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COMMENTS

Foreign Exchange Control Regulation and the New York Court of Appeals: *J. Zeevi & Sons, Ltd. v. Grindlays Bank (Uganda), Ltd.*

JOHN S. WILLIAMS*

One of the objectives of the International Monetary Fund, founded by the Bretton Woods Agreement in 1945,¹ has been to unify the treatment which exchange control regulations receive in the courts and administrative agencies of member countries. Pursuant to this goal, the Agreement which created the Fund incorporated the following provision as Article VIII, section 2(b):

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. In addition, members may, by mutual accord, co-operate in measures for the purpose of making the exchange control regulations of either member more effective, provided that such measures and regulations are consistent with this Agreement.²

The first sentence of this section has been the most litigated provision of the entire Agreement, and a number of New York cases established a

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1. Articles of Agreement of the International Monetary Fund, Dec. 27, 1945, 60 Stat. 1401, T.I.A.S. No. 2322, 2 U.N.T.S. 185 [hereinafter cited as Fund Agreement].

2. Fund Agreement, art. VIII, § 2(b). For a detailed discussion of this provision, see Williams, *Extraterritorial Enforcement of Exchange Control Regulations Under the International Monetary Fund Agreement*, 15 VA. J. INT'L L. 319 (1975).

strict interpretation of the clause.³ In May of 1975, however, the New York Court of Appeals apparently made a bold departure in its struggle with extraterritorial enforcement of exchange control regulations by embracing the "national policy of cooperation with Bretton Woods signatories" and an "expansive application of the IMF agreement."⁴ Yet scarcely a month later the same court by unanimous opinion in *J. Zeevi & Sons, Ltd. v. Grindlays Bank (Uganda), Ltd.*⁵ seemingly reversed direction and reverted to an extremely narrow and possibly illusory interpretation of the first sentence of Article VIII, section 2(b). Unfortunately, the court flatly rejected without discussion the application of the Fund Agreement. This Comment will analyze the court's failure in that regard.

I

THE FACTUAL SITUATION

In the main, the facts in the *Zeevi* case were not in issue. The plaintiffs sought to recover \$406,846.80 on an irrevocable international letter of credit.⁶ This claim arose after Hiram Zeevi Company (Uganda), Ltd., an Israeli corporation, deposited with the defendant, Grindlays Bank (Uganda), Ltd., some 3,000,000 Ugandan shillings in March of 1972. In consideration of this deposit, Grindlays issued an irrevocable letter of

3. *French v. Banco Nacional de Cuba*, 23 N.Y.2d 46, 242 N.E.2d 704, 295 N.Y.S.2d 433 (1968); *Banco do Brasil S.A. v. Israel Commodity Co.*, 12 N.Y.2d 371, 190 N.E.2d 235, 239 N.Y.S.2d 872 (1963), *cert. denied*, 376 U.S. 906 (1964); *Southwestern Shipping Corp. v. Nat'l City Bank of New York*, 6 N.Y.2d 454, 160 N.E.2d 836, 190 N.Y.S.2d 352, *cert. denied*, 361 U.S. 895 (1959); *Perutz v. Bohemian Discount Bank in Liquidation*, 304 N.Y. 533, 110 N.E.2d 6 (1953); *Brill v. Chase Manhattan Bank*, 14 App. Div. 2d 852, 220 N.Y.S.2d 903 (1st Dep't 1961); *Stephen v. Zivnostenska Banka Nat'l Corp.*, 140 N.Y.S.2d 323 (Sup. Ct.), *aff'd mem.*, 286 App. Div. 999, 145 N.Y.S.2d 310 (1st Dep't 1955); *In re Sik's Estate*, 205 Misc. 715, 129 N.Y.S.2d 134 (Sur. Ct. 1954); *De Sayve v. De La Valdene*, 124 N.Y.S.2d 143 (Sup. Ct. 1953); *In re Therese Liebl's Estate*, 201 Misc. 1102, 106 N.Y.S.2d 715 (Sur. Ct. 1951); *In re Maria Liebl's Estate*, 201 Misc. 1092, 106 N.Y.S.2d 705 (Sur. Ct. 1951); *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); *Kraus v. Zivnostenska Banka*, 187 Misc. 681, 64 N.Y.S.2d 208 (Sup. Ct. 1946).

4. *Banco Frances e Brasileiro S.A. v. John Doe No. 1*, 36 N.Y.2d 592, 599, 331 N.E.2d 502, 507, 370 N.Y.S.2d 534, 539-40, *cert. denied*, ___ U.S. ___ (1975). The *Banco Brasileiro* case is discussed by the present author in 70 *Am. J. Int'l L.* 101 (1976).

5. 37 N.Y.2d 220, 333 N.E.2d 168, 371 N.Y.S.2d 892, *cert. denied*, ___ U.S. ___ (1975), noted in 9 *Int'l Law* 795 (1975).

6. 37 N.Y.2d at 223, 333 N.E.2d at 170, 371 N.Y.S.2d at 895. The *Zeevi* plaintiffs also sought to recover \$203,423.40 on a second letter of credit but the Court of Appeals did not emphasize this claim since it found it submerged in unresolved questions of fact. Because the pertinent issues of law on both claims are the same for our purposes, only the facts regarding the claim for \$406,846.80 will be highlighted.

credit in favor of the plaintiff, J. Zeevi & Sons, in the amount of \$406,846.80. The credit (a) provided for payment, commencing April 15, 1972, in ten equal monthly installments against clean drafts drawn on Zeevi Uganda, the depositor, and (b) authorized the negotiating bank to seek reimbursement, *i.e.* payment, from the First National City Bank, New York (Citibank). Allegedly "the whole purpose of the transaction between the parties was to transfer funds from Uganda to New York."

As the apparent result of the strident anti-Israeli policy of President Amin of Uganda, officials of the Bank of Uganda, acting with the authority of the Minister of Finance under the Ugandan Exchange Control Act,⁸ issued directives in late March and April of 1972 instructing Grindlays to make no foreign exchange payments pursuant to the letter of credit. Grindlays advised Citibank accordingly. In December 1972 and January 1973 Chemical Bank, the negotiating bank, presented ten drafts drawn on Zeevi Uganda to Citibank for payment, but Citibank returned the drafts unpaid.

In the meantime, Zeevi had commenced suit by order of attachment on Grindlays' funds on deposit with Citibank. In September of 1973 Zeevi moved for summary judgment on its claim for \$406,846.80 and Grindlays cross-moved for summary judgment. The New York Supreme Court granted Zeevi's motion and denied Grindlays',⁹ and Grindlays appealed. The Appellate Division, First Department, unanimously affirmed without opinion¹⁰ and, once again, Grindlays appealed. In June of 1975 the New York Court of Appeals unanimously affirmed the Appellate Division in an opinion holding (1) that New York substantive law is controlling because "New York has an overriding and paramount interest in the outcome of this litigation" as the "financial capital of the world;"¹¹ (2) that the doctrines of impossibility of performance and act of state do not apply in bar of Zeevi's claim;¹² and (3) that Article VIII,

7. This was a memorandum decision made denying the Bank's motion to dismiss for lack of jurisdiction. The same comment was repeated in a decision on the present motion. *J. Zeevi & Sons, Ltd. v. Grindlays Bank (Uganda), Ltd.*, Civil No. 24330/72 (Sup. Ct., Dec. 18, 1973), at 16.

8. The Exchange Control Act of Uganda, Laws of Uganda, c. 158 at 3017 (Rev. ed. 1964). This Act is modeled upon and is similar to the English Exchange Control Act of 1947, 10 & 11 Geo. 6, c. 14.

9. *J. Zeevi & Sons, Ltd. v. Grindlays Bank (Uganda), Ltd.*, Civil No. 24330/72 (Sup. Ct., Dec. 18, 1973).

10. *J. Zeevi & Sons, Ltd. v. Grindlays Bank (Uganda), Ltd.*, 44 App. Div. 2d 914, 355 N.Y.S.2d 1015 (1st Dep't 1974).

11. *J. Zeevi & Sons, Ltd. v. Grindlays Bank (Uganda), Ltd.*, 37 N.Y.2d 220, 229, 333 N.E.2d 168, 174, 371 N.Y.S.2d 892, 898 (1975).

12. *Id.* at 228, 333 N.E.2d at 173, 371 N.Y.S.2d at 900.

section 2(b) of the Fund Agreement does not bar Zeevi's claim, for "even when read in its broadest sense" that provision "fails to bring the letter of credit within its scope, since said letter of credit is not an exchange contract."¹³ Then the court, quoting from *Banco do Brasil S.A. v. Israel Commodity Co.*,¹⁴ discredited but a month before,¹⁵ stated:

. . . [T]his court [has] frowned on an interpretation of said provision of the Bretton Woods Agreement which 'sweeps in all contracts affecting any members' exchange resources as doing considerable violence to the text of the section.'¹⁶

With deference to the Court of Appeals, the primary issue in the case was not whether the substantive law of Uganda or New York controlled, but rather whether the first sentence of Article VIII, section 2(b) was applicable. Only if that provision does not control is inquiry into the federal act of state doctrine and Ugandan law in order.

II

ANALYSIS OF THE ISSUES

A. THE STARTING POINT: ARTICLE VIII, SECTION 2(B)

Courts in the United States, like those in all members of the International Monetary Fund, have the obligation to assure that section 2(b) is appropriately applied in litigation which comes before them, by virtue of the fact that the Fund Agreement binds the sovereign rather than the parties.¹⁷ When the first sentence of that section appears to control,

13. *Id.* at 229, 333 N.E.2d at 174, 371 N.Y.S.2d at 900.

14. 12 N.Y.2d 371, 190 N.E.2d 235, 239 N.Y.S.2d 872 (1963), *cert. denied*, 376 U.S. 906 (1964).

15. In *Banco Frances e Brasileiro S.A. v. John Doe No. 1*, 36 N.Y.2d 592, 331 N.E.2d 502, 370 N.Y.S.2d 534, *cert. denied*, ___ U.S. ___ (1975). See note 4 *supra* and accompanying text.

16. *J. Zeevi & Sons, Ltd. v. Grindlays Bank (Uganda), Ltd.*, 37 N.Y.2d 220, 229, 333 N.E.2d 168, 174, 371 N.Y.S.2d 892, 900.

17. Fund Agreement, arts. I and XX, § 2(g). See also *Banco do Brasil S.A. v. Israel Commodity Co.*, 12 N.Y.2d 371, 376, 190 N.E.2d 235, 237, 239 N.Y.S.2d 872, 875 (1968); Judgment of April 27, 1970, 23 NEUE JURISTISCHE WOCHENSCHRIFT 1507, discussed in Gold, *The Fund Agreement in the Courts—X*, 19 I.M.F. STAFF PAPERS 468, 476 (1972). In this connection, it has been argued that the court and not the parties has the burden to establish consistency of the exchange control regulations with the Fund Agreement, G. DELAUME, *LEGAL ASPECTS OF INTERNATIONAL LENDING AND ECONOMIC DEVELOPMENT FINANCING* 295 (1967), and that the court has the obligation not to enforce an exchange contract whether or not the parties plead and prove unenforceability. See the Fund interpretation of the first sentence of article VIII, § 2(b), 1949 IMF ANN. REP., App. XIV, at 82-83; INTERNATIONAL MONETARY FUND, *SELECTED DECISIONS OF THE EXECUTIVE DIRECTORS AND SELECTED DOCUMENTS* 112-13 (7th issue 1975); 14 Fed. Reg. 5208-209 (1949); Delaume,

analysis must begin with whether it actually does so. In *Zeevi* it is strongly arguable that the sentence does govern,¹⁸ since the facts in *Zeevi* clearly raise the issue of the extraterritorial effect, if any, to be given to Ugandan exchange control regulations. This issue is not governed by traditional private international conflict of laws rules, for the first sentence of Article VIII, section 2(b) has been superimposed upon private international law, as both official IMF interpretations¹⁹ and decisional authorities²⁰ have held.

B. THE LETTER OF CREDIT AS AN EXCHANGE CONTRACT

To consider the applicability of section 2(b) only begins the analysis, for the Court of Appeals ruled that the letter of credit in *Zeevi* was not an "exchange contract" within the meaning of section 2(b) of the Fund Agreement.²¹ On the contrary, it seems clear that the letter of credit is an "exchange contract." The word "contract" in this provision has no unique meaning; rather, it connotes a legally binding agreement or undertaking as usually understood in both common and civil law jurisdictions.²² The contract dealt with by the court in the *Zeevi* case was a

On the elimination of the conflict of laws in monetary matters accomplished by the Articles of Agreement of the International Monetary Fund, and the limitations thereof, 81 J. DROIT INT'L 333, 356-60 (1954); J. GOLD, *THE FUND AGREEMENT IN THE COURTS* 81-82 (1962); F. MANN, *THE LEGAL ASPECTS OF MONEY* 448 (3d ed. 1971); Williams, *supra* note 2, at 361-62.

18. See notes 21-38 *infra* and accompanying text.

19. See the Fund interpretation of art. VIII, § 2(b), in 1949 IMF ANN. REP., App. XIV, at 83: An exchange contract contrary to the exchange control regulations of a member "will be treated as unenforceable notwithstanding that under the private international law of the forum, the law under which the exchange control regulations are maintained or imposed is not the law which governs the exchange contract or its performance." This interpretation is binding on domestic courts. See *International Bank for Reconstruction and Development & International Monetary Fund v. All America Cables and Radio, Inc.*, 17 F.C.C. 450 (1953), 8 Radio Reg. 927 (1955), discussed in GOLD, *supra* note 17, at 20-27, 55-59. See also J. GOLD, *INTERPRETATION BY THE FUND* 31-42 (I.M.F. Pamphlet Series No. 11, 1968) and cases cited therein; Williams, *supra*, note 2 at 332.

20. de Boer, *Widow Moojen v. Von Reichart*, 51 REV. CRIT. DROIT INT'L PRIVÉ 67 (1962), 89 J. DROIT INT'L 718 (Cour d'appel Paris 1962), discussed in GOLD, *supra* note 17, at 143-53. *But see* *Perutz v. Bohemian Discount Bank in Liquidation*, 304 N.Y. 533, 110 N.E.2d 6 (1953); *In re Sik's Estate*, 205 Misc. 715, 129 N.Y.S.2d 134 (Sur. Ct. 1954). See also A. DICEY & J. MORRIS, *CONFLICT OF LAWS* 920 (9th ed. 1973); Meyer, *Recognition of Exchange Controls After the International Monetary Fund Agreement*, 62 YALE L.J. 867, 896 (1953); MANN, *supra* note 17, at 399.

21. *J. Zeevi & Sons, Ltd. v. Grindlays Bank (Uganda), Ltd.*, 37 N.Y.2d 220, 229, 333 N.E.2d 168, 174, 371 N.Y.S.2d 892, 900 (1975).

22. A. DICEY & J. MORRIS, *supra* note 20, at 944; Meyer, *supra* note 20, at 886-88. *But see* MANN, *supra* note 17, at 440, arguing that it would be "inappropriate to attribute a strictly technical meaning to the word 'contracts.'"

letter of credit, which must be distinguished from the agreement of Grindlays Bank to issue the letter in consideration of the deposit by Hiram Zeevi & Company (Uganda), Ltd. The funds subject to this letter of credit were payable against drafts without accompanying documentation, and thus this letter was a "clean" letter and not a documentary letter of credit subject to the Uniform Customs and Practice for Documentary Credits.²³ Under both the laws of New York and of Uganda, also a common law jurisdiction,²⁴ letters of credit are considered contracts separate and distinct from the underlying transaction.²⁵ Thus, by any test, the letter of credit in *Zeevi* was a "contract" within the purview of Article VIII, section 2(b).

The question, then, is whether the letter of credit was an "exchange contract" within the scope of that provision. The meaning of the term "exchange contract" remains locked in substantial controversy. Three definitions have been offered. The narrow view, favored by Professor Nussbaum,²⁶ endorsed in dicta in *Banco do Brasil S.A. v. Israel Commodity Co.*,²⁷ and apparently resurrected by the New York Court of Appeals in *Zeevi*,²⁸ is that an "exchange contract" is a contract which has as its immediate object the exchange of international media of payment, usually the exchange of one currency for another.²⁹ The second

23. Compare UNIFORM COMMERCIAL CODE § 5-102 & Official Comment 1 with UNIFORM CUSTOMS AND PRACTICE FOR COMMERCIAL DOCUMENTARY CREDITS (rev. 1974) promulgated by the International Chamber of Commerce.

24. Record at 90-91, *J. Zeevi & Sons, Ltd. v. Grindlays Bank (Uganda), Ltd.*, 44 App. Div. 2d 914, 355 N.Y.S.2d 1015 (1st Dep't 1974) (uncontroverted affidavit of Oliver John Keeble, Sept. 25, 1973, in support of defendant's cross motion): "The law of Uganda is based upon, and virtually identical in all respects to, the common law of England." For a general background of the importation of English law into Uganda, see D. BROWN & P. ALLEN, AN INTRODUCTION TO THE LAW OF UGANDA 37-42 (1968); H. MORRIS & J. READ, UGANDA: DEVELOPMENT OF ITS LAW AND CONSTITUTION 237-60 (1966).

25. This is the view in England. See 3 HALSBURY'S LAWS OF ENGLAND ¶ 137 (4th ed. 1973) and cases cited. See also *O'Meara Co. v. Nat'l Park Bank*, 239 N.Y. 386, 395, 146 N.E. 636, 639 (1925); *Sweden v. New York Trust Co.*, 197 Misc. 431, 441, 96 N.Y.S.2d 779, 787 (Sup. Ct. 1949).

26. Nussbaum, *Exchange Control and the International Monetary Fund*, 59 YALE L.J. 421 (1950); A. NUSSBAUM, MONEY IN THE LAW NATIONAL AND INTERNATIONAL 542-43 (1950). See also Cabot, *Exchange Control and the Conflict of Laws: An Unsolved Puzzle*, 99 U. PA. L. REV. 476, 495 (1951).

27. 12 N.Y.2d 371, 375, 190 N.E.2d 235, 236, 239 N.Y.S.2d 872, 874. See also Brill v. Chase Manhattan Bank, 14 App. Div. 2d 852, 852-53, 220 N.Y.S.2d 903, 904-905 (1st Dep't 1961) (Botin & Steuer, JJ., dissenting).

28. See quotation accompanying note 16 *supra*.

29. See authorities cited in note 26 *supra*. See also Judgment of July 7, 1959 (unpublished) in [1958-59] E. DROBNIG, SAMMLUNG DER DEUTSCHEN ENTSCHEIDUNGEN ZUM INTERNATIONALEN PRIVATRECHT No. 135A, at 369, discussed in Gold, *The Fund Agreement in the Courts - VIII*, 11 I.M.F. STAFF PAPERS 457-65 (1964); *Emek v. Bossers & Mouthaan*, [1957]

suggested interpretation, that an exchange contract is a contract by which one party promises to pay a sum of money in the currency of a country whose exchange control regulations prohibit the transaction, was advanced by Dr. F.A. Mann in 1947.³⁰ Dr. Mann has since abandoned this view,³¹ and it has been criticized by other writers³² and disregarded by the courts.³³ The third suggestion is the broad view that "exchange contracts" are those contracts which "in any way affect a country's exchange resources."³⁴ That is, an exchange contract is a contract which, when performed, would increase or decrease in an economic sense the amount of foreign exchange or other international reserves which are under the control of the country whose currency is involved, *i.e.*, the country whose resources are affected. This broad construction of "exchange contracts," which implements the economic intent of the Fund Agreement, has been adopted in a number of court decisions.³⁵

Pasicrisie Luxembourgeoise 35, [1955] Int'l L.R. 722 (1953). Compare the Clearing Dollars Case (Chamber for Commercial Affairs, Hamburg Landgericht), [1955] Int'l L.R. 730 (1954), discussed in GOLD, *supra* note 17, at 82-86; and Frantzmänn v. Ponijen, [1960] N.J. No. 290 (Dist. Ct., Maastricht, Neth.), [1966] Int'l L.R. 423 (1959).

30. Mann, *The Exchange Control Act*, 10 MOD. L. REV. 411, 418 (1947).

31. See Mann, *Money in Public International Law*, 26 BRIT. Y.B. INT'L L. 259, 279 (1949); Mann, *The Private International Law of Exchange Contracts under the International Monetary Fund Agreement*, 2 INT'L & COMP. L.Q. 97, 102 (1953). See also MANN, *supra* note 17, at 441-42.

32. GOLD, *supra* note 17, at 54 n.38; Williams, *supra* note 2, at 337.

33. See *Banco do Brasil S.A. v. Israel Commodity Co.*, 12 N.Y.2d 371, 375-76, 190 N.E.2d 235, 236, 239 N.Y.S.2d 872, 874 (1963), *cert. denied*, 376 U.S. 906 (1964), refusing to apply this interpretation.

34. MANN, *supra* note 17, at 441; Gold & Lachman, *The Articles of Agreement of the International Monetary Fund and the Exchange Control Regulations of Member States*, 89 J. DROIT INT'L 666, 674 (1962); Williams, *supra* note 2, at 337-44. See also GOLD, *supra* note 17, at 92-93; J. GOLD, *THE INTERNATIONAL MONETARY FUND AND PRIVATE BUSINESS TRANSACTIONS* 25 (I.M.F. Pamphlet Series No. 3, 1965); J. GOLD, *THE CUBAN INSURANCE CASES AND THE ARTICLES OF THE FUND 27-35* (I.M.F. Pamphlet Series No. 8, 1966); MANN, *supra* note 17, at 442-44; and Meyer, *supra* note 20, at 888.

35. *Lessinger v. Mirau*, [1955] Int'l L.R. 725 (Oberlandesgericht, Schleswig 1954), discussed in GOLD, *supra* note 17, at 90-94; *Societe Filature et Tissage X. Jourdain v. Epoux. Heynen-Bintner*, [1957] Pasicrisie Luxembourgeoise 35 (Tribunal d'Arrondissement de Luxembourg), [1955] Int'l L.R. 727 (1956), discussed in GOLD, *supra* note 17, at 94-96; *de Boer, Widow Moojen v. Von Reichart*, 51 REV. CRIT. DROIT INT'L PRIVÉ 67 (1962), 89 J. DROIT INT'L 718 (Cour d'appel Paris 1962), discussed in GOLD, *supra* note 17, at 143-53; *Sharif v. Azad*, [1967] 1 Q.B. 605, [1966] 3 All E.R. 785. Compare *Perutz v. Bohemian Discount Bank in Liquidation*, 304 N.Y. 533, 110 N.E.2d 6 (1953); *Southwestern Shipping Corp. v. Nat'l City Bank of New York*, 11 Misc. 2d 397, 173 N.Y.S.2d 509 (Sup. Ct. 1958), *aff'd*, 6 App. Div. 2d 1036, 178 N.Y.S.2d 1019 (1st Dep't 1958), *rev'd*, 6 N.Y.2d 454, 160 N.E.2d 836, 190 N.Y.S.2d 352, *cert. denied*, 361 U.S. 895 (1959) and where the court states that an exchange contract is a contract which affects a country's balance of payments. This definition appears overly broad in some respects. See Gold, *The Fund Agreement in the Courts—X*, 19 I.M.F. STAFF PAPERS 468, 482-86 (1972).

Of the three definitions of "exchange contract" only the first and third are advocated today, and most contemporary textual authorities reject the narrow construction and favor the broad one. The case law, of which there is a great deal, is not so one-sided, and the courts are divided as to whether the broad or narrow interpretation is preferred. European courts favor the broad interpretation, while United States courts incline toward the narrow view.³⁶ It is submitted, however, that the broad interpretation is preferable on the basis of the international policy of cooperation in monetary affairs which the Fund Agreement seeks to implement.³⁷ Under this view, the letter of credit involved in the *Zeevi* case is clearly an exchange contract within the broad construction of that term.³⁸

C. UGANDAN EXCHANGE CONTROL REGULATIONS AND THE FUND AGREEMENT

A determination that the letter of credit in *Zeevi* was an "exchange contract" within the meaning of the Fund Agreement still leaves two remaining issues. The first is whether issuance of directives to the Grindlays Bank constituted "imposing" exchange control regulations within the meaning of that term in Article VIII, section 2(b). The second, which arises after a determination of the first, is whether application of those regulations was consistent with the Fund Agreement.

1. Imposition of Exchange Control Regulations

On their face the Ugandan regulations did not bar payment to Israeli nationals, or payment "unless value in the form of goods was received," nor are they otherwise repugnant to the Fund Agreement. The regulations as adopted by Uganda were *prima facie* consistent with the Fund Agreement.³⁹ However, application of these regulations through issuance of the directives effectively barred payment by Grindlays to the Israeli

36. See cases cited in note 35 *supra*.

37. See Fund Agreement, art. I, which states that "[t]he purposes of the International Monetary Fund are . . . [t]o promote international monetary cooperation. . . ."

38. The letter of credit in *Zeevi* may also be within the narrow interpretation as well, for it sought to transfer American dollars—clearly an international medium of payment—from a resident of Uganda, the Grindlays Bank, to a nonresident, the *Zeevi* plaintiff. Significantly, the Ugandan authorities asserted that the letter was subject to its exchange control regulations.

39. Compare the United Kingdom Exchange Control Act of 1947, 10 & 11 Geo. 6, c. 14, on which the Ugandan law is said to be modeled. Record at 88-92, *J. Zeevi & Sons, Ltd. v. Grindlays Bank (Uganda), Ltd.*, 44 App. Div. 2d 914, 355 N.Y.S.2d 1015 (1st Dep't 1974) (affidavit of Oliver John Keeble; Sept. 25, 1973, in support of defendant's cross motion).

plaintiffs, and hence it is necessary to inquire whether the word "imposed" in the first sentence of Article VIII, section 2(b) connotes both the *application* of exchange control regulations in a specific case as well as the *adoption* of such regulations by governmental authority.

Unfortunately, the meaning of the term "imposed" has never been set forth in full. Clearly, it means "adopted,"⁴⁰ but whether it also connotes "applied" is uncertain. On this point the *travaux préparatoires* of Article VIII, section 2(b) shed no light, nor do the *travaux préparatoires* of the other sections of the Fund Agreement where the terms "maintained or imposed" or "imposed" appear.⁴¹ However, it would be absurd to hold that Article VIII, section 2(b) was meant to reach only the written terms of exchange control regulations and not actual specific application of those regulations. The directives in the *Zeevi* case, moreover, had the force of regulations.⁴² If nothing more, these practical considerations require that the term "imposed" include both the concept "adopted" and the concept "applied." If this is so, application of the Ugandan regulations is covered by the first sentence of section 2(b).

2. *The Regulations and the Fund Agreement*

If the regulations as applied were "imposed" within the meaning of section 2(b), as argued above, the key question arises as to whether they were consistent with the Fund Agreement. This, in turn, depends on the reasons for Uganda's actions. If Uganda had applied the regulations to thwart payments in furtherance of a policy of economic or monetary discrimination toward Israel and Israeli nationals, then those directive-regulations were inconsistent with the Fund Agreement, for the Agreement was designed to eliminate the sort of discriminatory monetary practices which were characteristic of the international economy during the Great Depression.⁴³ The primary purpose of the Fund is "to promote

40. MANN, *supra* note 17, at 446; Meyer, *supra* note 20, at 893; Williams, *supra* note 2, at 357, 360.

41. The words "impose" or "maintained or imposed" appear in the Fund Agreement at art. VIII, § 2(b); art. VIII, § 4(a)(ii); art. XI, § 2; art. XIV, § 2. For conference references to the phrase in art. VIII, § 4(a)(ii), see U.S. DEP'T OF STATE, PUB. NO. 2866, 1 PROCEEDINGS AND DOCUMENTS OF THE UNITED NATIONS MONETARY AND FINANCIAL CONFERENCE, July 1-22, 1944 [hereinafter cited as PROCS. AND DOCS.], Doc. 32 at 32 (Alternative A), Doc. 144 at 156, Doc. 329 at 545-46, Doc. 413, at 671-72, Doc. 448, at 780-81. For references to art. XI, § 2, see PROCS. AND DOCS., Doc. 374 at 607, Doc. 413 at 676, Doc. 448 at 785. Art. XIV, § 2 is discussed in Doc. 323 at 538, Doc. 413 at 682, Doc. 448 at 791-92.

42. Record at 90, *J. Zeevi & Sons, Ltd. v. Grindlays Bank (Uganda), Ltd.*, 44 App. Div. 2d 914, 355 N.Y.S.2d 1015 (1st Dep't 1974) (affidavit of Oliver John Keeble, Sept. 25, 1973, in support of defendant's cross motion).

43. Address by H. Morgenthau, Jr., Secretary of the Treasury of the United States and President of the Bretton Woods Conference, July 22, 1944, in PROCS. AND DOCS. 1116-20.

international monetary cooperation,"⁴⁴ and the Agreement specifies that "no member shall engage in . . . any discriminatory currency arrangements" except as authorized by the Fund Agreement or approved by the Fund.⁴⁵ Further, a Fund decision has noted that "members will be expected to proceed with all feasible speed in eliminating . . . ["discriminatory restrictions imposed for balance of payments reasons"] against member countries."⁴⁶ There is no evidence in the record that the Fund ever approved of Uganda's alleged discriminatory restrictions,⁴⁷ and hence the regulations, if they were imposed in alleged furtherance of a policy of economic discrimination, would be inconsistent with the Fund Agreement. Accordingly, Article VIII, section 2(b) would not apply and the parties would be left to a determination of their rights based on usual conflict of laws analysis. If, on the other hand, the directives were issued to halt payments because value in the form of goods had not been received in Uganda⁴⁸ and issuance of such directives was customary in these circumstances, then application of the regulations may not have been inconsistent with the Fund Agreement. In that case Article VIII, section 2(b) of the Fund Agreement would apply in bar

See also R. GARDNER, *STERLING DOLLAR DIPLOMACY* 75-80 (1969); H. JOHNSON, *THE WORLD ECONOMY AT THE CROSSROADS* 20-35 (1965); J. WILLIAMS, *POSTWAR MONETARY PLANS* 191-215 (3d ed. 1947); L. YEAGER, *INTERNATIONAL MONETARY RELATIONS* 251-358 (1966); *Hearings on H.R. 3314 Before the Senate Comm. on Banking and Currency* 79th Cong., 1st Sess. (1945); *Hearings on H.R. 2211 Before the House Comm. on Banking and Currency*, 79th Cong., 1st Sess. (1945); Hudson, *Epitaph for Bretton Woods*, 23 J. INT'L AFF. 266, 269 (1969).

44. Fund Agreement, art. I (iii): Another purpose of the Fund is "to promote exchange stability, to maintain orderly exchange arrangements among members, and to avoid competitive exchange depreciation." See also *id.*, art. IV, § 4(a).

45. Fund Agreement, art. VIII, § 3. Compare the 1948 French problem of franc devaluation discussed in 1 J. HORSEFIELD, *THE INTERNATIONAL MONETARY FUND 1945-1965* at 200-204 (1969).

46. IMF Decision No. 955-(59/45) of Oct. 23, 1959, in *INTERNATIONAL MONETARY FUND, SELECTED DECISIONS OF THE EXECUTIVE DIRECTORS AND SELECTED DOCUMENTS* 119-20 (7th issue 1975).

47. Nor did the parties petition the Fund for a ruling on whether Uganda's directive-regulations were consistent with the Fund Agreement, although the Fund solicits such petitions. See the Fund interpretation of article VIII, § 2(b), in 1949 IMF ANN. REP., App. XIV, at 83; *Southwestern Shipping Corp. v. Nat'l City Bank of New York*, 11 Misc. 2d 397, 173 N.Y.S.2d 509 (Sup. Ct. 1958), *aff'd*, 6 App. Div. 2d 1036, 178 N.Y.S.2d 1019 (1st Dep't 1958), *rev'd*, 6 N.Y.2d 454, 160 N.E.2d 836, 190 N.Y.S.2d 352, *cert. denied*, 361 U.S. 895 (1959); *Pan Am. Life Ins. Co. v. Blanco*, 221 F. Supp. 219, 224-25 (S.D. Fla. 1963), *aff'd*, 362 F.2d 167 (5th Cir. 1966).

48. *J. Zeevi & Sons, Ltd. v. Grindlays Bank (Uganda), Ltd.*, 37 N.Y.2d 220, 227, 333 N.E.2d 168, 173, 371 N.Y.S.2d 892, 899. See Record at 97, *J. Zeevi & Sons, Ltd. v. Grindlays Bank (Uganda), Ltd.*, 44 App. Div. 2d 914, 355 N.Y.S.2d 1015 (1st Dep't 1974) (letter from Bank of Uganda Exchange Control Dep't to Grindlays Bank, April 13, 1972).

of the *Zeevi* plaintiffs' claims. Under the circumstances, and because summary judgment was sought, the Court of Appeals might have remanded the case for resolution of these issues of fact.⁴⁹

D. IMPOSSIBILITY OF PERFORMANCE AND THE ACT OF STATE DOCTRINE

Assuming that the first sentence of Article VIII, section 2(b) does not apply in this case,⁵⁰ the doctrine of impossibility of performance would not bar recovery.⁵¹ Although impossibility of performance caused by the law, decree or administrative action of a foreign country is in general a valid defense in American courts to an action for breach of contract,⁵² where the contract is performable in the United States, as in this case, American courts will not give effect to a foreign law, decree or act of state, unless it is consistent with our law.⁵³ Thus, the act of the Ugandan exchange control authorities does not bar recovery against Grindlays Bank funds held in Citibank.

The act of the Ugandan authorities, moreover, was not in itself an act of state barring recovery in the United States,⁵⁴ and the court's decision on the choice of law question could have been decided either way.

CONCLUSION

In addition to the apparently abrupt withdrawal of its endorsement of the "national policy of cooperation with Bretton Woods signatories"

49. The record is also unclear as to whether the directives forever barred Grindlays Bank from honoring the letter of credit or whether, on proper application, the Ugandan authorities would have granted the Bank permission to pay *Zeevi* pursuant to that letter.

50. For this analysis it is immaterial whether New York or Ugandan law controls, since both recognize impossibility as a bar. For discussions of the choice of law point, see *J. Zeevi & Sons, Ltd. v. Grindlays Bank (Uganda), Ltd.*, 37 N.Y. 2d 220, 226-27, 333 N.E.2d 168, 172-73, 371 N.Y.S.2d 892, 898-99; *Intercontinental Planning v. Daystrom, Inc.*, 24 N.Y.2d 372, 382, 248 N.E.2d 576, 582, 300 N.Y.S.2d 817, 825 (1969) and cases therein cited.

51. The Ugandan action making the *Zeevi* letter of credit unenforceable in that country "was of no force in New York and the doctrine of impossibility of performance lends no comfort to defendant." *J. Zeevi & Sons, Ltd. v. Grindlays Bank (Uganda), Ltd.*, 37 N.Y.2d 220, 228, 333 N.E.2d 168, 173, 371 N.Y.S.2d 892, 899.

52. *Texas Co. v. Hogarth Shipping Co.*, 256 U.S. 619 (1921); *Holzer v. Deutsche R.G.*, 277 N.Y. 474, 14 N.E.2d 798 (1938); *Horlock v. Beal*, [1916] 1 A.C. 486; UNIFORM COMMERCIAL CODE § 2-615.

53. See *Central Hanover Bank & Trust Co. v. Siemens et al.*, 15 F. Supp. 927 (S.D.N.Y. 1936), *aff'd*, 84 F.2d 993 (2d Cir. 1936); *Dougherty v. Equitable Life Assurance Soc'y*, 266 N.Y. 71, 193 N.E. 897 (1934); *Frankel & Co. v. L'Urbaine Fire Ins. Co.*, 251 N.Y. 243, 167 N.E. 430 (1929); *Glynn v. United Steel Works Corp.*, 160 Misc. 405, 289 N.Y.S. 1037 (Sup. Ct. 1935).

54. The New York Court of Appeals correctly determined this issue. *J. Zeevi & Sons, Ltd. v. Grindlays Bank (Uganda), Ltd.*, 37 N.Y.2d 220, 229, 333 N.E.2d 168, 174, 371 N.Y.S.2d 892, 900 (1975).

and "an expansive application of the IMF agreement" announced in the *Banco Brasileiro* case,⁵⁵ the New York Court of Appeals in its unanimous opinion in the *Zeevi* case did not recognize its obligation to begin the analysis by determining whether Article VIII, section 2(b) of the Fund Agreement was applicable. If that provision is taken as controlling, the weight of authority favors inclusion of the *Zeevi* letter of credit within the purview of the term "exchange contract," under either a broad or a narrow construction of that term. Whether the Ugandan exchange control regulations invoked to bar plaintiffs' claim were imposed consistently with the Fund Agreement, however, is not wholly free from doubt in fact. For that reason the court in reviewing a summary judgment might have remanded the case for further proceedings. By doing otherwise, the Court of Appeals has only further clouded the law regarding extraterritorial enforcement of exchange control regulations under the International Monetary Fund Agreement.

55. See note 4 *supra* and accompanying text.