

RECOGNITION OF EXCHANGE CONTROLS AFTER THE
INTERNATIONAL MONETARY FUND AGREEMENT

BERNARD S. MEYER†

CURRENT efforts toward "trade, not aid" have focused attention on the welter of restrictions and controls which hamstring present day foreign trade. Businessmen can enter into few international transactions without first obtaining an export license, an exchange permit, or an import license. In the realization that increased international trade is the touchstone of world economic stability, our Government has sought, through proposed amendment of our laws and participation in various international agencies and conferences, to minimize our own trade barriers and encourage other nations to do the same. One of these international arrangements—the International Monetary Fund Agreement¹—deals with obstacles posed by one form of foreign trade restriction—the exchange control. While the Agreement's ultimate aim is to eliminate the obstructive effects of such monetary restrictions, it permits retention of certain kinds of controls—and it attempts to unify the treatment these controls will receive in the courts of other nations. It is with this attempt that this article is concerned.

Monetary controls can be traced back a number of centuries, but only during the last thirty years have they reached full development. Originating as direct measures intended to provide revenue or a limited protection of the domestic economy, controls have grown as a result of upheavals of the Great Depression and two World Wars into complex systems integrated with trade restrictions for the purpose of allocating foreign exchange resources in accordance with governmental plan. Under most such systems, transactions productive of foreign exchange are controlled in order to require that all or some specified part of the exchange be surrendered to a central pool in return for local currency at specified rates. Foreign exchange is then distributed from the pool, through licensing or similar devices, to those persons who meet the criteria of the particular governmental plan. Those unable to obtain the required permission can deal only in "blocked" local currency accounts. In

†Member, Maryland, District of Columbia, and New York Bars.

1. Published in UNITED NATIONS MONETARY AND FINANCIAL CONFERENCE: FINAL ACT AND RELATED DOCUMENTS, PUBLICATION NO. 2187, CONF. SER. NO. 55 (U.S. Dep't State 1944). The International Monetary Fund Agreement is referred to hereinafter as the "Fund Agreement" or simply as the "Agreement."

order to prevent evasion, any importation or exportation of domestic currency (except, perhaps, in specified small quantities) is prohibited. For some favored categories of transactions, restrictions may be lifted through the use of a "general license" or "free list." Without either a general or a specific license, however, an exchange transaction falling within the restriction may not be enforceable.

The effect of these controls is far-reaching. In the field of foreign sales they result less in litigation than in a reduction of the volume of business done. Traders, aware of the problem, simply refuse to do business except on the basis of advance payment, or of letters of credit in their own currencies. The litigation which arises results mainly from the migration of both persons and capital which has taken place during the last two decades in the face of existing controls. A pensioner moving to a new country and finding his pension cut off by controls will seek to reach funds of his ex-employer in the new country. A political refugee, seeking safety for his funds or securities, may deposit them abroad only to be met after escape with a refusal to turn them over because required consents of his former homeland are lacking. The bank or other stakeholder, on the other hand, is faced with a dilemma: it may expect suit by the government of the foreigner's domicile if it refuses to pay over the funds to that government on demand, or, alternatively, suit by its customer for conversion if it makes payment on such demand. A foreigner who has inherited a bank account or other property located here may seek to effect a transfer of it without the authorization required by his government. An international traveler may seek by circuitous agreement to obtain the benefit of higher but black-market rates of exchange, only to find that honor among thieves is not always the rule. One who insures his life with a company of his domicile may find, after emigration, that payment of the surrender value of his policy cannot be made without a license. In these and many other everyday situations exchange controls influence business decisions and the outcome of litigation.

It is obvious that such broadly effective controls provide a trading position which makes them an ideal instrument of economic nationalism and ultimately of economic warfare. Hence, it is natural that the courts of the country imposing the restrictions should enforce them to the fullest possible extent, while the courts of other countries should seek—either through application of conflict of laws rules or through the use of the "public policy" device—to circumvent them. Such was the economic and legal situation when, toward the close of World War II, delegates of forty-four nations met at Bretton Woods for the United Nations Monetary and Financial Conference.

Out of that conference came agreement that "foreign exchange restrictions which hamper the growth of world trade"² are undesirable in principle and should be eliminated. At the same time, the economic reality of the post-war situation was recognized and provision made for the maintenance or, if need

2. Art. I(iv).

be, imposition of: (1) controls on "current" transactions during a transitional period following establishment of the International Monetary Fund; (2) controls when a Fund member's currency became scarce; (3) controls on capital movements; and (4) controls directed toward non-member countries. While repudiating restrictionism as a normal instrument of international economic policy, the conferees, in order to protect the limited controls sanctioned by the Agreement, found it necessary to reverse the legal doctrines under which foreign controls had largely been circumvented by the courts. To this end, they provided, in the first sentence of Article VIII, Section 2(b),³ that:

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

The Fund Agreement became effective December 27, 1945, and was accepted by the United States in the Bretton Woods Agreements Act.⁴ Article VIII, Section 2(b), has been officially interpreted by the Fund's Executive Directors,⁵ and that interpretation has been re-issued in an official release of the Chairman of the National Advisory Council on International and Financial Problems.⁶ Yet it was not until the cryptic decision handed down by the New York Court of Appeals in January, 1953, in *Perutz v. Bohemian Discount Bank in Liquidation*,⁷ that any court recognized that the Agreement had worked a change in previously existing law. Up to that time, it had been construed into insignificance by such an authority as Professor Arthur Nussbaum, who concluded, "[O]ne may doubt whether Art. VIII, § 2(b), will assume any major importance in legal practice,"⁸ and was generally ignored or circumvented by the courts.⁹

In contrast to this history of neglect and restriction stands the change in law intended to be brought by the Agreement. In order to ascertain

3. In the interest of brevity, reference is hereinafter made to art. VIII, § 2(b), although only the first sentence of that section may be in question.

4. 59 STAT. 512 (1945), 22 U.S.C. § 286 (1946), hereinafter referred to as the "Act."

5. Dated June 14, 1949, and reported in INTERNATIONAL MONETARY FUND, ANNUAL REPORT 1949, app. XIV (1949).

6. 14 FED. REG. 5208 (1949). The release received press notice in the Journal of Commerce, Aug. 24, 1949, p. 7, col. 4, and Business Week, Sept. 3, 1949, p. 92, col. 3.

7. 304 N.Y. 533, 110 N.E.2d 6 (1953).

8. Nussbaum, *Exchange Control and the International Monetary Fund*, 59 YALE L.J. 421, 429-30 (1950); NUSSBAUM, MONEY IN THE LAW, NATIONAL AND INTERNATIONAL 545 (1950). See also Note, 79 JOURNAL DU DROIT INTERNATIONAL 710 (France 1952).

9. Cases in which the provision was ignored are discussed in Part IV *infra*. A 1948 Note analyzing exchange control law makes no reference to it, 34 VA. L. REV. 697; a 1951 Comment gives it only passing reference, Friedmann, *Foreign Exchange Control in American Courts*, 26 ST. JOHN'S L. REV. 97.

For an example of a decision circumventing the provision, see *Cermal v. Bata Akciova Spolecnost*, 80 N.Y.S.2d 782, 785 (Sup. Ct. 1948), *aff'd mem.*, 275 App. Div. 919, 91 N.Y.S.2d 835 (1st Dep't 1949).

the status of exchange controls after the Agreement it is necessary to consider the law governing exchange controls aside from the Agreement, to mention the constitutional problems arising under our municipal law, and to analyze the meaning and determine the effect of Article VIII, Section 2(b), by reference to the context in which it was adopted. With this analysis in mind, we will then review the cases concerning member nations decided since that provision became effective and the cases outside the scope of the Agreement decided during that period.

I. THE LAW ASIDE FROM THE FUND AGREEMENT

While an understanding of the law aside from the Fund Agreement provision is crucial, the large body of decisional and analytical writing already in existence on that subject¹⁰ makes permissible a statement of that law in narrative form.

When the restriction in question is a law of the forum, it will be given effect,¹¹ but the mere fact that a foreign law is involved will not warrant a

10. Treatises: DICEY, *CONFLICT OF LAWS* 750 *et seq.* (6th ed. 1949); DOMKE, *TRADING WITH THE ENEMY IN WORLD WAR II* c. 20 (1943); MANN, *THE LEGAL ASPECTS OF MONEY* 259 *et seq.* (1938); NUSSBAUM, *MONEY IN THE LAW, NATIONAL AND INTERNATIONAL* 446 *et seq.* (1950); WOLFF, *PRIVATE INTERNATIONAL LAW* 472 *et seq.* (1950). Articles: Bloch & Rosenberg, *Current Problems of Freezing Control*, 11 *FORD. L. REV.* 71 (1942); Cabot, *Exchange Control and the Conflict of Laws: An Unsolved Puzzle*, 99 *U. OF PA. L. REV.* 476 (1951); Cohn, *Currency Restrictions and the Conflict of Laws*, 52 *L.Q. REV.* 474 (1936); Domke, *Foreign Exchange Restrictions (A Comparative Survey)*, 21 *J. COMP. LEG.* (3d Ser.) 54 (1939); Domke, *Money in the Law*, 24 *J. COMP. LEG.* (3d Ser.) 51 (1942) (review of NUSSBAUM); Freutel, *Exchange Control, Freezing Orders and the Conflict of Laws*, 56 *HARV. L. REV.* 30 (1942); Friedmann, *Foreign Exchange Control in American Courts*, 26 *ST. JOHN'S L. REV.* 97 (1951); Nussbaum, *Exchange Control and the International Monetary Fund*, 59 *YALE L.J.* 421 (1950); Nussbaum, *Public Policy and the Political Crisis in the Conflict of Laws*, 49 *YALE L.J.* 1027 (1940); Rashba, *Foreign Exchange Restrictions and Public Policy in the Conflict of Laws*, 41 *MICH. L. REV.* 777 and 1089 (1943); Weiden, *Foreign Exchange Restrictions*, 16 *N.Y.U. L.Q. REV.* 559 (1939). Notes: 34 *VA. L. REV.* 697 (1948); 47 *YALE L.J.* 451 (1928). The decisional writing is difficult to find because many of the appellate courts do not write opinions and because of the unfortunate failure of the formulators of the Digest System to include "Conflict of Laws" as a separate topic. Cases dealing with the instant problem are to be found dispersed under the following Key Numbers: Account Stated 14; Assignments 31, 65; Banks & Banking 119, 188½, 192; Bonds 67; Contracts 101(1), 101(2), 103, 276; Corporations 468, 473(b), 473(g), 657(2); Courts 8, 9; Executors and Administrators 84, 85(6), 207; Insurance 26, 244; International Law 4, 7, 10; Money Lent 1; Mortgages 98; Property 6; Shipping 163; Trusts 362; and probably others.

Most of the decisions are by New York courts since it is in New York that attachable funds of the foreign defendant usually are found.

11. *Bethlehem Steel Co. v. Zurich Gen. Acc. & Liab. Ins. Co.*, 307 U.S. 265 (1939); *Boissevain v. Weil*, [1949] 1 All E.R. 146 (C.A. 1948), *aff'd*, [1950] A.C. 327; Note, 34 *VA. L. REV.* 697 (1948).

court of the forum refusing application of that law,¹² if properly proved.¹³ Application or non-application of such a foreign law¹⁴ will depend on many and varying factors. While not often explicitly referred to, the time of imposition of the regulation in relation to the transaction in question has a discernible bearing on its application.¹⁵ The language in which the regulation is cast and its interpretation in the state of origin may be vital since, if it is regarded as a procedural rather than a substantive measure, the conflicts exception¹⁶ will render it inapplicable. The relation of the property involved to the original transaction is also important since a foreign restriction of the state of situs of property originally involved will be applied,¹⁷ whereas such a restriction will be refused application if the property originally involved is located in the forum.¹⁸ On the other hand, the location of property from which collection of the obligation was sought but which had no connection with the original transaction has in some cases been seized upon as a basis for refusing application.¹⁹ The latter decisions are in the minority and, it is submitted,

12. *Deutsche Bank Filiale Nurnberg v. Humphrey*, 272 U.S. 517, 519 (1926); *Perutz v. Bohemian Discount Bank in Liquidation*, 304 N.Y. 533, 110 N.E.2d 6 (1953). Note, however, the discussion in Part III(A)(2) *infra*, concerning the effect of a federal declaration of policy.

13. If not, the court is not required to take judicial notice of the law. N.Y. Civ. PRAC. ACT § 344-a; *In re Mason's Estate*, 194 Misc. 308, 86 N.Y.S.2d 232 (Surr. Ct. 1948). Normally, proof of foreign law presents a triable issue. *Werfel v. Zivnestenska Banka*, 287 N.Y. 91, 38 N.E.2d 382 (1941). As to correct pleading of foreign law, see *Grossman v. Western Financial Corp.*, 280 App. Div. 833, 114 N.Y.S.2d 198 (2d Dep't 1952).

14. The reference is to domestic, not conflict of laws, law since *renvoi* is not applied in this field. *Pan-American Securities Corp. v. Fried. Krupp Aktiengesellschaft*, 169 Misc. 445, 6 N.Y.S.2d 993 (Sup. Ct. 1938), *aff'd*, 256 App. Div. 955, 10 N.Y.S.2d 205 (2d Dep't 1939); *Lann v. United Steel Works Corp.*, 166 Misc. 465, 1 N.Y.S.2d 951 (Sup. Ct. 1938). See, however, *Estate of Schneider*, 198 Misc. 1017, 96 N.Y.S.2d 652, *reheard*, 198 Misc. 1030, 100 N.Y.S.2d 371 (Surr. Ct. 1950).

15. *Domke, Foreign Exchange Restrictions (A Comparative Survey)*, 21 J. COMP. LEG. (3d Ser.) 54 (1939). A statistical count by the present writer demonstrates that the courts more often refuse application to a later restriction than apply it, and more often apply an earlier restriction than refuse it application.

16. RESTATEMENT, CONFLICT OF LAWS §§ 584, 585 (1934).

17. *Canada Southern Ry. v. Gebhardt*, 109 U.S. 527 (1883); *Werfel v. Bohmische Escompte-Bank und Credit Anstalt*, 102 N.Y.L.J. 161, col. 4 (Sup. Ct. July 19, 1939). *But see* *Netherlands v. Federal Reserve Bank*, 201 F.2d 455, 461 (2d Cir. 1953).

18. *Moscow Fire Ins. Co. v. Bank of N.Y. & Trust Co.*, 280 N.Y. 285, 20 N.E.2d 758 (1939), *aff'd* (by an equally divided court), 309 U.S. 624 (1940); *Feuchtwanger v. Central Hanover Bank & Trust Co.*, 27 N.Y.S.2d 518 (Sup. Ct. 1941), *aff'd mem.*, 263 App. Div. 711, 31 N.Y.S.2d 671 (1st Dep't 1941), *aff'd*, 288 N.Y. 342, 43 N.E.2d 434 (1942); *Matter of Maria Liebl*, 201 Misc. 1092, 106 N.Y.S.2d 705 (Surr. Ct. 1951); *Matter of Theresie Liebl*, 201 Misc. 1102, 106 N.Y.S.2d 715 (Surr. Ct. 1951); *DICXV, CONFLICT OF LAWS* 752 (6th ed. 1949).

19. *Perutz v. Bohemian Discount Bank in Liquidation*, 279 App. Div. 386, 110 N.Y.S.2d 446 (1st Dep't 1952), *rev'd*, 304 N.Y. 533, 110 N.E.2d 6 (1953); *Sabl v. Laenderbank Wien Aktiengesellschaft*, 30 N.Y.S.2d 608 (Sup. Ct. 1941), *modified*, 33 N.Y.S.2d 764 (Sup. Ct. 1942), *aff'd*, 266 App. Div. 832, 43 N.Y.S.2d 270 (1st Dep't 1943), *leave to*

are incorrect since they use a factor unrelated to the transaction to avoid the holding which the selection process would otherwise require.²⁰

The status of the claimant is of interest because in some respects the claims of non-resident aliens are treated differently from those of domestic creditors or distributees.²¹ The connection of defendant with a transaction also has an important bearing on the selection of law. A foreign guarantor's obligation will be governed by different law from that of his principal.²² The law of the defendant's nationality or domicile, however, is no defense to him²³ unless the parties, by express agreement or necessary implication, can be said to have contracted with reference to that law.²⁴

As in conflicts law relating to contracts generally, place of performance and place of contracting are the most important factors. Where the contract is to be performed at the place at which it was made, the law of that place will be applied,²⁵ but, where places of making and of performance differ, the law of

appeal denied, 266 App. Div. 955, 44 N.Y.S.2d 678 (1st Dep't 1943); *David v. Veitscher Magnesitwerke Actien Gesellschaft*, 348 Pa. 335, 35 A.2d 346 (1944); *Domke, Money in the Law*, 24 J. COMP. LEG. (3d Ser.) 51, 55 (1942) (review of NUSSBAUM). See N.Y. CIV. PRAC. ACT § 977-b.

20. Cases expressing the majority view are cited at note 59 *infra*.

21. See *United States v. Pink*, 315 U.S. 203, 227 (1942); *Netherlands v. Federal Reserve Bank*, *supra* note 17, at 463; *In re Kahn's Estate*, 179 Misc. 939, 943, 38 N.Y.S.2d 839, 842 (Surr. Ct. 1942).

22. *Cie. Générale F. & P. v. Herzig & Sons Co.*, 89 Misc. 573, 153 N.Y. Supp. 717 (Sup. Ct. 1915). See *Domke*, *supra* note 15, at 60.

23. *Matter of Maria Liebl and Matter of Theresie Liebl*, *supra* note 18; *Matter of Muller*, 199 Misc. 745, 104 N.Y.S.2d 133 (Surr. Ct. 1951); *Marcu v. Fischer*, 65 N.Y.S.2d 892 (Sup. Ct. 1946); *In re Kahn's Estate*, *supra* note 21. It makes no difference that it is a corporation which pleads the defense. *Guinness v. Phoenix Assurance Co. of London*, 196 App. Div. 495, 188 N.Y. Supp. 137 (1st Dep't 1921); see N.Y. CIV. PRAC. ACT § 977-b, subd. 19.

24. Express agreement: *Bercholz v. Guaranty Trust Co.*, 180 Misc. 1043, 44 N.Y.S.2d 148 (Sup. Ct. 1943) (plaintiff had submitted to decree); *Kleve v. Basler Lebens-Versicherungs Gesellschaft*, 182 Misc. 776, 45 N.Y.S.2d 882 (Sup. Ct. 1943) (provisions of insurance policy). Necessary implication: *Branderbit v. Hamburg American Line*, 31 N.Y.S.2d 588 (App. Term 1941), *aff'd mem.*, 266 App. Div. 1011, 45 N.Y.S.2d 188 (2d Dep't 1943) (action between German nationals on a contract performable in Germany). However, even express agreement cannot overthrow the public policy of the forum. See text at note 48 *infra*.

25. *Central Hanover Bank & Trust Co. v. Siemens & Halske Aktiengesellschaft*, 15 F. Supp. 927 (S.D.N.Y.), *aff'd*, 84 F.2d 993 (2d Cir.), *cert. denied*, 299 U.S. 585 (1936); *Perutz v. Bohemian Discount Bank in Liquidation*, 304 N.Y. 533, 110 N.E.2d 6 (1953); *Holzer v. Deutsche Reichsbahn-Gesellschaft*, 277 N.Y. 474, 14 N.E.2d 798 (1938); *Compania de Inversiones Internacionales v. Industrial Mortgage Bank of Finland*, 269 N.Y. 22, 198 N.E. 617, *modified*, 269 N.Y. 602, 199 N.E. 691 (1935), *cert. denied*, 297 U.S. 705 (1936). Some of the cases speak in terms of place of contracting, but analysis shows the place of performance to have been the same. *Deutsch v. Gutehoffnungshutte*, 162 Misc. 872, 6 N.Y.S.2d 319 (Sup. Ct. 1938); *Glynn v. United Steel Works Corp.*, 106 Misc. 405, 289 N.Y. Supp. 1037 (Sup. Ct. 1935).

the latter will govern.²⁶ Where the contract authorizes performance in any of several places, the law governing the contract is fixed when the place of performance actually is chosen.²⁷ This rule has sometimes tempted courts, in an effort to reach a particular result, into holding that the place of performance shifts with the residence of the creditor²⁸ or that, in a restitution case, the place depends on where demand for repayment is made.²⁹ One European author has taken the position that there is "an implied condition in a promise to pay, to remove the place of performance from one country to another, if performance becomes impossible at the place where payment has been stipulated to be made";³⁰ it is believed that this position will not be followed by United States courts.

Closely related to place of performance and place of contracting rules, but also interwoven with public policy considerations,³¹ are the doctrines relating

26. Irving Trust Co. v. Deutch-Atlantische Telegraphengesellschaft, 22 N.Y.S.2d 581 (Sup. Ct. 1940); Hesslein v. Matzner, 19 N.Y.S.2d 462 (City Ct. 1940). See Swift & Co. v. Bankers Trust Co., 280 N.Y. 135, 19 N.E.2d 992 (1930); Mayer v. Hungarian Commercial Bank of Pest, 21 F. Supp. 144 (E.D.N.Y. 1937); cases cited note 25 *supra* and note 27 *infra*; and, with respect to banks, N.Y. BANKING LAW §§ 138(1), 204-a (3) (a).

27. Anglo-Continentale Treuhand A.G. v. St. Louis S'west. Ry., 81 F.2d 11 (2d Cir.), *cert. denied*, 298 U.S. 655 (1936); South American Petroleum Corp. v. Columbian Petroleum Co., 177 Misc. 756, 31 N.Y.S.2d 771 (Sup. Ct. 1941); Buxbaum v. Assicurazioni Generali, 33 N.Y.S.2d 496, 34 N.Y.S.2d 480 (Sup. Ct.), *aff'd mem.*, 264 App. Div. 855, 36 N.Y.S.2d 191 (1st Dep't 1942); Kaplan v. Assicurazioni Generali, 34 N.Y.S.2d 115 (Sup. Ct.), *aff'd mem.*, 264 App. Div. 855, 36 N.Y.S.2d 191 (1st Dep't 1942).

28. Gross v. Continental Caoutchouc-Export Aktien-Gesellschaft, 175 Misc. 496, 24 N.Y.S.2d 699 (Sup. Ct. 1939), *rev'd on other grounds*, 262 App. Div. 866, 24 N.Y.S.2d 434 (2d Dep't 1941); David v. Veitscher Magnesitwerke Actien Gesellschaft, 348 Pa. 335, 35 A.2d 346 (1944). This in effect is the use of a legal presumption to imply an agreement for performance in any of several places and does not seem justified.

29. Kassel v. N.V. Nederlandsch Amerikaansche Stoomvaart Maatschappij, 177 Misc. 92, 24 N.Y.S.2d 450 (App. Term 1940), *leave to appeal denied*, 264 App. Div. 859, 35 N.Y.S.2d 730 (2d Dep't 1942). The general rule is that refund is to be made where the money was paid, and the law of that place governs the right to restitution. American Union Bank v. Swiss Bank Corp., 40 F.2d 446 (2d Cir. 1930); Branderbit v. Hamburg American Line, 31 N.Y.S.2d 588 (App. Term 1941), *aff'd mem.*, 266 App. Div. 1011, 45 N.Y.S.2d 188 (2d Dep't 1943). In some cases, *e.g.*, an agreement to hold funds until the owner can take and possess them free from restrictions by foreign governments, a demand is requisite to create a cause of action and to start the running of limitations, Dumbadze v. Lignante, 244 N.Y. 1, 154 N.E. 645 (1926); Estate of Szeben, 127 N.Y.L.J. 529, col. 5 (Surr. Ct. Feb. 6, 1952), but as a matter of choice of law such demand is unimportant. Thus in Stern v. Pesti Magyar Kereskedelmi Bank, 303 N.Y. 881, 105 N.E.2d 106 (1952), the court affirmed without opinion against appellant's argument that the law of Hungary applied because a demand upon defendant bank for payment was required to be made in Hungary. See also Kleve v. Basler Lebens-Versicherungs Gesellschaft, *supra* note 24; Van der Veen v. Amsterdamsche Bank, 178 Misc. 668, 35 N.Y.S.2d 945 (Sup. Ct. 1942).

30. Pasching, in 67 JURISTISCHE BLAETTER 52 (1938), as paraphrased in Domke, *supra* note 15, at 60.

31. Domke, *supra* note 19, at 53; NUSSBAUM, MONEY IN THE LAW 491 (1939).

to impossibility and illegality. Although the same result can be more logically reached by holding that an exchange control factually cannot make impossible the payment of money outside the country of restriction,³² exchange control cases rely on the rule that impossibility caused by foreign laws is no excuse.³³ In cases applying this rule, however, the foreign law referred to has not been found to be the *governing* law under conflicts principles; where, as in the case of a supervening regulation of the place of performance, it is the governing law, performance will be excused³⁴—although, in a proper case, restitution may be ordered.³⁵ But a supervening regulation of any state other than that of performance will not be applied by American courts.³⁶

Similarly, where performance is due in the forum, an existing regulation of the place of contracting will not necessarily invalidate the contract,³⁷ nor

32. Domke, *supra* note 15, at 56. See also Central Hanover Bank & Trust Co. v. Siemens & Halske Aktiengesellschaft, *supra* note 25, 15 F. Supp. at 929; Perutz v. Bohemian Discount Bank in Liquidation, *supra* note 19; Kleve v. Basler Lebens-Versicherungsgesellschaft, *supra* note 24.

33. Central Hanover Bank & Trust Co. v. Siemens & Halske Aktiengesellschaft; Deutsch v. Gutehoffnungshutte; Glynn v. United Steel Works Corporation, *supra* note 25 (even though in the *Glynn* case the contract used the language "so far as lawfully possible"). In a restitution case the principle has no application since the action is for the return of the consideration paid for the performance which has failed. Sokoloff v. National City Bank, 239 N.Y. 158, 145 N.E. 917 (1924). As to an existing restriction the rule may influence the court's determination of place of performance, since the parties will be presumed to have intended their contract to be valid and performable. South American Petroleum Corp. v. Columbian Petroleum Co., *supra* note 27.

34. Holzer v. Deutsche Reichsbahn-Gesellschaft, *supra* note 25; see Mayer v. Hungarian Commercial Bank of Pest, *supra* note 26. As to contracts to be performed or deposits to be repaid at foreign offices of a domestic or a licensed foreign bank, see N.Y. BANKING LAW §§ 138(1), 204-a(3) (a).

35. Central Hanover Bank & Trust Co. v. Siemens & Halske Aktiengesellschaft, *supra* note 25. See also Richard v. Credit Suisse, 242 N.Y. 346, 152 N.E. 110 (1926); Sokoloff v. National City Bank, *supra* note 33; RESTATEMENT, RESTITUTION § 108(c) (1937).

36. See cases cited note 32 *supra*, and Anglo-Continentale Treuhand A.G. v. St. Louis S'west. Ry., *supra* note 27. Note, however, the line of English cases holding performance excused by a restriction which prevents payment by a means or method deemed essential to the contract. De Beeche v. South American Stores, Ltd., [1935] A.C. 148 (1934); Ralli Bros. v. Compania Naviera Sota y Aznar, [1920] 2 K.B. 287 (C.A.); *but cf.* St. Pierre v. South American Stores, Ltd., [1937] 1 All E.R. 206 (K.B. 1936), *aff'd*, [1937] 3 All E.R. 349 (C.A.), the principle of which has been accepted by American authorities in cases dealing with matters other than the payment of money, Texas Co. v. Hogarth Shipping Co., 256 U.S. 619 (1921); RESTATEMENT, CONTRACTS § 460 (1932); 6 WILLISTON, CONTRACTS § 1938 (Rev. ed. 1938), and has been adopted in modified form in § 2-614 (2) of the Uniform Commercial Code.

37. Aboitiz & Co. v. Price, 99 F. Supp. 602 (D. Utah 1951); *In re* De Gheest's Estate, 362 Mo. 634, 243 S.W.2d 83 (1951); *In re* De Montale's Estate, 199 Misc. 711, 107 N.Y.S.2d 146 (Surr. Ct. 1950); Weiss v. Lustig, 185 Misc. 910, 58 N.Y.S.2d 547 (Sup. Ct. 1945). *But cf.* Anglo-Continentale Treuhand A.G. v. St. Louis S'west. Ry., 81 F.2d 11 (2d Cir.), *cert. denied*, 298 U.S. 655 (1936); Estate of Strongman, 110 N.Y.L.J.

will a foreign regulation (existing or supervening) render such performance illegal in the forum, even though the effect is to recognize or require the doing of an act illegal under the foreign law.³⁸ If, however, performance is due in the foreign state, a supervening regulation of that state will,³⁹ and an existing regulation of that state may,⁴⁰ render the contract unenforceable because illegal. Whether restitution will be ordered depends on whether the court finds the parties to have been in *pari delicto*.⁴¹

In the last analysis, however, despite controversy among the writers,⁴² the case law is clear that the intention of the parties determines the law governing a contract if there is a reasonable "contact" with the intended jurisdiction.⁴³ Furthermore, that intention need not be clearly expressed, but may be presumed or implied.⁴⁴ So, in determining what law the parties meant to apply, the currency in which an obligation is payable has some weight,⁴⁵ although the fact that an obligation is payable in the currency of a particular country will not, of itself, subject the obligation to the law of that country.⁴⁶

1552, col. 6 (Surr. Ct. Nov. 30, 1943); RESTATEMENT, CONFLICT OF LAWS §§ 332, 347 (1934).

38. *In re De Gheest's Estate*, *supra* note 37; Dutch-American Mercantile Corp. v. Frank & Moloney, Inc., 124 N.Y.L.J. 569, col. 7 (Sup. Ct. Sept. 22, 1950); Kleinwort Sons & Co. v. Ungarische Baumwolle Industrie Akt., [1939] 2 K.B. 678 (C.A.).

39. *Mayer v. Hungarian Commercial Bank of Pest*, 21 F. Supp. 144 (E.D.N.Y. 1937); see N.Y. BANKING LAW §§ 138(1), 204-a(3) (a).

40. On the ground of the forum's public policy and despite the validity of the contract under the law of the place of making. One exchange control case has accepted this doctrine, *Hesslein v. Matzner*, 19 N.Y.S.2d 462 (City Ct. 1940), but three have not, *Second Russian Ins. Co. v. Miller*, 268 U.S. 552 (1925); *Hughes Tool Co. v. United Artists Corp.*, 279 App. Div. 417, 110 N.Y.S.2d 383 (1st Dep't 1952), *aff'd mem.*, 304 N.Y. 942, 110 N.E.2d 884 (1953); *Dutch-American Mercantile Corp. v. Frank & Moloney, Inc.*, *supra* note 38, in situations to which it could have been applied.

41. *Second Russian Ins. Co. v. Miller*, *supra* note 40; Note, 34 VA. L. REV. 697, 704 (1948). *But cf.* *Dutch-American Mercantile Corp. v. Frank & Moloney, Inc.*, *supra* note 38.

42. Compare *Stimson, Which Law Should Govern?*, 24 VA. L. REV. 748, 863 (1938), with *Cook, 'Contracts' and the Conflict of Laws: 'Intention' of the Parties*, 32 ILL. L. REV. 899 (1938), and *Goodrich, Yielding Place to New: Rest Versus Motion in the Conflict of Laws*, 50 COL. L. REV. 881, 898 (1950).

43. *Compania de Inversiones Internacionales v. Industrial Mortgage Bank of Finland*, *supra* note 25; *Dougherty v. Equitable Life Assurance Soc'y*, 266 N.Y. 71, 193 N.E. 897 (1934); *Kleve v. Basler Lebens-Versicherungs Gesellschaft*, *supra* note 24; *In re De Gheest's Estate*, *supra* note 37. The basic principle is adopted by the Uniform Commercial Code in § 1-105.

44. *Matter of Maria Liebl*, 201 Misc. 1092, 106 N.Y.S.2d 705 (Surr. Ct. 1951); *Goodman v. Deutsch-Atlantische Telegraphengesellschaft*, 166 Misc. 509, 2 N.Y.S.2d 80 (Sup. Ct. 1938); *Cie. Générale F. & P. v. Herzig & Sons Co.*, 89 Misc. 573, 153 N.Y. Supp. 717 (Sup. Ct. 1915); *Hesslein v. Matzner*, 19 N.Y.S.2d 462 (City Ct. 1940).

45. See *Coghlan v. South Car. R.R.*, 142 U.S. 101, 110 (1891).

46. *Liverpool Steam Co. v. Phenix Ins. Co.*, 129 U.S. 397 (1889); *Marine Ins. Co. v. McLanahan*, 290 Fed. 685 (4th Cir. 1923); *NUSSBAUM, MONEY IN THE LAW, NATIONAL AND INTERNATIONAL* 348 (1950).

In fact, all of the factors discussed above will be weighed to determine the intention of the parties.⁴⁷ Only one factor limits the freedom of the parties; they "may not by their intention, however expressed, override the laws of the country in which suit is brought when a matter of public policy of that country is involved."⁴⁸

The results produced by the above criteria are often cast aside by the courts on this ground of "public policy."⁴⁹ The phrase covers such varying bases for decision as that the regulation in question is confiscatory,⁵⁰ discriminatory,⁵¹ or *ex post facto*,⁵² that it is a penal or revenue measure,⁵³ is procedural in

47. The reason for applying the law of the place of performance is the presumed intention of the parties. The situs of the property involved is considered in determining intention, *Pan-American Securities Corp. v. Fried. Krupp Aktiengesellschaft*, 169 Misc. 445, 451, 6 N.Y.S.2d 993, 999 (Sup. Ct. 1938), *aff'd*, 256 App. Div. 955, 10 N.Y.S.2d 205 (2d Dep't 1939); *Marcu v. Fischer*, 65 N.Y.S.2d 892 (Sup. Ct. 1946), and so is nationality and domicile, *Branderbit v. Hamburg American Line*, 31 N.Y.S.2d 588 (App. Term 1941), *aff'd mem.*, 266 App. Div. 1011, 45 N.Y.S.2d 188 (2d Dep't 1943).

48. *Compania de Inversiones Internacionales v. Industrial Mortgage Bank of Finland*, 269 N.Y. 22, 31-2, 198 N.E. 617, 621 (1935). *Accord*: *Oceanic Steam Nav. Co. v. Corcoran*, 9 F.2d 724 (2d Cir. 1925).

49. See, generally, *Husserl, Public Policy and Ordre Public*, 25 VA. L. REV. 37 (1938); *Nussbaum, Public Policy and the Political Crisis in the Conflict of Laws*, 49 YALE L.J. 1027 (1940); *Rashba, Foreign Exchange Restrictions and Public Policy in the Conflict of Laws*, 41 MICH. L. REV. 777 and 1089 (1943). Distinguish, however, non-recognition, which may result in refusal to apply laws of an unrecognized state, *Russian Socialist Republic v. Cibrario*, 235 N.Y. 255, 139 N.E. 259 (1923); *A/S Merilaid & Co. v. Chase Nat. Bank*, 189 Misc. 285, 71 N.Y.S.2d 377 (Sup. Ct. 1947); and note that recognition does not require enforcement of laws which are contrary to the public policy of the forum, *Dougherty v. Equitable Life Assurance Soc'y*, 266 N.Y. 71, 193 N.E. 897 (1934).

50. *Bollack v. Societe Generale Pour Favoriser, etc.*, 263 App. Div. 601, 33 N.Y.S.2d 986, *leave to appeal denied*, 264 App. Div. 767, 35 N.Y.S.2d 717 (1st Dep't 1942). See *Plesch v. Banque National de la Republique D'Haiti*, 273 App. Div. 224, 77 N.Y.S.2d 43 (1st Dep't), *aff'd*, 298 N.Y. 573, 81 N.E.2d 106 (1948); *A/S Merilaid & Co. v. Chase Nat. Bank*, *supra* note 49; *Sulyok v. Penzintezeti Kozpont Budapest*, 279 App. Div. 528, 111 N.Y.S.2d 75 (1st Dep't), *aff'd as modified*, 304 N.Y. 704, 107 N.E.2d 604 (1952); *Matter of Theresie Liebl*, 201 Misc. 1102, 106 N.Y.S.2d 715 (Surr. Ct. 1951); *Marcu v. Fischer*, 65 N.Y.S.2d 892 (Sup. Ct. 1946); *cf. Werfel v. Zivnostenska Banka*, 260 App. Div. 747, 23 N.Y.S.2d 1001 (1st Dep't 1940), *rev'd on other grounds*, 287 N.Y. 91, 38 N.E.2d 382 (1941).

51. *Glynn v. United Steel Works Corp.*, 106 Misc. 405, 289 N.Y. Supp. 1037 (Sup. Ct. 1935). See *Pan-American Securities Corp. v. Fried. Krupp Aktiengesellschaft*, *supra* note 47.

52. *Bollack v. Societe Generale Pour Favoriser, etc.*, *supra* note 50.

53. *Ibid*; *Matter of Theresie Liebl*, *supra* note 50; *Matter of Maria Liebl*, *supra* note 44; *Matter of Tahtabourounian*, 198 Misc. 553, 102 N.Y.S.2d 198 (Surr. Ct. 1950); *International Investment Co. S.A. v. Swiss Bank Corp.*, 108 N.Y.L.J. 355, col. 7 (Sup. Ct. Aug. 14, 1942); *Friedmann, Foreign Exchange Control in American Courts*, 26 ST. JOHN'S L. REV. 97, 113 *et seq.* (1951).

nature,⁵⁴ or, in the absence of a treaty, does not have extraterritoriality,⁵⁵ or that the court will protect a domestic interest against a foreign law.⁵⁶ The logic of a refusal to enforce a regulation actually confiscatory or discriminatory⁵⁷ is evident, but the application of the other "public policy" bases to cases of exchange control is only a means to an end. *Ex post facto* restrictions are enforced against foreign nationals,⁵⁸ and, indeed, to refuse retroactive enforcement of such regulations is directly contrary to the governmental interest which necessitated the regulation. Exchange regulations are neither penal nor fiscal in purpose; they seek to protect the country's economy through preserving international balances and internal markets. So also, the purpose for which such restrictions are enacted makes clear that they are not simply procedural and that they are intended to have extraterritorial effect. The extraterritoriality and protection-of-domestic-interest concepts have no greater base in reason, for, if carried to their logical ends, no foreign law would ever be applied.

Though that "unruly horse," public policy, appears to be guided more often by predilection than by analysis, a survey of what the courts do (apart from the reasoning advanced) shows that the concept will be applied or withheld as the court finds the contacts with the forum to be substantial⁵⁹ and the in-

54. *Perutz v. Bohemian Discount Bank in Liquidation*, 304 N.Y. 533, 110 N.E.2d 6 (1953); *Meijer v. General Cigar Co.*, 73 N.Y.S.2d 576, 586 (Sup. Ct. 1947), *rev'd on other grounds*, 273 App. Div. 760, 75 N.Y.S.2d 536 (1st Dep't 1947). *Rashba*, *supra* note 49, and Note, 34 VA. L. REV. 697 (1948), also suggest that such a law is "political," but no case so holding has been found.

55. *A/S Merilaid & Co. v. Chase Nat. Bank*, *supra* note 49; *Perkins v. DeWitt*, 197 Misc. 369, 94 N.Y.S.2d 177 (Sup. Ct. 1950); *Marcu v. Fischer*, *supra* note 50. And see N.Y. CIV. PRAC. ACT § 977-b, subd. 19.

56. *United States v. Pink*, 315 U.S. 203 (1942); *In re Kahn's Estate*, 179 Misc. 939, 38 N.Y.S.2d 839 (Surr. Ct. 1942); *Guinness v. Phoenix Assurance Co. of London*, 196 App. Div. 495, 188 N.Y. Supp. 137 (1st Dep't 1921); *Matter of Maria Liebl*, 201 Misc. 1092, 106 N.Y.S.2d 705 (Surr. Ct. 1951); *Matter of Theresie Liebl*, 201 Misc. 1102, 106 N.Y.S.2d 715 (Surr. Ct. 1951); N.Y. BANKING LAW § 204-a(3)(b); *Nadelmann, Legal Treatment of Foreign and Domestic Creditors*, 11 LAW & CONTEMP. PROB. 696 (1946).

57. The Uniform Commercial Code uses the language "discriminatory, oppressive or predatory." § 2-614(2). And see *Rashba*, *supra* note 49, at 1099 n.203. The difficulty of determining what is confiscatory is suggested by the conflict between *Zivnostenska Banka Nat. Corp. v. Frankman*, [1950] A.C. 57 (1949), and *Matter of Theresie Liebl*, *supra* note 56, as to the same Czech regulations. See also *Anniger v. Hohenberg*, 172 Misc. 1046, 18 N.Y.S.2d 499 (Sup. Ct. 1939).

58. In a number of the so-called "ticket cases," of which *Branderbit v. Hamburg American Line*, *supra* note 47, is one, as well as in many of the cases cited above, the regulation or decree was retroactive.

59. So, contacts being few and interest slight, the courts have held in a number of cases that it is not against a state's public policy to hold a national to a contract made in his own country to be performed there according to the laws of that country. *Perutz v.*

terests of the forum to be great.⁶⁰ These are, however, relative terms which lend themselves readily to abuse, so that what should be the exception tends to become the rule. Of more than passing importance, therefore, is the question: with what agency rests the final determination of the forum's public policy?

A congressional act, as a national policy declaration in a field in which federal authority is supreme,⁶¹ will be determinative. When there is no such act, a deliberate determination by the executive department that specific foreign decrees should or should not be recognized, will be binding on the courts.⁶² When there is no formal expression by either of the political departments of the Federal Government, it is the present practice of the courts to speak in terms of a state policy determination while often relying on federal indicia.⁶³ While the law is by no means clear, reason appears to be on the side of the Federal Government's position,⁶⁴ that, in such case, the determination must be of federal rather than state policy. Clearly, however, this does not mean that state indicia not in conflict with federal policy must be ignored.

Bohemian Discount Bank in Liquidation, *supra* note 54; Dougherty v. Equitable Life Assurance Soc'y, *supra* note 49; Holzer v. Deutsche Reichsbahn-Gesellschaft, 277 N.Y. 474, 14 N.E.2d 798 (1938); Branderbit v. Hamburg American Line, *supra* note 47. See Rashba, *supra* note 49, at 1108; Note, 34 VA. L. REV. 697, 703 (1948). NUSSBAUM, MONEY IN THE LAW, NATIONAL AND INTERNATIONAL 471 (1950), and DOMKE, CONTROL OF ALIEN PROPERTY 209 (1947), speak of the "relativity" of public policy.

60. Domke, *supra* note 19, at 55 *et seq.*, speaks of "hostile," "prejudicial," and "unjust" measures; Nussbaum, *supra* note 49, at 1031, speaks of "an actual, strong and adverse interest of the forum"; RESTATEMENT, CONFLICT OF LAWS § 612 (1934) relates the question to "strong" public policy. The forum's interests may also require that the foreign law be given effect. Netherlands v. Federal Reserve Bank, 201 F.2d 455 (2d Cir. 1953); Anderson v. N.V. Transandine Handelmaatschappij, 289 N.Y. 9, 43 N.E.2d 502 (1942); Amstelbank N.V. v. Guaranty Trust Co., 177 Misc. 548, 31 N.Y.S.2d 194 (Sup. Ct. 1941).

61. As concerns exchange controls, federal supremacy is based on "the broad and comprehensive national authority over the subjects of revenue, finance and currency." Norman v. Baltimore & Ohio R.R., 294 U.S. 240, 303 (1935).

62. See Part III(A)(2) *infra*.

63. That the use of federal indicia by a state court in determining policy is not unusual is evident from the cases, cited at note 205 *infra*, decided under § 269 of the N.Y. Surrogate's Court Act, basing the withholding of payment of legacies to inhabitants of Soviet-Bloc countries on the determination by the Secretary of the Treasury, made with respect to checks drawn on United States funds, that there is no assurance that the payee will actually receive payment.

64. Set forth in the *amicus curiae* brief filed in the Court of Appeals in Werfel v. Zivnostenska Banka, *supra* note 50, and in the "suggestion" filed by the United States Attorney on behalf of the Secretary of State in Anderson v. N.V. Transandine Handelmaatschappij, *supra* note 60. See Netherlands v. Federal Reserve Bank, *supra* note 60. Federal policy, of course, governs in territory under United States occupation. Matter of Muller, 199 Misc. 745, 104 N.Y.S.2d 133 (Surr. Ct. 1951).

II. THE INTERNATIONAL MONETARY FUND AGREEMENT— CONSTITUTIONAL PROBLEMS

Since we are concerned with the effect on United States law⁶⁵ produced by Article VIII, Section 2(b), of the Agreement, it is necessary to advert briefly to some of the constitutional issues involved.⁶⁶

The authorities⁶⁷ are clear that a "legislative-executive" agreement,⁶⁸ such as resulted from the congressional authorization to accept the Fund Agreement, is constitutional in form when, as here, the subjects dealt with are within the competence of Congress.⁶⁹ They also hold that the due process clause is not violated by an act invalidating previously existing contracts,⁷⁰ provided the congressional action is not arbitrary and capricious.⁷¹ So no constitutional

65. It would unduly lengthen this article and invade fields completely beyond the author's ken to attempt to analyze the municipal law of countries other than the United States. Sufficient for an article intended primarily for the legal profession in the United States to note that questions as to that law can arise neither in international nor in United States law courts. In the former, the question would be barred by the representation made under art. XX, § 2, of the Agreement and by the rule of international law which prevents a state from advancing its own municipal law as a ground for invalidating an agreement, see *Cases of Serbian and Brazilian Loans*, P.C.I.J., Ser. A, No. 20/21, at 46-7 (1929); WILLOUGHBY, *FUNDAMENTAL CONCEPTS OF PUBLIC LAW* 313-14 (1924); Levitan, *Executive Agreements*, 35 ILL. L. REV. 365, 393 (1940); in the latter, by the rule of domestic law which holds inquiry into the authority under foreign law to enter into an international agreement to be a "political" matter for decision by our executive department, *Doe v. Braden*, 16 How. 635 (U.S. 1853); *Russia v. National City Bank of N.Y.*, 69 F.2d 44, 47-8 (2d Cir. 1934), or by the rule that the governmental acts of a foreign country done within its own borders are not subject to examination by our courts in order to determine whether or not those acts were legal under the municipal law of the foreign state, *Underhill v. Hernandez*, 168 U.S. 250 (1897); *Banco de Espana v. Federal Reserve Bank*, 114 F.2d 438 (2d Cir. 1940); cf. *United States v. Watkins*, 159 F.2d 650 (2d Cir. 1947).

66. Limitations of space prevent consideration of the delegation of power problems. They are, however, answered in a *Joint Memorandum of the Treasury General Counsel and the Assistant Secretary [later Secretary] of State*, which is reprinted in *Hearings before Senate Committee on Banking & Currency on H.R. 3314*, 79th Cong., 1st Sess. 529-62 (1945).

67. The literature is abundant. See Borchard, *Shall the Executive Agreement Replace the Treaty?*, 53 YALE L.J. 664 (1944), and *Treaties and Executive Agreements—A Reply*, 54 YALE L.J. 616 (1945); McDougal & Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, 54 YALE L.J. 181 and 534 (1945).

68. 40 OPS. ATT'Y GEN. 469 (1946) uses this expression.

69. Both the monetary powers and the powers over foreign commerce would sustain this Agreement.

70. *Overnight Transportation Co. v. Missel*, 316 U.S. 572 (1942); *Guaranty Trust Co. v. Henwood*, 307 U.S. 247 (1939); *Norman v. Baltimore & Ohio R.R.*, 294 U.S. 240 (1934).

71. *Battaglia v. General Motors Corp.*, 169 F.2d 254 (2d Cir.), *cert. denied*, 335 U.S. 887 (1948); *Fisch v. General Motors Corp.*, 169 F.2d 266 (6th Cir. 1948), *cert. denied*, 335 U.S. 902 (1949). But see *Moss v. Hawaiian Dredging Co.*, 187 F.2d 442 (9th Cir. 1951).

infirmity results from retroactive application of Article VIII, Section 2(b), to controls existing before the Agreement (or before a new member became a member, or before a member adopted a permissible control), nor from the fact that the section gives internal effect to foreign law not otherwise applicable under conflicts rules.⁷²

What is the constitutional effect of the executive agreement under consideration? Since it is a congressional-executive agreement, it would be supreme law of the land⁷³ even in the absence of Section 11 of the Act.⁷⁴ With that section of the Act serving as evidence of an intention to override state laws,⁷⁵ it is beyond cavil that Article VIII, Section 2(b), of the Agreement, in every situation to which it applies, is supreme law of the land and takes precedence over contrary state policy.⁷⁶

III. THE MEANING AND EFFECT OF THE FIRST SENTENCE OF ARTICLE VIII, SECTION 2(b)

(A) *Tools for Interpretation*

Professor Nussbaum's conclusion that Article VIII, Section 2(b), is of little importance in legal practice is drawn from his premises that "exchange contracts" are limited to transactions in international media of payment, that an exchange regulation is not consistent with the Agreement unless the country promulgating it has taken steps to give its provisions internal law effect, that the section provides only for unenforceability of contracts *void* under foreign law, and that it applies only to the regulations of the country whose currency—as distinguished from other exchange resources—is involved.⁷⁷ These premises lose validity, however, when viewed in the light of

72. *United States v. Pink*, 315 U.S. 203 (1942), was such a situation. See Stevenson, *Effect of Recognition on the Application of Private International Law Norms*, 51 *COL. L. REV.* 710, 721 (1951).

73. "Not as a treaty but by authority of an Act of Congress." Dodd, *International Relations and the Treaty Power*, 30 *A.B.A.J.* 360 (1944). See 40 *OPS. ATT'Y GEN.* 469 (1946). See also *Testa v. Katt*, 330 U.S. 386 (1947); *Hines v. Davidowitz*, 312 U.S. 52 (1941).

74. 59 *STAT.* 516 (1945), 22 *U.S.C.* § 286(h) (1946): "[T]he first sentence of Article VIII, Section 2(b) . . . shall have full force and effect. . . ."

75. The intention is also made clear by the statement, made in *H.R. REP. No. 629*, 79th Cong., 1st Sess. 70 (1945), and *SEN. REP. No. 452*, 79th Cong., 1st Sess. 28 (1945), that:

"It also gives effect to that portion of the fund agreement which provides that when other member countries have exchange controls which are consistent with the articles of agreement, United States courts will not enforce exchange contracts that violate such controls."

76. *Perutz v. Bohemian Discount Bank in Liquidation*, 304 *N.Y.* 533, 110 *N.E.2d* 6 (1935); *cf.* *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937).

77. NUSSBAUM, *MONEY IN THE LAW, NATIONAL AND INTERNATIONAL* 542-5 (1950); Nussbaum, *Exchange Control and the International Monetary Fund*, 59 *YALE L.J.* 421, 426-9 (1950).

the purpose, legislative history, and context of the provision; the context of the entire Agreement; the interpretation issued by the Executive Directors of the Fund⁷⁸ under Article XVIII of the Agreement;⁷⁹ and the usual rules of construction,⁸⁰ which call for liberal interpretation and relate interpretation to purpose, context, and natural and reasonable meaning. To set the scene for this analysis, however, it will be necessary to provide a brief résumé of the legislative history and to ascertain the effect to be given the Fund interpretation.

(1) *Legislative History*⁸¹

The provision which became Article VIII, Section 2(b), first appeared as part of a section headed "Foreign Exchange Dealings Based on Par Values";⁸² it read as follows:

78. Issued July 14, 1949, and reported in INTERNATIONAL MONETARY FUND, ANNUAL REPORT 1949, app. XIV (1949), reissued by the National Advisory Council, 14 FED. REG. 5208 (1949) (hereinafter cited as "Fund interpretation").

79. "(a) Any question of interpretation of the provisions of this Agreement arising between any member and the Fund or between any members of the Fund shall be submitted to the Executive Directors for their decision. . . .

"(b) In any case where the Executive Directors have given a decision under (a) above, any member may require that the question be referred to the Board of Governors, whose decision shall be final. . . ."

In a recent FCC proceeding, these contentions were raised: that such an interpretation was not final because appealable to the Board of Governors; that it was *ultra vires* the Executive Directors because the question arose between private companies and the Fund; that causing request for an interpretation to be made was *ultra vires* the National Advisory Council. These contentions were overruled. *International Bank for Recon. & Devel. and International Monetary Fund v. All America Cables & Radio, Inc.*, FCC Docket No. 9362, Hearing Examiner's decision, Nov. 20, 1951, affirmed by the Commission, Mar. 23, 1953. The interpretation there involved had been made unanimously more than a year and a half previously, the National Advisory Council had indicated that the United States did not intend to appeal, and no other member had taken any steps to do so. On the second point see *Lattimer's Lessee v. Potteet*, 14 Pet. 4, 14 (U.S. 1840); *Aboitz & Co. v. Price*, 99 F. Supp. 602, 609 (D. Utah 1951). The third point is not applicable to the July 14, 1949, interpretation.

80. See *Factor v. Laubenheimer*, 290 U.S. 276 (1933); *Santovincenzo v. Egan*, 234 U.S. 30 (1931); *United States v. D'Anterive*, 10 How. 609 (U.S. 1850).

81. The history of the Agreement is published in PROCEEDINGS AND DOCUMENTS OF THE UNITED NATIONS MONETARY AND FINANCIAL CONFERENCE, PUBLICATION No. 2366, INT'L ORG. AND CONF. SER. 1, No. 3 (U.S. Dep't State 1948). The documents relating to art. VIII, § 2(b), are (page references are to PUBLICATION No. 2366): 32 (p. 54); 172 (p. 217); 191 (p. 230); 236 (p. 334); 238 (p. 341); 307 (p. 502); 326 (pp. 542-3); 343 (pp. 575-6); 370 (p. 599); 374 (p. 605); 393 (p. 628); 413 (p. 671); 448 (p. 803). The history of the Act shows that it was originally introduced in joint bills, H.R. 2211 and S. 540, 79th Cong., 1st Sess. (1945). After hearings on H.R. 2211 before the House Committee on Banking and Currency, the bill was rewritten and introduced as H.R. 3314, on which all further proceedings in the House and Senate were had. Except for the statement from the House and Senate reports quoted in note 75 *supra*, and the fact that one of the amendments made in rewriting was the addition of § 13, requiring that an official interpretation be obtained, the history of the Act is not significant.

82. This section finally became art. IV of the Agreement. It was intended to be an

"Exchange transactions in the territory of one member involving the currency of any other member, which evade or avoid the exchange regulations prescribed by that other member and authorized by this Agreement, shall not be enforceable in the territory of any member."⁸³

Poland proposed a requirement of cooperation among members "to render really effective" controls and regulations for the purpose of regulating international movements of capital,⁸⁴ and the United Kingdom proposed a change in the last line of the paragraph from "not be enforceable" to "be an offense."⁸⁵

The Drafting Committee rejected the United Kingdom proposal, but favored cooperation among members and submitted for consideration the following language:

"Exchange transactions in the territory of one member involving the currency of any other member which are outside the prescribed variation from parity set forth in (a) above shall not be enforceable in the territory of any member country.

"Each member agrees to cooperate with other members in their efforts to effectuate exchange regulations prescribed by such members in accordance with this Agreement."⁸⁶

Commission I of the Conference referred the question to a Special Committee which recommended that the Drafting Committee be asked (1) to reconcile the difference between its language and that of the earlier version, quoted above, "to indicate that there is no intent of imposing criminal rather than civil penalties," and (2) to consider parallel stipulations for dealing with non-member countries.⁸⁷

The Drafting Committee then reported out as Article VIII, Section 2(b),⁸⁸ a provision which, with minor revisions, became the final text. Aside from the reference in the *Second Report of the Drafting Committee* to the provision as a "new formulation,"⁸⁹ there is nothing in the history to explain the major textual changes made by the Drafting Committee, or the transposition of the provision from Article IV to Article VIII. That the transposition occurred suggests, however, that the "new formulation" was the statement of a principle of general application (Article VIII), rather than one directly related to the par value of currencies (Article IV).⁹⁰

elaboration of art. IX, § 2, of the Joint Statement, which stated as a purpose: "Not to allow exchange transactions in its market in currencies of other members at rates outside a prescribed range based on the agreed parties."

83. Document 32, *supra* note 81.

84. Document 191, *ibid.*

85. Document 236, *ibid.*

86. Document 307, *ibid.*; considered in Documents 326, 343, *ibid.*

87. Document 374, *ibid.*

88. Document 413, *ibid.*

89. Document 448, *ibid.*

90. The transposition also explains the discrepancy between the title of § 2 ("Avoidance of restrictions on current payments") and the broad language of subsection (b), as

(2) *Binding Effect of the Fund Interpretation*

Professor Nussbaum takes the position that decisions of the Fund authorities are not binding on private persons.⁹¹ It is submitted, however, that, except as the Fund interpretation is overridden by a later congressional or executive determination, and subject to the proviso that the Fund may not, under the guise of interpretation, engage in legislation,⁹² United States courts will give conclusive effect in private litigation to Fund interpretations.

It seems clear that Congress, in passing the Bretton Woods Agreement Act, so intended, even though Article XVIII is not listed among the Agreement provisions which are to have the "force of law."⁹³ Clearly, Congress was aware of the interpretation provision, for Section 13 of the Act requires that an official interpretation be obtained. Congress was also aware of the obligation to make Article VIII, Section 2(b), effective under municipal law,⁹⁴ and of the requirement that each government certify that it had taken all steps necessary to carry out all of its obligations under the Agreement.⁹⁵ Congress had also been advised that the Act contained all additional legislative authority necessary to permit the making of that certification.⁹⁶ It must, therefore, be concluded that Congress understood the binding effect of Fund interpretations.

Nor does the fact that Article XVIII of the Agreement refers only to questions arising between a member and the Fund itself or between Fund members militate against the conclusion that interpretations of Article VIII,

well as the failure to be more specific in art. XIV, §§ 2, 3, in referring to the "obligations" of art. VIII, § 2. As to the former, the title of the section clearly does not refer to § 2(b), which relates to the enforcement rather than avoidance of restrictive regulations. For this reason, and because § 6 of art. VIII implies that such restrictions may relate to both current and capital transfers (the latter being permitted under art. VI, § 3), it seems clear that the title of the section cannot be seized upon as limiting the scope of the section. As to art. XIV, see notes 124, 125 and related text *infra*.

91. NUSSBAUM, *MONEY IN THE LAW, NATIONAL AND INTERNATIONAL* 529, 542 n.44 (1950). (Professor Nussbaum's analysis of this problem and of art. VIII, § 2(b), originally appeared in *Exchange Control and the International Monetary Fund*, 59 *YALE L.J.* 421 (1950)). See Mann, *Confiscatory Legislation and Share Certificates*, 11 *MOD. L. REV.* 479 (1948), as to the English law. Nussbaum recognizes, however, that such interpretations may "carry weight" in private litigation, apparently having in mind the treaty interpretation rule giving weight to the practical construction of the parties to the treaty.

92. See the colloquy between Representatives Smith and Sabath, 91 *CONG. REC.* 5536-8 (1945); and NUSSBAUM, *op. cit. supra* note 91, at 529.

93. As pointed out in Part II *supra*, the Agreement would be supreme law of the land even had the "force of law" provision, 59 *STAT.* 516 (1945), 22 *U.S.C.* § 286(h) (1946), been omitted from the Act.

94. The obligation is set forth in art. VIII, § 1. See also paragraph 2 of the Fund interpretation.

95. Art. XX, § 2.

96. *Hearings before the Senate Committee on Banking and Currency on H.R. 3314*, 79th Cong., 1st Sess. 556-8 (1945).

Section 2(b), bind private rights. The interpretation function was not set up for the determination of private rights, but Article VIII, Section 2(b), being restricted as it is to civil unenforceability, deals only with private rights. The Agreement, which is supreme law of the land, makes interpretations issued under its provisions final. If those interpretations are not final in private litigation, how reconcile the presence in the Agreement of both the interpretation provision and Article VIII, Section 2(b)? Moreover, at least as to interpretations of Article VIII, Section 2(b), the "force of law" provision must be considered to include interpretations to which, under Article XVIII of the Agreement, it is subject.

It is not necessary, however, to rely solely on what appears in the Agreement and the Act,⁹⁷ for the State Department has made clear its position "that the United States Government is committed to support" such interpretations.⁹⁸ It may, therefore, be expected that a certificate or suggestion of the State Department concerning the Fund interpretation under discussion will be forthcoming in cases dealing with currency regulations of Fund members. Since the courts hold themselves concluded by a deliberate determination of the State Department that the acts or decrees of a foreign government should or should not be recognized,⁹⁹ they will give conclusive effect to the

97. Additional arguments may be made (a) that the Act is a continuing authorization (similar to the Trade Agreements legislation) permitting the Executive to enter into further agreements by accepting (whether or not he concurs in) an interpretation made under art. XVIII, (b) that the interpretation as the practical construction of the parties is entitled to great weight, *Nielsen v. Johnson*, 279 U.S. 47 (1929), and (c) that because the July 14, 1949, interpretation was reissued by the National Advisory Council, it is the Executive's construction and as such is entitled to great weight, *Sullivan v. Kidd*, 254 U.S. 433 (1921).

98. Letter from Department of State to FCC, dated Jan. 25, 1951, in *International Bank for Recon. & Devel. and International Monetary Fund v. All America Cables & Radio, Inc.*, FCC Docket No. 9362, mimeo. p. 14, Mar. 23, 1953. See also letter from Department of State to FCC, dated June 2, 1950, *ibid.*

99. *Latvian State Cargo & Passenger S.S. Line v. McGrath*, 188 F.2d 1000 (D.C. Cir.), *cert. denied*, 342 U.S. 816 (1951), in which the court held itself bound by a certificate of the Secretary of State that the incorporation of Latvia by the USSR and the nationalization decrees of the resulting regime had not been recognized by the United States. The court stated:

"We are of the opinion that when the executive branch of the Government has determined upon a foreign policy, which can be and is ascertained, and the non-recognition of specific foreign decrees is deliberate and is shown to be part of that policy, such non-recognition must be given effect by the courts. The rule applicable in such circumstances is the same rule applicable to an act of recognition. Any other treatment of a deliberate policy and act of non-recognition would reduce the effective control over foreign affairs by the executive branch to a mere effectiveness of acts of recognition. The control of the executive branch over foreign affairs must necessarily be broader than that." 188 F.2d at 1003.

See *United States v. Pink*, 315 U.S. 203 (1942); *The Maret*, 145 F.2d 431 (3d Cir. 1944); *Sullivan v. State of Sao Paulo*, 122 F.2d 335 (2d Cir. 1945). But see *Anderson*

executive's determination that Fund interpretations must be recognized in private litigation concerned with currency restrictions.¹⁰⁰

(B) *Meaning of the Provision*

(1) *"Exchange Contracts"*

Since there is no precedent of any value,¹⁰¹ we must look to the legislative history, the context of the Agreement, and the rules of construction for the meaning of the phrase "exchange contracts."

Professor Nussbaum concludes that the phrase is limited to international media of payment and, therefore, excludes securities, merchandise, and the like. He reasons that the scope of "exchange transaction" is limited to international media of payment, and that Article VIII, Section 2(b), was revised from "exchange transaction" to "exchange contract," which must be considered of even narrower significance.¹⁰² The context of the Agreement clearly demonstrates, however, that an "exchange transaction"—which includes within its scope a "movement,"¹⁰³ an "operation,"¹⁰⁴ a "contract,"¹⁰⁵ as well as a "transaction"¹⁰⁶—covers a broad range of dealings. The fact that in a number of instances the Agreement contains language limiting the phrase to media transactions¹⁰⁷ indicates that the drafters knew how to limit the phrase

v. N.V. Transandine Handelmaatschappij, 289 N.Y. 9, 20, 43 N.E.2d 502, 507 (1942). The doctrine and its development are fully dealt with in Note, *Judicial Deference to the State Department on International Legal Issues*, 97 U. OF PA. L. REV. 79 (1948). See also JAFFE, *JUDICIAL ASPECTS OF FOREIGN RELATIONS* (1933); Finkelstein, *Judicial Self-Limitation*, 37 HARV. L. REV. 338 (1924); Stevenson, *Effect of Recognition on the Application of Private International Law Norms*, 51 COL. L. REV. 710, 725-8 (1951); Weston, *Political Questions*, 38 HARV. L. REV. 296 (1925).

100. The cases holding that interpretations of the political departments do not conclude the judiciary, e.g., *Jones v. Meehan*, 175 U.S. 1 (1899); *Z. & F. Assets Realization Corp. v. Hull*, 114 F.2d 464 (D.C. Cir. 1940), *aff'd*, 311 U.S. 470 (1941); *Banco de Espana v. Federal Reserve Bank*, 114 F.2d 438 (2d Cir. 1940), are not contrary since we are dealing not with an executive interpretation, but with the executive's determination that the Fund's interpretation must be recognized.

101. The only pre-agreement case found which specifically defines the phrase, *Bank of China, Japan, & the Straits, Ltd. v. American Trading Co.*, [1894] A.C. 266, is clearly inapplicable since it dealt with a term of local trade. The problem has been mentioned in, but not decided by, post-agreement cases.

102. NUSSBAUM, *op. cit. supra* note 91, at 542. See also *id.* at 543. Cabot, *Exchange Control and the Conflict of Laws: An Unsolved Puzzle*, 99 U. OF PA. L. REV. 476, 495 (1951), adopts Nussbaum's view.

103. Art. VI, § 3.

104. Art. VII, § 3(b).

105. Art. VIII, § 2(b), together with art. VIII, § 6.

106. A "current transaction" is defined by art. XIX, § (i), to include "foreign trade, other current business, including services, and normal short-term banking and credit facilities." Note also the broad meaning of the word "transaction" as used in art. V, § 7(b) (ii), art. VIII, § 4(b) (ii), and art. XI, § 1 (iii).

107. Either by specific statement: art. IV, § 3 ("exchange transactions between the currencies") and § 4(b) ("exchange transactions between its currency and the currencies

when they wanted to and bears out the conclusion that "exchange transaction" is not limited to transactions in international media of payment.

We may agree that the first and second versions of Article VIII, Section 2(b), relating as they did to parity, used the words "exchange transaction" in their narrow sense. However, with the expansion of the concept of the provision to cover exchange control regulations dealing not only with transactions in currency, but also with purchases of commodities, transfers of real and personal property, payment of tort obligations and the like,¹⁰⁸ the phrase "exchange transactions" became in its narrow sense too limited, in its broad sense too amorphous to retain. With the "new formulation," "exchange contracts" became the appropriate phrase. It was consistent with the expansion of concept implicit in the rephrasing and transposition of the provision¹⁰⁹ and yet did not so far extend the provision as to make it applicable to tort claims, for example, about which there might be considerations of policy which would make unacceptable the application of another country's exchange controls.

Nor is it logical to suppose that the phrase "exchange contracts" is used in an even narrower sense than media transactions. The broad declaration of purposes of the Agreement,¹¹⁰ the rule of liberal construction, the widely varying purposes for which the Agreement allows controls, and the broad range of transactions normally covered by such controls suggest that an "exchange contract" covers equally as great a range as an "exchange transaction," and differs only in that the word "contract" necessitates that there be a consensual or contractual basis. The illogic of the contrary position, which would render media transactions unenforceable but would leave untouched the quantitatively greater—and therefore more harmful—dealings in other forms of property and services, substantiates that result.

of other members"); art. XV, § 3 ("transactions of the Fund in its currency"); or by implication: art. XX, § 4(a), (c), (d), (h), (i) (relating to the beginning or postponement of "exchange transactions" by the Fund). The implication would be that these were media transactions since the Fund presumably will not deal with other than media.

108. See, e.g., Military Law 53 for the U.S. Zone of Germany, quoted in *Matter of Muller*, 199 Misc. 745, 104 N.Y.S.2d 133 (Surr. Ct. 1951).

109. This broad view of the provision is also substantiated by comparing the second version with the final one. The second version, which was limited to cases of variation from parity, included an *obligation* upon members to cooperate in the effectuation of exchange regulations generally. In the final version the parity limitation of the first sentence was removed, and the obligation of the second sentence was reduced to permission to enter into mutual accords. This strongly suggests that some part, or all, of the former obligation is now covered by the first sentence. See Documents 326, 343, *supra* note 81.

110. To promote international monetary cooperation (cl. i), promote exchange stability, maintain orderly exchange arrangements among members (cl. iii), and shorten the duration and lessen the degree of disequilibrium in the international balances of payments to members (cl. vi.). Clause iv, relating to elimination of foreign exchange restrictions, does not negate the conclusion drawn in the text, since the restrictions dealt with by art. VIII, § 2(b), are sanctioned by the Agreement.

We are thus led to the conclusion that the term "exchange contracts," as used in Article VIII, Section 2(b), means transactions having their bases in contract and involving exchange, whether of currency, property, or services.¹¹¹ Such contracts must however be deliberate (based on consent in fact, whether formally stated as in a bilateral contract, or implied from the facts as in a unilateral contract) rather than imputed (based on consent imputed by law, as the implied contract to return embezzled funds). The purpose in limiting the provision to contract cases would appear to have been to exclude matters not based on volition, thus reducing the area in which policy arguments against the "extraterritorial" application of foreign regulations might be made. Put another way, the policy considerations involved in consigning to the area of unenforceability (in the interest of international cooperation) a deliberate contract violative of a control regulation are very much different from those concerned with the unenforceability *vel non* of a non-voluntary right or obligation; the adverse effect on international cooperation of excluding the latter from the provision's scope is relatively slight. Particularly is this true when it is remembered that what we are considering is *unenforceability*, not enforceability.

Once it is determined that such a deliberate contract exists, it does not matter where the contract was made, whether or not it involved exchange at its inception (provided only that exchange is involved at the time the question arises), or whether or not the proceeding in which the question is raised is between the parties to the contract.¹¹² The first conclusion follows from the legislative history of the provision;¹¹³ the second and third conclusions, from the absence of limiting language in the provision and from its broad purpose. That purpose and the necessity (under the law of nations) for uniform interpretation of the Agreement, also make it clear that domestic law rules relating to the form of action¹¹⁴ may not be seized upon as the basis for holding that a consensual obligation, because it is not a "contract," is outside of the provision's coverage.

With these criteria, we may consider some specific instances. The obvious exclusions which come to mind are torts and the devolution of property by

111. This view was first expressed by Mann, in *Money in Public International Law*, 26 BRIT. Y.B. INT'L L. 259, 279 (1949), and represented a substantially broader view than he had expressed in *The Exchange Control Act, 1947*, 10 MOD. L. REV. 411 (1947).

112. See Part III(B)(7), at pages 894-5 *intra*.

113. The first and second versions of the provision related to exchange transactions "in the territory" of a member, whereas that phrase does not appear in the final version.

114. For example, the English rule which permits a third party beneficiary to sue only in certain exceptional cases in which a trust can be found, and in those cases requires that the action be one to enforce the trust. The result is nonetheless the enforcement of the contract. Of course, if under private international law criteria no obligation exists because consideration, a properly formalized writing, or privity of contract is lacking, the question of whether the Agreement applies will never be reached.

will or intestacy. Clearly, also, such obligations as the deposit of security for costs¹¹⁵ or the filing of a bond in an attachment or injunction proceeding are not "contracts." On the other hand, such closely kindred matters as an action on an attachment bond, or rights arising under an *inter vivos* trust agreement would be included.¹¹⁶ And, it would seem, the exclusion urged by Dr. Mann¹¹⁷—of claims *in rem* and all claims by an owner of a chattel against a possessor—is too broad, since such claims are often founded on contract.¹¹⁸ Finally, it would appear that a judgment based on contract must be considered within the provision to the same extent that the underlying contract would be, for otherwise an obvious means of circumventing the provision would exist.

(2) "Involve the Currency"

The evidence on which we have based our conclusion that "exchange contracts" are not limited to media of payment transactions points to the parallel conclusion that neither does the phrase "involve the currency" impart such a limitation. Support for this conclusion is to be found in the meaning of the word "involve," which not only denotes the ideas of "including" or "containing" but also the ideas of "implicating," "affecting," "relating to," and "being connected with." Foreign trade contracts or security transactions affect, implicate, relate to, or connect with the currency of a country just as strongly as dealings in the currency itself, if not more so. Thus the purchase of Italian hemp for English pounds involves lire as well as pounds, since the export sale of hemp produces an Italian exchange resource and directly relates to the international value of Italian lire.¹¹⁹

On this basis, Professor Nussbaum's example of pounds exchanged in Paris for lire¹²⁰ would be within the scope of Article VIII, Section 2(b), if English or Italian regulations were violated. And if the pounds or lire were physically within France, or owned by a French resident even if located outside France, they would also be French exchange assets; in such a case, the transaction would also be within the scope of the provision if *French* regulations were violated. It should be noted, however, that it is the location of the asset or residence of the party which is the important factor, not the geographic location of the transaction. No practical or logical reason exists for subjecting

115. See Note, 77 JOURNAL DU DROIT INTERNATIONAL 743 (France 1950), commenting on a decision of the Vienna Court of Appeals.

116. Cf. *N.V. Transandine Handelmaatschappij v. Mass. Bonding & Ins. Co.*, 181 Misc. 202, 40 N.Y.S.2d 499 (Sup. Ct. 1943) (attachment bond).

117. See citations at notes 91, 111, *supra*.

118. Thus *Kahler v. Midland Bank, Ltd.*, [1949] 2 All E.R. 621 (H.L.), involved causes of action in contract and in detinue based on the same deposit of securities.

119. NUSSBAUM, *op. cit. supra* note 91, at 543, somewhat reluctantly concedes that more than one currency can be involved.

120. *Id.* at 544.

a transaction to French regulation when its *sole relation* to the interests of France is that the physical transaction occurs within her territory. As we have observed, the legislative history of the provision shows that such a concept was abandoned.

It may be urged that the construction here advanced is extreme, because, under this interpretation, even a barter transaction will "involve the currency" of the countries whose exchange resources are concerned. This is, however, the logical result of the language used and a reasonable construction in view of the purpose of the provision. More convincing arguments against the positions here adopted are: (1) since every international contract relates to currency, property, or service, each of which is an exchange asset, the words "involve the currency" are redundant in view of the requirement that the contract be an "exchange" contract; (2) as an extension of the first argument, the result of the constructions so far advanced is to make the provision read, "contracts involving exchange which are contrary to the exchange control regulations of any member . . ."—which is not the language used. The answer to the first argument is that the exact form of the language is an historical accident, carried over from a parity provision. As for the second, it may be said that though the quoted language would more clearly have carried out the purpose and intent of the Agreement, the above construction is not, in the light of that purpose and intent and of the history, a forced, unnatural, or unreasonable reading of the provision as it was adopted.

(3) "Member"

The Agreement is explicit that both original members and those later elected to the Fund are members from the time of deposit of the respective member's instrument of acceptance with the United States Government.¹²¹ The Agreement also specifies that a voluntary withdrawal from membership is effective on the date written notice of withdrawal is received by the Fund at its principal office.¹²² It does not explicitly cover a member required by Board decision to withdraw,¹²³ but presumably the determinative date will be that of the Board decision unless the decision otherwise specifically so provides. It is also clear from the Fund interpretation¹²⁴ and from the practical absurdities which would otherwise result,¹²⁵ that the fact that a member avails it-

121. Art. XX, § 2(b). As to original members the section contains a now irrelevant condition.

122. Art. XV, § 1.

123. Art. XV, § 2(b).

124. "2. By accepting the Fund Agreement, members have undertaken to make the principle mentioned above effectively part of their national law. This applies to all members, whether or not they have availed themselves of the transitional arrangements of Article XIV, section 2."

125. For example, there would be no reciprocity of obligation. And during the transitional period (when, presumably, more control regulation will be in effect) the policy of art. VIII, § 2(b), would be more limited in scope than in a later period (when there will be less need for that policy because of the fewer regulations then existing).

self of the transitional arrangements provided for in Article XIV does not exclude it from the operation of Article VIII, Section 2(b).

(4) "Contrary"

There is nothing in either the meaning of the word "contrary" or the legislative history to support Professor Nussbaum's conclusion that the provision "provides only for international unenforceability of contracts *void* under foreign law."¹²⁶ If a contract required by applicable regulations to be licensed is carried out without a license, the regulation has been equally contravened whether it speaks in terms of a criminal or void act or only in terms of unenforceability.¹²⁷ There would have been consistency to the Professor's argument if the effect of the Agreement provision were to void contracts with which it deals; but, as we have seen, the concept of "offense" was abandoned in favor of one of unenforceability. There is no reason, then, to import a stronger requirement as to the domestic regulation involved. Indeed, there is every reason not to do so, for the result would be the emasculation of the provision: few exchange controls go to the extreme of voiding the contracts with which they deal.

On the other hand, the change from "evade or avoid" in the first version to "contrary" in the final version of the provision shows that "contrary" is used in the sense of evasion, not avoidance. One consequence of this is that while a sale of machinery by an English company to a French manufacturer for dollars will be unenforceable unless French exchange control regulations are complied with, a guaranty of the dollar payment by an American firm (so long as not in violation of any American regulation) will be enforced. This results from the fact that, though the contract of guaranty avoids the effect of the French regulation, it is a separate and distinct contract not involving French exchange resources. This follows even though the arrangement between the French manufacturer and the American firm, as a result of which the guaranty is issued, itself contravenes the French regulation and would be unenforceable.

(5) "Exchange Control Regulations"

The context and purpose of the Agreement and the natural meaning of the phrase suggest that "exchange control regulations" are enactments which control the movement of exchange assets (currency, property, or services) for

126. NUSSBAUM, *op. cit. supra* note 91, at 545 (emphasis added). Compare WOLFF, PRIVATE INTERNATIONAL LAW 475 (2d ed. 1950), which indicates that "contrary" means only "inconsistent with."

127. Apparently Professor Nussbaum experienced some doubts between the writing of the article, *Exchange Control and the International Monetary Fund*, 59 YALE L.J. 421 (1950), and the publication of the same material as part of his book, MONEY IN THE LAW, NATIONAL AND INTERNATIONAL (1950), for in the former he said with respect to an unlicensed contract (at 429), "Such contracts may be enforced elsewhere," while in the latter (at 545) he omitted that sentence from the otherwise identical paragraph.

purposes related to the financial policy of the controlling country.¹²⁸ The title or designation of such a regulation is not controlling. But the present day interrelation of financial and trade restrictions¹²⁹ necessitates a distinction between various regulations on the basis of the purpose of the regulatory technique employed. In most cases the distinction is obvious: the foreign funds controls maintained during the last war and recently reimposed with respect to China are exchange controls; but tariff regulations, though related directly to fiscal policy and having a limiting effect on the movement of exchange, are not. And a price control regulation, though it may contain provisions designed to strengthen or complement exchange controls,¹³⁰ is not itself an exchange control. In other cases a greater degree of refinement is required: as we have above indicated, a barter provision included as a complementary part of an exchange control is within Article VIII, Section 2(b), but a barter provision of a regulation governing the export or import of a particular commodity is not. In the excluded cases the primary purpose of the regulation is revenue or price stabilization; transactions contrary to such regulations are not rendered unenforceable by the Agreement provision.

(6) *"Maintained or Imposed Consistently with this Agreement"*

A reading of the Agreement supplies reasonably clear criteria with which to determine whether or not a regulation is consistent with it. It permits the maintenance or imposition of "such controls as are necessary to regulate international capital movements,"¹³¹ of "limitations on the freedom of exchange operations in the scarce currency,"¹³² of "restrictions on the making of pay-

128. Compare Friedmann, *Foreign Exchange Control in American Courts*, 26 *ST. JOHN'S L. REV.* 97, 104 n.27 (1951) (protection of the domestic currency), with *Hughes Tool Co. v. United Artists Corp.*, 279 App. Div. 417, 110 N.Y.S.2d 383 (1st Dep't 1952), *aff'd mem.*, 304 N.Y. 942, 110 N.E.2d 884 (1953) (regulation of imports and exports). An exposition of the nature and types of controls is contained in INTERNATIONAL MONETARY FUND, FIRST ANNUAL REPORT ON EXCHANGE RESTRICTIONS 3-16 (1950), and a survey of restrictions maintained by various countries (including some non-member countries) is contained in that report and in the second (1951) and third (1952) reports.

129. See, e.g., art. XV of the General Agreement on Tariffs and Trade, U.S. Treaty and Other Int'l Acts Ser., No. 1700 (Dep't State 1949), dealing with restrictions authorized by the Fund as related to trade problems. See also DICEY, *CONFLICT OF LAWS* 543 (6th ed. 1949); *Kent Jewelry Corp. v. Kiefer*, 119 N.Y.S.2d 242 (Sup. Ct. 1952).

130. According to the Journal of Commerce, Jan. 30, 1952, p. 1, col. 6, the purpose of an OPS amendment to Ceiling Price Reg. 61 was to prevent American exporters from allowing a foreigner to violate his country's exchange control laws by overpricing his imports and thus building a dollar fund in the United States.

131. Art. VI, § 3. The section contains the limitation that "no member may exercise these controls in a manner which will restrict payments for current transactions or which will unduly delay transfers of funds in settlement of commitments, except as provided in Article VII, Section 3(b), and in Article XIV, Section 2."

132. Art. VII, § 3(b). There must be first a formal declaration by the Fund of scarcity of the currency and consultation with the Fund as to the limitations to be imposed.

ments and transfers for current international transactions" (provided approval of the Fund is obtained),¹³³ of "restrictions on exchange transactions with non-members or with persons in their territories,"¹³⁴ and of "restrictions on payments and transfers for current international transactions"—even though not approved by the Fund—"during the post-war transitional period."¹³⁵ Article VIII, Section 3, makes it clear that transitional period restrictions are permitted even though discriminatory. In the light of that clear language and of the Fund's offer to advise whether particular controls are consistent,¹³⁶ there would be little need for further discussion of the phrase¹³⁷ had not Professor Nussbaum advanced certain arguments which require refutation.

The first of these arguments, that the party interested in invalidation must prove¹³⁸ the "consistency of the regulation invoked with the letter and spirit of the Agreement,"¹³⁹ is predicated on the thought that some regulations "maintained" (*e.g.*, Czechoslovakian regulations imposed in part by the Hitler regime) are not "consistent" with the Agreement—that is, consistency means conformity to the basic purpose of the Agreement. The answer is that the Agreement sanctions *all* transitional period regulations, including, for example, those maintained by the present Czech government, even though they originated in part with the Hitler regime. That the Fund has not entered into an examination of a transitional period regulation¹⁴⁰ means nothing, for Section 2 of Article XIV is automatic and requires no action by the Fund.

133. Art. VIII, § 2(a).

134. Art. XI, § 2.

135. Art. XIV, § 2. The Fund in its Circular No. 6 (of which Revision 5 was issued on January 1, 1952) lists the members who have accepted the obligations of art. VIII, §§ 2, 3, 4, and those who have availed themselves of the transitional arrangements of art. XIV, § 2.

136. The offer is contained in the Fund interpretation. It extends to "any other aspect of Article VIII, Section 2(b)." Such a determination considered as an interpretation under art. XVIII or as an approval or disapproval of the regulation involved would be conclusive.

137. Mann's inquiry in *The Exchange Control Act, 1947*, 10 Mod. L. Rev. 411, 419 (1947), whether any inconsistency, no matter how insignificant, would be fatal, does not present a practical problem. Presumably, however, only the portion of the regulation sought to be invoked need be shown to be consistent.

138. The use of the word "prove" raises an interesting collateral question. It is, of course, true that an exchange control regulation as a foreign law must be proved, *supra* note 13, but it would seem clear the court may take judicial notice not only of the Fund Agreement but of the acts and proclamations of the Fund in carrying the Agreement into effect. *United States v. Reynes*, 9 How. 127, 147 (U.S. 1850); *cf.* *The New York*, 175 U.S. 187 (1899). Consequently, it is only necessary that the party interested in invalidation prove the regulation. The determination of "consistency" will then be made by the court based either on the Fund's determination of the question, or in the absence of such, on its own interpretation of the Agreement.

139. NUSSBAUM, *op. cit. supra* note 91, at 543. Cabot, *supra* note 102, takes the same position. See Mann, *supra* note 137, at 412.

140. Consultation by members with the Fund concerning retention of such restrictions has been required only since March 1, 1952, although the Fund has had power since its

Finding in Article XX, Section 2(a), a requirement that Article VIII, Section 2(b), be made part of each member's national law, Professor Nussbaum reasons that if any country fails to comply, its own regulations are perforce not consistent with the Agreement: "in other words: the 'consistency' requirement implies a reciprocity rule. . . ."¹⁴¹ We may readily admit there is a requirement that the principle of Article VIII, Section 2(b), be made part of a member's internal law,¹⁴² and concede also that there is implicit in the Agreement this principle of reciprocity.¹⁴³ It does not follow, however, that to endow the provision with the effect of internal law necessarily requires specific legislation,¹⁴⁴ nor even that failure to give the provision force under national law makes the regulation of the defaulting member inconsistent with the Agreement. The provision requires only that the "exchange control regulations of that member" be consistent; it does not demand consistency in all of the member's conduct relating to other members' regulations or to other matters dealt with by the Agreement. The effect of a member's conduct inconsistent with the Agreement may be ineligibility to use Fund resources or even compulsory withdrawal; so long as a country remains a member, however, its regulations come within the provision if they are permitted under one of the sections of the Agreement discussed above.

In addition, Professor Nussbaum complains that inclusion of restrictions "maintained" consistently with the Agreement results in retroactive application of restrictions.¹⁴⁵ We may add that by becoming a member or withdrawing, a country can retroactively render enforceable or unenforceable contracts which have previously had the opposite status, and that any new regulation imposed after the Agreement may make unenforceable a previously existing contract, and, to this extent, is also retroactive. Legally, there is no objection to such retroactive application,¹⁴⁶ and practically, retroactivity is essential to the financial objectives of the controls.

inception to make representations that controls be withdrawn. Art. XIV, § 4. Its failure to act before March 1, 1952, proved nothing; its failure to act since that date may, perhaps, be considered an implied affirmation of consistency. See N.Y. Herald Tribune, May 28, 1951, p. 5, col. 3, reporting a statement of Fund officials so indicating.

141. NUSSBAUM, *op. cit. supra* note 91, at 545.

142. The Fund's interpretation so states.

143. The reciprocal obligation stems rather from art. XX, § 2(a), than from the word "consistently" as used in art. VIII, § 2(b).

144. The only specific legislation required relates to status, immunities, and privileges of the Fund and its employees, art. IX, § 10. Art. XX, § 2(a), requires only a general representation. Countries such as the United States and France (Professor Nussbaum to the contrary notwithstanding: see arts. 26, 28 of the French Constitution), in which treaties are the law of the land, could properly make that representation without specific legislation. In any event, United States courts would not go behind the representation and inquire into another country's municipal law. See note 65 *supra*.

145. NUSSBAUM, *op. cit. supra* note 91, at 543.

146. The constitutional question has been referred to in Part II *supra*. As to retroactivity in the conflict of laws, compare DICEY, *op. cit. supra* note 129, at 638, with 1 BEALE, THE CONFLICT OF LAWS 1 n.1 (1935).

(7) "Unenforceable"

The Fund interpretation states the meaning of this term as follows:

"1. Parties entering into exchange contracts involving the currency of any member of the Fund and contrary to exchange control regulations of that member which are maintained or imposed consistently with the Fund Agreement will not receive the assistance of the judicial or administrative authorities of other members in obtaining the performance of such contracts. That is to say, the obligations of such contracts will not be implemented by the judicial or administrative authorities of member countries, for example, by decreeing performance of the contracts or by awarding damages for their non-performance."

This language, and the rejection of the proposed amendment making offending contracts an "offense" instead of simply "unenforceable,"¹⁴⁷ show that the latter word as used in the provision involves the familiar concept that the validity of the contract is unimpaired, but the contract will not be enforced.¹⁴⁸ The underlying validity of the contract is of substantial importance, for it follows from this principle that the only regulations relevant to a particular case are those in effect at the time enforcement is sought; it is of no interest that the contract may have been contrary to regulations existing at the time of its making. It also follows that if a party can enforce a contract by self-help, he may do so,¹⁴⁹ and in any action against him may set up the defense that the contract authorized the self-help action taken.

As the interpretation states, the provision proscribes not only court enforcement, but also enforcement by administrative authorities. Moreover, arbitration, though privately administered, is also barred, because it depends upon statute and ultimately upon court action for its validation. Only voluntary execution or self-help will escape the provision.

The interpretation, however, clouds one point through use of the language, "*Parties* entering into exchange contracts . . . will not receive . . . assistance."¹⁵⁰ The provision, however, reads "Exchange contracts . . . shall be un-

147. Documents 236, 307, *supra* note 81.

148. Mann, *International Monetary Cooperation*, 22 BRIT. Y.B. INT'L L. 251, 254 (1945); 1 WILLISTON, CONTRACTS § 16 (Rev. ed. 1936); RESTATEMENT, CONTRACTS § 14 (1932).

149. HOWARD, EXCHANGE AND BORROWING CONTROL 254 (1948) states:

"It should be noted that contracts in contravention of any member's Exchange Control Regulations are not illegal and void, but merely unenforceable. This is important, since, provided a Bank (e.g.) does not have to rely on the Courts for the purpose of enforcing its rights against a non-resident, it is not concerned to enquire whether any transaction has been approved in accordance with the non-resident's currency regulation. Ordinary banking transactions are therefore quite safe. . . ."

150. (Emphasis added.) The second paragraph includes similar language: "[I]f a party to an exchange contract . . . seeks to enforce such a contract. . . ."

enforceable," wording which makes clear that unenforceability may be urged in an action not involving the parties. Were this not so, the provision could easily be circumvented by an assignment or by the making of a contract for the benefit of a third party, who would then be free to enforce it. Since the phrasing of the interpretation appears inadvertent, it is not to be expected that the courts will limit Article VIII, Section 2(b), to actions between the parties to the contract.

Since unenforceability is a negative concept, it follows that no member need take any positive action to police or enforce another's regulation.¹⁵¹ So, for example, there is no obligation on a member to procure payment to another member of funds in the former's territory which the latter's regulations purport to vest¹⁵²—even though the same regulations render unenforceable the contract under which the funds are held. Likewise, a contract consistent with the regulations of member A, whose currency is involved, need not be enforced by member B if inconsistent with B's regulation, for the obligation relates only to unenforceability.

(S) "*Territories*"¹⁵³

Little need be said concerning the meaning of this word, other than that Article XX, Section 2(g), makes clear that it includes not only members' metropolitan territories but also "all their colonies, overseas territories, all territories under their protection, suzerainty, or authority and all territories in respect of which they exercise a mandate."

(C) *Effect of the Provision*

Having thus delimited the meaning of the first sentence of Article VIII, Section 2(b), we turn to a consideration of its effect. One important limitation, stemming from Article VIII, Section 6, and Article VII, Section 5, concerns engagements between members which were entered into prior to the Agreement and which conflict with the application of exchange restrictions authorized by the Agreement. Except with respect to restrictions imposed under the scarce currency provision, the Agreement does not override such conflicting engagements, unless the members agree otherwise. Another limitation is the rule of treaty construction under which an earlier treaty (in this case, the Agreement) may be affected by a later treaty, even though some of the parties to the first agreement did not participate in the second.¹⁵⁴

151. NUSSEBAUM, *op. cit. supra* note 91, at 545; see *Kahler v. Midland Bank, Ltd.*, [1949] 2 All E.R. 621, 634 (H.L.) (dissenting opinion). The second sentence of art. VIII, §2(b), authorizes agreements to that end, however.

152. See *Solicitor for the Affairs of His Majesty's Treasury v. Bankers Trust Co.*, 304 N.Y. 282, 107 N.E.2d 448 (1952), which involved the procedural aspects of such a case.

153. It does not appear significant that the first and second versions of the provision used the singular "territory."

154. TOBIN, *TERMINATION OF MULTIPARTITE TREATIES 206 et seq.* (1933); Harvard Research in International Law, *Draft Convention on the Law of Treaties*, 29 AM. J. INT'L

However, where no earlier or later limiting agreement exists, the effect of Article VIII, Section 2(b), is far-reaching. The purpose of the provision is the international recognition of such controls as the Agreement sanctions.¹⁵⁶ To accomplish that purpose required limitation not only of the public policy doctrine (often destructively applied¹⁵⁶), but also of such right as a country has under private international law to select its own theories of conflict of laws.¹⁵⁷ The Fund interpretation announces the achievement of that purpose in the following language:

"An obvious result of the foregoing undertaking is that if a party to an exchange contract of the kind referred to in Article VIII, Section 2(b) seeks to enforce such a contract, the tribunal of the member country before which the proceedings are brought will not, on the ground that they are contrary to the public policy (*ordre public*) of the forum, refuse recognition of the exchange control regulations of the other member which are maintained or imposed consistently with the Fund Agreement. It also follows that such contracts will be treated as unenforceable notwithstanding that under the private international law of the forum, the law under which the foreign exchange control regulations are maintained or imposed is not the law which governs the exchange contract or its performance."¹⁵⁸

Since more than one currency may be involved, a contract will be unenforceable if contrary to the regulation of any member affected; only if the contract remains enforceable under all such laws may the court return to a consideration of its own private international law. Thus the Agreement has now superimposed¹⁵⁹ the law of the currency on the pre-existing rules.

L. 1016 *et seq.* (Supp. 1935). See also *id.* at 1009 *et seq.*; and *In re Ross*, 140 U.S. 453 (1891). The United States-United Kingdom Agreement of December 6, 1945, U.S. TREATIES AND OTHER INT'L ACTS SER., No. 1545 (Dept. State 1945), under which the respective governments agreed not to continue, after one year, to invoke the transitional period provisions of the Agreement unless after consultation they agreed otherwise, is such an agreement.

155. See *Kraus v. Zivnostenska Banka*, 187 Misc. 681, 685, 64 N.Y.S.2d 208, 211 (Sup. Ct. 1946); *Frankman v. Anglo-Prague Credit Bank*, [1948] 1 K.B. 730, 746, *rev'd*, [1949] 1 K.B. 199 (C.A. 1948), *rev'd sub nom. Zivnostenska Banka Nat. Corp. v. Frankman*, [1950] A.C. 57 (1949).

156. Note, 47 YALE L.J. 292 (1938): "Since the substance of public policy has seldom been defined, it has been recognized that unless checked it may be applied destructively to interfere with the normal play of private international law." See also NUSSBAUM, *op. cit. supra* note 91, at 544.

157. See *Aboitiz & Co. v. Price*, 99 F. Supp. 602 (D. Utah 1951).

158. *Accord*, HOWARD, *op. cit. supra* note 149; see also DICEY, *op. cit. supra* note 129, at 752. *Contra*: Lord MacDermott's dissent in *Kahler v. Midland Bank, Ltd.*, [1949] 2 All E.R. 621, 629 (H.L.); see also NUSSBAUM, *op. cit. supra* note 91, at 544; SCHMITT-HOFF, A TEXTBOOK OF THE ENGLISH CONFLICT OF LAWS 122 (1948); Note, 26 BRIT. Y.B. INT'L L. 487 (1949).

159. Mann, in articles, *supra* note 111, speaks of the substitution of *lex monetae* for *lex causae*. The word "superimposed" is believed more apt.

This is the clear effect of the provision. Yet courts and writers who have long relied on policy arguments in exchange control matters and who are perhaps confused by apparent contradiction between the unenforceability provision and the inclusion as an ultimate Agreement objective of the "elimination of restrictions which hamper the growth of world trade," have been reluctant to accord the provision full effect.¹⁶⁰ The short answer—at least in countries (such as the United States and France) where a treaty is the law of the land, and presumably in countries (such as England) where the quality of internal law has been specifically conferred on Article VIII, Section 2(b)—is that where the provision applies, the courts may no longer consider policy. The policy of all members is now determined by or under the Fund Agreement. It is determined by the Agreement in the case of capital transfer restrictions and transitional period restrictions which, even though discriminatory, will be enforced. It is determined under the Agreement in the case of non-transitional restrictions on current transactions, which, through the Fund's power of approval or disapproval, are subject to determination of policy by the Fund rather than any court. Acceptance of these policy determinations and cession of the approval function have been ratified by each member's policy-making body—its government—after full consideration of all of the policy problems involved.¹⁶¹ Each government has thus accepted the Fund—with its power to impose sanctions upon any member which enforces unapproved current restrictions or retains transitional restrictions after the Fund directs their withdrawal—as the arbiter of policy and of the penalties to be exacted for violation of policy. And the judiciary must always follow such legislative determinations of policy. There is, therefore, no longer any basis for the courts to consider the question. Given only consistency with the Agreement, no distinction can be drawn among various controls.

IV. CASES CONCERNING MEMBER NATIONS DECIDED SINCE THE AGREEMENT

Of the nineteen cases concerned with exchange controls of a member country decided in the seven years that the International Monetary Fund Agree-

160. See NUSSBAUM, *op. cit. supra* note 91, particularly at 542-3. DICKEY, *op. cit. supra* note 129, suggests that as to property situated in England the law of the situs may still override foreign controls (*Contra*: Note, 93 SOL. J. 749 (1949)), and that a court may be faced with the dilemma of choosing between the policy condemning confiscatory controls and the policy to observe treaty obligations. The courts, as we shall see in Part IV *infra*, have been slow to consider the Agreement.

161. During the debate on H.R. 3314, it was argued that while the Agreement purported to eliminate restrictions, it actually fostered them by permitting them to remain in effect for an indefinite period at the discretion of the Fund Governors. Senator Taft proposed an amendment prohibiting any country from drawing on the Fund until it had removed all restrictions, 91 CONG. REC. 7753 (1945), and Senator Ball proposed an amendment directing the United States Governors to request an amendment to the Agreement to this end, *id.* at 7776. Both amendments were defeated. *Id.* at 7774, 7779.

ment has been in effect,¹⁶² the majority simply make no reference to it.¹⁶³ Of those cases in which an argument based on the Agreement was presented, some reached conclusions consistent with it,¹⁶⁴ but prior to the Court of

162. There may, of course, also be other cases in the courts of countries the reports of which are not readily available. *Freund v. Laenderbank Wien Aktiengesellschaft*, 277 App. Div. 770, 97 N.Y.S.2d 549 (1st Dep't 1950), is not included, although at the time of the decision Austria had been a Fund member for two years, because the case was concerned with German regulations applicable to Austria.

163. Two cases reach results at variance with the Agreement. All the other decisions which do not mention the Agreement reach results consistent with it: *Industrial Export & Import Corp. v. Hongkong & Shanghai Banking Corp.*, 302 N.Y. 342, 98 N.E.2d 466 (1951), upheld a Chinese regulation against public policy arguments, noting that the Exchange Stabilization Board was "apparently created under a plan formulated by the Governments of United States, Great Britain and China." *Id.* at 346, 98 N.E.2d at 468. *Matter of Maria Liebl*, 201 Misc. 1092, 106 N.Y.S.2d 705 (Surr. Ct. 1951), and *Matter of Theresie Liebl*, 201 Misc. 1102, 106 N.Y.S.2d 715 (Surr. Ct. 1951), are discussed in the text below. *In re De Montale's Estate*, 199 Misc. 711, 107 N.Y.S.2d 146 (Surr. Ct. 1950), and *Perkins v. DeWitt*, 197 Misc. 369, 94 N.Y.S.2d 177 (Sup. Ct. 1950) held that, as a matter of construction of the control invoked, the control was not applicable. *In re De Gheest's Estate*, 362 Mo. 634, 243 S.W.2d 83 (1951), held enforceable an agreement to be performed in Missouri but which had been made in Occupied France without the license required by regulations (whether French or German does not appear) there in force. *Sakin v. London-New York-Shanghai Trading Corp.*, 125 N.Y.L.J. 1086, col. 6 (Sup. Ct. Mar. 26, 1951), vacated an attachment on the ground that a transfer to England under compulsion of British controls resulted from *force majeure* and was not fraudulent; *Marcu v. Fischer*, 65 N.Y.S.2d 892 (Sup. Ct. 1946), held a defense based on Belgian regulations insufficient where the securities involved were here and their owner had not been domiciled in Belgium; the Vienna Court of Appeals, in a case decided June 29, 1949, reported in 77 *JOURNAL DU DROIT INTERNATIONAL* 741 (France 1950), and in *Oesterr. Juristenzeitung Ev. Bl.*, 1949, No. 564, held that British controls would not excuse an English plaintiff from furnishing security for costs.

Of the two inconsistent cases, *Hughes Tool Co. v. United Artists Corp.*, 279 App. Div. 417, 422, 110 N.Y.S.2d 383, 387 (1st Dep't 1952), *aff'd mem.*, 304 N.Y. 942, 110 N.E.2d 884 (1953), which involved the currency of twelve countries, eight of which were Fund members, stated that "[n]o illegality that we can recognize is likely to be involved in the transfer in New York of the title to foreign balances which remain in the foreign countries." This dictum is, in the light of the Agreement, clearly too broad, and in view of the *Perutz* decision, *infra* note 165, apparently will not be followed. The other, *Ahmed Bey Naguib v. Heirs of Moise*, Mixed Ct. Alexandria, Nov. 24/25, 1948, J.T.M. No. 4003, refused to apply Italian restrictions where an insurance contract made in Cairo called for payment in lire by check on an Italian bank, holding that this meant a check negotiable in Cairo.

164. *Jacobson v. Warzyski*, 275 App. Div. 795, 88 N.Y.S.2d 909 (1st Dep't 1949), action on a deposit brought without Polish license, summary judgment for defendant properly granted "in the absence of opposition"; *Cermak v. Bata Akciova Spolecnost*, 80 N.Y.S.2d 782 (Sup. Ct. 1948), *aff'd mem.*, 275 App. Div. 1030, 91 N.Y.S.2d 835 (1st Dep't 1949), the court finding as a fact that defendant had the license required by Czech regulations. *Zivnostenska Banka Nat. Corp. v. Frankman*, [1950] A.C. 57 (1949); *Kahler v. Midland Bank, Ltd.*, [1949] 2 All E.R. 621 (H.L.); and *Catz & Lips v. S.A. Union Versicherung, Tribunal Civil D'Anvers*, Belgium, Jan. 21, 1949, 7 & 8 *JURISPRUDENCE DU PORT D'ANVERS* 321, are discussed in the text below.

Appeals decision in the *Perutz* case,¹⁶⁵ only two decisions may be said to have relied upon the Agreement.¹⁶⁶ The language of the three cases last referred to, as well as the reference in *Perutz* to two other cases where the Agreement was argued (*Kahler*¹⁶⁷ and *Frankman*¹⁶⁸), makes clear that these decisions resulted from the application of conflicts criteria, rather than from the acceptance by the courts of the Agreement as a "superimposed" rule of decision. For the purposes of these decisions, nothing more was required. Eventually, however, the courts will be faced with the case in which conflicts norms produce results divergent from the Agreement. Since the earlier decisions will have important bearing on the conclusion reached in such a case, a review of their passage through the courts appears in order.

In the *Perutz* case, plaintiff was the administratrix of a former employee of a Czechoslovakian bank (the predecessor of defendant); the employee had come to the United States in 1940 and died in 1949. Under an agreement with the bank, he was entitled to a pension commencing in 1940, and under a consent judgment had obtained all sums due him under the contract up to October 31, 1942. The present action, begun by attachment, was for the sums accruing after that date. While conceding the sums to be due under the contract, and in fact having deposited them in plaintiff's name in a blocked account in Czechoslovakia, defendant set up the lack of a license under Czech regulations as a defense to the action. The lower court, noting that the contract provided for payment in Czech crowns at defendant's place of business in Czechoslovakia, held that defendant had by its deposit fully performed, and dismissed the complaint.¹⁶⁹ On appeal plaintiff argued that the Czech regulations under the present political situation were confiscatory, that they were penal and fiscal and therefore should not be enforced, and that since judgment could be had in Czechoslovakia, judgment should also be granted here. Defendant responded that Czech law was applicable unless it offended public policy; that there was no question of public policy here in view of the Bretton Woods Agreement Act and of Article VIII, Section 2(b), and other provisions of the Agreement; that the Agreement is a binding international agreement; that the court cannot attempt to make recognition dependent on the political situation of the moment;¹⁷⁰ and that the fact that plaintiff could

165. *Perutz v. Bohemian Discount Bank in Liquidation*, 304 N.Y. 533, 110 N.E.2d 6 (1953).

166. *Kraus v. Zivnostenska Banka*, 187 Misc. 631, 64 N.Y.S.2d 203 (Sup. Ct. 1946), applying a Czech regulation, noted that the Fund Agreement provided for such recognition; *Spitz v. Schlesische Kredit Anstalt*, 119 N.Y.L.J. 267, col. 6 (Sup. Ct. Jan. 20, 1948), on the authority of the *Kraus* case, applied a Polish regulation.

167. *Kahler v. Midland Bank, Ltd.*, [1949] 2 All E.R. 621 (H.L.).

168. *Zivnostenska Banka Nat. Corp. v. Frankman*, [1950] A.C. 57 (1949).

169. *Perutz v. Bohemian Discount Bank in Liquidation*, 125 N.Y.L.J. 440, col. 4 (Sup. Ct. Feb. 2, 1951).

170. The basis for the argument was that Czech controls had existed for twenty-five years and included those of the pre-war regime, the Nazi occupation, and the post-war

get judgment in Czechoslovakia did not mean that she had a cause of action here. The Appellate Division, however, without reference to the Agreement, reversed, holding that since the expert testimony was that plaintiff could get judgment in Czechoslovakia, and since the court had jurisdiction of the matter, judgment could be obtained here.¹⁷¹ It further held (two judges dissenting on this point) that satisfaction of a judgment obtained here out of assets attached here would not necessitate transmission of funds from Czechoslovakia and that the absence of a Czech license did not necessitate a stay of execution. The majority explained the grant of a stay would "give unwarranted extra-territorial effect to foreign law and enforce it beyond its terms,"¹⁷² since the money had its situs here and since Czech controls could have no control over a levy on such funds, nor over the enforcement of process by the courts of New York. The Court of Appeals,¹⁷³ reversing the Appellate Division, adopted, in part, the defendant's line of argument. It referred to the Agreement only to establish that because of it and the membership of the United States and Czechoslovakia in the Fund, Czech regulations could not be considered contrary to public policy.

The *Frankman* case, an English proceeding, involved sterling debentures issued by a Czechoslovakian corporation in London. Certain of those debentures, held by the London branch of defendant bank, became the property of Mrs. Frankman, a Czech citizen. Thereafter Mrs. Frankman came to England, where she died. Her personal representative claimed re-delivery of the debentures, a claim opposed by the bank because the consent required under Czech controls had been refused. The court of first instance held the place of performance and contracting to be Czechoslovakia; it countered the argument that the Czech exchange controls were penal and revenue acts with the statement that "[t]he Bretton Woods Agreement shows that such restrictions are honoured by the members of the International Monetary Fund"; in support, Article VIII, Section 2(b), was quoted.¹⁷⁴ The Court of Appeals reversed, making no reference to the Agreement, holding that English law was intended by the parties to govern.¹⁷⁵ The House of Lords reversed the Court of Appeals; its five opinions were concerned primarily with showing that the terms of the contract between the parties made Prague the place of contracting and of performance.¹⁷⁶ Only one opinion referred to the Agreement and that only on the penal and confiscatory law point.¹⁷⁷

Communist government. The argument, in the absence of a binding federal determination of policy, is fallacious. See Part V *infra*.

171. *Perutz v. Bohemian Discount Bank in Liquidation*, 279 App. Div. 386, 110 N.Y.S.2d 446 (1st Dep't 1952).

172. *Id.* at 392, 110 N.Y.S.2d at 452.

173. 304 N.Y. 533, 110 N.E.2d 6 (1953).

174. *Zivnostenska Banka Nat. Corp. v. Frankman*, [1948] 1 K.B. 730, 746.

175. [1949] 1 K.B. 199 (C.A. 1948).

176. [1950] A.C. 57 (1949).

177. *Id.* at 72. See Mann, *Money in Public International Law*, 26 BRIT. Y.B. INT'L L. 259, 281-2 (1949).

Another English case, *Kahler v. Midland Bank, Ltd.*,¹⁷⁸ involved negotiable shares in a Canadian company originally purchased by plaintiff in London. In 1938, while plaintiff was a Czechoslovakian national resident in Prague, he transferred custody of the shares to a Czech bank, of which he had become a customer. The Czech bank continued to hold the certificate in London in its dossier with defendant, an English bank. Plaintiff left Czechoslovakia in 1939 and brought action both in contract and in detinue for the certificate. The defendant bank answered to the first that there was no privity and to the second that plaintiff was not entitled to immediate possession, the consent required under Czech exchange regulations having been refused. The court of first instance held for plaintiff, but was reversed by the Court of Appeals, which upheld both of defendant's contentions.¹⁷⁹ The only reference to the Agreement, however, was the statement that an interesting argument, turning largely on the interpretation of the term "exchange contract" in Article VIII, Section 2(b), had been made, but that in view of the decision reached it was not necessary to express a view on the argument. The House of Lords affirmed the Court of Appeals by a three to two vote. The majority stated that plaintiff's right to immediate possession depended upon his contract with the Czechoslovakian bank, and since the contract was subject to Czech law and consent under that law had been withheld, plaintiff could not compel delivery of the shares to himself. The argument concerning the Fund Agreement apparently was not so clearly put in the House of Lords as it had been below, with the result that the only reference to the Agreement is a statement in one of the dissents rejecting the argument.¹⁸⁰

Each of the three cases involved an "exchange contract":¹⁸¹ *Kahler* and *Frankman*, because the transactions, under plaintiffs' constructions, would have permitted a Czech national who had deposited securities abroad to have them delivered in the foreign country either to himself or another; *Perutz*, because the pension agreement was a deliberate contractual arrangement, enforcement of which was sought in dollars rather than kronen. In each, therefore, the Agreement pointed the way without reference to conflicts principles.¹⁸² The failure to adopt—or spell out more clearly—the line of reasoning based on Article VIII, Section 2(b), of the Agreement as the supreme law¹⁸³ can only be productive of future confusion.

178. [1949] 2 All E.R. 621 (H.L.).

179. [1948] 1 All E.R. 811 (C.A.).

180. [1949] 2 All E.R. 621, 633-4 (H.L.).

181. The point was argued in *Perutz* on an earlier motion to vacate the attachment, but, strangely, on the motion for judgment dismissing the complaint was only incidentally referred to in the briefs. This, perhaps, explains the cryptic decision rendered.

182. See Note, 26 BRIT. Y.B. INT'L L. 487 (1949). Mann, *supra* note 177, suggests as a further ground for the *Kahler* and *Frankman* decisions the duty of the court to refuse to effectuate a claim, recognition of which would amount to a breach of art. 5 of the Monetary Agreement between Britain and Czechoslovakia.

183. While there is no British constitutional provision corresponding to ours, the

The two *Liebl* cases furnish apt examples of this potential difficulty. *Matter of Maria Liebl*,¹⁸⁴ relying on conflicts principles and construction of the Czech regulation, held that lack of a Czech license could not affect the Public Administrator's right to a bank book covering a New York account of a United States resident who died while in Czechoslovakia. *Matter of Theresie Liebl*,¹⁸⁵ relying on the policy to protect domestic distributees and the policy against confiscatory fiscal laws, held that lack of a Czech license could not affect the Public Administrator's right to a bank book covering a New York account of a Czech resident who became entitled, before her death, to a Totten trust account because she had survived the trustee. In neither case was the Agreement applicable: *Maria Liebl* did not involve Czech currency or other exchange assets; *Theresie Liebl* concerned the right of inheritance of distributees rather than enforceability of a contract. And in both cases, the bank, in urging the Czech regulations to prevent administration of assets located here, was asserting a positive claim beyond the unenforceability concept of Article VIII, Section 2(b). Yet despite the provision's patent inapplicability, the less than precise language of the *Perutz* decision could induce an erroneous reliance upon the Agreement in the *Liebl* situations. For if the meaning of the *Perutz* decision is that the policy concepts on which *Theresie Liebl* is based may not be urged because the United States and Czechoslovakia are members of the Fund, the Agreement will be given effect beyond its own express provision. The illogic of that result supplies the gap in the reasoning of the decision.

Only one other case involving Fund members requires discussion. In *Catz & Lips v. S. A. Union Versicherung*,¹⁸⁶ a Belgian court reached a correct result on reasoning which, however, overlooked Article VIII, Section 2(b), and confused several other provisions of the Agreement. The action was an attachment of funds in Belgium brought by a Dutch claimant against a Czechoslovakian insurance company. The defendant invoked the Bretton Woods Agreement and the Dutch-Czechoslovak convention of November 15, 1946, entered into pursuant to the Agreement, which prohibited the transfer of funds from one country to another whenever the payment was for a debt incurred prior to December 20, 1945. The court held that the action must be rejected, basing the result on the following confused and circuitous reasoning: Article VI of the Agreement permits the control of capital movements and Article XIV, Section 2, further extends this permission with regard to occupied countries; neither the Agreement nor the convention concluded thereunder prohibit an attachment in the creditor's country since this cannot involve a

Schedule to the Order in Council (S.R. & O., 1946, No. 36) relating to the Bretton Woods Agreements gives full force and effect to art. VIII, § 2(b).

184. 201 Misc. 1092, 106 N.Y.S.2d 705 (Surr. Ct. 1951). In both this case and the other *Liebl* case, *infra* note 185, the *Kahler* case was extensively analyzed; in neither was the Agreement mentioned.

185. 201 Misc. 1102, 106 N.Y.S.2d 715 (Surr. Ct. 1951).

186. Tribunal Civil D'Anvers, Belgium, Jan. 21, 1949, 7 & 8 JURISPRUDENCE DU PORT D'ANVERS 321.

capital transfer; the purpose of the Bretton Woods Agreement was not to prevent a debtor from paying his debts, but to allow countries the possibility of prohibiting certain modes of payment, namely capital transfers; the 1946 Dutch-Czechoslovak convention prevents the Czechoslovakian debtor from paying in Holland, where it has no funds; this does not prevent plaintiff from taking protective steps to obtain payment, but attachment is not a protective but a compulsory measure whereby plaintiffs seek to obtain indirectly what the convention prevents them from obtaining and their debtor from giving; this is therefore contradictory to the laws of the three countries involved and the claim cannot be enforced. The court thus based its decision on the sole ground that Belgium, recognizing a convention entered into by two other members under the Agreement,¹⁸⁷ will not enforce what such a convention prohibits. It ignored or avoided the equally clear ground that the insurance claim constituted an exchange contract under Article VIII, Section 2(b), payment of which would contravene the regulations of Czechoslovakia, a member country, and which therefore could not be enforced, through attachment or otherwise, in Belgium. In so doing, the court unnecessarily and erroneously classified the payment of an insurance claim as a capital transfer, whereas such a payment seems clearly "due in connection with foreign trade, other current business, including services,"¹⁸⁸ and took an unnecessarily strict view of what a capital transfer involved. In the light of *Perutz* and the language of the Agreement itself, it is not expected that the decision will be given much weight by United States courts.

V. CASES OUTSIDE THE SCOPE OF THE AGREEMENT

That a particular situation falls outside the scope of the Agreement does not necessarily mean that conflict of laws principles remain unchanged, for other international agreements or laws affect the situation. Thus, the Special Exchange Agreement between Indonesia and the Contracting Parties of the General Agreement on Tariffs and Trade (GATT)¹⁸⁹ contains a clause which is an adaptation of Article VIII, Section 2(b), of the Fund Agreement, except that it is unilateral; it provides for unenforceability only "in the territories of Indonesia." Yet an Indonesian control permitted under the Special Exchange Agreement would deserve recognition from the Contracting Parties. Since the United States is indirectly a party to that agreement, it is reasonable to suppose that it will be possible to obtain from the State Department a suggestion that federal policy requires recognition of such a control. So also the peace treaty provision subjecting compensation payments to foreign exchange

187. The report states that a similar convention exists between Belgium and Czechoslovakia, a fact which may have influenced the Belgian court.

188. Agreement, art. XIX(i).

189. October 20, 1950 (published by the United Nations). Similar agreements with Ceylon and Haiti automatically expired when those countries became members of the Fund.

controls¹⁸⁰ will work a change in pre-existing law in the cases to which it specifically applies, and a military government law promulgated by United States authorities will be given effect as an expression of federal policy.¹⁸¹ However, for a variety of reasons, the Fund Agreement cannot be used as the basis for requiring, under a most-favored-nation arrangement, a member nation to apply a non-member's controls.¹⁸²

In the absence of an applicable treaty provision, it is nonetheless argued that the recognition of exchange controls by the Fund Agreement, the peace treaties, and GATT,¹⁸³ and the change in extent to which and purpose for which such restrictions were invoked after World War II indicate a change of conditions sufficient to work a reversal of the former public policy rule.¹⁸⁴ Insofar as the argument is based on the Fund Agreement, it overlooks the fact that Agreement provisions extend international recognition only to controls of those countries which through membership in the Fund have accepted the principles of cooperation, limitation, and supervision set forth in the Agreement, and that, although "parallel stipulations for dealing with non-member countries" were requested,¹⁸⁵ they are not to be found in the Agree-

190. Contained in the treaties with Italy, art. 78(4) (c); Rumania, art. 24(4) (c); Bulgaria, art. 23(4) (c); Hungary, art. 26(4) (c), U.S. Treaties and Other Int'l Acts Ser., Nos. 1648-51 (Dep't State 1947); as well as in the Memorandum of Understanding between the United States and Italy, § 16(d), U.S. Treaties and Other Int'l Acts Ser., No. 1757 (Dep't State 1948).

191. Matter of Muller, 199 Misc. 745, 104 N.Y.S.2d 133 (Surr. Ct. 1951); Kent Jewelry Corp. v. Kiefer, 119 N.Y.S.2d 242 (Sup. Ct. 1952); *In re Habekost's Estate*, 118 N.Y.S.2d 315 (Surr. Ct. 1952).

192. The rule *ejusdem generis* will exclude most clauses. SNYDER, THE MOST-FAVORED-NATION CLAUSE 39-40, 93, 140, 224 (1948); *cf.* art. XVII, Treaty of Friendship, Commerce and Navigation with Ireland, U.S. Treaty and Other Int'l Acts Ser., No. 2155 (Dep't State 1950). If not, there remain the problems whether or not unenforceability may be termed a "favor," 6 OPS. ATT'Y GEN. 148, 151 (1853); whether or not the clause may be enforced by an individual in private litigation, *George E. Warren Corp. v. United States*, 94 F.2d 597, 599 (2d Cir.), *cert. denied*, 304 U.S. 572 (1938); whether or not it is necessary to show reciprocity on the part of the other nation, 1 HACKWORTH, DIGEST OF INTERNATIONAL LAW 274 (1943); Sayre, *The Most-Favored-Nation Policy in Relation to Trade Agreements*, 33 AM. POL. SCI. REV. 411, 418 (1939); and whether the fact that the Fund Agreement is a multi-partite convention to which non-members can become parties prevents the application of the clause, 2 HACKWORTH, *op. cit. supra*, at 293; SNYDER, *op. cit. supra*, at 167.

193. U.S. TREATY AND OTHER INT'L ACTS SER., No. 1700 (Dept. State 1947), particularly arts. XIV(5), XV. The Charter of the International Trade Organization also is sometimes referred to, but it is not considered herein because it presumably will not be ratified by the United States. Dep't of State Press Release, No. 1221, Dec. 6, 1950.

194. See *Strauss & Co. v. Canadian Pac. Ry.*, 254 N.Y. 407, 412, 173 N.E. 564, 566 (1930); 72 C.J.S. 218 (1951); 5 WILLISTON, CONTRACTS 4556 (Rev. ed. 1937). See Friedmann, *Foreign Exchange Control in American Courts*, 26 ST. JOHN'S L. REV. 97, 115 (1951).

195. Document 374, PROCEEDINGS AND DOCUMENTS OF THE UNITED NATIONS MONETARY AND FINANCIAL CONFERENCE, PUBLICATION No. 2866, INT'L ORG. AND CONF. SER. 1, No. 3, p. 605 (U.S. Dep't State 1948).

ment.¹⁹⁶ Since the Agreement supersedes prior policy only because it is an executive agreement,¹⁹⁷ the deliberate limitation of its provisions negates the extreme conclusions sought to be drawn from it. Likewise, the limited recognition accorded controls by the peace treaties and by the GATT provisions for restrictions consistent with the Fund Agreement does not yield any more substantial implication. Moreover, the contention that exchange controls are now in more general use is, it appears, subject to question.¹⁹⁸ Nor is the statement that present day controls rest on economic rather than political principles a sound generalization. True, in many cases exchange restrictions are necessary to economic survival,¹⁹⁹ and conceivably the interests of the United States may require recognition of a non-member country's controls as a means of protecting its balance of payments.²⁰⁰ Yet it is also true that the existing "cold war" has in the case of some of the Soviet-Bloc nations returned the situation to that which existed before World War II, when regulations acceptable on paper were administered for hostile purposes.²⁰¹

Thus, after the Communist coup in Czechoslovakia, the same regulations previously regarded as not confiscatory²⁰² were held, in *Matter of Theresie Liebl*,²⁰³ to produce a confiscatory result. Another New York case, *Plesch v.*

196. Though art. XI of the Agreement specifically excepts "the right of any member to impose restrictions on exchange transactions with non-members or with persons in their territories."

197. *Bollack v. Societe Generale Pour Favoriser, etc.*, 263 App. Div. 601, 33 N.Y.S.2d 986, *leave to appeal denied*, 264 App. Div. 767, 35 N.Y.S.2d 717 (1st Dep't 1942) (refusing to apply *United States v. Belmont*, 301 U.S. 324 (1937), on the ground that the latter case had been based on an executive agreement). See also *Anderson v. N.V. Transandine Handelmaatschappij*, 289 N.Y. 9, 20, 32 N.E.2d 502, 507 (1942); and *Mann, Money in Public International Law*, 26 BRIT. Y.B. INT'L L. 259, 279 (1949).

198. For a comparison of the use of controls before and after World War II, see STERN, *THE UNITED STATES IN INTERNATIONAL BANKING* (1951), particularly pp. 29 and 378, and INTERNATIONAL MONETARY FUND, *FIRST ANNUAL REPORT ON EXCHANGE RESTRICTIONS* (1950), both of which indicate that pre-World War II use of controls was widespread.

199. See *Hughes Tool Co. v. United Artists Corp.*, 279 App. Div. 417, 421, 110 N.Y.S.2d 383, 386-7 (1st Dep't 1952), *aff'd mem.*, 304 N.Y. 942, 110 N.E.2d 834 (1953), where the court stated:

"[I]t would be impractical as well as unjust to stay executions upon judgments until the removal of currency restrictions by foreign governments, which, in the foreseeable future, they cannot accomplish in many cases except at the expense of national survival."

200. DICEY, *CONFLICTS OF LAW* 751 (6th ed. 1949). See *Industrial Export & Import Corp. v. Hongkong & Shanghai Banking Corp.*, 302 N.Y. 342, 93 N.E.2d 466 (1951).

201. Bronz, *The International Trade Organization Charter*, 62 HARV. L. REV. 1039, 1098 (1949).

202. *Werfel v. Zivnostenska Banka*, 260 App. Div. 747, 23 N.Y.S.2d 1001 (1st Dep't 1940), *rev'd on other grounds*, 287 N.Y. 91, 33 N.E.2d 382 (1941). The *Kahler* and *Frankman* cases reached the same result.

203. 201 Misc. 1102, 106 N.Y.S.2d 715 (Surr. Ct. 1952).

Banque Nationale de la Republique d'Haiti,²⁰⁴ was decided on the ground that there was no showing that the Haitian decrees involved were not confiscatory and that it could not be assumed they were valid. Such cases, as well as the use of Section 269 of the New York Surrogate's Court Act to withhold payment of legacies to persons in various Soviet-Bloc countries,²⁰⁵ and the decision in *A/S Merilaid & Co. v. Chase National Bank of New York*²⁰⁶ (holding that an Estonian decree made after the incorporation of that country into the U.S.S.R. was confiscatory) indicate that the courts are not likely to accept the factual basis of the contention that public policy has been reversed, in the face of hostile political interests. Other evidence, in fact, indicates that political considerations are of more importance than deductive reasoning based on factual niceties: the failure of the courts to distinguish between normal controls and regulations which are truly confiscatory,²⁰⁷ and the implication arising from decisions rendered without discussion of the argument that controls which had been in effect since 1931 could not be regarded as confiscatory.²⁰⁸ It is not surprising, therefore, to find the court which in *Perutz* held the Fund Agreement to have worked a reversal of public policy, not accepting the con-

204. 273 App. Div. 224, 77 N.Y.S.2d 43 (1st Dep't), *aff'd per curiam*, 298 N.Y. 573, 81 N.E.2d 106 (1948).

205. Hungary: Matter of Braier, 108 N.Y.S.2d 417 (Surr. Ct. 1951), *aff'd*, 279 App. Div. 1008, 113 N.Y.S.2d 246 (1st Dep't 1952), *aff'd*, 305 N.Y. 148, 111 N.E.2d 424 (1953); Estate of Theresa Grisbako, 127 N.Y.L.J. 958, col. 2 (Surr. Ct. Mar. 7, 1952); Matter of Anna Kudlich, 127 N.Y.L.J. 51, col. 2 (Surr. Ct. Jan. 3, 1952); *In re Getream's Estate*, 200 Misc. 543, 107 N.Y.S.2d 225 (Surr. Ct. 1951). China: Matter of Wong Hoen, 199 Misc. 1119, 107 N.Y.S.2d 407 (Surr. Ct. 1951); Matter of Yee Yoke Ban, 200 Misc. 499, 107 N.Y.S.2d 221 (Surr. Ct. 1951). Russia: Matter of Best, 200 Misc. 332, 107 N.Y.S.2d 224 (Surr. Ct. 1951). The Russian Zone of Germany: Matter of Thomae, 199 Misc. 940, 105 N.Y.S.2d 844 (Surr. Ct. 1951); Matter of Max Perlinsky, 128 N.Y.L.J. 76, col. 7 (Surr. Ct. July 11, 1952). Lithuania: *In re Geffen's Estate*, 199 Misc. 756, 104 N.Y.S.2d 490 (Surr. Ct. 1951). See also N.Y. CIV. PRAC. ACR §§ 474, 978; and *In re Url*, 7 N.J. Super. 455, 71 A.2d 655 (1951), *appeal dismissed*, 5 N.J. 507, 76 A.2d 249 (1950). While these cases are concerned with our control of foreign assets, they are nonetheless important indications of state policy. As indicated in note 63 *supra*, they are based in part on related federal policy.

206. 189 Misc. 285, 71 N.Y.S.2d 377 (Sup. Ct. 1947).

207. *Sulyok v. Penzintezeti Kozpont Budapest*, 279 App. Div. 528, 111 N.Y.S.2d 75 (1st Dep't), *aff'd as modified*, 304 N.Y. 704, 107 N.E.2d 604 (1952), involved (1) a decree which prohibited payment of pensions to persons who had departed from Hungary for more than three months and (2) Hungarian exchange controls which had been in effect since 1931. The court correctly held the decree to be confiscatory and simply ignored the argument based on the exchange controls.

208. See *Sulyok v. Penzintezeti Kozpont Budapest*, *supra* note 207; *Stern v. Pesti Magyar Kereskedelmi Bank*, 303 N.Y. 881, 105 N.E.2d 106 (1952), *mem. affirming* 278 App. Div. 811, 105 N.Y.S.2d 352 (1st Dep't 1951), *mem. reversing* 123 N.Y.L.J. 1281, col. 3 (Sup. Ct. April 12, 1950) (trial court applied Hungarian exchange control); *Freund v. Laenderbank Wien Aktiengesellschaft*, 277 App. Div. 770, 97 N.Y.S.2d 549 (1st Dep't 1950) (concerned with German controls in effect in Austria).

tention that a change in public policy had occurred with respect to Hungarian regulations.²⁰⁹

It cannot, however, be safely assumed that a different attitude will prevail with respect to countries outside the Soviet-Bloc. *Dutch-American Mercantile Corporation v. Frank & Moloney, Inc.*,²¹⁰ involved a sale of Spanish peseta. Defendant contended that the sale was invalid under Spanish law and that as a matter of public policy our courts will not enforce a contract which, though made here, calls for performance of an act illegal under the law of the place of performance. The court held the contract valid under the law of New York, where it was made, and the Spanish law not pertinent. *Hughes Tool Company v. United Artists Corporation*,²¹¹ which was a rate of exchange case involving the currencies of Argentina, Burma, Palestine, and South Africa, among others, contains a dictum that "[n]o illegality that we can recognize is likely to be involved in the transfer in New York of title to foreign balances which remain in the foreign countries."²¹² And, while the *Industrial Export & Import Corporation* case²¹³ evidences a more tolerant approach to exchange controls, the court in its decision carefully noted the participation of the United States in the establishment of the Stabilization Board, whose regulations were in question.

CONCLUSIONS

Prior to the International Monetary Fund Agreement, there were few situations in which it could be said with certainty that an exchange control regulation would be applied. A restriction of the forum was given effect, except, perhaps, where forum was the *sole* point of contract. In other cases, however, application hinged on what law was found to govern and what the public policy of the forum was found to be. The first inquiry revolved around the intention of the parties, and, in the absence of a clear indication of intent,

209. In the *Stern* case, *supra* note 208, and the *Sulyok* case, *supra* note 207, in both of which the point was fully briefed and argued. The same conclusion was reached by a Dutch court in a case reported in *Netherlands Jurisprudence*, 1948, No. 130, and noted in Saher, *A Dutch Judgment Concerning Hungarian Foreign Exchange Regulations*, 3 INT'L L.Q. 102 (1950). So also there is consistency between *Jacobson v. Warzycki*, 275 App. Div. 795, 88 N.Y.S.2d 909 (1st Dep't 1949), involving Poland at a time when she was a Fund member and in which the decision was in favor of the proponent of the argument, and *Kaufman v. Miedzynarodowy Bank Handlowy S.A.*, 126 N.Y.L.J. 55, col. 4 (Sup. Ct. July 9, 1951), decided after Poland withdrew from the Fund and in which a motion by defendant for summary judgment was denied.

210. 124 N.Y.L.J. 569, col. 7 (Sup. Ct. Sept. 22, 1950).

211. 279 App. Div. 417, 110 N.Y.S.2d 383 (1st Dep't 1952), *aff'd mem.*, 304 N.Y. 942, 110 N.E.2d 884 (1953).

212. 279 App. Div. at 422, 110 N.Y.S.2d at 387.

213. *Industrial Export & Import Corp. v. Hongkong & Shanghai Banking Corp.*, 302 N.Y. 342, 98 N.E.2d 466 (1951). While the case concerned China, which is a Fund member, it made no reference to the Agreement and is therefore considered *apposite*.

great importance was attached to the place of performance, place of making, and situs of the property originally involved; but little or no weight was given to nationality, domicile (except as to matters of inheritance), or the currency involved. If this inquiry showed the restriction to be the governing law, it might nonetheless be refused application on public policy grounds if the contact with the forum was relatively strong (as where domestic contract rights or a domestic creditor or beneficiary was involved) or if the conflict with the interest of the forum was relatively great (as where the interests of a hostile government would be furthered or confiscation permitted).

The drafters of the Agreement, while establishing as the ultimate goal the removal of restrictions on current transactions, nonetheless recognized the necessity for controls on capital movements and, in some situations, on current transactions. They recognized also that such controls would come to nought if left prey to the judicial clichés which competitive national interests had developed. Accordingly, they agreed on the first sentence of Article VIII, Section 2(b), as the proper principle to be applied among members who had accepted international financial cooperation by subjecting themselves to the limitations of the Agreement and the supervision of the Fund. The Agreement thus not only determined policy concerning capital controls, but also transplanted from the courts to an international body of monetary specialists the determination of policy concerning restrictions on current transactions.

In so doing, the Agreement supplanted the conflict of laws rules which previously formed the initial basis of decision. Under the Agreement and regardless of relative strength of contacts, a United States agency or tribunal will give effect to the law of the currency and refuse enforcement of a deliberate consensual arrangement involving the exchange resources (currency, property, or services) of a country which is a Fund member at the time the case is decided, if the arrangement then contravenes a restriction which that member has maintained or imposed (whether before or after the arrangement was entered into) consistently with the Agreement. In such a case, it is not necessary that the proceeding be between the parties to the arrangement. It is of importance, however, to consider other international agreements between the United States and such member country, because another agreement, whether earlier or later in time, may be of overriding force.

That the Agreement sanctions discriminatory controls during the transitional period, may require retroactive application of a regulation, and may, as in the *Perutz* case, result in the enforcement of controls maintained by a hostile government, does not lessen its binding effect in cases to which it applies. Nor may these facts be advanced as valid policy objections to the Agreement. The first two facts are concessions to the governmental interests involved. The third objection may be answered by pointing to the sanctions provided by the Agreement with which the Fund authorities may control members whose regulations are being used for hostile, rather than valid, economic purposes. In terms of policy, the degree of uniformity achieved through

the Agreement in this otherwise chaotic field is to be counted a major blessing.

In the same period of post-war international economic and financial cooperation that produced the Fund Agreement, other international agreements recognized the necessity for exchange controls in particular situations or sought to extend the area of operation of the Agreement. This led to the contention that "exchange control, formerly a bastard of the law, had become legitimate,"²¹⁴ and that public policy no longer prevented but, on the contrary, required the application of foreign exchange regulations even to situations not covered by the terms of any specific international agreement. Transition from the cordial post-war period to the increasing political tensions of the "cold war" has proven those statements to be exaggerated. While it is true that an exchange control may no longer be considered *per se* contrary to public policy, the change in attitude, to continue the above-quoted metaphor, must be likened to the statutes which permit an illegitimate to inherit from his mother but not from his father! Thus American courts, in cases not involving an international compact, tend to use the public policy device to deny application of controls, unless the situation is one in which a positive interest of the United States otherwise indicates. Whether the interest of the United States requires the application or rejection of a particular restriction is a matter which the courts will hold concluded by a deliberate determination, formally expressed, of the political departments of the Federal Government. To the extent that the policy determination is thus shifted from the courts to political and economic specialists, one may expect a more widespread recognition of controls maintained for purposes which are truly economic. This does not, however, presage an increased willingness to recognize the controls of Soviet-Bloc non-member countries; nor does it mean the replacement of private international law norms by the law of the currency, as in the case of the Agreement. It is not to be expected that the courts will readily accept the view that public policy now requires the application of controls which, under conflicts criteria, would not otherwise be applicable.²¹⁵

There thus remains a broad area in the field of exchange control law which must be clarified by further international regulation before we can have a common standard guaranteeing uniform decisions in the field.²¹⁶ But with or without clarification, the *Perutz* case and Article VIII, Section 2(b), strongly suggest that the bar and the business community must scrutinize

214. Friedmann, *Foreign Exchange Control in American Courts*, 26 ST. JOHN'S L. REV. 97, 108 (1951). See Domke, *Protection of American Property Abroad*, 4 THE RECORD 268, 271 (1949).

215. Mann, *Money in Public International Law*, 26 BRIT. Y.B. INT'L L. 259, 278 (1949). See also DOMKE, CONTROL OF ALIEN PROPERTY 206 (1947).

216. The need for further regulation is suggested by Mann in an unpublished paper on "International Monetary Law," presented by him to the 1952 Lucerne Conference of the International Law Association.

foreign controls more carefully—at least until the establishment of government insurance against non-payment caused by exchange controls.²¹⁷ Now, even more than before, the careful negotiator will demand payment before delivery or through an irrevocable letter of credit in his own currency, or, failing that, the guaranty of a resident of his own or some third country.

217. Such insurance has been proposed in a bill introduced by Senator Murray of Montana. N.Y. Times, Mar. 8, 1953, § 3, p. 5, col. 4.

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CONTRIBUTORS TO THIS ISSUE

BERNARD S. MEYER. B.S. Johns Hopkins University, 1936; LL.B. University of Maryland, 1938. Attorney, Office of the General Counsel, Treasury Department, 1941-43. Author, *Tort Liability under the Wartime Car Sharing Plan*, 11 *Geo. Wash. L. Rev.* 1 (1942), *Legislative History and Maryland Statutory Construction*, 6 *Md. L. Rev.* 311 (1942). Member, Committee on Procedure in Fraud Cases, Section of Taxation, American Bar Association. Member Maryland, District of Columbia, and New York Bars.