Re: Pre-War Contracts of Americans Or Other Nationals
Of Countries Belonging To The United Nations And
Enemies.

In pursuance to the assignment given to me on December 27, 1944, I am preparing an analysis of the material on pre-war contracts between nationals of belligerent countries, especially cartels, in international and comparative law. (Minutes of Peace Conference of Paris, Decisions of Mixed Tribunals and of Anglo-American and Continental European Courts).

Under the present political and military conditions speedy action seems to be necessary, wherefore I submit now a draft of a policy toward pre-war contracts between belligerents and give a short reasoning to each suggested principle.

It is obvious that the interest of our division does not exceed the actual cartel field (cartel agreements and contracts made in support of cartels). However, all aspects of the contract problem are so interwoven with each other that it is not promising to submit proposals exclusively dealing with the questions in which we are directly interested. It is necessary to submit a proposal covering the entire contract field, excluding only a number of highly specialized cases such as insurance contracts. Since no draft by any Department has been submitted, we can expect that our draft will be used as the basis of final action.

The objective in regard to the cartel problem, to accomplish abrogation of the cartel agreements to which the Germans were partners at the beginning

of this war becomes effective in the entire territories of the United Nations as well as in Germany.

Another objective is to abrogate contracts between American and German firms which without being direct violations of the antitrust legislation seem to support such agreements or seem to accomplish similar ends.

The abrogation of contracts should be accomplished in a way which cannot be used as a defense of enterprises in antitrust suits, especially in cases in which the defendants have done everything to continue the cartel relations with the present enemies.

It is necessary to accomplish all these aims within the constitutional limitation. The proposal suggests to accomplish the first aim by entrusting the execution of the policy in regard to pre-war contracts between several Allied individuals or corporations on the one side and Germans on the other, to a United Nations office. This office shall be bound to enforce the abrogation of contracts whenever any government belonging to the United Nations states that it has a political interest in such abrogation. The number of contracts in which we find several Allied persons on the one side and Germans on the other side is quite limited. The number of contracts in which one of the governments will express a political interest is even smaller. As a matter of fact only cartel agreements are involved. This suggestion is not at all novel in international law. It follows certain lines taken in the Peace Conference of Paris. This proposal would give us the power to abrogate and police the abrogation of pre-war cartel agreements of international character to which the Germans were parties. The proposal does not deal with the problem of new agreements. This problem is dealt with in other proposed conventions. Under the proposal our government is bound to

state a political interest in the abrogation whenever restrictive agreements exist wherever the restriction may become operative. As far as pre-war contracts are concerned, our antitrust practice followed before and during the war would show effects beyond the borderlines of the United States.

There are agreements which are inconsistent with the spirit of the antitrust legislation but which may not be successfully attacked under this legislation because of lack of contacts with the United States or because the form of the agreement is not covered by the rules established by our courts in applying the antitrust legislation. In regard to these cases is would be the duty of our Division to suggest that demand for abrogation be filed by our government with the Inter-Allied Committee. While the abrogation of certain contracts exclusively between Americans and Germans is suggested as of the date of the outbreak of war, such suggestion is not made in regard to contracts to which several Allied persons were parties. Since the date of the outbreak of war is different in many instances, the abrogation of these contracts should become effective as of the date of the declaration of the United Nations Office. Another reason in favor of this suggestion is the great number of cases in which the effect of the contracts is to be felt in neutral countries. This solution would accomplish that the statute of limitation in regard to violation of the antitrust legislation begins to run only at the date of the demand of the United Nations Office unless the defendant has done something to bring the contract to an end before such date or has at least done nothing to prepare the continuation of the contract as we have seen it in the Bendix and Standard Oil cases.

In regard to all other questions I refer to the draft herewith submitted.

I. Definitions.

1. In the scope of these principles "contracts" mean all agreements enforceable or unenforceable, not entirely reduced to a monetary obligation definitely fixed and due at a certain date (debts).

The establishment of a clearing method for debts is assumed. The rules try to make clear which claims arising out of the contract settlement shall be subject to this clearing process or to vesting of the Alien Property Custodian, if not vested.

2. A "contract between enemies" means a contract to which, at the time of the end of hostilities to be determined by proclamation of the President, were parties -

a. a government, a national of or subject to one of the United Nations or a corporation or other business organization organized within one of the United Nations, and

b. a government, a national of or subject of Germany (unless bona-fide resident or by virtue of dual citizenship national of one of the United Nations) or a resident of Germany, (unless nationals of or subject to one of the United Nations or one of the neutral countries without being a German by virtue of dual citizenship, or organizations organized under the law of Germany or controlled by the German government or nationals thereof.)

3. An "American" means a Federal or any state government or national of or subject to the United States or a corporation or other business organization organized within the United States.

4. A "German controlled person or organization" means any person or organization wherever situated included at any time in the Proclaimed List of Certain Blocked Nationals promulgated in pursuance to Proclamation No. 2497 of the President of July 17, 1941 or in any corresponding list promulgated by any of the United Nations or subject to protective measures of any of the governments of the United Nations (outside of the United States) provided that such measure is or was based on assumed German control.

5. "Germany" within the scope of these principles means the territory belonging to Germany on Sept. 1, 1939 with the exception of the territories ceded by Czechoslovakia in September, 1938.

"Germans" are all persons covered by 2-b.

6. The "date on which the parties became enemies" means Sept. 7, 1941, or if any element by virtue of which the contract became a contract between enemies took place at a later date, such later date.

In modern peace treaties contracts between individuals especially business organizations, belonging to countries waging war with each other should be regulated. Certain of these contracts in themselves have political significance, although made by individuals. The entirety of contracts between individuals of two countries determine very substantially the relations between such countries. In most peace treaties following the last war this conclusion from modern economy has been drawn, however, without participation of the United States, which for reasons considered later excluded itself from international regulation of the pre-war contract problem.

In describing the scope of the contracts covered by these rules and in considering the law on them we have to keep in mind two types of cases which were not of substantial significance after the last war:

a. Contracts of refugees who in the meantime became American citizens, made in Germany and relating to the sale of their property.

b. Contracts made with citizens of or subjects to United Nations or neutral countries who for one or the other reason have been considered as enemies during this war.

While under the definition I-2 these contracts are covered by the suggested rules, monetary claims arising out of contracts made and to be performed abroad do not compete in the clearing system with monetary obligations arising out of contracts made and to be performed in the United States.

The German subsidiaries of American corporations are treated as "German". That follows the practice of our government and the decision in Gramophone Co. Ltd. v. The German Government and Deutsche Grmmaphon A.G. and Polyphonwerke A.G., Anglo-German Mixed Arbitration Tribunal, Recueil IV 1925, p. 605.

It has been considered whether a distinction between Austrian and German nationals in regard to the contract problem can be made. However, the fact that the Austrian and German economy are so interwoven with each other makes such distinction impractical. However, the suggested rules are of such flexible character that enough leeway is given to agencies and courts entrusted with the enforcement of the rules that proper consideration to genuine Austrian interests can be given.

II. Types of Cases.

Type 1: Contracts between Americans and Germans.

The position taken by the American delegation in Paris to pre-war contracts was that this problem is to be handled as a domestic problem of each of the Allied governments. All other Allied and associated nations with the exception of Japan and Brazil came to uniform rules. This proposal follows the basic principle of the view of the American delegation as far as exclusive relations between one Allied country and Germany is concerned. It seems to be most advisable to settle the basic problems by domestic legislation. The peace treaty may either provide that contractual relations between the nationals of one Allied country and Germans shall remain subject to domestic legislation of each of the Allied countries or that this type of contractual relations shall be subject to uniform rules following the line of these proposals. The peace treaty must provide that Germany will recognize the binding effect of measures taken under our domestic legislation on Germany. While this proposal adopts the view of the American delegation in Paris in regard to contracts between Americans and Germans it adopts a view even exceeding the view taken in Paris by the Allies of the United States in cases in which more than one Allied government has an interest: in regard to these cases not only uniform rules but united enforcement of stipulated rules within all territories of Allied countries is suggested.

Rule 1. All contracts between an American and a German are abrogated as of the date at which the parties became enemies unless covered by one of the exceptions suggested in these principles.

Patent license contracts and insurance contracts are subject to special rules.

The prevailing opinion in American business at the end of the last war was in favor of abrogation of contracts (the diary of Mr. Hunter Miller, Document 602, Vol. 7, report of Mr. Gay, Director of the Central Bureau of Planning & Statistics dated March 22, 1919). The two American representatives in the sub-committee on pre-war contracts, Mr. Hunter Miller and Mr. Palmer, brought in the discussion a number of situations in which hardship to American parties would result from abrogation of contracts. All these cases had to do with situations in which the American party had delivered or received a part of the goods relating

to which the contract was made. The exceptions suggested in the following rules seem to take care of all these cases.

The practical problems during and after the last war and the practical problems after this war are substantially different. After this war we will have to deal only with a few cases of individual pre-war sales contracts between American and German firms, with relatively few insurance contracts or ~~other~~ short term agreements. The type of agreements we have principally to deal with are contracts either establishing permanent relations or being a part of such relations. Because of Definition 1 only exceptional cases of credit agreements will follow the contract rules. Having this in mind it is much more practical to adopt the principle of abrogation and to make exceptions from this rule than to adopt the principle of suspension and to make exceptions from this principle. Permanent relations between enterprises acting in the international market (which are usually big enterprises) are so closely related to the political and military relations between nations that they cannot survive the war.

The rule uses the word "abrogation" instead of the word "dissolve", as used in Art. 299 of the Versailles Treaty. The meaning of "dissolved" may be "terminated" (without retroactive effect). The words "abrogated as of the date * *" make clear that the contracts shall not be considered as in existence after the specified date. These rules deal with certain hardships which may arise in some cases.

Rule 2. A contract between enemies is generally excepted from the effect of these rules if its performance during the time of the war was licensed by a Federal agency authorized to grant such licenses.

This rule is necessary because of a number of licenses given to American firms to perform pre-war contracts with blacklisted enterprises and for the licenses granted under Executive Order 8389 of June 14, 1941 as amended authorizing the Treasury Department (Foreign Property Control) to grant licenses (e.g. performance of contracts between American patent attorneys and German clients).

Rule 3. Contracts which otherwise would be abrogated under Rule 1 are only suspended if one of the parties to the contract, who under the terms of the contract is obliged to perform non-monetary acts, had at the

date on which the parties became enemies, performed a substantial part of his obligations.

In case of contracts providing for the delivery or manufacture of separable goods either party within a period of three months may inform the agency to be designated by the President, of his intention to abrogate contracts which under Rule 3, Par. 1 would only be suspended. This agency shall inform the other party of this decision unless the agency wishes to exercise its rights granted to it by Rule 7. The agency may serve notice to a German party by informing the German government.

> In Paris the American representative, Mr. Palmer, repeatedly referred to the following cass: Germans had promised to establish a broadcasting station within the territory of the United States and to deliver valuable patents to an Allied firm after the station was completed. The Allied firm had already paid the consideration agreed on. The Germans established the station but the war broke out before they could assign the patents. The Allied party had no interest in getting back the money because the patents were much more valuable. In this case, which obviously was the basis of Mr. Palmer's opinion, the contracts under the suggested rules are only suspended and the Allied party can demand full performance of the contract. However, in cases in which delivery of separable goods (1000 tons of tin annually during a period of ten years) is agreed on the parties should be encouraged to abrogate the contract since the economic conditions are basically changed and the amendment of contracts provided later shall only be used as an extraordinary measure if other remedies prove to be impractical.

Rule 4. Leases and agreements for leases of land and houses as well as contracts of mortgage, pledge or lien are sustained unless at the date when the parties became enemies such contracts were not performed by either side or only by the side obliged to make payments.

Leases or agreements for leases however, shall be abrogated if during the war third parties acquired interest in the land or in houses inconsistent with the continuous existence of the lease or agreement for lease.

It may be argued that the express inclusion of leases, etc. is not necessary since they are already covered by Rule 3. The proposal however, expressly mentions these cases because our previous treaties have done so, wherefore their exclusion may be wrongly interpreted. Another reason for the express inclusion of these cases is the necessity to make the exceptions provided for in the second paragraph of this rule. If an American party to a lease agreement with the Germans has sold the real property covered by the least agreement such American party shall be protected against any claims arising out of the lease.

Rule 5. Contracts of employment, agency, partnership, transportation and contracts relating to the establishment of corporations or similar organizations are abrogated even if substantial non-monetary acts had been performed at the date on which the parties became enemies. However, agents, employees, partners, shippers or contractees to an agreement relating to the establishment of corporations or similar organizations who in pursuance to their contracts had property of their contractees in custody are liable for any disposition of such property not done in good faith, with reasonable care or prudence and in reliance on the existence of the contract. They are also liable for reasonable custody of such property if and as long as not disposed of.

The first paragraph follows the general principles of common law as well as the decisions of the mixed tribunals established under the Versailles Treaty.

The second paragraph tries to avoid difficulties which arose in connection with the abrogation of agency and other pertinent contracts. In Hally v. Basch, German-French Mixed Tribunal, Receuil XXI, 169 ff. the German agent in accordance to the terms of the agency agreement sold pictures given to him by the French party. The sale took place after the outbreak of war. The Tribunal ordered the German dealer to pay the money received plus damages for having sold the pictures in spite of the outbreak of war. This decision is unsound, especially since the proposal takes care of proper consideration of the depreciation of the currency in regard to the claim for money paid and acts done.

The provision of Rule 5, Par. 2, is especially important in connection with the relation between bank and bank depositor or other clients. In Loewenbach v. Bayerische Hypotheken-und

Wechselbank, German-French Mixed Tribunal, Receuil II, p. 119, the bank was held liable for disposition made in accordance to the contract; for the same reason as Hally v. Basch this position should be reconsidered.

Rule 6. Contracts between individuals or corporations or other organizations and states, provinces, municipalities or similar juridical persons charged with administrative functions relating to concessions are abrogated unless the party obtaining the concession or the right to obtain the concession is an American.

Annex 2 of Art. 303 of the Versailles Treaty provides for the general sustaining of this kind of contracts and concessions. It seems doubtful if this group should be covered by a section dealing with contracts between individuals. This proposal includes this point to avoid any doubt which otherwise may arise. The political implications of such concessions make it advisable to draft any provision on a reciprocal basis. The principal case covered by this is the case of mining rights.

Rule 7. If the provisions of a contract are in part abrogated under Rule 1 the remaining provisions of the contract shall continue to be in force, if they are severable. In cases in which the provisions are not severable the contracts shall be abrogated in its entirety.

This rule is to be applied in regard to patent licenses or insurance contracts containing provisions dealing with other matters than patents or insurance.

Rule 7, Par. 1 follows substantially Sec. 3 of the Annex to Art. 303 of the Versailles Treaty.

Rule 8. The sale of a pledge held for an unpaid debt owed by an enemy shall be considered as valid irrespective of notice to the owner provided the creditor acted in good faith with reasonable care and prudence and in reliance on the existence of a contract.

This proposal follows almost literally Sec. 5 of the Annex to V, Pt. 10, of the Versailles Treaty. The provision is necessary to affirm reasonable sales of pledges which took place in accordance to the provisions of an agreement.

Rule 9. In all cases in which only monetary obligations fixed in regard to the amount payable and the date of payment, including negotiable instruments, were in existence when the parties became enemies the rules on debts are to be applied. In all cases in which monetary obligations arising out of abrogated contracts would, if the contract had not been abrogated, have become due during the war or under the terms of the contract would have become due after the war, the payment shall be due at the date of the end of hostilities. Reference is made to Rule 11.

In all cases in which contracts were only suspended and the full monetary obligation not performed at the date when the parties became enemies, prices and conditions shall be amended to meet the present price and currency conditions. Reference is made to Rule 14.

Payments in pursuance to contracts shall not be considered as full performance of the contractual obligations if made after September 1, 1939 under the freezing rule of the German government unless the American party in the original contract agreed that payment in accordance to freezing rules shall be considered as full performance of the contract.

This rule is one of the most important of the proposal. It provides for evaluation of monetary obligations in accordance with the actual economic and monetary conditions whenever contracts are suspended. In regard to other obligations the rules on debts may provide for proper evaluation.

The necessity of an amendment of the contracts in accordance with the existing economic price and currency conditions is obvious.

This rule follows the principles applied by the Mixed Claims Tribunal after the last war (Compare decision of German-French Mixed Tribunal of Oct. 16, 1922, Marion v. Carlowitz, Receuil II, p. 553). During the last American inflation the United States Supreme Court in Willard v. Tayloe, 8 Wall (75 U.S. 557,) 1869, refused to grant specific performance to a purchaser of real property having a ten year option on the basis of a fixed dollar price on the ground that it would be "inequitable to compel a transfer of the property for notes worth when tendered in the market only a little more than one-half of the stipulated price." The step from this principle to an actual amendment of the contract is not great. Amendment alone can do justice to American claimants if any contract should be sustained. The interests of the American party are fully protected by Rule 14, Par. 3.

In regard to cases in which the amount or date of payment was not fixed but in which the contract is abrogated by virtue of these rules, claims for money paid and acts done (Rule 11) arise, in order to bring the relations between the parties to the former contract to an equal balance. The suggested rule to consider the date of the cessation of hostilities as the date at which such claims become due, if the abrogated contract provided for payment during or after the war, is necessary because of the rules on interest (Rule 11).

Payments which Americans received on blocked accounts in whatever form they may be after the outbreak of the European war should not be held against an American creditor unless, knowing what he had to expect when he entered the contract he agreed to payment on blocked account. It has been considered whether payments in block accounts already made at a previous date should be deprived of its character as performance of the contract. However such action may mean a revival of many deals completed long before the war. It has furthermore been considered whether the consent of the American party to payment in blocked account given after the contract was made should be considered as an estoppel to a revival of claims, even if payment was made after outbreak of the European war. It is well-known that such consent has been given only under compulsion, leaving no other choice to the American party. Under these conditions the suggested rule seems to follow an equitable middle road course.

Rule 10. The agency designated by the President to execute these rules shall in specific cases, be entitled to request that a contract otherwise abrogated by virtue of these rules shall be sustained and that a contract otherwise suspended by virtue of these rules shall be abrogated.

In order to clarify the situation the agency shall make the request to abrogate contracts in all cases which have directly or in connection with other contracts or legal situations the effect of restriction of production or marketing in this country or elsewhere. The making of such request shall in no way be considered as the recognition of the lawfulness of the contract or interfere with any antitrust proceedings provided the American party to the contract at any time during the war behaved as if the contract would be sustained for the post-war period.

An American subject to such request may ask for damages in the court of claims provided the contract subject to the request of the agency is lawful.

The courts have no authority to review the justification of the request of the agency unless such request is purely arbitrary.

The agency shall inform both parties to the contract of its request. The German party may be informed by giving notice to the German government or its representatives.

In the Paris Peace Conference Italy suggested an amendment to the principles of abrogation in order to enable each government in specific cases of great importance for the economy of the country involved to impose the settlement of the contract problem on the parties dictated by the public interest of the government involved. The American delegates in Paris were alone in refusing to acknowledge the existence of a public interest great enough to justify a request of the government to impose on the parties the sustaining of contracts otherwise abrogated or the abrogation of contracts otherwise suspended. The development of the economic relations between government and business in the last few years has certainly changed the general attitude of American law towards this problem. There is a very substantial public interest in the fate of any kind of agreements affecting general market conditions. There may be a public interest in the continuance of certain credit arrangements or in arrangements relating to the management of German subsidiaries of American business organizations or in many other types of agreements. Therefore,

it is very important that our government has all those rights in regard to contracts with the enemy which our Allied governments have. Otherwise our government would be handicapped in negotiations with the Allies. Furthermore, the most careful preparation of these rules providing for each type of contract on the merit of such types cannot avoid very substantial inconsistency between public interest and the result of these rules in specific cases. Therefore as a last resort our government should have the power to decide the question of abrogation or suspension of pre-war contracts on the merit of specific cases and the implications of public legal character.

It is envisaged that only in a relatively few cases will the government exercise the power under these rules. Certainly the American party is entitled to compensation if ordered to do anything which he would not have done otherwise. Under Art. 299-b, Par. 2 of the Versailles Treaty the only compensation provided for was the right of the Allied party to call on the Mixed Tribunal for amendment of contracts sustained on the request of a government. Such a rule would not be sufficient under American constitutional law. Furthermore, Rule 9 gives the right to ask for amendment in accordance to change of economic conditions to any party to a sustained contract, no matter if sustained on the request of the government or otherwise. Under the suggested rule the government would only have to pay damages to the extent as they arise out of other reasons than changed market conditions.

Procedural rules (Rule 20) give the agency the power to issue rules and regulations under which the agency has to be given notice about all existing contracts. Such rule may enable the agency to find in which cases Rule 10 shall be applied.

Rule 11. In case of abrogation of contracts each party has a claim against the other for acts done or money paid. The court in its discretion may rule that the parties shall compensate each other by payment of money, by delivery of goods or by other acts. In its determination the court shall give proper consideration to the change of currency conditions.

On the motion of either party the court may grant payment in installments or at a later date. The court in its discretion may give

proper consideration to the provisions of the former contract relating to the dates of payment.

Each party shall pay interest beginning with the due date unless the former contract provides for such payments already for the period before the due date.

The claims of a German party arising out of this rule or claims of a German party for damages arising out of any other rule are subject to vesting by the Alien Property Custodian unless otherwise provided. However, the Alien Property Custodian shall not vest any right of the German party to receive compensation for the performance of a suspended contract unless under a contract providing for severable acts the German party has performed s acts before the parties became enemies and is entitled to ask for compensation for these specific acts.

> Abrogation of contracts demands a settlement of the relation between the parties if the contract is not entirely executed on both sides. The claim for money received and acts done is a proper legal remedy to accomplish this settlement. The very difficult currency relations makes it advisable to authorize the court to determine the obligation of the German party in money or otherwise. The American party may ask for the delivery of certain goods in payment for his claim.
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> It has been considered whether rights of a German party arising out of this rule shall be subject to vesting by the Alien Property Custodian or subject to the general clearing process between the governments to be established in the rule on debts. While important equitable arguments can be made in favor of subjecting these claims to the clearing, the matter has been decided in favor of vesting by the Alien Property Custodian because in this war, different from the last, the Alien Property Custodian has already vested all rights arising out of contracts. This procedure has been followed in a substantial number of cases. The new Trading With the Enemy Act at present in the stage of preparation, should authorize the Alien Property Custodian to permit the use of these claims for purposes of clearing, provided that such method in the opinion of the State Department should be considered as best fitted to serve American interests.

However, a notice given by the American parties after the enactment of these rules shall not interfere with the right of the agency under Rule 10.

Rule 12. This rule shall prevail over any contractual provision regulating the relations between the parties in case of war, however in which during the period of war either party would have been entitled to dissolve the contract by notice to the other parties.

The American party may give notice to the German party through the agency entrusted with the execution of these rules within a period of three months after the enactment of these rules. To this extent Sec. 8, Par. 1 of the Trading With the Enemy Act of 1917 shall be amended.

This rule follows the principle of Ertel Beiber & Co. v. Rio Tinto Co., 1918 A.C. 260 and Friederich Krupp v. Orconera Inre Ore Co. Ltd. 128 L.T. 386. The effect of war on contracts is/matter of public interest and public law. It is not up to private interests to regulate this case in advance. The highly political implications of the public make it necessary to subject all contracts to the same principles. However, at least the American parties shall not be deprived of their right to dissolve a contract for other reasons. If the contract provides for dissolution by notice he may consider which is more advisable for him: to subject the contracts to these rules or to dissolve the contracts on the basis of the express provision of the contract providing for dissolution by notice.

A certain exception however, seems to be necessary because of Rule 10, since it is provided that the government shall only exercise the rights under Rule 10 in cases of great political importance and since the American party is guaranteed full compensation for any damage , no hardship is done to the American party.

Rule 13. Contracts abrogated in accordance with Sec. 8, Par. 2 of the Trading With The Enemy Act of 1917 as amended are not affected by these rules. However, should the abrogation take place after the enactment of these rules the power of the government under Rule 10 shall not be affected.

Sec. 8 of the Trading With The Enemy Act provides for abrogation of pre-war contracts which "provide for delivery, during or after any war in which the present enemy or ally of enemy nations has been or is now engaged, of anything produced, mined or manufactured in the United States."

Since under the prevailing interpretation of the Trading With The Enemy Act of 1917 this provision is in force in this until revoked, rights already acquired on the basis of Sec. 8, Par. 2 can generally not be interfered with. However, those contracts might be elements of a contractual system affecting other Allied countries whereby those cases would be covered by Type 2 with which the next chapter of these rules deals. In regard to those cases reference is made to the rules under the next chapter.

Mr. Hunter Miller in some of his letters and diary notes expressed the opinion that the best solution of the whole pre-war contract problem would be to permit the American party to withdraw from any contract which he considers as unfavorable to him and to permit the sustaining of contracts which he considers as favorable to him. The British and French delegates rightly pointed out that such a policy if followed by all nations would have the effect that nobody would receive anything because the Germans can only perform contracts in foreign countries by using the proceeds arising out of contracts with foreign nationals performed in favor of the Germans. That is a natural and logical consequence from the general currency system. The experiences after the last war show that Mr. Miller's view was not correct and that it is more realistic to follow the British and French line of thinking.

Rule 14. The District Court of the District of Columbia shall have jurisdiction in all cases arising out of pre-war contracts between Americans and Germans provided that under the terms of the contract or under general principles of law procedure no other American Federal or state court has jurisdiction. Any provision of the contract inconsistent with these rules shall be considered as stricken from the contract. That includes the provision providing for arbitration.

The American courts having jurisdiction under this rule shall have jurisdiction to decide counter-claims filed by the defendant in those cases.

The court shall decide this litigation on the basis of the law which under the rules of conflict of law of the forum govern the contract. However, German legal provisions having to do with war or war preparations, or specific National Socialist philosophy, including the law on currency restriction, shall not be applied. The German party shall not be entitled to raise the argument of the outbreak of war or any German war measure as a defense against the performance of suspended contracts. The question whether a contract was actually made before or after the parties became enemies is to be decided under the law of the forum.

Whenever in application of Rule 9, Par. 2, the court wishes to amend prices or other conditions of the contract the court shall inform the parties four weeks before rendering the decision about this intention and the new claim for prices and conditions. In this case the American party is entitled to inform the court that he prefers abrogation of the contract. However, the power of the government under Rule 10 shall not be affected.

In cases of suspended contracts the court may issue rules providing for the specific performance of the contract.

After this war American parties cannot be expected to go to German courts in litigation arising out of pre-war contracts. Therefore in all cases in which German courts would have jurisdiction the establishment of the jurisdiction of an American court is absolutely necessary. It is suggested to give the District Court of the District of Columbia this jurisdiction unless other American courts have jurisdiction. The jurisdiction of American ordinary courts shall prevail over arbitration agreements provided for contracts covered by these rules. The highly important political implications in this matter make it necessary that Federal and state courts have exclusive jurisdiction.

The rule gives the American court a guide in regard to the law to be applied. In cases in which the agency entrusted with the execution of the rules finds a political interest in sustaining of the contract Rule 10 is to be applied. The agency, in the rules and regulations to be issued by it, may assure itself that it is informed about the suggestion of the court and the decision of the American party under Rule 14, Par. 3.

Of special importance is Par. 3 of the rule. By this procedure the American party is protected against any form of amendment of the contract inconsistent with his own ideas of his right. He shall make his decision whether the contract is abrogated or not, knowing the principles of the court.

Rule 15. The American may serve the German party either by serving the German Consul's Office in Washington, if there is one, or by serving the German government through the agency to be designated by the President or by public service under the rules of the court of the District of Columbia or other American courts having jurisdiction in the case. By the same method the American party may serve the German party or the German government with all other information to be given under these rules.

The proposal speaks for itself. Under the political conditions which we have to expect in Germany it is necessary to protect the American party by providing for an easy method of service. The rule is in no way discriminatory against interests of German parties since the German government and the German parties can assure themselves of receiving notice under the suggested rules.

Rule 16. The decisions of the American court, including injunctions or attachments, having jurisdiction in cases dealing with pre-war contracts shall be enforceable in Germany. The American party through the Secretary of State shall submit the decision of the American court to the German government which is obliged to guarantee the enforcement of the decision as fast as possible.

However obligations to pay money, under the judgment of the court shall be subject to any treaty relating to the regulation of payment by Germans to foreigners or to be performed in countries outside of Germany, or to a general settlement of debts.

This rule gives the American party the guarantee of the most expedient enforcement of the decisions of the American courts. However, it is necessary to consider the enforcement of decisions

providing for payment of money under the aspect of eventual treaties or executive agreements or policies regulating foreign currency in Germany. Consideration may be given to coordinating all monetary obligations arising out of these judgments with the program relating to the settlement of debts.

Rule 17. The decision of the American court relating to its jurisdiction under these rules is binding on the German courts.

Any decision of a court or arbitration tribunal or any compromise shall be res judicata in regard to the existence and interpretation of contractual relations between the parties as of the time when decision was rendered or compromise made, provided such decision or compromise is dated before the parties became enemies. American court decisions however, shall be res judicata to the same extent even if rendered during the war. As far as necessary the American courts having jurisdiction in cases dealing with pre-war contracts may order the stay of enforcement of any American or German court decision, arbitration award or compromise whose enforcement may be inconsistent with the principles of these rules.

The American courts dealing with these cases shall not reopen litigation already settled before the war. A distinction between decisions of American and German courts, however, is necessary to the extent as decisions rendered during the war are concerned.

The recognition of decisions relating to the involved contract as res judicata shall only go as far as consistent with these rules.

Rule 18. The Secretary of State on the motion of an American or on his own motion may determine that specific cases arising under these rules are of such political importance that the litigation has to be handled as litigation between governments. In these cases the Secretary

of State shall certify that the case is to be decided by the international court (compare Type 2). Whenever such certification is submitted to the American court having jurisdiction in the matter the court shall order a stay of proceedings. If after a period of six months the certification has not been renewed or the international court has not decided the case the American court may go on with the case.

It is a problem of constitutional law whether by virtue of the treaty power or by Federal statutes an American party can be deprived of the right to appeal to American courts provided that such courts had jurisdiction. Since this problem is much more important in connection with cases covered by Type 2, the constitutional problem is indicated under the rules to Type 2.

Rule 19. The German government shall undertake to prohibit its nationals or residents from bringing any legal procedure outside of the procedure provided by these rules. That includes legal procedure within neutral countries even if the performance of the contract under the terms thereof would take place partly or in whole in such neutral countries. This principle shall not cover an attempt of German parties to enforce a decision of an American court under these rules in neutral countries.

The German government on behalf of its nationals renounce all rights which a German national may have obtained in any court procedure dealing with contracts covered by these rules.

This proposal gives all possible respect to the rights of neutral courts. However in cases in which Americans and Germans have contracts with each other the contacts of neutral countries are so loose that no objection can be raised against a provision in the future peace treaty that neutral courts shall be excluded from interfering in these contractual relations.

The necessity for the suggested rule may be shown by reference to the following two situations: I. G. Farben and Sterling Products had a contract in accordance to which Sterling is prevented from selling within Argentina. Sterling entered a consent decree in the District Court of New York by virtue of which the contract between I.G. Farben and Sterling was cancelled. Without this cancellation the contract would have to be abrogated under the principles of these rules. I.G. Farben brought a suit in Argentina against Sterling asking for a court order by which Sterling would be prohibited from selling in Argentina as provided by the contract. The suggested rule would make pursuance of this suit impossible.

Under general principles an American firm having property in Switzerland could be sued in Switzerland by a German firm and its property could be attached. The rule would prohibit such procedure. I do not see any justifiable neutral interests which would make such procedure inadvisable from point of view of international law.

Rule 20. The agency designated by the President to enforce these rules may issue rules and regulations necessary to obtain control over the entire field of contracts between Americans and Germans. They may request the filing of reports within a specified period of time provided that the reports already filed with the Alien Property Custodian or Foreign Funds Control should not prove to be sufficient.