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INTERNATIONALLY UNIFORM PROBATE LAW-- A METHOD FOR IMPROVING ADMINISTRATION OF MULTINATIONAL ESTATES

John G. Webb III*

The need to coordinate succession laws of different nations was recognized as early as 1893 at the first Hague Conference where attempts were begun to coordinate the laws of succession on death through multilateral conventions.[1] Notwithstanding so early an effort, however, the administration of multinational estates[2] has remainded plagued by diversity of national laws governing succession on death.[3] The resulting confusion and inefficiency of administration has often frustrated the testamentary intentions of decedents of many nationalities. While no viable uniformity has been attained among nations, the need for consistency increases. Half a million United States civilian citizens live abroad, and three million aliens live in the United States.[4] Given the current trends in immigration to the United States, in world-wide expansion of United States trade and industry, and in exploitation of the United States market by foreign producers, this number will undoubtedly continue to increase, as will the need to administer multinational estates. In response to this need, efforts continue to be made through proposed multinational conventions to coordinate succession laws of nations, and recent United States participation in such efforts, make success of the undertaking more likely in the near future.

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1. See Rabel, The Form of Wills, 6 VAND. L. REV. 533, 534 (1953).

2. For purposes of this paper, a "multinational estate" is defined as the aggregate of tangible and intangible property in which a decedent claimed an interest.

3. "Every system in the checkered table believes in [the merits of its own system for succession on death]. All together have created chaos." 4 E. RABEL, THE CONFLICT OF LAWS: A COMPARATIVE STUDY 271 (1958).

4. In 1960, 1,374,421 United States citizens resided permanently outside the United States, 610,174 of whom were in the armed forces. BUREAU OF THE CENSUS, U.S. DEP'T OF

The purpose of this paper is to examine some of the problems inherent in the administration of multinational estates and to propose possible solutions to these problems that could function within the United States and within the framework of the probate laws of the several states and the Federal Constitution. In addition, this paper will discuss several methods of implementing the proposed solutions. It will, therefore, be limited to a consideration of multinational estates that have significant contacts with the United States.[5] One such example that will be helpful in subsequent discussion occurs when a United States citizen, a resident of another country, dies while conducting business in a third country.

I. SOME PROBLEMS IN MULTINATIONAL ESTATE ADMINISTRATIONS

Although most nations provide for an orderly procedure of passing property from decedents to beneficiaries under decedents' wills or to heirs of intestate decedents,[6] their

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COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1968, tab. 10, at 11. In 1967, 3,669,000 aliens reported to the United States Attorney General that they were residents of the United States, and there were 826,000 excess immigrations over departures. Id., tabs. 133, 136, at 95-97. No mortality figures for nonresident United States citizens or for resident aliens of the United States were available.

5. A comparison of existing municipal law provisions for determining succession on death and the administration of decedents' estates, called "probate laws" in this paper, is not attempted. For a comparative study of various national probate laws see, 4 E. RABEL, supra note 3, at 245; Brown, Winding Up Decedents' Estates in French and English Law, 33 TUL. L. REV. 631 (1959); Brutau, An Introduction to the Law of Succession Mortis Causa, 1 INTER-AM.L. REV. 291 (1959); Farran, The Devolution of Property on Death in Spanish and English Law, 32 TUL. L. REV. 387 (1958); Pelletier & Sonnenreich, A Comparative Analysis of Civil Law Succession, 11 VILL. L. REV. 323 (1966); Rheinstein, European Methods for the Liquidation of the Debts of Deceased Persons, 20 IOWA L. REV. 431 (1935); Tay, The Law of Inheritance in the New Russian Code of 1964, 17 INT'L & COMP. L.Q. 472 (1968).

6. See generally M. RHEINSTEIN, THE LAW OF DECEDENTS' ESTATES (1955); Brutau, supra note 5.

prescribed methods for succession of property on death are quite different. This places significant import upon the resolution of the conflicts of law problems that inevitably arise during settlement of multinational estates.[7] Moreover, the diplomatic resolutions of international differences in rules for the succession of decedents' multinational estates that have been developed[8] have had limited success in assisting the judicial and legislative development of an orderly system for the administration of multinational estates.[9] Bilateral treaties have not developed a comprehensive system for the administration of multinational estates.[10] Consequently, numerous situations continue to arise in which an estate plan might be frustrated because of a multinational aspect of the estate.[11] Moreover, administration of multinational estates can be so expensive that heirs or beneficiaries realize small pecuniary benefit on the distribution of the estate assets.

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7. See 4 E. RABEL, supra note 3, at 246 n.1; Ester & Scoles, Estate Planning and Conflict of Laws, 24 OHIO ST. L.J. 270 (1963); Hopkins, Conflict of Laws in Administration of Decedents' Intangibles, 28 IOWA L. REV. 422 (1943); Lewald, Questions de Droit International des Successions, 9 RECUEIL DES COURS 5, 27-38 (1925); Comment, Testate and Intestate Succession to Domestic Property by Alien Beneficiaries, 17 DE PAUL L. REV. 343 (1968).

8. See generally Boyd, Constitutional, Treaty and Statutory Requirements of Probate Notice to Consuls and Aliens, 47 IOWA L. REV. 29 (1961); Boyd, Treaties Governing the Succession to Real Property by Aliens, 51 MICH. L. REV. 1001 (1953); Opton, Recognition of Foreign Heirship and Succession Rights to Personal Property in America, 19 GEO. WASH. L. REV. 156 (1950); Walker, Modern Treaties of Friendship, Commerce, and Navigation, 42 MINN. L. REV. 805 (1958).

9. See, e.g., Corbett v. Stergios, 256 Iowa 12, 126 N.W.2d 342 (1964); cf. Frederickson v. Louisiana, 64 U.S. (23 How.) 445 (1860); Lazarou v. Moraros, 101 N.H. 383, 143 A.2d 669 (1958).

10. See 4 E. RABEL, supra note 3, at 246.

11. See Boyd, Consular Functions in Connection with Decedents' Estates, 47 IOWA L. REV. 823, n.158 (1962). An American attorney with extensive experience with multinational estates reported that in 1950 between $50,000 and $100,000 was distributed to non-residents of the United States from estates administered in the United States. Id. In view

A. Frustration of Decedent's Intent

1. Failures of testamentary plans for succession to multinational estates.--The multinational aspects of an estate present numerous problems that may prevent the attainment of the decedent's intentions. Moreover, when a multinational estate plan is not given full effect not only the testator's intent but also the basic policies of the probate system are often frustrated.

(a) Multiple domicile.--If a testator resides in two or more countries, the determination of his domicile has significant bearing on the disposition of his multinational estate. If, for example, the person executes a will in the country which he believes to be his domicile, and he subsequently dies in another state of residence, he may be declared a domicile of the state where he died. If the laws of his declared domicile differ from those of the country of his chosen domicile, the testator may have his testamentary intentions frustrated. Although courts may accept the testator's unequivocal declaration in his will of his intended domicile as dispositive of the domiciliary issue, litigation over multiple taxation of domestic estates indicates that a court may thrust upon the testator a domicile other than the one he has expressly chosen.[12] Moreover, when two countries both assert that the decedent was domiciled within their respective borders for estate tax purposes, each may succeed in taxing his multinational estate.[13] In addition, the domicile of a

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of the number of persons involved and of the increase in international intercourse during recent years, it seems reasonable to conclude that there exists a significant number of multinational estates with United States contacts which might be adversely affected by conflicts of laws which upset testamentary plans for disposition of the estate.

12. Compare In re Dorrance's Estate, 309 Pa. 151, 163 A. 303 (1932) with In re Dorrance's Estate, 115 N.J. Eq. 268, 170 A. 601 (Prerogative Ct. 1934).

13. Cf. In re Dorrance's Estate, 309 Pa. 151, 163 A. 303 (1932); In re Dorrance's Estate, 115 N.J. Eq. 268, 170 A. 601 (Prerogative Ct. 1934). See generally 4 LEAGUE OF NATIONS, TAXATION OF FOREIGN AND NATIONAL ENTERPRISES 67-70 (1933); Carey, A Suggested Fundamental Basis of Jurisdiction with Special Emphasis on Judicial Proceedings Affecting Decedents'

decedent has further significance as a determinant of the taxable situs of personal property in his multinational estate.[14]

(b) Form of the will.--A testator's intentions are often not fulfilled because of his failure to comply with requirements for the formation of wills. Much of the difficulty in this area derives from the lack of uniformity among jurisdictions. In the United States, for example, the formalities required by statute for a valid will differ from state to state.[15] A testator could, therefore, move from a state in which his will would be valid into a state which would refuse to recognize it for such reasons as lack of sufficient number of witnesses,[16] lack of proper signature,[17] lack of competence of an interested witness,[18] or lack of some other formality.[19] If the testator had no domicile in a state where his will would be valid, his estate would then pass to his heirs under the laws of descent and distribution in the state where he was domiciled at the time of his death. When a multinational estate is involved, variation among nations in their formal requirements for a valid will may give rise

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Estates, 24 ILL. L. REV. 44 (1929); Simons, Dangers of Double Domicile and Double Taxation, 20 TAXES 345 (1942); Tweed & Sargent, Death Taxes Are Certain--But What of Domicile, 52 HARV. L. REV. 68 (1939).

14. Speed v. Kelly, 59 Miss. 47 (1881). See generally MC DOWELL, FOREIGN PERSONAL REPRESENTATIVES (1957); Stimson, Conflict of Laws and the Administration of Decedents' Personal Property, 46 VA. L. REV. 1345 (1960); Note, Unitary Administration of Decedents' Intangibles, 50 MINN. L. REV. 129 (1965).

15. See 2 W. BOWE & D. PARKER, PAGE ON THE LAW OF WILLS § 19.4 (1960) [hereinafter cited as PAGE ON WILLS]; cf. MASS. ANN. LAWS, ch. 191, § 5 (1969) (will, valid where executed, is valid in Mass.); TEX. PROB. CODE ANN. §§ 100-04 (Vernon 1956) (Uniform Probate of Foreign Wills Act); WIS. STAT. ANN. § 310.07 (1958).

16. Cf. Davis v. Mason, 26 U.S. (1 Pet.) 503 (1828); 2 PAGE ON WILLS § 19.75, at 174 n.4.

17. In re Estate of Williams, 172 So. 2d 464 (Fla. 3d Dist. Ct. App. 1965) ("X" insufficient signature).

18. In re Will of Moody, 155 Me. 325, 154 A.2d 165 (1959).

19. See generally 2 PAGE ON WILLS § 19.

to similar difficulties. If, for example, a testator executed a will in the United States under the laws of one state and subsequently established domicile and died in a foreign country, a court of that country may not give effect to his will because of its lack of conformity with the country's testamentary requirements.[20] In order to eliminate this problem, a multilateral convention is being developed by the International (Rome) Institute on the Unification of Private Law, which would establish a standard will form that would be recognized by all countries adhering to the convention.[21]

(c) Testamentary capacity.--In the United States, the question of whether a testator had legal testamentary capacity at the time he executed his purported will is decided by a competent court.[22] When the forum that determines a testator's capacity is not located in the same jurisdiction in which a will disposing of a multinational estate was executed, there may be several impediments to an adjudication effectuating the testator's intent. For instance, witnesses of the will may be extremely difficult to locate, or foreign customs surrounding the transmission of estates may be misinterpreted. Moreover, differences between the law of the forum and the law of the place of execution may cause the forum to refuse to enforce a testamentary disposition which contravenes the forum's public policy.[23] A decision that the testator did not intend his purported will to dispose of his multinational estate, when that decision is influenced by any of the foregoing factors, would

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20. See generally Wren, Problems in Probating Foreign Wills and Using Foreign Personal Representatives, 17 SW. L. J. 55 (1963).

21. Rome Institute Draft International Convention Providing a Uniform Law on the Form of Wills, 2 INT'L LAWYER 251 (1968). See notes 54-57 and accompanying text infra.

22. Since probate proceedings were not within the jurisdiction of English common law courts, there is no constitutional right in the United States to a trial by jury in courts administering a decedent's estate. 3 PAGE ON WILLS § 26.85. Some states, however, provide for jury trials in the contest of wills. 3 PAGE ON WILLS § 26.86.

23. Dammert v. Osborn, 141 N.Y. 564, 568, 35 N.E. 1088, 1089 (1894) (dictum).

certainly frustrate the testator's true intention concerning the disposition of his estate.

(d) Diverse interpretations.--Variations in the judicial interpretation of the terms in a decedent's will may cause his property to go to different persons or to be divided in different shares than he intended when he executed the will. For example, if a decedent had directed that equal interests in all real property in his multinational estate should pass to each of his "children" and one of his children has been adopted after the execution of the will, the adopted child may not share in property located in jurisdictions which do not construe the term "children" to include adopted children of a decedent.[24]

Although this problem would not arise if the United States Constitution required that full faith and credit be given a domiciliary court's construction of a will,[25] state tribunals are not constitutionally compelled to recognize a domiciliary court's determination of rules for the disposition of property situated within its jurisdiction.[26] Moreover, there is no compulsion, absent a contrary treaty provision or forum policy,[27] for a foreign forum to give conclusive effect to a United States court's interpretation of a term effecting the disposition of property within the foreign jurisdiction. If the decedent in the example above had four natural children and an adopted child, his multinational estate might be divided four ways in one country and five ways in another.[28] Another anomaly may arise if one of the countries allows the adopted child to share in

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24. See Note, Adopted Children: Inheritance Through Intestate Succession, Wills and Similar Instruments, 42 BOSTON U.L. REV. 210 (1962).

25. Blodgett v. Silberman, 277 U.S. 1 (1928).

26. Clarke v. Clarke, 178 U.S. 186 (1900) (real property in non-domiciliary state); Kerr v. Moon, 22 U.S. (9 Wheat.) 565, 571 (1824) (personal property in non-domiciliary state; dictum).

27. Cf. Dammert v. Osborn, 140 N.Y. 30, 35 N.E. 407 (1893) (dictum). But see Convention with the Swiss Confederation, Nov. 25, 1850, art. VI, 11 Stat. 587, 591 (1850), T.S. No. 353 (decisions of situs courts control).

28. Cf. Trotter v. Van Pelt, 144 Fla. 517, 198 So. 215 (1940).

personal property but prevents him from sharing in real property physically located in the country.[29]

The following two examples demonstrate problems in the interpretation of terms. First, suppose that A executes a will in country Z, in which he left the residue of his estate "to my heirs at law." If A dies in country X, a civil law country, and X assumes jurisdiction to administer the estate, whose law will the X court apply to determine A's "heirs at law?"[30] If the X court determines that A's heirs are those persons who would have been A's heirs to the Z property under the law of X if A had been a national of X, a court in Z must decide whether to accept this determination or to make a new determination on this issue under its own laws.

If the X court decides that the law of the United States should be applied to determine A's heirs, a second problem arises as to which state's law will be applicable. Whenever a foreign court applies United States law, this problem arises because there is no federal succession law in the United States. The choice of law rules of the forum would normally determine the applicable state law, but since A would not be a citizen of any particular state because he is not domiciled within the United States, there would be no guide in United States local law for making the determination. When this problem arises, United States consuls are required to transmit the assets of a foreign-domiciled United States citizen for whose estate there is no foreign administration to the state in which the decedent was last domiciled.[31]

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29. The state might have situs rules which require personal property to be distributed under the domiciliary interpretation of a testator's will, and yet have statutes which prevent children adopted after the execution of the will from inheriting realty unless the will clearly indicates that such children are intended to be included among the takers of real property. See generally 6 PAGE ON WILLS §§ 60.6 to -.9.

30. Cf. In re Johnson, [1903] 1 Ch. 821 (German-domiciled British decedent's property passed party under German intestate laws).

31. 22 U.S.C. § 1175 (1964).

These two examples illustrate some of the problems that could be resolved if nations would agree to a multilateral convention that would establish uniform rules of interpretation and conflicts of law.[32]

2. United States local law barriers to fulfillment of decedent's intent.--While wise estate planners and administrators may circumvent many multinational estate problems arising out of conflict of laws or inadequate estate plans, there are within the United States a number of unavoidable state laws that may prevent the intended disposition of a testator's multinational estate. Generally, these laws impose restrictions on the transmission of property to aliens and non-residents of the United States. Although in some instances treaties may supersede these state-created barriers, in most cases state statutory restrictions are controlling and successfully limit the distribution of a multinational estate to aliens or non-residents of the United States.

(a) Alien disabilities.--Although the common law disabilities that prevent aliens from holding or inheriting personal property have been uniformly abolished among the states,[33] similar restrictions on real property exist in full or in limited form in at least twenty-eight states.[34] Bilateral treaties that provide a period within which distributed property may be sold mitigate the problems of some aliens who inherit real property located in those few states

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32. See notes 48-65 and accompanying text infra.

33. See generally Kohler, Legal Disabilities of Aliens in the United States, 16 A.B.A.J. 113 (1930); Meekison, Treaty Provisions for the Inheritance of Personal Property, 44 AM. J. INT'L L. 313 (1950); Note, Alien Succession Under State Law: The Jurisdictional Conflict, 20 SYRACUSE L. REV. 661 (1969); Note, Treaties and the Constitution: Alien Property Rights, 37 COLUM. L. REV. 1361 (1937).

34. E.g., Arizona, Arkansas, California, Connecticut, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oklahoma, Oregon, Texas, Vermont, Virginia, Washington, Wyoming. W. GIBSON, ALIENS AND THE LAW, app. B, tabs. 5-6, at 180-81 (1940).

which perpetuate the common law disabilities.[35] Such treaty provisions, however, are of no benefit to aliens who are not nationals of countries which have such treaties with the United States; moreover, the United States treaty commitments do not directly abrogate these state-created alien disabilities.[36] The elimination of such disabilities through international agreements is desirable because it would permit a fuller realization of a testator's intent by assuring alien beneficiaires the receipt of all property that is due them under the terms of a will.

(b) Discriminatory taxation of non-resident alien beneficiaries' shares.--Certain states of the United States impose a higher inheritance tax on property inherited by non-resident aliens of the United States.[37] Bilateral treaties which deal with the inheritance of property specifically invalidate such discriminatory taxation in the case of property situated in the taxing state which was owned by a foreign national who is a resident of a party to the treaty.[38] It seems well settled, however, that such treaty provisions do not apply to state discriminatory taxation of property inherited from a deceased United States citizen,[39] although the treaties invalidate discriminatory taxation of property

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35. E.g., Treaty with Italy, Feb. 2, 1948, art. VII, § 2, 63 Stat. 2255, 2266 (1949), T.I.A.S. No. 1965 (3 years); W. GIBSON, supra note 34, app. B, tab. 8(a), at 182-83.

36. For a treaty provision which granted national treatment in any matter related to the acquisition of real property by the other country's nationals see, Treaty with Argentina, July 27, 1853, art. IX, 10 Stat. 1005, 1009 (1853), T.S. No. 4.

37. Frederickson v. Louisiana, 64 U.S. (23 How.) 445 (1859) (discriminatory tax held valid); W. GIBSON, supra note 34, at 107; cf. Mager v. Grima, 49 U.S. (8 How.) 490 (1850) (discriminatory tax held valid); In re Stixrud's Estate, 58 Wash. 339, 109 P. 343 (1910) (discriminatory tax held invalid).

38. E.g., Treaty with Denmark, Apr. 11, 1857, 11 Stat. 719 (1857), T.S. No. 67.

39. Skarderud v. Tax Comm'n, 245 U.S. 633 (1917); Duus v. Brown, 245 U.S. 176 (1917); Petersen v. Iowa, 245 U.S. 170 (1917); Frederickson v. Louisiana, 64 U.S. (23 How.) 445 (1859).

inherited from deceased aliens.[40] While the only practical effect of state discriminatory taxation is diminution of the value of property passing to non-resident aliens, from the decedent's standpoint his United States beneficiaries have received preferential treatment over his alien beneficiaries. Unless he contemplated such a result, his intent is frustrated by such discrimination.

(c) "Iron Curtain" statutes.--Certain states have statutes which prohibit distribution to aliens of inherited property when the alien beneficiaries may not have the beneficial use or enjoyment of the property.[41] A typical example of a prohibitive device is a statute which precludes inheritance of property by the national or resident of a country which does not permit residents of the forum state to inherit property situated in that country.[42] Due to the apparent intent by those states' legislatures to prevent American money from going into the treasuries of communist countries, such statutes have been called "Iron Curtain" statutes.[43] Certain applications of these statutes have been declared unconstitutional as an intrusion on the federal prerogative for making foreign policy decisions.[44] A recent case, however, indicates that a decedent's alien heirs or beneficiaries may still be prevented from obtaining inherited property by the "Iron Curtain" statutes.[45]

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40. Nielson v. Johnson, 279 U.S. 47 (1929); Comment, 1960 WIS. L. REV. 74 (1960).

41. E.g., N.Y. Surr. Ct. Proc. § 2218 (McKinney 1967).

42. E.g., CAL. PROB. CODE § 259 (West 1941); MONT. REV. CODE ANN. § 91-520 (1964).

43. See generally Sobko Estate, 88 Pa. D. & C. 76 (Orphan's Ct. 1954); Note, International Law--Inheritance by Nonresident Aliens in Oregon: The Oregon Statute, the Effect of Treaties, and the Federal Law, 45 ORE. L. REV. 221 (1966); Note, Conflict of Laws--Constitutionality of State Statutes Governing Ability of Nonresidents to Receive Property Under American Wills: Zscernig v. Miller, 21 VAND. L. REV. 502 (1968).

44. Zscernig v. Miller, 389 U.S. 429 (1968), noted in 21 VAND. L. REV. 502 (1968); Kolovrat v. Oregon, 366 U.S. 187 (1961).

45. In re Estate of Leikind, 22 N.Y. 2d 346, 292 N.Y.S. 2d 681, 239 N.E. 2d 550 (1968).

B. Wasteful Multiplicity of Administrations

Ancillary administrations of a multinational estate in several countries or states of the United States involves a tremendous financial outlay that depletes the estate.[46] The persons whose multinational estates stand to lose most from multiple administrations are those persons who have no estate plans or wills or whose estate plans are invalidated. Unitary administration of all estate assets, wherever located, has frequently been suggested as a means to eliminate expensive multiple administrations in the United States, but the proposed solution has not been implemented. International agreements to submit all multinational estates to unitary administration under the supervision of a convenient forum would seem to be a solution to both the domestic and international problems. Such a proposal should not meet stiff opposition by parties with vested interests in fractionalizing estate administrations, since unitary administration would presumably be in the interest of international conciliation. The recently ratified Vienna Consular Convention[47] may provide a framework for a system of worldwide unitary administration of multinational estates. Article 5 of the Convention, for example, would presumably make it possible for a consul in a receiving state to represent by proxy an interested absent national of the sending state in the administration of a multinational estate.

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46. The excessive expense of multiple administrations of estates is not the only criticism that can be raised. Since other writers have exhaustively delineated the various undesirable incidents of multiple administrations within the United States, it would be superfluous to reiterate those arguments since they are equally applicable to the administration of multinational estates. See generally R. LEFLAR, CONFLICT OF LAWS §§ 202, 204 (2d ed. 1968); MCDOWELL, supra note 14; STUMBERG, CONFLICT OF LAWS 400 n.6 (3d ed. 1963); Atkinson, The Uniform Ancillary Administration and Probate Acts, 67 HARV. L. REV. 619 (1954); Currie, The Multiple Personality of the Dead: Executors, Administrators and Conflict of Law, 33 U. CHI. L. REV. 429 (1966); Ester & Scoles, Estate Planning and Conflict of Laws, 24 OHIO ST. L.J. 270 (1963); Goodrich, Problems of Foreign Administration, 39 HARV. L. REV. 797 (1926); Opton, supra note 8; Scoles, Conflict of Laws in Estate Planning, 9 U. FLA. L. REV. 398 (1956); Stimson, supra note 14; Wren, supra note 20; Note, supra note 14.

47. Vienna Convention on Consular Relations with Optional Protocol, art. 5(g), opened for signature April 24, 1963, 115

II. A UNIFORM MULTINATIONAL PROBATE LAW THROUGH INTERNATIONAL CONVENTION

A. Background

Historically, the United States has not participated actively in the development of international uniform laws. In 1963, however, with the encouragement of the American bar,[48] Congress made possible the first official United States participation in multinational projects for developing conventions to unify private international law. Congress appropriated $25,000 to send United States delegates to the Hague Conference on Private International Law and to the International (Rome) Institute for the Unification of Private Law.[49] Considering the past tendency of United States diplomacy to isolate itself from efforts of international cooperation to unify private international law,[50] Congress's action may signal an important new direction in American foreign policy concerning private international law.[51]

CONG. REC. 30945 (1969); see Rocca v. Thompson, 223 U.S. 317 (1912); J. FARLEY, RIGHTS OF FOREIGN CONSULS IN THE UNITED STATES 44 (1931); L. LEE, CONSULAR LAW AND PRACTICE (1961); Boyd, supra note 11, at 824 n.7.

48. See American Bar Ass'n House of Delegates Res. of Feb. 4, 1963, 88 A.B.A. REP. 107 (1963); H.R. REP. No. 873, 88th Cong., 1st Sess. (1963); S. REP. No. 781, 88th Cong., 1st Sess. (1963).

49. H.R.J. Res. 778 of Dec. 30, 1963, 22 U.S.C. § 269(g) (1964).

50. See generally Nadelmann, Ignored State Interests: The Federal Government and International Efforts to Unify Rules of Private Law, 102 U. PA. L. REV. 323 (1954); Potter, Inhibitions Upon the Treaty-Making Power of the United States, 28 AM. J. INT'L L. 456 (1934).

51. But cf. Letter from George W. Ball, Acting Secretary of State, to Lyndon B. Johnson, President of the Senate, Aug. 9, 1963, 109 CONG. REC. 16594-95 (1963). "[O]ur membership is predicated on the understanding that U.S. Federal constitutional and legal requirements would, insofar as the United States is concerned, at all times be paramount over any present or future activities or provisions of the two organizations in case there should be any inconsistency." Id. at 16595.

The United States delegates participated actively in the 1964 and 1968 session of the Hague Conference.[52] The delegates also participated in formulating, among other draft conventions,[53] the Draft International Convention Providing a Uniform Law on the Form of Wills.[54] According to representatives who served as unofficial observers at the 1960 Hague Conference, the United States concept of uniform legislation was widely accepted by member nations as a method of harmonizing the legal systems of member nations.[55] The Draft Convention is the first convention to employ a uniform law, and it is the first convention with which the United States has had any official connection. Apparently, it is also the first convention on the subject of administration of decedents' estates which employs a uniform law.[56] Similar conventions dealing with the administration of decedents' estates are likely to be forthcoming from at least one of the conferences, since the 1972 Hague Conference has the topic on its agenda.[57]

There is historical precedent and good cause for nations to adopt the promulgation of internationally uniform laws as a vehicle for developing uniform rules governing the administration of decedents' estates. Diversity among state probate laws has precipitated the same types of conflict of

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52. See Report of the United States Delegation to the Eleventh Session, 8 INT'L LEG. MATERIALS 785 (1969); Kearney, Progress Report--International Unification of Private Law, 23 RECORD OF N.Y.C.B.A. 220 (1968).

53. E.g., The Hague Conference on Private International Law: Draft Convention on Recognition of Foreign Divorces and Legal Separations, 14 AM. J. COMP. L. 697 (1966).

54. Rome Institute Draft International Convention Providing a Uniform Law on the Form of Wills, 2 INT'L LAWYER 251 (1968).

55. See Kos-Rabcewicz-Zabkowski, The Possibilities for Treaties on Private International Law to Serve as Model Laws, 26 REV. DU B. DE QUEBEC 229 (1966); Nadelmann, The United States Joins the Hague Conference on Private International Law, 30 LAW & CONTEMP. PROB. 291 (1965).

56. Kearney, supra note 52, at 236.

57. The Conference has given the second place on the agenda to considering "succession of property, especially the problems relating to administration of decedents' estates." 8 INT'L LEG. MATERIALS 824 (1969).

laws problems within the United States that exist on an international scale. The process of developing uniform laws in the United States and the development of internationally uniform laws have been almost identical. In the United States, the Commissioners on Uniform State Laws have sought admirably to resolve differences among state probate laws by means of uniform acts.[58] Inertia, politics, and vested interests, however, have prevented the realization of the Commissioners' goals in developing these uniform acts.[59] Nevertheless, states' experience with the Uniform Commercial Code and other extensively adopted uniform acts proves the effectiveness of uniform acts as a means of reducing expensive interstate conflict of laws. Essentially the same formulative process seems to prevail in the development of multilateral conventions, and multinational uniform laws could perform analogous functions in an international context.

There has been some indication that uniform laws developed by international conferences might be submitted for enactment in the several United States, just as the Uniform Commercial Code and other domestic Uniform acts have been enacted.[60] The precise method, however, by which each uniform law would be ratified is still an open question. If a uniform multinational probate law is drafted and subsequently enacted in the United States, its domestic operation may be analogous to the domestic operation of the ancient lex mercatoria (Law Merchant) in England.[61] The Law Merchant was a body of customary rules which governed the affairs of businessmen of different

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58. In 1967 the following Uniform Acts in the area of administration of decedents' estates (probate law) had been recommended for adoption by the states: Ancillary Administration of Estates Act; Estate Tax Apportionment Act; Model Estates Act; Model Execution of Wills Act. J. RICHIE, N. ALFORD & R. EFFLAND, CASES AND MATERIALS ON DECEDENTS' ESTATES AND TRUSTS 25 n.91 (3d ed. 1967).

59. Cf. Lee, Some New Features in the Consular Institution, 44 GEO. L.J. 406, 414-15 (1956).

60. See Kearney, supra note 52, at 237; Nadelmann, supra note 55.

61. See generally Schmitthoff, International Business Law: A New Law Merchant, 2 CURRENT L. & SOC. PROB. 129, 131 (1961).

nationalities. It existed simultaneously with the English common law rules governing the enforcement of legal obligations incident to business transactions. Businessmen who dealt with foreigners in England apparently preferred the internationally uniform, practical Law Merchant to the ponderous, fiction-ridden common law. Just as the Law Merchant provided a means for expediting international business transactions, a uniform multinational probate law could fulfill a special need for administering decedents' multinational estates with a minimum of delay, confusion, and expense.

B. A Uniform Multinational Probate Law

It is too early in the development of international conventions providing uniform acts to predict whether a comprehensive multinational probate code or several uniform acts like the Draft Uniform Law on the Form of Wills[62] will emerge as the means for achieving simplicity and economy in the administration of multinational estates. For simplicity's sake, this discussion will proceed on the premise that a multinational convention on probate law will emerge from the negotiations at the Hague and in Rome and that this hypothetical convention will comprehensively harmonize the probate laws of all member nations. Before any convention providing for a Uniform Multinational Probate Law will be ratified by the United States, its advocates will have to prove that it will provide a better means than now exists for economically administering decedents' multinational estates with United States contacts and for effectuating a testator's intent for the disposition of his multinational estate. Possible approaches that a Uniform Multinational Probate Law might take to solve the problems which have traditionally plagued the administration of multinational estates are discussed below.

1. Multiple domicile.--A Uniform Multinational Probate Law should provide some means for determining a single forum that would have jurisdiction over the administration of the estate. There are a number of possible bases for jurisdiction over the administration: the decedent's domicile, as in

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62. Draft International Convention Providing a Uniform Law on the Form of Wills, supra note 54.

common law systems; decedent's nationality, as in some civil law systems; or a hybrid, considering both decedent's nationality and place of habitual residence, as in some civil law systems. A person who has a multinational estate may be so mobile that traditional tests of domicile would be difficult to apply to him. In such cases, nationality would seem to provide the most easily determined basis for jurisdiction. This standard, however, would not be adequate in those instances where the testator was a citizen of several countries. Thus, it would appear preferable for courts to use a hybrid standard that would permit a court to assume jurisdiction over administration of a multinational estate whenever it found that it was in the interest of economy to the estate and fulfillment of the testator's intent for disposition of his multinational estate.

2. Will formalities.--The policy of the Draft International Convention Providing a Uniform Law on the Form of Wills--the recognition of a standard will form to which all nations can agree--should be implemented in a Uniform Multinational Probate Law. Some doubts about the Draft Convention itself have been raised, however, as evidenced by scholarly criticism[63] and the continuing study and discussion of the Convention by both United States and foreign lawyers.[64] Perhaps a provision like the Massachusetts law which recognizes that any will is valid that would be enforceable in the locale where executed or where probated would provide a more widely acceptable means for validating testamentary plans for multinational estates.

3. Testamentary capacity.--The Uniform Law ought to establish standards for determining what forum should make make the decision on testamentary capacity. It should also provide a means to decide whether the forum's local law or some other nation's law should serve as a basis for determining testamentary capacity. The policy of the Uniform Law should be to provide a means most capable of finding that the testator did have the capacity to make a will, since that would most likely fulfill the testator's intent.

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63. Cheatham & Maier, Private International Law and Its Sources, 22 VAND. L. REV. 27, 54 (1968).

64. 4 E. RABEL, supra note 3, at 305.

4. Local law barriers.--State law barriers to the fulfillment of a testator's intent in the disposition of his multinational estate should be subordinated to provisions of the Uniform Law. The Uniform Law might invalidate alien disabilities altogether, or it might prohibit discriminatory taxation of shares of a multinational estate which go to nationals of different adhering nations. Perhaps adhering nations might agree to waive the exchange controls which tend to defeat a testator's intent for distribution of his multinational estate. Such a waiver would make the "Iron Curtain" statutes unnecessary insofar as they are directed toward eliminating the effects of such restrictions.[65] An alternative to the problems that "Iron Curtain" statutes present would be for the Uniform Law expressly to invalidate them.

C. Implementation of a Uniform Multinational Probate Law in the United States

Once a workable Uniform Multinational Probate Law has been developed, it will remain for the convention to be implemented into law by the member states. Within the United States ratification could be effected either by becoming federal law or by becoming state law.

1. Implementation as Federal Law: Treaty or Executive Agreement.--International agreements can become federal law in the United States by one of two means. Either the agreement becomes a treaty with the advice and consent of two-thirds of the Senate or it is ratified as federal law by the official or implied approval of Congress. Treaties of friendship, commerce, and navigation are examples of the former;[66] the General Agreement on Tariffs and Trade is an example of the latter.[67] Thus, the convention promoted in this Note could become federal law either as a treaty under article II, section 2 of the Constitution or as an executive agreement with congressional approval.

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65. State law restrictions that have been found to be directed toward foreign exchange controls have been denied effect. Kolovrat v. Oregon, 366 U.S. 187 (1961).

66. Treaty of Amity, Commerce and Navigation with Great Britain, Nov. 19, 1794, art. IX, 8 Stat. 116, T.S. No. 105.

67. 61 Stat. A3, pts. 5 & 6 (1947), 56-64 U.N.T.S.

If the proponents of the Uniform Law decide that a treaty is the proper method of implementation, they should first canvas the Senate to ascertain whether two-thirds of the Senate will vote for the treaty. The Senate's refusal to ratify the Treaty of Versailles bears witness to the political folly of a President's ignoring senatorial sentiment during negotiation of an international agreement.[68] If the proponents of the Uniform Law do find that it would be more expedient to enact the Convention as an executive agreement, it is possible that Congress has already implicitly expressed its approval of any convention concluded at either the Hague Conference or the International (Rome) Institute by authorizing the President to participate in those multinational negotiations. If this were the case, then any convention dealing with multinational estate that would be signed by a United States delegate would automatically become federal law[69] and would remain a part of United States domestic law until either the United States withdrew from the convention or until Congress repealed the law's domestic effect by the enactment of inconsistent legislation.[70] Domestic effect, for example, has been given to the General Agreement on Tariffs and Trade by a similar procedure that makes a convention, negotiated under the authority of a joint resolution of Congress, law in the United States as of its execution by United States delegates. Thus, joint resolutions have been used previously to give domestic effect to executive agreements. Moreover, the hearings which the House Committee on Foreign Affairs and the Senate Foreign Relations Committee would hold on the convention would provide an additional forum for expression of public opinion on the convention.

Executive agreements may also become domestic law upon their execution by a Presidential delegate without prior congressional approval. There is no case law developing this thesis, however, and, as a practical matter, the

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68. See D. CHEEVER & H. HAVILAND, AMERICAN FOREIGN POLICY AND THE SEPARATION OF POWERS 68 (1952).

69. Cf. United States v. Guy W. Capps, Inc., 204 F.2d 655 (4th Cir. 1953), aff'd on other grounds, 348 U.S. 296 (1954) (statute preceded executive agreement).

70. See Henkin, The Law of the Land and Foreign Relations, 107 U. PA. L. REV. 903, 906 (1959).

academic query has little importance since Congress could repeal domestically any convention with which it was in disagreement.[71] In the past, the Chief Executive has preferred the more conservative approach of having Congress ratify executive agreements that are designed to have domestic effect after signature.

Irrespective of whether the Uniform Law is implemented as a treaty or as an executive agreement, the result would be the enactment of federal legislation governing the administration of multinational estates within the United States.

As a result, not only would the traditional remedies be available to beneficiaries and heirs of purely domestic estates for protecting their interests, but also the beneficiaries and heirs of multinational estates might have access to other remedies in federal courts. Since issues arising out of multinational estate administrations would always be federal questions and therefore within the federal district courts' jurisdiction,[72] such remedies as declaratory judgments,[73] injunctions,[74] and removal if begun in a state court[75] would be available for the protection of multinational estate assets and beneficiaries. In order to avoid flooding of the district court dockets, however, it would be desirable for Congress to insure concurrent jurisdiction over the administration of multinational estates in federal and state courts. This would also preserve the judicial expertise in estate administration that many state judges possess.

2. Implementation as state law.--Another means for enacting the Uniform Law would be for the President to submit it to the states with a recommendation that it be enacted into state law and to the Congress with the recommendation that it be enacted in the District of Columbia and the territories.[76] One basis for the President's authority to

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71. Cf. id.
72. See 28 U.S.C. § 1331(a) (1964).
73. See 28 U.S.C. § 2201 (1964).
74. See 28 U.S.C. §§ 2282, 2284 (1964).
75. See 28 U.S.C. §§ 1441(b), (c) (1964).
76. This method is being considered by United States delegates to the two international conferences. See Kearney, supra note 52 at 237.

make such submissions might be implied from article I, section 10 of the Constitution. The authorization to negotiate the Convention would be viewed as advance congressional approval of state implementation of the Uniform Law.

In view of the small success of the uniform acts in the area of estate administration promulgated by the Commissioners on Uniform State Laws it seems unlikely that this would produce effective United States adherence to the convention. Moreover, submission of the Uniform Law to the states may raise questions of the law's constitutionality. Since other means for implementing the Convention are clearly available, employment of this procedure might be interpreted as an admission that the law deals with an area of law in which Congress is not competent or willing to act. Assuming that Congress is not competent to act on such a convention, it might well be that the President did not have authority to negotiate the Convention, since it allegedly dealt with an area of law within the exclusive province of the states. This objection as well as other constitutional difficulties will hereinafter be discussed more fully. Suffice it to say that the administration of multinational estates is properly within the exercise of the foreign relations power.[77] Furthermore, the administration of multinational estates may have sufficient effects upon foreign and interstate commerce so that congressional action in this area may be sustained solely on the basis of the commerce clause.

A more serious concern is whether the submission of the Uniform Law to the states would achieve the Convention's goal of uniformity and administrative convenience. If the states acted on the President's recommendation, there might well be fifty different versions of the text of the "Uniform" Multinational Probate Law.[78] Uniformity would further be diminished within the United States if there were no one tribunal to which all lower courts could look for a resolution of conflicting interpretations in different states.

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77. See notes 79-93 and accompanying text infra.

78. See Schnader, Why the Commercial Code Should Be "Uniform", 69 COM. L.J. 117 (1964); Cheatham & Maier, supra note 63, at 52-54.

D. Constitutional Bases for a Uniform Multinational Probate Law in the United States

Once a Uniform Multinational Probate Law has been developed and implemented, its constitutionality undoubtedly will be challenged. If the Uniform Law is enacted as federal law, the constitutional challenge most likely to be asserted is that the Uniform Act is an unconstitutional abrogation of the powers reserved to the states under the tenth amendment. The constitutionality of the Uniform Law, however, probably will be upheld as a valid exercise of the Executive's foreign relations power. Under the Constitution[79] and the inherent power of the United States as a sovereign nation,[80] executive agreements and treaties ratified by the Senate have equal force as United States law.[81] Although disagreement exists on the extent to which the foreign relations power can effect changes in state law,[82] the greater weight of authority supports the proposition that the President has the power to enter into agreements with other sovereigns regardless of the effect which such agreements might have on United States domestic law.[83] The

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79. U.S. CONST. art. VI, cl. 2.

80. See United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936) (dictum); Burnet v. Brooks, 288 U.S. 378, 396 (1933) (dictum).

81. United States v. Belmont, 301 U.S. 324 (1937) (executive agreements); Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796) (treaties); Cheatham & Maier, supra note 63, at 44-45.

82. Compare Santovincenzo v. Egan, 284 U.S. 30, 40 (1931) (treaty overriding state probate law), with League of Nations Doc. C. 97, N. 23, 1930, II, Proceedings of the International Conference on the Treatment of Foreigners, 1st Sess., 4th Meeting, 49, reported in 28 AM. J. INT'L L. 456, 460-61 (1934) (remarks of United States representative Gordan) (state regulation of alien residents); Nadelmann, supra note 50.

83. Geofroy v. Riggs, 133 U.S. 258, 266-67 (1890). "Treaties make international law and also they make domestic law. . . . Treaties, for example, can take powers away from the Congress and give them to the President; they can take powers from the States and give them to the Federal Government or to some international body, and they can cut across the rights given the people by their constitutional Bill of Rights."

leading case supporting this view is Missouri v. Holland.[84] In this case, the state of Missouri argued that a federal statute[85] implementing a treaty[86] between Canada and the United States governing migratory birds was not enforceable within its territory, since it had exclusive power under the tenth amendment to regulate wild animals within its own borders. The Supreme Court upheld the statute on the grounds that, assuming Congress had no inherent power to regulate migration of birds, the treaty provision concerning such migration between Canada and the United States empowered Congress to act.[87] Thus, when the President has negotiated an executive agreement with another government concerning a matter of legitimate mutual concern to the nations, the fact that giving the agreement effect abrogates a state law will not automatically preclude its becoming domestic law.[88]

There exists, however, a more restrictive minority view that would limit the foreign relations power to areas of "international concern."[89] Under this view, the foreign relations power cannot be exercised to abrogate the powers reserved to the states under the tenth amendment.[90] In view of the proliferation of international contacts as a result of improved means of communication and transportation, it is clear that the administration of multinational estates is

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84. 252 U.S. 416 (1920).

85. Act of July 3, 1918, ch. 128, 40 Stat. 755.

86. E.g., Treaty with Great Britain, Aug. 16, 1916, 39 Stat. 1702, T.S. No. 628.

87. Missouri v. Holland, 252 U.S. 416, 432-34 (1920).

88. The doctrine that only matters of "international concern" are proper subjects for international agreements has little authoritative basis. Cf. Nadelmann, supra note 50; Remarks by Charles Evans Hughes, 23 AM. SOC'Y INT'L L. PROC. 194, 195-96 (1929).

89. Remarks by Charles Evans Hughes, supra note 88.

90. E.g., Finch, The Need to Restrain the Treaty-Making Power of the United States Within Constitutional Limits, 48 AM. J. INT'L L. 57 (1954). But see United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936) (dictum).

predominately an international area of concern. Moreover, two nations having contacts with a multinational estate obviously have mutual concern with the administration of the estate. Therefore, the administration of multinational estates would probably be an appropriate subject for the exercise of the foreign relations powers under either the majority view or the restrictive view of the scope of the foreign relations power.

The policy of harmonizing national laws relating to the administration of multinational estates has been implicit in previous exercises of the treaty power.[91] Early treaties of friendship and commerce contained provisions granting rights of inheritance to citizens of the contracting parties.[92] Consular conventions usually provide for mutual consular privileges with respect to the administration of the estates of nationals residing in the territory of the receiving parties.[93] The lack of any successful challenge to these treaties further supports the conclusion that the administration of multinational estates is a valid subject for the exercise of the foreign relations power.

III. CONCLUSION

Participation by the United States with other nations in the formation of an international workable system for administering multinational estates is desirable. It is in the national interest, furthermore, to implement a domestic probate law for multinational estates which would be superimposed on, but which would not supersede, existing state probate laws. Federalization of a uniform multinational probate law is constitutionally permissible, and it would be the most efficient means of achieving the goal of international harmonization of multinational estate administration.

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91. See Corbett v. Stergios, 256 Iowa 12, 126 N.W. 2d 342 (5-4 decision), rev'd per curiam, 381 U.S. 124 (1965); Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796).

92. E.g., Treaty of Amity, Commerce and Navigation with Great Britain, supra note 66.

93. E.g., Consular Convention with the Netherlands, Jan. 22, 1855, art. XI, 10 Stat. 1150 (1855), T.S. No. 253.