note 50 *supra*) still seems to be lingering on in Swiss courts. In *In re Michel*, BGE 23 I 490 (1897) the Federal Tribunal started from the principle of national treatment as laid down in the 1850 text, even if qualified with a reservation in favor of local law, but held that "it follows (from Art. I) that Michel being a national of the United States of America is entitled in Switzerland to a treatment like a Swiss citizen, and that his deposit located in Chur may be taxed by the Canton . . . only if a similarly located deposit of a Swiss citizen who dies in this Canton and was domiciled in another Canton . . . would be subject to the taxing power of the former Canton." Cf. also *Wolfe v. Frei*, BGE 76 I 111 (1950).

Art. II, 3), with Greece (1952, Art. XXIV, 4), with Denmark, (1951, Art. XXII, 4) and with Israel (1951, Art. XXII, 4).⁵⁷

The idea of such "internal foreigner treatment" is at the bottom of the provision contained in the treaty with Greece (1951, Art. VI) concerning the enforcement of *arbitral awards*. In general, the treaty accords such awards what amounts to national treatment since they "shall be entitled to privileges . . . pertaining to awards rendered locally." This rule, however, is qualified insofar as the United States is concerned, by the understanding that "awards rendered outside of the United States of America shall be entitled in any court in any State thereof only to the same measure of recognition as awards rendered in other States thereof."

Finally, it may be added that the national treatment clause is not always adopted in its pure form. In many treaties it appears subject to qualifications, e.g., reciprocity (treaty with Switzerland, 1850/55, see note 50) or is combined with the most-favored nation treatment.

VI

MOST-FAVORED-NATION TREATMENT

While the national treatment extends the applicability of local law otherwise applicable only to nationals, to treaty aliens, the *most-favored-nation clause*⁵⁸ makes applicable to treaty aliens provisions of a treaty entered into with a third country. Accordingly, such treaty applies, on the one hand, within its original area of coverage, i.e., between both countries parties to the treaty, and, on the other hand, it may apply to nationals of a country not party to such treaty, on the basis of the most-favored-nation clause. This clause, consequently, entitles nationals of the country so favored to invoke, with respect to matters governed by the clause, any provision of any treaty entered into by the other contracting country dealing with the same matter.⁵⁹

57. There is an analogous equal alien treatment, according to Art. I, 3 of the treaty with Austria (1928), also Art. IX, 3 of the treaty with Denmark (1951), as to interests in land which shall be granted "subject to reciprocity" as accorded "to foreigners by the laws of the place where the property is situated." Likewise, according to Annex XIV to the peace treaty with Italy (1947) property rights of Italian nationals resident in ceded territories shall be subject "only to such legislation as may be enacted from time to time regarding the property of foreign nationals and juridical persons generally" (9).

58. Hornbeck, *The Most-Favored Nation Clause*, 3 AM. J. INT'L L. 295 (1909); Washburn, *The American Interpretation of the Most-Favored Nation Clause*, 1 VA. L. REV. 257 (1913); LUDWIG, CONSULAR TREATY RIGHTS AND COMMENTS ON THE MOST-FAVORED NATION CLAUSE (1913); SNYDER, THE MOST-FAVORED NATION CLAUSE (1948); Schwarzenberger, *The Most-Favored Nation Standard in British State Practice*, 22 BRIT. Y.B. INT'L L. 96 (1945). Cf. 5 HACKWORTH, DIGEST . . . 269 (1943).

59. Recent treaties define the clause as meaning "treatment accorded within the territories of a Party upon terms no less favorable than the treatment accorded therein, in like situations to nationals . . . of any other country" (e.g., treaty with Ireland, 1950, Art. XXI, 2).

It is obvious that the clause applies only with respect to matters specified in the treaty granting the most-favored-nation treatment.⁶⁰ There must be, of course, a treaty entered into by either contracting country, available for such secondary application. The question whether or not such possibility exists, does not, as a matter of principle, affect the operation of the clause. Nevertheless, the doctrine of the conditional most-favored-nation clause brings this aspect into focus.

The doctrine of the *conditional most-favored-nation clause* developed, it seems, under the impact of the idea of consideration. The rule of a *quid-pro-quo* is considered to apply also in situations where treaty provisions invoked under the clause are contained in another treaty and it appears as if the necessary consideration was given elsewhere. In such a situation, it is reasoned that the country required to grant such privileges may inquire, before according them, whether or not the country invoking such privileges under the clause can show a consideration equal to the one contained in the original treaty. At a glance, it may be noted that the most-favored-nation clause was bargained for and consideration may be shown by the very existence of the treaty granting it. In addition to this, it is quite difficult to determine the amount (and nature) of a consideration given in the original treaty in view of the fact that such treaty, as a rule, does not contain just one, but a number of mutually interconnected privileges. Such straight notion of the clause proved unworkable in almost all situations where such consideration could not be isolated. Consequently, the clause was changed into one requiring *reciprocity*.⁶¹ This means that a privilege may be invoked under the clause provided the country (or its national) invoking it is able to show that it grants, according to its own law or under a treaty with a third country amenable to the clause, to the invoking country (or its nationals) the same privilege as is sought to be enforced under the clause. Finally, the doctrine of the conditional most-favored-nation clause was abandoned altogether,⁶² starting with the treaty with Germany (1923)⁶³ as to commercial matters and, then, introduced as a general rule in the

60. Cf. *Lukich v. Dep't of Labor and Industries*, *supra*; *In re Clausen's Estate*, 202 Cal. 267, 258 Pac. 1094 (1927) holding that the clause contained in a commercial treaty with Denmark (1826) did not cover consular administration of estates under the treaty with Germany. In *Dobrin v. Mallory S.S. Co.*, 298 Fed. 349 (2d Cir. 1924) the clause of the treaty with Great Britain concerning property (1899, 1902) did not support plaintiff's claim to recover upon the death of a relative. Cf. *National Provincial Bank v. Dollfus* (Cour d'Appel, Paris, July 9, 1947), noted in 2 INT'L L.Q. 267 (1948) and in 43 AM. J. INT'L L. 188 (1949).

61. Cf. *Santovincenzo v. Egan*, 284 U.S. 30 (1941); *Rocca v. Thompson*, 223 U.S. 323 (1911); *Sullivan v. Kidd*, 254 U.S. 433 (1920); also 5 HACKWORTH, DIGEST . . . 274.

62. The unconditional clause was expressly agreed even earlier, e.g., in the treaty with Yugoslavia (1881, Art. IV): "It is understood that every favor or exemption which shall be subsequently granted in this matter to the subjects of a foreign country by one of the two contracting powers shall be immediately and by right extended to the citizens or subjects of the other party."

63. Cf. *John T. Bill Co. v. United States*, 104 F.2d 67 (D.C. Cir. 1939).

treaty with Italy (1948). In the latter it is declared, with proper emphasis, that the treaty is "based in general upon the principles of the . . . most-favored-nation treatment in the *unconditional* form" (preamble). Nevertheless, the conditional doctrine may still apply under previous treaties.

The most-favored-nation clause is used, in our treaties, mostly in connection with commerce, especially customs, taxes of different kind, etc. There is, however, quite an impressive list of situations where the clause applies in matters closely connected with conflict law. In many treaties, the clause determines the law applicable with respect to establishment and sojourn (*e.g.*, treaty with Turkey, 1931, Art. I; with Greece, 1936, Art. I); regarding the protection of persons and rights (treaty with Nepal, 1947; with Italy, 1948, Art. V); with regard to the personal status of Iranians in the United States (treaty with Iran, 1929); legal status of juridical entities (treaty with Rumania, 1930, Art. I); as to the organization and participation in such entities (treaty with China, Art. IV, 1; with Italy, 1938, Art. III, 1). The clause applies with respect to interests in real property (treaty with Sweden, 1910, Art. XIV, 5; with China, Art. VIII, 1); relating to personal property (treaty with China, 1946, Art. VIII, 5), or both (treaty with Yugoslavia, 1881, Art. II, 1, and under the Agreement of 1948, Art. 5⁶⁴; with Great Britain under the treaty of 1899, etc.). The clause applies in cases of nationalization (treaty with Italy, 1948, Art. V, 3); trade-marks (see *infra*); as to jurisdiction in general (treaty with Ethiopia, 1914); "judicial competence" (treaty with Turkey, 1931, Art. 1) and some specific aspects thereof, as for example, free access to courts (treaty with Thailand, 1937, Art. 4); representation in courts (treaty with Spain, 1902, Art. VI), and searches (treaty with Italy, 1948, Art. VI). The following matters are, moreover, subject to the clause: administration of estates by consular officials (*e.g.*, treaty with Greece, 1912, Art. XII, 2); consular privileges in general (treaty with Italy, 1787, Art. XVII; with Saudi Arabia, 1933, Art. I; with Liberia, 1938, Art. I; with the Philippines, 1947, Art. 1). It applies as to controls of international payments (treaty with China, Art. VIII, 4; with Italy, 1948, Art. XVII, 3); as to the protection of copyright, etc.⁶⁵ It is, finally, quite common to determine the treatment to be given imported goods (treaty with Switzerland, 1936, Art. I; with Guatemala, 1936, Art. I).

In some treaties the most-favored-nation clause is combined with the national treatment, *e.g.*, according to the treaty with Thailand (1937 Art. IV) where access to courts is granted "equally with the nationals of the state of residence and with nationals of the most favored nation."

64. 19 DEP'T. STATE BULL. 137 (1948).

65. Cf. Garcia, *El Derecho de Autor ante la Clausula de la Nación Mas Favorecida*, 12 REVISTA COL. ABOG. 437 (Buenos Aires 1933); *Los Tratados y Convenciones Internacionales sobre Propiedad Literaria* . . . 1 DERECHOS DE AUTOR 11, 19 (1946).

A similar provision is also contained in the treaty with China (1948 Art. V, 4); the effect of such combination being that, in addition to the national treatment, the most-favored-nation clause will make available privileges not granted to the country's own nationals but, under treaties, to nationals of some other countries.

VII

CONFLICT OF JURISDICTIONS

The extent to which independent countries may exercise their judicial powers⁶⁶ is determined, in principle, by the idea of sovereignty. "The jurisdiction of courts is a branch of that which is possessed by the nation as an independent sovereign power," and, consequently, "is susceptible of no limitations not imposed by itself."⁶⁷ Such consent may be expressed by treaties or by rules of self-limitation contained in municipal law in view of the co-existence of other "distinct sovereignties, possessing equal rights and equal independence." This accounts for a "relaxation of that absolute and complete jurisdiction within their respective territories which sovereignty confers."⁶⁸ The doctrine is restated in the Inter-American Convention on rights and duties of states (1938, 49 Stat. 3097) recognizing every country as having the right to "define the jurisdiction and competence of its courts" subject to no other limitations than "the exercise of the rights of other states according to international law" (Art. 3), and, of course, treaties.⁶⁹

Access to courts.—To what extent, if at all, international law requires a country to keep its courts open to aliens, is controversial. In the United States aliens have not been denied the privilege of appearing in courts as parties litigant. In many countries, however, such privilege is not granted and in order to guarantee the privilege to its nationals, the United States has frequently resorted to treaties.⁷⁰

66. Cf. Nussbaum, *Jurisdiction and Foreign Judgment*, 41 COL. L. REV. 221 (1941); Beale, *The Jurisdiction of a Sovereign State*, 36 HARV. L. REV. 241 (1923); STUYT, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL TRIBUNALS TO DISPUTES ON ATTRIBUTION AND EXERCISE OF STATE JURISDICTION* (1946); NEUNER, *INTERNATIONALE ZUSTÄNDIGKEIT* (1922); RIEZLER, *INTERNATIONALES ZIVILPROZESSRECHT* (1949); Perassi, *Norme Convenzionali sulla Competenza Giurisdizionale e Norme Interne sulla Competenza Internazionale*, 21 ANNUARIO DIRITTO COMPARATO 1 (1946); MORELLI, *DIRITTO PROCESSUALE CIVILE INTERNAZIONALE* 73 (1938); Pagenstecher, *Gerichtsbareit und Internationale Zuständigkeit als Selbständige Prozessvoraussetzungen*, 11 RABELS ZTSCHR. 337 (1937); Goldschmidt, *Jurisdicción Internacional*, 5 REVISTA ESPAÑOLA DERECHO INTERNACIONAL 163 (1952).

67. *Schooner Exchange v. McFadden*, 7 Cranch 116, 136 (U.S. 1812).

68. *Ibid.*

69. The problem how to delimit judicial jurisdiction also appears in the draft declaration on the rights and duties of states (adopted by the General Assembly of the U.N. in 1949, YEARBOOK OF THE U.N. 1948/9, 948) disregarding the distinction between the legislative and judicial jurisdiction (Art. 2).

70. See the exhaustive discussion by Wilson, *Access-to-Courts Provisions in United States Commercial Treaties*, 47 AM. J. INT'L L. 20 (1953). Also Beale,

The present trend in treaties, as well as in municipal law, is toward granting aliens in court a non-discriminatory treatment. The Inter-American Convention on the status of aliens (Havana, 1928, 46 Stat. 2753) formulates the rule by providing that "Foreigners are subject as are nationals to local jurisdiction and laws, due consideration given to the limitations expressed in conventions and treaties" (Art. 2). The same rule is repeated in the Charter of the Organization of American States (Bogota, 1948, 2 UST 2394): "The jurisdiction of states within the limits of their national territory is exercised equally over all the inhabitants whether nationals or aliens" (Art. 12).⁷¹

The "free access to courts" privilege is intended to guarantee aliens the right to appear in courts as a party litigant like any other party in the same place and under like circumstances,⁷² without granting them any preferential treatment over that prescribed by the *lex fori* generally. The right of such treaty aliens "to sue are governed by settled practice and procedure so long as not unequal or unjustly discriminatory. The right to appear in courts implies a right to prosecute or defend a cause of action upon the same terms as accorded to others. Such appearance must be subject to decisions by the courts upon the general principles of law by which they are guided in deciding causes presented through the appearance of other parties equally favored." Consequently, the court complied with the "free access" privilege when "the contentions have been decided according to general principles of law governing the rights of all litigants similarly situated."⁷³

In treaties "free access" is accorded most often under the national treatment clause (e.g., with Bolivia, 1858, Art. 13; Costa Rica, 1851, Art. VII; Chile, 1832, Art. X and additional 1833 treaty; Switzerland, 1850/55, Art. I; Ireland, 1950, Art. VI, 1, c). In some treaties the most-favored

Jurisdiction over Foreigners, 26 HARV. L. REV. 283 (1913), and Pillet, *Jurisdiction in Actions Between Foreigners*, 18 HARV. L. REV. 325 (1905); cf. PÆPE, *ETUDES SUR LA COMPETENCE CIVILE A L'EGARD DES ETRANGERS* (1900).

71. The American Declaration of the rights and duties of man [Bogotá, 1948, 43 AM. J. INT'L L., Supp. 133, (1949)] provides that "Every person may resort to the courts to ensure respect for his legal rights . . ." while the U.N. Declaration (1948, *ibid.* 127) seems to be more explicit by providing that "Everyone has the right to an effective remedy by the competent national tribunal for acts violating the fundamental rights granted him by the constitution or by law" (Art. 8). Cf. 3 NOVENA CONFERENCIA INTERNACIONAL AMERICANA (Bogota, 1948), ACTAS Y DOCUMENTOS 186 ss. (1953).

72. *Missouri v. Lewis*, 101 U.S. 22, 31 (1879).

73. *Universal Adjustment Corp. v. Mittand Bank Ltd.*, 281 Mass 303, 184 N.E. 152, 163 (1933). Consequently, it was held that the application of the *forum non conveniens* doctrine was not precluded by the "free access" privilege.

In the recent *Ambatielos* case (May 19, 1953, I.C.J. Reports 1953, 10) the dissenting opinion pointed out that the "free access" "has as its purpose the removal, for its beneficiaries, of the obstructions which existed in certain countries as the result of old traditions, to the right of foreigners to have recourse to the courts. Its object is . . . to ensure free access to the courts, not to regulate the different questions of the production of evidence Free access to the courts is one thing: the proper administration of justice another", the latter meaning "alleging a violation of general international law" (33, 34).

nation clause is used (e.g., with China, 1946, Art. VI, 4; Italy, 1948, Art. V, 4) even combined with the national treatment (e.g., Denmark, 1951, Art. V; Israel, 1951, Art. V, etc.) or with reciprocity added (Yugoslavia, 1881, Art. IV, 3). Moreover, some treaties settle a few specific questions involved. A few state that the "free access" privilege applies not only to courts but includes "administrative tribunals and agencies, in all degrees of jurisdiction" as well (e.g., Uruguay, 1949, Art. V, I, c; Denmark, Art. V, 1). Some treaties deal with the question of counsel (e.g., Italy, 1948, Art. V, 4), with the right of parties to be present wherever such presence is allowed under the *lex fori* (e.g., Bolivia, 1858, Art. XIII); some treaties go into the problem of the *cautio actoris*.⁷⁴

The "free access" privilege is accompanied, as a rule, by a reference to local law ("conforming to the laws regulating the matter", e.g., treaty with Germany, 1923, Art. XII; El Salvador, 1926, Art. XII; Finland, 1934, Art. XVI). A special limitation is introduced in the treaty with Israel (1951) that "free access" does not "obligate" the contracting countries to "entertain an action where a decree of dissolution of marriage is sought by an alien" (Protocol 2), probably a reservation in favor of local law.

The right of alien *legal entities* (e.g., associations, corporations, etc.) to appear in courts of the other country is complicated by a preliminary problem: whether or not courts will recognize their legal existence. While older treaties failed to mention specifically legal entities when granting the "free access" privilege, recent treaties expressly deal with this problem.

74. The question whether the "free access" privilege includes also an exemption from giving security for costs and judgment and the right to free legal aid, is answered in treaties in different ways. The treaty with Esthonia (1925) denies it (Protocol 1) subjecting Esthonians in the United States to the equal alien treatment. As to American nationals in Esthonia, it is "understood that inasmuch as in the United States the privileges of this character are regulated largely by the laws of several States, nationals of the United States domiciled in States which accord such exemptions . . . to nationals of Esthonia freely or on the basis of reciprocity shall be accorded the exemptions . . . authorized by Esthonian law." It is interesting to note that the situation of aliens in federal courts was not taken into consideration (Cf. § 1915, Tit. 28 U.S.C. and 3 HACKWORTH, DIGEST . . . 570).

A contrary rule is adopted by the treaty with Denmark (1951, Protocol 1); Israel (1952, Protocol 1); the treaty with Greece (1951, Art. XXIV, 5) grants the privileges on the national and most-favored-nation basis.

The privilege of "free access" regarding corporations is considered by the treaty with Ireland (1951) providing that either country retains the power "to order a company . . . suing or applying to it, to give security for costs where such company fails to show that it has substantial available and sufficient assets within the jurisdiction of such court" (Protocol 4).

A French court sustained defendant's motion for the *cautio judicium solvi* against an American plaintiff pointing out that there is no treaty in force dispensing with it (July 19, 1926, J. DROIT INT'L 656, 1927). Cf. *French Legal Aid is Not for Americans*, 11 BRIEF CASE 3 (1953) and DELAUME, *AMERICAN-FRENCH PRIVATE INT'L LAW* 30 (1953).

Jordan, *Clause du Libre Acces et Libre et facile Access*, 3 LAPRADELLE-NIBOYET, REPERTOIRE DROIT INT'L 513; *Caution Judicatum solvi*, *id.* at 167; Kosler, *Freies Gericht und Sicherheitsleistung für Prozesskosten im Internationalen Rechte*, 59 J.W. 1802 (1930); Richter, *Die Klausel des freien und unbedingten Zutritts zu den Gerichten in internationalen Staatsverträgen*, DEUTSCHE JUR. ZTC. 309 (1928); Philonenko, *La Caution Judicatum solvi en Droit Francais Modern*, 56CLUNET 609, 896 (1929).

Often, both provisions are contained in the same article; the standard formula as used between 1923 and 1945 reads as follows:

Limited liability and other corporations, whether or not for pecuniary profit, which have been or may hereafter be organized in accordance with and under the laws, National, State or Provincial, of either High Contracting Party and maintain a central office within the territories thereof, shall have their judicial status recognized They shall enjoy free access to the courts of law and equity, on conforming to the laws regulating the matter (Germany, 1923, Art. XII).⁷⁶

According to this provision, copied by a number of treaties entered into during this period, the recognition of the existence of a legal entity is conditioned not only upon the fact that such entity is incorporated in the other contracting country but also that it maintains there a central office. The clause, "They shall enjoy free access . . ." leaves us with the impression that the "free access" privilege will not be granted to entities with no such "central office" within the country of incorporation.

Some of the recent treaties restrict considerably the enjoyment of privileges granted to legal entities incorporated in the other country but controlled by third country nationals. Such restrictions, however, do not affect the privilege under the treaties, of "free access" to courts.⁷⁶

Whether a legal entity, in order to qualify for the "free access" privilege, must be locally registered (domesticated) depends, in absence of a specific treaty provision, upon the *lex fori*.⁷⁷ Treaties, however, tend to dispense with such a requirement. The Inter-American Declaration on the juridical personality of foreign companies (1939, TS 973) states that companies have the right "to enter appearances in the courts as plaintiffs and defendants", adding an express reference to local law that "they comply with the laws of the country." The Declaration being only a statement of the law as it is in force in the signatory countries

75. In *Eskimo Pie v. Margarinewerk Dr. A. Sch., A.G. the German Reichsgericht* (June 3, 1927, 117 R.G.Z. 215) discussed the capacity of a Delaware corporation to sue in a German court. The question was decided according to the law of Delaware (Art. 1, 1 of the Introductory Law to the German Civil Code), disregarding the controlling Art. XII of the treaty with the United States.

76. According to the treaty with Uruguay (1949, Art. XXI, 1, c) both contracting countries may deny the advantages of the treaty to any "company, even though it may have the nationality of the other Party, as long as ownership or direction of the company is controlled by nationals or companies of a third country. However, the provisions of the present treaty relating to the juridical status of foreign companies and their appearance in court, are exempted from the limiting provisions of the present paragraph" (also treaty with Greece, 1951, Art. XXIII, 1, f; Israel, 1951, Art. XXI, 1, e; Denmark, 1951, Art. XX, 1, f; Ireland, 1951, Art. XX, 1, f, etc.).

77. Latty, *International Standing in Court of Foreign Corporations*, 29 MICH. L. REV. 28 (1930). State law denying corporations incorporated abroad, access to state courts [which prohibition may even be, in diversity cases, binding upon federal courts, *Woods v. Interstate Realty Co.*, 337 U.S. 535 (1949)] "as long as such corporations fail to comply" with local requirements of registration (*e.g.*, FLA. STAT. § 613.07) will prevail in all cases where there is no treaty law to the contrary since no constitutional problem of undue burden on inter-state commerce is involved [as, *e.g.*, in *Sioux Remedy Co. v. Cope*, 235 U.S. 197 (1914) etc.].

was not intended to supersede local law; nevertheless, the United States signed the Declaration with the understanding that companies "shall be permitted to sue or defend suits of any kind without the requirement of registration or domestication." On the contrary, an express dispensation with local registration is to be found in the treaty with Italy (1948, Art. V, 4) granting corporations and associations "not engaged in business or in nonprofit (*sic*) activities" "free access" to courts "without any requirement of registration or domestication." The treaty with China (1946, Art. VI, 4) introduced a new feature, namely the non-existence of a permanent establishment, branch or agency, within the territory of the other contracting country, *i.e.*, where the corporation is not incorporated. Only such corporations may appear in court without going through local registration; nevertheless, they are required to file "at any time prior to appearance . . . reasonable particulars" as prescribed by local law. This provision recently has been rewritten so that local registration as a prerequisite for the "access to court" does not apply to corporations "not engaged in activities within the territories of the other Party" (treaty with Ireland, 1951, Protocol 5).

Similar problems arise with regard to *international organizations*, *e.g.*, the United Nations and their specialized agencies. Without going into details which are better discussed outside of this study, it may be said that the United Nations enjoys "such capacity as may be necessary . . ." for the performance of its functions (Art. 104 of the Charter). The International Labor Organization has, according to its Constitution (Art. 39) the capacity to "institute legal proceedings," as have other specialized agencies of the United Nations. These treaty privileges are, in addition, implemented by municipal law.⁷⁸

Judicial jurisdiction.—Conflicts involving the exercise of judicial jurisdiction on the inter-national level may be, by means of treaties, settled in different ways. The most articulate method is to regulate, by mutual agreement between countries, the extent of their respective judicial powers. There are also other methods aimed at solving, at least partially, the same problem, one of them being to authorize, by treaty, consular officials on duty in a foreign country to take cognizance of certain classes of disputes between their own nationals. Another way is to create quasi-judicial bodies (*e.g.*, international commissions) to try and adjudicate disputes between nationals of both contracting countries. Finally, treaties may encourage private arbitration of such disputes.

Treaties delimiting judicial jurisdiction as between countries are by no means common. Most countries rely, in this respect, on general rules

78. For a compilation, see I ZEYTEL, *ENABLING INSTRUMENTS OF MEMBERS OF THE UNITED NATIONS* (1951), esp. the International Organizations Immunities Act (59 STAT. 669), Art. 2. Cf. *Balfour v. United States*, 90 F. Supp. 831 (N.D. Cal. 1950); *International Refugee Organization v. Republic*, 92 F. Supp. 674 (D. Md. 1950), 189 F.2d 858 (4th Cir. 1951).

of international law in addition to their municipal law; nevertheless, there are a few treaties in point.

(a) A peculiar provision survived in our treaty with Switzerland (1850/55) providing that:

Any controversy that may arise among claimants to the same succession, as to whom the property shall belong, shall be decided according to the laws and by the judge of the country in which the property is situated (Art. VI).

This provision, quite common in the past,⁷⁹ was litigated once in Switzerland⁸⁰ and once in the United States.⁸¹ It contains two simple conflict rules: one designating the law applicable as to *inheritance claims* (to be discussed later) and the other settling the questions of judicial jurisdiction in the sense that such jurisdiction is vested exclusively in the *forum rei sitae*.⁸²

(b) A different type of jurisdictional delimitation by treaty is contained in the Warsaw Convention. Here plaintiff is given the choice of several jurisdictions in which to bring his action on claims arising from *international*

79. E.g., treaties with Prussia, 1828, Art. XIV, Austria, 1829, Art. IX; Wurtemberg, 1844, Art. V, also with Haiti, 1864, Art. 9, etc.

80. *In re Wohlwend* (November 24, 1883, BGE 9 507) decedent died in Illinois leaving a savings account in a Swiss Bank. The Swiss Federal Tribunal assumed that "at the time of the signing of the treaty by the contracting countries, they were . . . in accord as to movable property so that by using the words 'judge and laws of the land where the property is situated' they did not mean 'judges and laws' of the country where the individual pieces of the estate are located in fact, but 'judges and laws' of the last domicile of the deceased where such pieces are considered to be situated on the basis of a legal fiction, i.e., *mobilia ossibus inheret*" (516). But see note 82 *infra*.

81. *In re Schneider's Estate*, 928 N.Y. 852, 96 N.Y.S.2d 652 (1950). For a discussion, see Falconbridge, *Renvoi in New York and Elsewhere*, 6 VAND. L. REV. 708, 725 (1953).

82. It is to be kept in mind that an identical provision was contained already in the previous treaty with Switzerland (1847, Art. I *if.*; cf. 5 MILLER, TREATIES AND OTHER INTERNATIONAL ACTS . . . 169). Negotiating the 1850 treaty, Swiss representatives attempted unsuccessfully to replace this provision with one patterned after their draft convention with France (Art. 7) that "Difficulties relative to inheritance shall be judged by the courts of the country where they are opened" (cf. MILLER, *op. cit.* 183). This proposal [cf. PILLET, LES CONVENTIONS INTERNATIONALES RELATIVES A LA COMPETENCE JUDICIAIRE ET A L'EXECUTION DES JUGEMENTS, 145, 353 (1913)] was rejected by the American negotiator, as evidenced by the Swiss message mentioned note 50 *supra*, explaining that "either in the United States it is not permissible for a judge to render an opinion according to other laws than those of the country, or, because . . . the same court may be called upon to judge a dispute under the laws of two or three countries." These supposed grounds for the attitude of the American negotiator against changing Art. VI may not be in point as to American law, but they prove nevertheless that there was no change in the American determination not to change Art. VI. Finally, for fear expressed in the same message, that Swiss insistence upon such change might bring about "some unforeseen obstacle in the United States Senate", Swiss negotiators gave in and Art. VI was adopted without changes.

It is to be added that the doctrine underlying Art. VI is only the time honored Statutist rule "tot hereditates quot patrimonia diversis tertiois obnoxia;" cf. 2 LAINE, INTRODUCTION AU DROIT INTERNATIONAL PRIVE CONTENANT UNE ETUDE HISTORIQUE ET CRITIQUE DE LA THEORIE DES STATUTS . . . 285 (1892); DELAUME, LES CONFLITS DE LOIS A LA VEILLE DU CODE CIVIL, 315 (1947).

air transportation: the air carrier's domicile, his principal place of business, the location of his agency through which the particular contract has been concluded, and the place of destination (Art. 28). The first three contacts follow the civil law rule of *actor sequitur forum rei* while the last relies on the contact of the place of performance. It may be added that the place of injury as designating the forum was rejected.⁸³

(c) A third group relates to disputes arising out of *trade-mark* infringements. According to the Inter-American Convention for trade-mark and commercial protection (Washington, 1929, 46 Stat. 2907) jurisdiction is vested in courts of the place where such infringement occurred, granting the owner of a protected trade-mark "the right to employ all legal means, procedure or recourse provided in the country in which such interfering mark is being used or where its registration or deposit is being sought", with the routine reference to local law (Art. 7).⁸⁴ Older treaties, on the contrary, are less explicit on this point. According to the treaties with France (1869), Belgium (1875), Yugoslavia (1881), etc., claims of this nature are to be "prosecuted . . . in courts of the country in which the counterfeit shall be proven as if the plaintiff were a subject of that country."

(d) An elaborate set of rules delimiting jurisdiction is contained in the Agreement between the parties to the NATO regarding the *status of their forces* (London, 1951, TIAS 2846). Jurisdiction over claims against members of the armed forces and their civilian components for damages "in the territory of the receiving State to third parties" arising out of their performance of official duties (other than contractual claims) shall be settled according to a scheme prescribed by Art. VIII, 5 of the Agreement. Claims arising out of torts not connected with official duties will be dealt with by the "authorities of the receiving State" and "nothing in this paragraph shall affect the jurisdiction of the courts of the receiving State to entertain an action against a member of a force . . . unless and until there has been payment in full satisfaction of the claim" (Art. VIII, 6, d) which rule applies also in cases of "the unauthorized use of any vehicle of the armed services . . . except in so far as the force of civilian component is legally responsible" (Art. VIII, 7). Local jurisdiction regarding contractual claims is not affected at all.

(e) Finally, some treaties touch upon the parties' determination of judicial jurisdiction, *prorogation*.⁸⁵ One provision falling into this group was contained in the now expired Montreux Convention (1931) concerning

83. GOEDHUIS, NATIONAL AIRLEGISLATION AND THE WARSAW CONVENTION 287 (1937; cf. *Rotterdamsche Bank v. B.O.A. Corp.*, 1 All E.R. 675 (1953)).

84. The prior Santiago Convention (1923, 44 STAT. 2494) formulated the rule to read that "in any civil, criminal or administrative proceedings arising in a country with respect to marks . . . the domestic authorities of the same State have jurisdiction thereof, and the precepts of the law and procedure shall be observed" (Art. V, 1).

85. Cf. Graveson, *Choice of Law and Choice of Jurisdiction in the English Conflict of Laws*, 28 BRIT. Y.B. INT'L L. 1951, 273 (1952).

capitulations in Egypt. There, an option was given foreigners to elect local courts by entering into an express agreement by means of a clause "attributing competence", or, by the mere fact that such foreigner has instituted proceedings before a local court or has not challenged its jurisdiction in due time, or, with regard to legal entities, by inserting into their charters a clause attributing judicial jurisdiction to Egyptian courts. A provision limiting the choice by parties of judicial jurisdiction is contained in the Warsaw Convention (1929) declaring without effect "all special agreements . . . by which parties purport to infringe the rules laid down by this Convention . . . by altering the rules as to jurisdiction" (Art. 32).⁸⁶

Note: The present study will be continued in the next issue of the *Miami Law Quarterly* and will discuss, among others, problems concerning judicial procedure, torts, contracts, property, family law, legal entities, devolution upon death, administration of decedent estates and general problems (e.g., characterization, renvoi, etc.).

86. Among recent drafts the Rome Convention on damages by foreign aircraft to third parties on the surface (1952, 2 INT'L & COMP. L.Q. 94, 1953) vests exclusive jurisdiction in the court of the locus damni, and giving at the same time parties a chance to take "action before the courts of any other Contracting State" which proceedings will not prejudice parties litigating in the forum loci damni." In addition, parties may agree to arbitrate "in any Contracting State" (Art. 20). Cf. Davis, *Surface Damage by Foreign Aircraft, the United States and the New Convention*, 38 CORNELL L.Q. 570, 586 (1953).

Cf. Colclaser, *Jurisdiction in Private Air Law Cases*, 49 MICH. L. REV. 1163 (1951). The Draft for a uniform law of the international sale of personal property (Provisional Draft of Buenos Aires, 1953) contains an express provision similar to the one adopted by the above Rome draft. Disputes arising out of international sales of chattels (as defined by Art. 1, par. 2 of the Draft) shall be adjudicated by "judges and courts of the place of performance of the obligation" (Art. 22), though this place is not defined by the Draft. In addition, parties may "by mutual consent stipulate the judges, courts or arbitrators as some other place." The rule giving exclusive jurisdiction to courts of the place of performance is contrary to basic jurisdictional principles of our law and will make the acceptance of the convention rather difficult. It seems advisable to eliminate all jurisdictional provisions except those relating to arbitration, and stay with substantive rules.