

THE PRIVATE INTERNATIONAL LAW OF EXCHANGE CONTRACTS

PRIOR TO AND WITHIN THE ARTICLE VIII, SEC. 2 (b)
OF THE INTERNATIONAL MONETARY FUND
AGREEMENT

by

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I. INTRODUCTION

1. — THE SCOPE OF THE TOPIC :

The general aspect of this research can be defined as " Restrictions on the freedom of private international trade ". The systems of exchange control were originally intended to " check the flight of capital from the restricting country and thus prevent the collapse of its currency " ¹ The exchange control which has started as a temporary, emergency device, has evolved into a permanent aspect of economic and also of political policy. Since 1931, the exchange control has spread over the world and in our day no country is free of it ². Businessmen can enter into few international transactions without first obtaining an export license, an exchange permit or an import license. Under most systems, " transactions productive of foreign exchange are controlled in order to require

1) Freutel, E. C. Jr., Exchange Control, freezing orders and the conflict of laws, 56 Harv. L.R. 30 (1942-43) p. 30;

2) Even in U.S. and Switzerland as far as transactions in gold are concerned, a government license is required; for U.S., Gold reserve Act of January 31, 1934, 31 U.S.C. 441 (1946); for Switzerland, Decree of the Federal Council of Dec. 7, 1942, Eidgenössische Gesetzammlung 1137 (1942);

that all or some specified part of the exchange be surrendered to a central pool in return for local currency at specified rates"³.

Besides those who can obtain the foreign exchange through licenses or similar means or devices, there is a group of businessmen who have to deal only in local currency accounts being unable to obtain the required permission. Some favored categories of transactions may not come under the restrictions ; a " general license " or a " free list " covering them. But an exchange transaction or contract falling within the restriction, may not be enforceable. Consequently problems of private international law will arise as the reaction of the domestic law to foreign exchange control regulations. It's obvious that the Courts of the country imposing the restrictions will enforce them to the fullest extent ; but the courts of other countries will rather, through application of conflict of laws rules or through the use of the " public policy " device, circumvent them.

Such was the economic and legal situation when toward the end of world II, delegates of forty four nations met at Bretton Woods for United Nations Monetary and Financial conference. The conference has agreed that "foreign exchange restrictions which hamper the growth of world trade" (Agreement art. 1, IV), are undesirable in principle and should be eliminated⁴; in view of the "establishment of a multilateral system of payments in respect of current transactions and the limitation of foreign exchange restrictions"⁵[art. 1 (iii)], an agreement which is known as "International Monetary Fund⁵ and International Bank for Reconstruction and Development" has entered in force on December 27, 1945⁶ and has today sixty eight members⁷.

The Fund Agreement in the first sentence of it's article VIII sec 2 (b), provides 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 consis-

3) Meyer, B. S., Recognition of Exchange Controls after the International Monetary Fund Agreement, 62 Yale L. Rev. 867 (1953), p. 867;

4) Meyer, op. cit. p. 868;

5) Hereinafter referred to as IMF

6) Treaty Series vol. 2, 1947, p. 39;

7) Turkey has ratified the Agreement with the law of February 19, 1947, 5016, (R.G. 25, Şubat 1947);

tently with this agreement, shall be unenforceable in the territories of any member... ”

Therefore the scope of this research will be limited to the problem of the enforceability or unenforceability of exchange contracts of transactions, as studied in connection with the conflict of laws rules.

Firstly the private international law of the exchange contracts will be examined according to the Doctrine and the Courts Decisions ; secondly, this examination will be done under the provision of the IMF agreement ; finally our conclusion will summarize the results that will be reached in the development.

2. — EXPOSE OF THE PROBLEM :

An international conflict arising from an exchange contract or transaction may be manifested in different aspects ; the following hypothetical cases will give the idea ;

Let us assume that an American A and a Turkish citizen B make a contract in England by which agreement A promises to pay B in french francs in France; this agreement is contrary to the french exchange control regulations. B brings a suit in an english court in order to obtain the enforcement of this contract...

Or, assume an agreement between A (french) and B (english), according to which A promises to pay the bills incurred by B in Switzerland in Swiss francs and B undertakes the obligation to reimburse A in England, by depositing Danish securities for B's account ... Can B suing A in an english court, succeed with the enforcement of the agreement?

Finally let us assume that a barter agreement concluded between two residents of different countries A and B, involving on the one side a piece of real property situated within the territory of country A and on the other side securities located within the territory of country B and expressed in the currency of country C... can this agreement in either country A or B be enforced ?

Therefore contracts having as their immediate object the handling of an international media of payment or those which provide for consideration in the form of exchange i.e. currency of those which in any way affect a country's exchange resources (real pro-

perty for securities) can be subject to the exchange control regulations, as the emphasis will be given. The question in all above mentioned cases would be whether those agreements involving a foreign currency should be recognized and enforced by the court of a third or even of one of the party's country.

II. THE CONFLICT OF LAWS RULES OF EXCHANGE CONTRACTS PRIOR TO IMF AGREEMENT:⁸

1. — PROBLEM OF QUALIFICATION AND CONFLICT OF LAWS RULES IN GENERAL :

A considerable volume of litigation has arisen from attempts by debtors to invoke exchange legislation as a defense when sued for failure to make payment⁹. And " it has frequently been said that the private international law of exchange control is or ought to be dominated by the principle that exchange control regulations are incapable of international recognition "¹⁰. The doctrines of the public law character of the " territorialité " of the monetary law have been invoked in support of this solution. French courts and writers specially have favored this view that the laws in question are " restrictions administratives et pénales " or " purement politiques " and hence the principle of " stricte territorialité " applies¹¹. Professor Nussbaum criticized this theory as being " cryptic and confusing in any event ", being " particularly inept with reference to

8) This heading will concern general rules which apply also as between a country and a State which is not a member of IMF and to such questions which are not dealt with by the Bretton Woods Agreement;

9) For a general background see Nussbaum, A., *Money in the law, national and international*, 1950 pp. 340-375; Mann, F.A., *The legal aspect of Money*, 1953, pp. 141-181; Bergmann, *Le régime des devises dans la pratique du DIP*, 1936, 35 Bull. de l'Inst. Jur. International 29; Cohn, note, *Currency restrictions and the conflict of laws* (1936) 52 L. Q. Rev. 479;

10) Mann, *op. cit.* p. 355;

11) *Société C. H. Boehringer Sohn v. Legerlotz*, La cour de Paris, 20 Juillet 1939, 37 Rev. Science et Lég. financières 608 (contrat allemand est en cause); for a defense of this french concept, Domke, *Money in the Law*, (1942), 24 J. Comp. - Leg. Int. L. 51, 56;

exchange control which explicitly purports to affect debtors residing abroad and assets held abroad by inland residents¹².

An other qualification given to the foreign exchange control is the "revenue laws" character¹³, as synonymous with the "tax laws". Even the promulgation of exchange control laws may have for reasons, economic and currency policy, "an extension of the revenue law rule to include exchange restrictions would be unfortunate both because the rule itself is of doubtful utility and because exchange control is by no means always promulgated for reasons of economic policy"¹⁴.

An other characterization may be based upon the language in which the regulation is cast and its interpretation in the state of origin; this may be vital since, if the exchange control regulation is regarded as a procedural rather than a substantive measure¹⁵; because exchange restrictions do not explicitly affect the substance of the debt, but they merely prevent the debtor from making the payment¹⁶. On the other hand the exchange control or restrictions are often classified as substantive law¹⁷; similarly to the rules concerning the nature of and the excuses for performance, exchange restrictions must be considered as part of "governing law"; therefore of the substantive law.

Finally the doctrine of "ordre public" has been invoked; exchange control regulations are classified as part of laws qualified as those of public policy. Therefore some courts in support of such a view, held a strong position against recognition of foreign exchange restrictions¹⁸. But let's point out that rules of public policy are not often involved in currency problems¹⁹.

12) Nussbaum, A., *Money in the Law* (1939), p. 487;

13) Saek, (non) Enforcement of foreign revenue laws in int. Law and Practice (1933) 81 U. of Pa L. Rev. 559, 560;

14) Freutel, op. cit. p. 46;

15) Meyer, op. cit. p. 871; Freutel, op. cit. p. 97; Rabel, E., *The Conflict of Laws*, 1950, vol. III, pp. 48-49;

16) Freutel, *ibid.*

17) Donke, *La législation allemande sur les devises en d.i.p.* 1937, Clunet, pp. 22-, 229 (Characterization of German Courts as substantive)

18) Tribunal Fédéral Suisse, 1935 JdT 72-82; Clunet 1937 p. 963; Gold, J., *L'application des Statuts du Fonds Monétaire par les tribunaux*, Rev. Crit. DIP, 1951 p. 583; Rabel, op. cit. pp. 49-50;

All these characterizations lead us to the application of the *lex fori*, to be the law of the court, thus eliminating two others, equally applicable, which are the *lex causae*, meaning the law of the obligation or the proper law of the contract and the *lex monetae* to be the law of the currency, meaning the law of the country whose currency is stipulated to be payable. Therefore wherever foreign currency is involved, three legal systems may have to be considered.

When under a foreign obligation the duty to pay a sum of foreign money arises (for exemple, under a contract governed by french law, the debtor is obliged to pay U.S. dollars), the proper international law of the forum ascertains the proper law of the obligation and the law of the currency and decides how far the former applies and which questions are to be answered by the latter. But mostly the courts give effect to the exchange control regulations of the proper law of the contract and of the *lex loci solutionis* and since the "payment restrictions affect the legality and possibility of performance rather than the essential validity of the contract, the relevant choice of law rule is that which deals with matters of performance"²⁰.

19) Mann, *op. cit.* p. 139;

20) Freutel, *op. cit.* p. 37; Mann, *op. cit.* p. 138; Meyer *op.* 873-874; Graveson, R. H., *The conflict of laws*, 1955 p. 493 : "in two english cases foreign exchange control provisions have been disregarded by the english courts ; in the first one, on the ground that such provisions are forming no part of the law of the contract; in the second, that such exchange restrictions are not comprised in either the proper law or the *lex loci executionis*, both dating from 1939"; (pp. 493-494);

Batiffol, H., *Les conflits de lois en matière de contrats*, 1938, pp. 444-445 (quant à la monnaie en laquelle le paiement devra avoir lieu, l'accord est aujourd'hui à peu près général sur la compétence de la loi du lieu de paiement...);

Rabel, *op. cit.* p. 48; in favor of the governing law of the contract : "The main principle again must be that the law of the contract decides the force of any restriction. This includes two rules: a) Where the governing law itself sets up an obstacle to the discharge of money obligations, the parties are bound to it, irrespective of where the payment is to be performed and where the suit for payment is brought, and b) restrictions by a state whose law does not govern the contract are immaterial".

The scope of application of each either law having been so determined, all further questions are to be answered by the respective municipal laws.

When the proper of the contract is the law of the forum, the law of the currency may have to be considered also (e.g. a businessman in London makes a loan of 100 U.S. dollars to a Liverpool merchant); the law of the currency may intervene as the "proper law" in respect of the particular questions connected with currency; or as a merely incorporated law to that extent in an obligation entirely governed by the "proper law" of the contract²¹.

The proper law of the contract will be determined by the conflict of laws rules of the Forum. Therefore it can be the law of the place of making or the place of performance or the the law referred to by the parties.

2. — THE PRACTICE OF THE COURTS :

In its general attitude the Federal Court of Switzerland was hostile to the international recognition of foreign exchange control regulations; in its decision of 8 Octobre 1935 (*Clunet* 1937, p. 963) the Swiss Federal Court dealt with an action for recovery of a debt due by a German to a swiss firm which had assigned it to the plaintiff. The debtor contended that under german law the assignment made without the Foreign Exchange Board's consent was invalid and that performance was impossible. Although according to the conflict of laws rules of forum, German law governed both assignment and the contract, the court refused to give effect to German currency regulations, holding them to be irreconcilable with Swiss public policy (*ordre public*); "leur inobservation par les parties ne heurte pas les bonnes moeurs"²².

Similarly Cour de Paris (*decision of 30 Juin 1933, Clunet* 1933 p. 963), considering a russian statute of exchange control

21) This distinction between reference to and incorporation of a foreign law, being of no practical significance for currency problems, (as mentioned by Mann, *op. cit.* p. 139)...

22) See also references given by Freutel, *op. cit.* p. 48; also, *Nouvelle rev. de DIP*, 1938 feb. 1, p. 893;

without effect out of the territory, held that : " que n'ayant d'autre objet que de protéger la monnaie nationale, elles demeurent sans effet devant une juridiction française même en cas de contestations entre ressortissants russes "23.

In Germany, The Supreme Court, in the same facts considered the contract void, applying the Russian law as the law governing the contract, disregarding therefore the rule of German public policy (*decision of July 1930, IPRechtsprechung, 1930 no. 15*).

The application of the proper law of the contract is mostly defended in doctrine, also in english courts²⁴; " If the exchange control regulations of a foreign country, the law of which governs the contract render it invalid, then it is invalid in England "25. But the public policy may interfere, " if the real object and intention of the parties necessitates them joining in an endeavour to perform in a foreign and friendly country some act which is illegal by the law of such country "26.

American courts tend to apply *lex solutionis*, as to questions relating to performance ; thus in *Sabl v. Laenderbank*, 30 N.Y.S. 2nd 608, 19 (1941), affirmed without opinion, 33 N.Y.S. 2nd 270 (1943), the court reached the result that the performance of contract which is clearly subject to the law of the restricting country, is not affected by exchange control if the creditor resides outside the restricting state ; also in *David v. Veischer Magnesitwerke*, 348 Pa. 335, 35 A.2d 346 (1944); but in some cases it was held that the contract was governed by German law, that its provisions precluded a refund in U.S. and this was not against the public policy; in *Steinfink v. Nortgerman Lloyd Steamship Co.*, 1941, A.M.

23) The French doctrine stems from art. 3 of the Fr. C.c. which states that " les lois de police et de sûreté obligent tous ceux qui habitent le territoire " ; from this it has been drawn the proposition that foreign " lois de police et de sûreté " are limited to a strictly territorial effect, Mann, *The legal aspect of Money*, 1938 p. 230; also, Freutel, *op. cit.* p. 45;

24) Wolff, *Private Int. Law*, p. 472; Dicey, *Conflict of laws*, 6 th ed. rule 166 p. 750; Mann, *op. cit.* p. 360;

25) Mann, *ibid.*

26) *Foster v. Driscoll* (1929) 1 K.B. 470, 521; also Freutel's references *op. cit.* pp. 49-50.

C. 773; in *Ornstein v. Compagnie Générale Transatlantique*, 1941, 31 N.Y.S. 2n 524, affirmed 32 N.Y.S. 2n 243 1942^{27, 28}.

III. THE CONFLICT OF LAW RULES OF EXCHANGE CONTRACTS WITHIN THE IMF AGREEMENT

1. — GENERAL ASPECT OF THE PROBLEM :

Exchange control is ordinarily employed where a " country has an insufficient amount of actual or anticipated foreign currency or currencies to pay for all its existing or anticipated obligations in that currency or currencies"²⁹. Broadly speaking, exchange control is the " governmental control of international payments and of transactions in international media of payments "³⁰.

Before World War II, there was no international law rule inhibiting a country from imposing restrictions, including complete prohibitions on the exchange of his currency for that of an other, or for another goods or services. A country could easily and freely impose an exchange restriction over " capital transfers " or " current transactions ".

After World War II, in order " to promote international monetary cooperation through a permanent institution which provides the machinery for consultation and collaboration on international monetary problems (i), to facilitate the expansion and balanced growth of international trade (ii), to assist in the establishment of a multilateral system of payments in respect of current transactions between members and in the elimination of foreign exchange restrictions which hamper the growth of world trade ... (iv),³¹,

27) Mann, op. cit. 1953, pp. 357-358; Freutel, op. cit. pp. 51-52;

28) Turkey has the Law for safeguarding the value of turkish currency, enacted in Feb. 20, 1930/1433; and Decree no. 13 (3/5843) for safeguarding the value of turkish currency, May 26, 1947 no. 6615; the practice of our courts within this and related other currency legislation prior to Fund agreement will be the topic of an other research.

29) Metzger, Exchange Control and Inter. Law, U III. L.F. 1959 p. 315;

30) Nussbaum, A., Exchange control and the IMF, 59 Yale L. J. 421 (1950);

31) Article 1 (i) (ii) and (iv) of the IMF agreement ;

the leading countries held a Conference at Bretton Woods, New Hampshire, from July 1st to July 22nd, 1944; from this conference was created the IMF agreement.

The article VIII sec 2 (a) of the IMF agreement enjoins the imposition of "restrictions on the making of payments and transfers for current international transactions". This rule is in accord with the above mentioned objectives of the Fund. But the significance of the art. VIII sec 2 (a) is limited; a distinction is made between capital transfers and current transactions; only restrictions upon these latter are prohibited by the mentioned article. Control of capital transfers remains uninhibited³². The prohibition of restriction on current transactions is furthered by a declaration of the Fund that a currency is scarce [art. VII sec 3 (b)], or during the postwar transitional period where a nation so electing, may continue to impose restrictions on current transactions, by a wholly universal decision (art. XIV sec 2)³³.

An other limitation of the significance of the art. VIII sec 2 (a) may result from art. VIII sec 2 (b), second sentence which allows the members of the Fund to make mutual treaties in order to render the exchange control regulations of either member more effective³⁴. Therefore an exchange contract is yet subject to exchange restrictions, in several circumstances.

Without doubt the key sentence of the art. VIII sec 2 (b), involving private international law principles, is the most important for us :

"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".

32 "Control of capital transfer requires inevitably a certain control of all transfers in order to intercept capital transfers disguised as current transactions", Nussbaum, op. cit, p. 424;

33) But if the Fund advises against the retention and the member does not comply, repressive measures may be taken (art. xiv sec 4);

34) This provision seems to be in contradiction with the proclaimed

2. — THE MEANING AND THE INTERPRETATION
OF THE ART. VIII SEC (2) (b) :

a) The meaning of the first sentence :

aa) *Exchange contracts* :

When initially proposed at the Bretton Woods Conference, the provision which later became art. VIII sec 2 (b), dealt with exchange transactions rather than with exchange contracts; " 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 " ³⁵. In the version which was finally accepted, the term " Exchange Contracts " replaced the phrase " Exchange Transactions ".

A very narrow view of the provision is held by Nussbaum; according to him, " exchange transactions " this term is more familiar and is used repeatedly elsewhere in the Agreement. In reality exchange contract was supposed to have a narrower significance ; exchange transactions are generally understood to mean transactions which have as their immediate object " exchange ", that is, international media of payment. The meaning of exchange contracts cannot be broader... " ³⁶.

According to Mann, " exchange contracts " are contracts which in any way affect a country's exchange resources. This would appear to be in better harmony with the purpose of the Agreement and the true intention of its authors... ³⁷.

The fact that in a number of instances the Agreement contains language limiting the phrase to media transactions ³⁸, indicates

objective of the Fund, prohibiting all regulations of exchange control on international payments.

35) Proceedings and documents of the U. N. Monetary and Financial Conference Publication no. 2866, Document 32, p. 54;

36) Nussbaum, op. cit. 1950 p. 542;

37) Mann, op. cit. 1953, p. 382;

38) Art. iv sec 3 (exchange transactions between the currencies), and sec 4 (b) (Exchange transactions between its currency and the

that the drafters knew how to limit the phrase where they wanted to; the conclusion is that, "exchange transactions", this term is not limited to transactions in international media of payment. This term would cover contracts in which only one of the obligations is in currency, the opposite obligation being in commodities, services etc..., as well as contracts as the sale and rent of commodities or contracts providing for the hire of service³⁹.

bb) Involve the currency of a member:

This phrase is interpreted in various ways, too. The narrowest view is limiting its significance to exchange contracts which call for the payment of a stated amount of the currency of a member⁴⁰; on the other hand the most liberal interpretation takes those terms as to mean "affect the exchange resources"⁴¹. This latter interpretation seems to be sound, in view of the scope of

currencies of other members), art xv sec 3 (transactions of the Fund in its currency);

39) Lachmann, P. R., The article of agreement of IFM and the unenforceability of certain exchange contracts, Netherlands Int. L. Rev. 1955, p. 156, according to the author barter of commodities, contracts as the exchange of services for securities and of services for services are included also in the art. VIII sec 2 (b); Meyer, op. cit. p. 886;

40) Nussbaum, op. cit. 1950, pp. 543 - 544 also his article on "Exchange control and the Int. Monetary Fund, 59 Yale L.J. 427 - 428; "French control regulations would come under the rule only if French francs are involved. But the draftmen of the Agreement should have envisaged rather french transactions in non french, say english currency. Of course if english pounds are bought in France, francs may be involved as the purchase price. Thus after all, french regulations would come in. But they remain outside the scope of sec 2 (b) if pounds are exchanged in Paris, say for lire.

41) Mann, op. cit. (1953) p. 382; same author, "The IP law of exchange Control under the IMF Agreement, Int. and Comp. L. Q. vol. 2 (1953) p. 102: "... it is not so much the denomination in a particular currency that matters, but the prejudicial effect which a translation may have upon a member State's financial position and which, by international cooperation the members agreed to preclude. Gold, securities of whatever denomination, even land, movables or intangibles may be the subject matter of exchange control and their transfer may involve the currency".

the term "involve", which does not denote only the ideas of "including" or "containing", but also that of "implicating", "affecting", "relating to" and "being connected with"⁴².

Therefore a contract dealing with foreign trade or securities transactions will be considered as dealing in the currency itself if only it affects, implicates, relates to or is connected with the currency of a country. The geographic location of the transaction has a lesser importance beside the location of the asset⁴³, or residence of the party; the fact that a transaction occurs in a certain country may not give effect to the exchange regulations of this country. But contracts for the transfer of an asset situate in a member country between two non residents as well as contracts for the transfer of an asset not situate within its territory by a resident to a non resident, constitute exchange contracts involving the currency of the member countries of which the parties are residents of where the asset is located⁴⁴. Barter agreements will be interpreted in the same way⁴⁵.

cc) Exchange control regulations maintained or imposed consistently with the Fund Agreement:

Exchange control regulations are generally defined as: "Enactments which control the movement of currency, property or

42) Meyer, *op. cit.* p. 888; and Delaume, G.A., De l'élimination des conflits de lois en matière monétaire... et de ses limites, *Clunet* (Journal de DIP) 1954, p. 348; where an illustration is given as it follows: "... Un contrat de vente est passé en Allemagne où les marchandises sont situées, entre un créancier anglais, résidant normalement en Grande Bretagne, et un débiteur belge résidant normalement en Belgique. Il est fort possible qu'en vue de savoir si ce contrat peut permettre au créancier de saisir les fonds de son débiteur en France, le juge français doit rechercher si rien ne s'y oppose non seulement dans la réglementation allemande du lieu de situation des marchandises ou la réglementation belge de la résidence du débiteur, mais encore dans la réglementation britannique de la résidence du créancier..."

43) The relation of the property involved in the original transaction is also considered as an important factor by U.S. courts, cases referred to by Meyer *op. cit.* p. 871 note 18;

44) Meyer, *op. cit.* p. 888; Lachmann, *op. cit.* p. 159;

45) Lachmann, *op. cit.* p. 158;

services for the purpose of protecting the financial resources of a country"⁴⁶. Therefore a preliminary question would be whether the regulation involved is an exchange control regulation.

Often trade restrictions are not easily distinguished from exchange restrictions⁴⁷. In a doubtful case, the Fund may be requested to state its views as to whether the regulation invoked is an exchange regulation.

These regulations must be maintained or imposed consistently with the Fund Agreement; the term "consistently" means that all members of the Fund will in their internal legislation concerning exchange control observe the general principle which pertains to this subject as it is laid down in article VIII sec 2 (a): "... no member shall without the approval if the Fund impose restrictions on the making of payments and transfers for current international transactions"⁴⁸. And this provision must be made part of each member's national law, according to the article xx sec 2 (a) which provides: "Each (member) government has accepted this Agreement in accordance with law and has taken all steps necessary to enable it to carry out all of its obligations under this Agreement"⁴⁹. Some member countries have explicitly conferred in their enabling Acts, the quality of internal law upon article vii sec 2 (b) first sentence⁵⁰. Nussbaum insists upon this incorporation as necessary "to carry out" the obligation imposed by the Agreement. Therefore exchange regulations of the contries who have failed to give

46) Mann, art. cit. p. 103;.

47) Lachmann, op. cit. p. 160;.

48) This prohibition has several exceptions in the Agreement as art. VII sec 3 (b); art. XIV sec 2...

49) Law of February 19, 1947/5016, art. 1, has enabled Turkish Government to take all devices necessary to adhere at the IMF Agreement, in conformity with its provisions; and according to the art. 2 of the Decree no. 14, published on September 15, 1955, issued on the authority of the law for safeguarding the value of Turkish Currency (Feb. 20, 1930/1567) "all transactions resulting from... the IMF Agreement are exempted from the prohibitions of the Decree; according to art. 18, 21 of the mentioned Decree, all currency transactions, loans, barter operations between assets of money are prohibited.

50) U.S., England, Canada, The Phillipine Republic, Costa Rica (Nussbaum, op. cit. 1950, p. 544; Lachmann, op. cit. p. 150, 151, 152;.

art. viii sec 2 (b) first sentence, the force of internal law, are not "consistent" with the Agreement. Consequently according to him, "contract invalidation resulting from such regulation does not fall under art. viii sec 2 (b) first sentence⁵¹.

This view seems to be unsound for rendering inconsistent the exchange regulations of a member who failed to sanction the art. above mentioned within its internal law. The provision requires only the consistency of the member's regulations with the Agreement and nothing more. Therefore if the restrictions prohibitions are observed within the limit of the Agreement, the exchange regulations are to be considered as consistent with Fund.

The terms "maintained" or "imposed" give rise to the "time element" controversy; it is urged by Mann that, "... the question whether or not a contract is an exchange contract must be decided with reference to the time when it is made...". His thesis is that the validity of an exchange contract can only be determined by investigating the exchange control regulations in affect at the time the contract was drawn up originally⁵². Thus if a contract was valid when originally drawn up but later, because of the imposition of new exchange control regulations, became invalid under the new regulations, then the forums should declare the contract unenforceable within the meaning of art. viii sec 2 (b). On the other hand if a contract invalid at the time of origin later became valid, then the forums would not be able to declare the contract unenforceable on the grounds that it was invalid at the time of its origin.

We can not agree with this construction which is not compatible with the aim of the art viii sec 2 (b); a country may, retroactively render enforceable or unenforceable contracts which have previously been unenforceable or enforceable⁵³. As Dr. Lachmann emphasizes this view, "if a country, recognizing that its balance of payments no longer requires the protection of exchange control regulations, abolishes these regulations, thereby allowing payments which were formerly prohibited, it would be unnecessary to re-

51) Nussbaum, *Money*, op. cit. 1950, p. 545;.

52) Mann, 1953, op. cit. p. 387;.

53) Same, Lachmann, op. cit. p. 161; Nussbaum, (1950) op. cit. p. 543 note 91; Meyer, op. cit. p. 893;.

quire the courts of other members (countries) to refuse their assistance in the enforcement of a contract which is enforceable in the country whose currency is involved"⁵⁴ (and versus versa).

No objection exists to such a retroactive application, as legally in the field of financial objectives of the controls, this retroactivity seems to be more essential⁵⁵.

b) The interpretation of the art. VIII sec 2 (b) and impact of it on the existing private international law rules:

aa) *The interpretation of art. VIII sec 2 (b):*

According to the art. XVIII of the Fund Agreement, 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... and by a decision of June 10, 1949, the Executive Board interpreted the art. VIII sec 2 (b) first sentence⁵⁶, in order to ensure uniformity among members in the application of the mentioned article⁵⁷.

The interpretation reads as it 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 will not receive the assistance of the judicial or administrative authorities of other members in the obtaining the performance of such contracts. That is to say, the obli-

54) Lachmann, *ibid.*

55) accordingly Meyer, *op. cit.* p. 893; Freutel *op. cit.* p. 60 (... or an American might be sued for failure to transfer funds to a blocked country under a contract entered into before the freezing orders were issued...").

56) Gold, J., The interpretation by the IMF of its articles of Agreement, 3 *Int. and Comp. L. Q.* pp. 261-262; (1954); and Rev. Crit. DIP, 1951, pp. 586 (from p. 17 note (56)).

— 587; Fund's Annual Report, 1949 Appendix XIV pp. 82-83; Lachmann, *op. cit.* P. 153-154;

57) Gold, *Int. and Comp. L. Q.* p. 261;.

- gations of such contracts will not be implimented 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;
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 art. XIV sec 2 (This art. authorized the use of exchange controls during the transitional period to multilateral unrestricted trade after World War 11).
 3. An obvious result of the foregoing undertaking is that if a party to an exchange contract of the kind referred to in art. VIII sec 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 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 private international law of the forum, the law under which the foreing exchange control regulations are maintained or imposed is not the law which governs the exchange contract or its performance.

The Fund will be pleased to lend assistance in connection with any problem which may arise in relation to the foregoing interpretation or any other aspect of art. VIII sec 2 (b). In additon the Fund is prepared to advise whether particular exchange control regulations are maintained or imposed consistently with the Fund Agreement (letter to members on unenforceability of exchange contracts, IMF Annual Report 1949. Appendix XIV pp. 82 - 83).

bb) Impact of this interpretation on the existing private international law rules:

The unenforceability of the exchange contracts and the elimination of the law governing the obligation:

Prior to the interpretation of the Board, the mentioned art. of the Fund was dealing only with the unenforceability of the exchange contracts; the interpretation has not only emphasized on the unenforceability of those transactions, but it has explicitly mentioned the proper law of the contract in order to sweep it out of existence, may be partially. According to the interpretation, exchange contracts within the meaning of the art. VIII sec 2 (b), 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 performance⁵⁸.

An exchange contract, according to general conflict of law rules, is not wholly subject to the law of the currency. Selection by the parties of a certain currency "may be one factor among others in leading to the conclusion that the parties intended to adopt the law of the currency as the law of the contract, but the weight of this factor in the whole setting is slight"⁵⁹. The law of the obligation and the law of the currency with *lex fori*, intervene, each having its field of application as determined by the private international law rules of the court, as we have emphasized in this work⁶⁰.

Within the interpretation of the art. VIII sec 2 (b), the law which governs the exchange contract or its performance is eliminated. Therefore the law of the currency (as *lex monetae*) is "su-

58) In *Southwestern Shipping Corp. v. National City Bank*, 139 N.Y.L.J. 7; 173 N.Y.S. 2d 509 (1958); the court after having determined that the entire transaction here involved is illegal, void and unenforceable in Italy (Italian law being the *lex monetae*), held that "such contract will be treated as unenforceable notwithstanding that under the PI 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".

59) Nussbaum, (1950) *op. cit.* pp. 348-349;.

60) Mann, *op. cit.* (1593) p. 138 ;.

perimposed"⁶¹ for not saying "substituted"⁶² to the proper law of the contract (*lex causae*)⁶³. There is no need for seeking the probable intention of the parties, nor to allow them to determine expressly the law governing the contract; it will be sufficient for the judge to determine objectively the connecting factor between such a contract and the legislation of one or several members⁶⁴.

The purpose of this provision is the international recognition of exchange control regulations of member State; the exchange contract will not be enforced if it's contrary to the exchange control regulations of the country whose currency (resources) is involved. The term "unenforceable" means, the "ineffectiveness" in the forum; therefore the unenforceability does not mean "invalidity", "nullity", "voidness" and "illegality"; the underlying validity of the contract exists⁶⁵; it follows that if a party can enforce the contract by self - help, the payment which is effectuated will not be considered as an undue payment, therefore rules concerning

61) Meyer, *op. cit.* p. 896;.

62) Reference to Mann (*Money in Public Int. law*, 26 *Brit. Y.B. Int'l law* 259, 279, (1949) by Meyer, *op. cit.* p. 896 note 159;

63) The proper law (*lex causae*) which governs the essential validity and the effects of the contract might be the law of the place of making or that of performance of the contract or the law expressly or implicitly chosen by the parties (Swiss Fed. Court, *JdT* 1954. 1. 533; 1956.1. 375); Turkish Doctrine favors in majority the autonomy rule; we believe that within the scope of the law of 1915 (1330) concerning the rights and duties of aliens residing in Turkey, (specially art. 4), all contracts made or to be performed in Turkey have to be governed by the Turkish law as far the essential validity or the performance are concerned; for contracts made abroad or to be performed abroad, we propose the determination of the *lex obligationis* (the law of the contract) as the law of the place of performance of the characteristic obligation in the contract, which law will determine the scope of the autonomy of the parties as far as the effects of the contract are concerned, the conditions of the validity being determined a priori by the *lex obligationis*, in order prevent a certain "cercle vicieux".

64) Delaume, *op. cit.* pp. 348-350;.

65) Meyer, *op. cit.* p. 894; Lachmann, *op. cit.* p. 163; Delaume, *op. cit.* pp. 332-379;.

the unjust enrichment have not to apply; the voluntary execution will also escape the provision⁶⁶.

If the contract involves more than one currency and remains enforceable under all the laws of the currencies, it will be subject again to the general rules of the private international law, the provision of the Fund, having lost weight of application.

Generally actions, as those in rem, in tort, in quasi-contract (undue payment) or for the enforcement of obligations ex lege or of a judgment which are outside the realm of exchange contracts, are subject to the general rules of the Conflict of laws⁶⁷. Therefore the court will decide only on the enforceable or unenforceable character of the exchange contract, in view of the exchange control regulations of the *lex monetae*, leaving the question of the unenforceability from nullity, voidness and illegality arising under the contract, to be determined by the proper law of the contract⁶⁸.

An other question arises such as whether the provision of the art. VIII sec 2 (b) should be applied ex officio by the court or left to the parties to be argued and proved?

Usually the debtor invokes exchange legislation as a defense when sued for failure to make payment. According to the general principles of the private international law, the pleading party has the burden of proof of the existence and the content of the foreign

66) "Arbitration though privately administered is also barred, because it depends upon statute and ultimately upon court action for its validation", Meyer, *op. cit.* p. 894;

67) Mann, *op. cit.* (1953) p. 386 and the case *Hahler v. Midlank Bank* (1950) as analysed by Gold, *Rev. crit. LIP* pp. 59-595 also Delaume, *op. cit.* pp. 362-364;

68) In *Estate of Sik*, 129 N.Y.S. 2d 134 (1954) a contract of exchange was executed between two citizens of Yugoslavia to be paid in dollars; even though the U.S. court held that "U.S. and Yugoslavia being both members of the IMF, we must recognize and uphold the foreign exchange regulations", having longly emphasized on the law governing the validity of the contract, as the law which the parties intended to govern it... the court did not clearly distinguished the question of the unenforceability under the law of the currency from that of the enforceability arising under the law of the contract.

law (or regulation) on which he relies in his claim (pretence)⁶⁹. If this solution is adopted, it would be left to one of the parties to decide whether it wishes to plead the exchange control regulations or to ignore them; most of time the parties to a contract do not refer to the exchange control regulations, because they are not quite familiar with them or because they prefer to argue within the field of the civil or commercial contracts which are more familiar to them. And the court being not sufficiently informed, is thus precluded from treating the contract as invalid. Such result would not be in conformity with the objects of the provision of the art. VIII sec 2 (b) which clearly provides that : "... such contracts will not be implemented by the judicial or administrative authorities of member countries..." (by the interpretation).

Therefore the method followed in private international law as mentioned above, must be abandoned here in order " to respect the letter and the spirit of the provision of the Fund "⁷⁰.

The elimination of the public policy of the forum :

Generally the public policy restriction in the field of the conflict of laws relies on an " ultimate residue " of power and discretion which " every developed legal system reserves to itself " and " which it exercises when necessary, on the basis of its concepts of justice, public policy and international comity "⁷¹. In Anglo-American legal systems the scope of public policy is rather narrow⁷²; in some continental legal systems, the public policy

69) According to the art. 76 of the Turkish civil procedural law "... a party relying on a foreign law, has to prove it; in case of failure to prove, the court decides the case after the Turkish law ".

70) Delaume, *op. cit.* pp. 356-360 : " S'il apparaissait en cours d'instance que le contrat litigieux est contraire à la réglementation des changes d'un autre Etat-membre, maintenue ou imposée en conformité avec les statuts du Fonds, les tribunaux de l'Etat requis devraient alors appliquer d'office cette réglementation même si les parties ne s'y étaient pas référées dans leur conclusion " ; also, Mann, *op. cit.* (1953) p. 385;

71) Graveson, (1955) *op. cit.* p. 483.

72) Stumberg, G. W., *Principles of Conflict of Laws*, (1951) 2nd ed. p. 278 : " The policy at the forum in order to preclude giving effect to foreign agreements, must however be an unusually important one. The mere fact that the forum may disapprove of a foreign rule of law should

is provided as a general rule⁷³; and mostly it is clearly declared and recognized by the decisions of the courts⁷⁴.

As we have mentioned above for an exchange contract the exchange control regulations are those of the proper law of the contract, which law can be either that chosen by the parties or that of the place of making or performance of the contract⁷⁵. In cases where contracts are governed by the restrictive law (currency law), the regulating country was both the place of making and the place of performance of the contract⁷⁶.

As we have mentioned also above, the courts in their practice were following two different ways; the law of the contract is applied notwithstanding of the public policy of the forum⁷⁷; but often the exchange restrictions imposed by an other country are disregarded, in regard of the strictly territorial character of them⁷⁸ or on the ground of the public policy of the forum⁷⁹.

Within the Fund Agreement, the public policy as preventing the recognition of foreign exchange regulations, is eliminated; the interpretation of the art. VIII sec 2 (b) reads as it follows: "... The tribunal of the member country before which the proceedings are brought will not, on the ground that they are

not be material and it is believed that public policy as a reason for relief should be exceptional; also Graveson, *op. cit.* p. 483;

73) B. G. B., Law of the introduction art. 30; Italian civ. C. of 1942 art. 21; Greek civ. C. of 1946 art. 33; Turkish Law on the rights and the duties of aliens residing in Turkey of 1915 (1330) art. 4 (last sentence).

74) *Batiffol*, *op. cit.* pp. 414-418;

75) See 11,1 and notes (20) and (21);

76) *Freutel*, *op. cit.* pp 44-64 for the cases cited and the note (59);

77) Decisions of the German Supreme Court are referred to by *Mann*, *op. cit.* (1953) p. 361 note (2) and p. 357 note (1); American courts decisions, *Mann*, *ibid* note (4) particularly; and *Freutel* *op. cit.* pp. 51-58 English cases, *Mann*, p. 359, 360; and *Graveson*, *op. cit.* pp. 493-494; also *Nussbaum*, *op. cit.* (1950) pp. 465-466;

78) *Gold*, *Rev. crit.* p. 583 (generally) and *Freutel*, *op. cit.* pp. 45-46; *Mann*, *op. cit.* (1953) p. 356 and the references of the note (3) for the decisions of the french courts.

79) *Mann*, *op. cit.* p. 356; *Freutel*, *op. cit.* pp. 47-48, for the decisions of the Swiss Federal Court; also *Rebel*, *op. cit.* p. 49; *Delaume*, *op. cit.* p. 334, note (6);

contrary to the public policy of the forum, refuse recognition of the exchange control regulations of the other member which are maintained or imposed consistently with the Fund Agreement..⁸⁰

Therefore among members the public policy can no longer prevent the enforceability of exchange regulations as covered in art. viii sec 2 (b); a contract not contrary to one or more of such regulations will be recognized and enforced, notwithstanding of the public policy of the forum⁸¹. The administrative or judicial authorities of the member State will have only the task to see whether the exchange regulations of the member State whose currency is involved are infringed or not by the exchange contract.

CONCLUSION :

The Exchange contracts are generally governed by the *lex causae*, which is the proper law of the contract. This proper law is the law of the obligation which can be determined as the law of the place of making or of performance of the contract. But the court can refuse to give effect to foreign exchange regulations holding them to be irreconcilable with its public policy.

The provisions of the Fund Agreement have modified the existing principles of the conflict of laws in this field; the law which governs the exchange contract or its performance, is eliminated; the law of the currency (*lex monetae*) is "superimposed" to the proper law. Therefore the enforceability of an exchange contract is recognized when it only satisfies with the exchange regulations of the member State whose currency (resources) is involved. But it should be pointed out that only the question of unenforceability falls under the art. viii sec 2 (b); the concept of ille-

80) Lachmann, *op. cit.* p. L 53;

81) In *Perutz v. Bohemian Discount Bank*, 304 N. Y. S. 533 (1953), the court sustained the enforcement of an exchange contract on the ground that both countries were members of IMF; but the court has also emphasized the public policy to refute the foreign law which would govern the contract as the law of the place of performance; we believe that under the provision of the IMF agreement, this evocation of the public policy and of the governing law of the contract should be omitted.

gality or nullity of the contract is handled again within the provisions of the *lex causae*. Also when the legal relationship involved does not have a contractual origin, the connecting factor is determined again within the general rules of conflict of laws.

The public policy of the forum is rendered inefficient; it can not prevent the recognition and the enforcement of the exchange contract.

The method followed in private international law according to which the pleading party has the burden of proof of the existence and the content of the foreign law (or regulations) on which he relies in his claim, is also abandoned, in order to respect the letter and the spirit of the provision of the Fund Agreement; the judge of the member State before whom the case is brought, has to apply by himself the exchange regulations of the "currency country", which regulations are found as sustained and maintained in conformity with the Fund Agreement.

Therefore as far as the relation among the member States are concerned, the main principles of the conflict of laws, concerning the contracts are essentially modified, for not saying eliminated; but these general rules of private international law may intervene when the relationship involves member and non-member States.

We conclude that art. VIII sec 2 (b) is an "original creation, without precedent"; the omission of the settled principles and rules of the private international law seems to be justified in view of the goal (aim) provided for in the Fund Agreement which is emphasized as "... To promote international monetary co-operation through a permanent institution..... (i) (IMF agreement art. 1 (i)).
