EXCHANGE CONTROL AND THE INTERNATIONAL MONETARY FUND*

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THE monetary turmoil which has followed the last war has engendered two main sets of problems in the legal field. First, the post-war devaluations, and particularly those of last September, have raised afresh numerous questions generally connected with devaluation. A considerable body of cases and legal literature has long evolved in this matter.[1] The second line of problems relates to exchange control, that is, broadly speaking, to governmental control of international payments and of transactions in international media of payments (foreign exchange, gold). Since 1931 exchange control has spread over the world; in our day no country is free of it.[2] Although ample material, judicial as well as doctrinal, is available on this score too,[3] an unprecedented situation arose in 1946 when the Articles of Agreement of the International Monetary Fund[4] became effective.[5] Several of these articles contain rules on exchange control which are novel and of considerable interest to the lawyer.

For the purpose of the present inquiry it is necessary first to appraise the general legal significance of the Agreement. It would be erroneous to assume that each of the articles is binding upon American courts or

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1. *Cf.* NUSSBAUM, MONEY IN THE LAW §§ 22 and 36 (1939).

2. It has often been asserted that the United States and Switzerland have no exchange control. That assertion is not accurate. In both countries transactions in gold are subject to government license. For this country see Gold Reserve Act of January 31, 1934, 48 STAT. 337 § 6, 31 U.S.C. 441 (1946); 31 CODE FED. REGS., Part 54 (1949) (Gold Regulations of the Treasury). As for Switzerland, *cf.* Decree of the Federal Council of Dec. 7, 1942, EIDGENÖSSISCHE GESETZSAMMLUNG 1137 (1942).

3. NUSSBAUM, MONEY IN THE LAW §§ 37–39; Bloch & Rosenberg, *Current Problems of Freezing Control,* 11 FORD. L. REV. 71 (1942); Freutel, *Exchange Control, Freezing Orders and the Conflict of Laws,* 56 HARV. L. REV. 30 (1942).

4. UNITED NATIONS MONETARY AND FINANCIAL CONFERENCE, FINAL ACT AND RELATED DOCUMENTS (Dep't State Pub. No. 2187, Conf. Ser. No. 55) (1944). Hereafter the articles of the Agreement are cited by their numbers only.

5. The precise date is December 27, 1946, as thirty governments had declared their accession. INTERNATIONAL MONETARY FUND, FIRST ANNUAL MEETING OF THE BOARD OF GOVERNORS (1946–7). Members were authorized to join until Dec. 31, 1946 with the privileges of original members under Art. II § 2(a) of the Agreement. INTERNATIONAL MONETARY FUND, SELECTED DOCUMENTS. BOARD OF GOVERNORS INAUGURAL MEETING 21, 28 (1946).

upon courts of other member countries.[6] To ascertain the status of an article, one has to look at the national enabling acts, and particularly at the American Bretton Woods Agreement Act of 1945,[7] the English Bretton Woods Agreement Order 1945, together with the Order in Council, 1946,[8] and the Canadian Bretton Woods Agreement Act of 1945.[9]

Under Art. XX § 2(a) of the Agreement, each member's instrument of acceptance must set forth that the government "has taken all steps necessary to enable it to carry out all of its obligations under this Agreement." As regards the obligations concerning the status, immunities and privileges of the Fund, Art. IX § 10 imposes upon the member governments the additional duty to make the pertinent provisions of the Agreement "effective in terms of their own law," that is, to "incorporate" them into their respective municipal laws. No such duty is specifically set forth regarding the other parts of the Agreement. Generally, therefore, the governments are not bound to transform the canons of the Agreement into their internal laws.

Of course, the Agreement is internationally binding upon the member governments to its full extent, but the absence of the internal effect is of considerable importance. To give an instance: the Agreement obligates the member governments to buy or sell gold within a certain margin only at a prescribed price. In February 1949 the dailies reported that South African gold was sold above that price with the cooperation of an English broker. The broker had not violated the English internal law which only prohibited unlicensed importation of gold; and such importation was not intended. The problem is highlighted by the language of the English and Canadian enactments: they state that only the provisions on status, immunities and privileges of the Fund and Art. VIII § 2(b)(1)—to be discussed later—have "the force of law." The English Bretton Woods Order in Council is particularly illuminative. It contains a Schedule enumerating the Agreement provisions which "have the force of law"; these provisions are only those mentioned above. That arrangement makes it perfectly clear that the nonenumerated provisions are not the "law of the land." They are not *ipso facto* binding upon individuals and, to this extent,

6. The members are at present (1949): Australia, Austria, Belgium, Bolivia, Brazil, Canada, Chile, China, Colombia, Costa Rica, Cuba, Czechoslovakia, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, France, Greece, Guatamala, Honduras, Iceland, India, Iran, Iraq, Italy, Lebanon, Luxembourg, Mexico, Netherlands, Nicaragua, Norway, Panama, Paraguay, Peru, Philippine Republic, Poland, Siam, Syria, Thailand, Turkey, Union of South Africa, United Kingdom, United States, Uruguay, Venezuela, Yugoslavia. Among the outsiders are Argentina, Germany, Ireland, Japan, the Soviet Union, Sweden, Spain and Switzerland.

7. 59 STAT. 512 (1945), 22 U.S.C. §§ 286–286k (1946).

8. 9–10 Geo. VI., c. 19 (1945).

9. 9–10 Geo. VI., c. 11 (1945).

must not be applied by the ordinary law courts. Similar enumerations are found in the Bretton Woods Act of the United States.[10] Most regulations of other member states [11] are not so specific and may give rise to doubts that can be solved only on the basis of the principles prevailing in each particular state regarding the internal-law effect of international agreements. The celebrated controversy on the "monistic" or "dualist" theory [12] may play a role in such inquiries though the situation at hand is peculiar inasmuch as the Agreement itself does not generally require the internal-law effect.

Generally speaking, the provisions of the Agreement on exchange control are addressed to the member governments only. For instance, Art. VIII § 2(a) enjoins the imposition of "restrictions on the making of payments and transfers for current international transactions." This rule is in accord with the proclaimed objectives of the Fund, which are to "facilitate the expansion and balanced growth of international trade" [Art. I (ii)] and to eliminate "foreign exchange restrictions which hamper the growth of world trade." The text of Art. VIII § 2(a) sounds sweeping. In reality its significance is greatly limited. The Agreement differentiates capital transfers and current transactions, a distinction replacing the older one [13] of financial and commercial payments. Restrictions of *capital* transfers are not prohibited by Art. VIII § 2(a); they are permitted without time limit. The Fund may even request a member to introduce them in order to meet a large or sustained outflow of capital.[14] Moreover, restrictions of *current* transactions are permitted (or required) in two cases, namely, (a) if a currency becomes so scarce (dollars!) that the Fund will have to apportion its supply among the members, and (b) during the transitional period.[15]

The scarce-currency problem though of paramount economic interest [16] does not require much discussion from a legal point of view.[17]

10. There the language is used that the enumerated provisions "shall have full force and effect in the United States and its Territories and possessions." 22 U.S.C. § 286h. The divergence from the English and Canadian enactments is verbal only.

11. They are on the whole rather scanty. Some instances are given *infra* notes 38 and 40. In fact many member states have not even passed formal Acts on the subject.

12. See, *e.g.*, 1 OPPENHEIM, INTERNATIONAL LAW 35 *et seq.* (6th ed., Lauterpacht, 1947).

13. NUSSBAUM, MONEY IN THE LAW 510 (1939).

14. Art. VI § 3.

15. Arts. VII § 3(b) and XIV § 2, both referred to in Art. VIII § 2(a).

16. See, particularly, WILLIAMS, POSTWAR MONETARY PLANS lxxii (1947); Bernstein, *Scarce Currencies and the International Monetary Fund*, 53 J. POL. ECON. 1 (1945); Beckhart, *The Bretton Woods Proposals versus Alternatives* in MONEY AND THE LAW 15 (New York University School of Law ed. 1945); Warburton, *The Tripartite Problem of Scarce Currencies*, 64 POL. SCI. Q. 388 (1949).

17. Except that Art. VII sets forth a number of procedural regulations with regard to the handling of scarce currencies. Furthermore, under Art. VIII § 6, members agree not to invoke obligations of earlier agreements in such a manner as will prevent the opera-

Regarding the transition period which runs five years—apparently from March 1, 1947—members may for its duration maintain controls over current transactions and adapt them to changing conditions; [18] those whose territories were occupied by the enemy in World War II may introduce new restrictions. True, according to the Agreement, abolition of restrictions on current transactions should be taken into consideration by the Fund and its members during the transitional period,[19] but this vague provision has not gained practical significance as yet. On the other hand, restrictions do not end automatically on March 1, 1952, but members who wish to retain them have to consult the Fund. Then if the Fund in a carefully regulated proceeding advises against retention and the member does not comply, repressive measures may be taken.[20] Control of *capital* transfers, we repeat, remains uninhibited anyhow, and requires inevitably a certain control of all transfers in order to intercept capital transfers disguised as current transactions.[21] It appears, therefore, that exchange control will probably persist for a long time to come—far beyond the "transitional" period.

The borderline between "capital transfers" and "current transactions" is drawn in the Agreement by defining the latter [22] and authorizing the Fund to elaborate the definition further.[23] Again the definitions by the Agreement or by the Fund do not have the force of internal law, that is, they are not binding in themselves upon individuals unless and until they have been enacted into internal law. On the other hand, they may carry weight beyond the sphere of the International Monetary

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tion of restrictions imposed under Art. VII § 5, for reducing the scarcity. Does this mean (as assumed by WILLIAMS, *op. cit. supra* note 16, at lxxvii) that if dollars are apportioned as "scarce currency," the United States must put up with discriminatory treatment contrary to previous agreements? It is true that countries short of dollars have to cut down imports from the United States. Still this consequence, apparently envisaged by Williams, can hardly be considered discriminatory in a legal sense. *Cf.* 1 GENEVA GENERAL AGREEMENT ON TARIFFS AND TRADE (United Nations Publications; Dep't State Pub. No. 3107, Comm. Policy Ser. No. 111) Part II, Art. III (1947).

18. Art. IX §§ 2–5. As to the beginning of the transitional period, see Art. XIV § 4, and INTERNATIONAL MONETARY FUND, ANNUAL REPORT 1947, p. 70, but the question seems not to be definitely settled as yet.

19. Art. XIV § 2.

20. Art. XIV § 4.

21. This has been acknowledged, with evident reluctance, by Art. VI § 3.

22. Art. XIX(i). "Payments for current transactions means payments which are not for the purpose of transferring capital, and includes, without limitation: (i) All payments due in connection with foreign trade, other current business, including services, and normal short-term banking and credit facilities; (ii) Payments due as interest on loans and as net income from other investments; (iii) Payments of moderate amount for amortization of loans or for depreciation of direct investments; (iv) Moderate remittances for family living expenses."

23. Art. XIX(i) par. 2.

Fund as the distinction between current transactions and capital transfers is employed elsewhere also, for instance, in Treasury rulings under the American Freezing Order of 1940.[24]

The innate contradiction between the proclaimed objective of the Fund—elimination of exchange control—and its actual result—preservation of exchange control—is accentuated by the fact that in two important relations the Agreement makes provision for strengthening exchange control (in itself purely a matter of domestic law) by giving it international effect. Art. VIII § 2(b) second sentence, encourages members to "co-operate, by mutual accord in measures for the purpose of making the exchange control regulations of either member more effective. . . ." Thus the Agreement favors special exchange control arrangements, bipartite or multipartite, among members. This authorization has been used on a large scale for conventions saving the actual transfer of gold or money by way of elaborate set-off (clearing) procedures. The Agreement for Intra-European Payments and Compensations, concluded on October 16, 1948, under the Marshall Plan between eighteen European governments, is the main instance.[25]

The other provision in point forms the legally most interesting part of the Agreement. It is the first sentence of Art. VIII § 2(b), which reads as follows:

> "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 rule can be traced back to a suggestion of the Keynes Plan that "inward movements not approved by the countries from which they originate" should be "deterred" abroad by appropriate means.[26] The English were therefore leaders in the process of drafting. The original draft read that "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

24. Exec. Order No. 8389, as amended, 12 Fed. Reg. 2249 (1947), and Rep. Sec'y Treas. 53 (1941). The distinction appears also in the Anglo-American Financial Agreement of 1945, 8ii (Dep't State Pub. No. 2439, Comm. Policy Ser. No. 80), and in the Economic Agreement between His Majesty's Government in the United Kingdom and the Argentine Government *passim* (Cmd. 6953, 1946).

25. The lengthy and highly complicated text of the Agreement is set out, together with a lucid comment, in Bank for International Settlements, 19th Annual Report 200-258 (1949).

26. 2 Proceedings and Documents of the United Nations Monetary and Financial Conference (Dep't State Pub. No. 2866, Int. Org. and Conf. Ser. Nos. 1, 3) 1536 *et seq.* (1944).

member." [27] A proposal to make such transactions an "offense" outside the country of the currency involved, failed in Committee.[28] An attempt to confine the provision to violations of the par value rule was likewise unsuccessful.[29] The final text evolved from the Drafting Committee [30] with no indication of the reasons for the changes made.

The whole § 2 of Art. VIII now bears the caption "Avoidance of Restrictions on Current Payments." This reads as if the rule under discussion [§ 2(b)] should be confined to "current" payments. However, it would be preposterous to impart a greater international effect to restrictions on current transactions than to those on capital transfers. Evidently, the caption tallies only with Art. VIII § 2(a).[31] The inaccuracy is probably irrelevant legally, but it does not evoke much confidence in the accuracy of the draft.

We turn now to an examination of the text of § 2(b).

Already the first words, "exchange contracts," confront us with a grave problem. That phrase is by no means self-explanatory.[32] "Exchange transactions" is more familiar and is used repeatedly elsewhere in the Agreement.[33] As was seen, § 2(b) was originally drafted in terms of "exchange transactions." Obviously "exchange contract" was supposed to have a narrower significance. This gives at least some hint at interpretation. Exchange transactions are generally understood to mean transactions which have as their immediate object "exchange," that is, international media of payment.[34] The meaning of "exchange contracts" cannot be broader. However, national enactments on exchange control often invalidate unlicensed contracts not directly concerned with international media of payment, such as unlicensed contracts for sale of foreign securities, or contracts for import or export particularly where the price is determined in foreign currency. Totalitarian governments—and one has to remember that Poland and Czechoslovakia are members of the Fund—will go to great lengths to extend their control.[35] It cannot be the meaning of the Agreement that

27. 1 *id.* at 54–5.

28. 1 *id.* at 334, 341, 502.

29. 1 *id.* at 543, 576.

30. 1 *id.* at 808, 625.

31. Page 423 *supra*.

32. It is subject to the Fund's interpretation according to Art. XVIII of the Agreement, but only in a controversy between a member of the Fund and the Fund or between members; the Fund's power does not extend to private litigation in ordinary law courts. The question was touched upon, but not decided, in Kahler v. Midland Bank Ltd. [1948] 1 All E.R. 811, 819 (C.A.), *aff'd*, [1949] 1 All E.R. 621 (H.L.).

33. Art. IV §§ 3 and 4(b) ; Art. XI § 2.

34. See, *e.g.*, U. S. Treaty of Commerce of 1937 with Siam, 192 LEAGUE OF NATIONS, TREATY SERIES 247, Art. III, par. 6 (1938), and Trade Agreement of 1939 with Turkey, 202 *id.* 129, Art. 8 (1940).

35. It so happens that the few recorded cases in print are all concerned with Czecho-

the other member countries have to carry out such policies. The criteria of "exchange contract" must be gathered from the Agreement itself. The latter is exclusively concerned with the handling of international media of payment as such. Therefore, contracts involving securities or merchandise cannot be considered as exchange contracts except where they are monetary transactions in disguise. And save for this exception, even if invalid under the law of the "country of the currency," other countries are not compelled to hold them unenforceable.

This approach is corroborated by another line of argument. Section 2(b)(1) envisages "exchange control regulations . . . maintained or imposed consistently with this Agreement." As to "maintained," Art. XIV § 2 explains that "members may . . . maintain . . . restrictions on payments and transfers for current international transactions" during the transitional period (restrictions on capital payments it was seen are permissible anyway). Consequently, Art. VIII § 2(b)(1) applies to regulations decreed and contracts made thereunder prior to the establishment of the Fund. In other words, the rule has retroactive effect. This extraordinary feature in itself suggests vigilance in its application. It cannot be presumed that all of the exchange control regulations of the members are "consistent" with the Agreement. Significantly, in some of the cases mentioned,[36] the Czechoslovakian regulations had been imposed in part by the Hitler régime after the conquest of Czechoslovakia. The fact that the Fund has not disapproved an exchange regulation, proves nothing as the Fund has not entered into such an examination. In other words: Art. VIII § 2(b)(1) should apply only where the party interested in the invalidation can prove the consistency of the regulation invoked with the letter and spirit of the Agreement.

The situation is complicated by the fact that Art. VIII § 2(b)(1) contemplates only exchange regulations of that member *whose currency is involved*. Here again an inaccuracy seems to have occurred. To give an instance, French control regulations would come under the rule only if French francs are involved. But the draftsmen of the Agreement should have envisaged rather French transactions in non-French, say English currency. Of course, if English pounds are bought in France,

slovakian exchange control. See Frankman v. Anglo-Prague Credit Bank, [1948] 2 All E.R. 1025 (C.A.); Kraus v. Zivnostenska Bank, 187 Misc. 681, 64 N.Y.S.2d 208 (Sup. Ct. 1946), and Cermak v. Bata Akciova Spolecnost, 80 N.Y.S.2d 782 (Sup. Ct. 1948); *cf.* Werfel v. Zivnostenska Bank, 260 App. Div. 747, 23 N.Y.S.2d 1001 (1st Dep't 1940), *rev'd*, 287 N.Y. 91, 38 N.E.2d 382 (1941), analyzed by DOMKE, TRADING WITH THE ENEMY IN WORLD WAR II 316 (1943) from the angle of war emergency law. [The *Frankman* decision has now been reversed by a highly questionable judgment in [1949] 2 All E.R. 671 (H.L.)].

36. In the *Frankman* and *Werfel* cases, *supra* note 35.

francs may be involved as the purchase price. Thus, after all, French regulations would come in. But they remain outside the scope of § 2(b)(1) if pounds are exchanged in Paris, say for lire. This result does not make much sense. An attempt to explore the latter hypothesis in detail may lead into inscrutable bramble woods. Returning instead to the simple sale of pounds for French francs, French exchange control law, we found, has to be given effect. But what about English exchange control which is likewise involved? Suppose a Dutch court is confronted with the contract. In that case Dutch private international law will decide which legal system is applicable. If the contract was made in Paris, French law will probably govern, so as to eliminate English law, including English exchange control law. The example reveals the practical significance of § 2(b)(1): Dutch Courts—provided they consider French law applicable—are barred from precluding, for reasons of Dutch public policy, the application of French exchange control regulations. Generally speaking, invalidation of "exchange contracts" under the law of the "country of the currency" must be recognized by member states regardless of their own "public policies."[36a] Still, English and, to a lesser degree, American courts are reluctant to invoke "public policy" as a means of eliminating an undesirable foreign exchange-control law. Instead, they decline application of the foreign exchange-control law on the ground that the "place of payment" is outside the exchange-control country, or through a strained interpretation of contractual or statutory provisions.[37] The question is whether the Agreement compels unenforceability where according to the conflict rules of the forum the law of the country of the currency is out of the picture.

Thus Private International Law rises its mysterious head behind the Agreement. To the various puzzle games so significant in the theory of Private International Law, the Agreement has added another.

The United States, England, Canada, the Philippine Republic and Costa Rica have in their enabling Acts[38] explicitly conferred the quality of internal law upon Art. VIII § 2(b)(1). Evidently, it is the theory of the governments of these countries that without such action

36a. The same opinion has quite recently been expressed by the Fund, ANNUAL REPORT 1949, p. 83. This report became generally known only after the present article had gone to press.

37. See the writer's article, *Public Policy and the Political Crisis in the Conflict of Laws*, 49 YALE L.J. 1027, 1037 (1940). In recent decisions the trend indicated in the article has become even more marked. *Cf.* South-American Petroleum Corp. v. Colombian Petroleum Co., 177 Misc. 756, 31 N.Y.S.2d 771 (Sup. Ct. 1941); Boissevain v. Weil, [1949] 1 K.B. 482 (C.A.); Frankman v. Anglo-Prague Credit Bank, [1948] 2 All E.R. 1025 (C.A.); Graumann v. Treitel, [1940] 2 All E.R. 188 (K.B.).

38. References, *supra* notes 7–9. See furthermore Bretton Woods Agreements Act of the Philippine Republic of Oct. 15, 1945, Commonwealth Act No. 699, § 11; and Costa Rica Act of Dec. 24, 1945, No. 55, § 8.

the provision would be devoid of any actual effect and, therefore, that its "incorporation" is obligatory under the general rule of Art. XX § 2(a).[39] That opinion seems to be fully justified, as otherwise Art. VIII § 2(b) (1) would be a thing of nought. Its incorporation is necessary to "carry out" the obligations imposed upon the Government by the Agreement. This theory leads to a far-reaching conclusion regarding those countries which have failed to give Art. VIII § 2(b) (1) the force of internal law. Exchange regulations of the latter countries, it appears, are not "consistent" with the Agreement. Consequently, contract invalidation resulting from such regulations (the French, for instance [40]), does not fall under Art. VIII § 2(b)(1). To this extent the conflict norms of each member country will decide the question of enforceability or nonenforceability of the contract involved. In other words: the "consistency" requirement implies a reciprocity rule which is certainly appropriate to the situation.

Perhaps the most important point in the analysis of Art. VIII § 2(b) is that it provides only for international unenforceability of contracts void under foreign law. It does not impose upon the member states any obligation to give active assistance to the exercise of that control. A proposal to create such an obligation was defeated at Bretton Woods.[41] Hence Art. VIII § 2(b) does not prescribe recognition of all of the manifold effects which the exercise of national exchange control may have beyond the frontiers. This is especially true of the refusal of exchange authorities to grant the license necessary to the performance of an otherwise valid contract.[42] Such contracts may be enforced elsewhere.

All considered, it appears that the statement of an English court that "The Bretton Woods Agreement shows that such restrictions [namely, exchange restrictions of member states generally] are honored by the members of the International Monetary Fund" [43] is far too broad. The line which the courts will actually follow is not yet visible, but one may doubt whether Art. VIII § 2(b) will assume any major

39. Page 422 *supra*. Again, the same view has been announced by the Fund. Note 36a *supra*.

40. The French Acts of Dec. 26, 1945, Journal Officiel of Dec. 27, 1945, p. 8590, does not refer, directly or indirectly, to Art. VIII § 2(b) (1).

41. 1 PROCEEDINGS AND DOCUMENTS OF THE UNITED NATIONS MONETARY AND FINANCIAL CONFERENCE, *supra* note 26, at 502, 543, 576.

42. This and other points were overlooked in the *Frankman* and the *Kraus* cases, *supra* note 35.

43. In Frankman v. Anglo-Prague Credit Bank, [1948] 1 All E.R. 337, 342 (K.B.), *rev.* [1948] 2 All E.R. 1025 (C.A.) now restored by the House of Lords, note 35 *supra*. Lord Simonds observed in his opinion that the Czechoslovakian Act did not appear to differ materially "from the legislation contemplated by the Bretton Woods Agreement which is now part of the laws of this country." This statement apparently fails to recognize an obligation toward Czechoslovakia. The other opinions do not mention the agreement.

importance in legal practice.[44] From a broader point of view, Art. VIII § 2b, remains remarkable as the strongest manifestation of the sway held by the pro-exchange-control forces in the drafting of the Fund Agreement. More than any other provision, it illustrates the fact that the Agreement, which represents itself as an instrument of economic freedom, is actually designed as a machinery for economic compulsion.

44. In Cermak v. Bata Akciova Spolecnost, 80 N.Y.S.2d 782 (Sup. Ct. 1948), the court, disregarding Czechoslovakian exchange control regulations as foreign "revenue" law, refused to pass on the impact of the Bretton Woods Agreement.