EXTRATERRITORIAL EFFECTS OF FOREIGN EXCHANGE CONTROLS IN INTERNATIONAL TRANSACTIONS

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I. INTRODUCTION

The notion of currency restrictions in international payment of monetary obligations has recently assumed wide recognition as Foreign Exchange Controls.[1]

Exchange control regulations have two objectives. On the one hand they are designed to prevent as far as possible the loss of foreign currency, and on the other they aim at the greatest possible increase of the country's foreign currency reserves and at their being placed at the disposal of that country. These aims are achieved by one set of rules prohibiting certain juridical acts, and by another set of rules commanding certain acts.[2] In this context, foreign exchange controls apply to both International Trade and Foreign Investment. As a type of international commercial operation International Trade, however, is more exposed to the problems of exchange control than Foreign Investment. This is understandable because it deals with ordinary exchange of goods, concessions, services and their payments while Foreign Investments on the other hand pertains to less frequent transfers or flow of capital and capital goods.[3]

Furthermore, under the Monetary Fund Agreement restrictions affecting capital transfers are not prohibited as a matter of principle. States are free to proceed as they deem fit in all that con-

* Ll. B. UP (1956); Ll. M. Harvard (1959).

1 Distinction is sometimes made between "control" and "restriction." According to Professor Nussbaum, "exchange control" means literally control of foreign money or, more precisely, of media of international payment by the government, the term "exchange" being used here in the same sense as in "rate of exchange." Actually, "exchange control," has come to include government control with respect to any financial intercourse with foreign countries whatever the intercourse with foreign countries whatever the currency. (Nussbaum, **Money In The Law** (1950), p. 440). But see International Monetary Fund Agreement where "restriction" and often times "regulation" is used. Art. VIII Sec. 2 (b); also, Treaty of Paris of February 10, 1947 (Compensation to be paid to United Nations nationals for war damages); United States Peace Treaty with Bulgaria, Art. 23 (4, c.); with Hungary, Art. 26 (4, c.); Charter of International Trade Organization, Havana, March 24, 1948. (Department of State Publication No. 2598, Commercial Policy Series, 93 (1948).

2 Hug, **The Law of International Payments**, p. 606.

3 Art. XIX (i) of the International Monetary Fund Agreement draws a distinction between current transcations and capital transfers. By current transactions were to be understood payments not effected for the purpose of capital transfer. They are as follows:

(1) All payments due in connection with foreign trade, other current business including services, and normal short term banking and credit facilities;

(2) Payments due as interest on loan and as net income from other investment;

(3) Payments of moderate amount of amortization of loans or for depreciation of direct investment;

(4) Moderate remittance for family living expenses. International Monetary Fund Articles of Agreement, December 27, 1945, 2 U.N.T.S. 40.

cerns the import and export of capital.[4] Current transactions or international trade are a different matter. Member states are bound by the Agreement to abolish, sooner or later, all restrictions on current payments, and may not impose new ones without the consent of the Fund.[5] In the light of this distinction it is more profitable therefore to disregard the problems of capital transfers as it has a tendency to assume the fixity of conventional international law and concentrate more on the legal problems of exchange controls in International Trade or Transactions. It is also in this type of commercial operations where jurisprudence, and in particular, the case law, is unsettled and often times conflicting.

A. *Nature of Foreign Exchange Control*

Foreign exchange controls are regulations issued by a sovereign state in order to protect its currency in particular and its economy in general. These regulatory measures govern transactions which include but are not limited to currency notes and coins, letters of credit, draft, bonds, bill of exchange, or other instruments having international financing implications.[6] They also cover assets, tangible or intangible of persons, natural or juridical, whether resident or non-resident of the restricting state.[7]

The nature of exchange controls is best exemplified by restriction on payments of monetary obligations arising from a sale of goods in International Transaction. Controls over such payments at once involve the inter-relation between the legal systems of two or more states, namely that of the place or places where the contract was made or to be performed and that of the restricting state. For instance in a shipment of goods from New York to Manila, Philippines, payable in dollars, the buyer is confronted with the the problem of effecting payment in the hard currency. Philippine exchange control regulations require previous licensing of imports.[8] Will the contract stand notwithstanding failure to comply with licensing regulations? Is non-performance due to impossibility a defense on the part of the buyer? Supposing the buyer has assets in New York, will the shipper be allowed to satisfy his claim over these assets? These are some of the complex legal problems that confront the courts in the determination of the extraterritorial effect of foreign exchange controls.

B. *History*

As a result of the economic crisis of 1930 and the Second World War, the system of free international payments was restricted and even temporarily suspended in some countries in Europe. The only country in Europe which was able to maintain free international

4 Ibid., Art. 6, 1 (a). The Fund may even request a member to introduce restriction in order to prevent a large or substantial outflow of capital; see also, Nussbaum, op. cit., p. 539.

5 Ibid., Art. VIII Sec 2.

6 See Central Bank (Philippines) Circular No. 81, (47 O.G. 5367) Sec. 2, and Manual of Foreign Exchange and Trade Controls (Phil.), (1950), definitions, p. xi; cf. Harfield, "Elements of Foreign Exchange Practice," 64 Harv. L. Rev. p. 437.

7 Ibid., Sec. 2.

8 Ibid., Sec. 3.

payments, though by no mean entirely, was Switzerland. At first, such restrictions were introduced by several states as unilateral measures to protect their currency and balance of payments in international trade. Subsequently they compelled the other trading states to make bilateral arrangements to regulate economic and commercial relations between them. In this way a network of bilateral treaties spread all over Europe, and even Switzerland, notwithstanding her hard currency and her strong economic position has to conclude dozens of such agreement a few years before the Second World War.[9]

It became apparent that uniformity in currency measures among the restricting states was of vital importance to the maintenance of orderly international trade. Delegates to the Bretton Woods Monetary and Financial Conference agreed to the formation of the International Monetary Fund as a foundation for better things to come.[10] Through cooperation they have made it clear that no nation, however, powerful, has the moral right to invoke its sovereign prerogative to pursue an independent course in the matter of money. For herein lies economic warfare — the straight road to armed conflict. The chief aims of the Monetary Fund Agreement are "to facilitate the expansion and balanced growth of international trade . . . (and) to promote exchange stability."[11] Bearing in mind the disorganized world conditions under which it is proposed to initiate operation of the Fund, and stripping the Agreement of unnecessary verbiage, the problems boiled down to: whether under conditions of extreme readjustment social, political and economic, expansion of trade and also balance be achieved on the basis of fixed exchanges? The answer based on the facts that the economy is the sum total of all activities indicate that it could not be warranted. To harness world economy to static exchanges at such a time and condition of economic readjustment is to stifle action and obstruct reaction, because it is by their very fluctuations that the exchanges create those corrective adjustment which make for balance in international trade relations.[12] Hence a compromise was reached. Conflicting views on this matter were settled by providing that the Fund can not change the par value of exchanges with-

9 Condliffe, **The Reconstruction of World Trade**, New York, 1940, p. 59; Hug, **The Law of International Payments**, p. 520.

10 The Fund Agreement received its ultimate form at the United Nations' Monetary and Financial Conference held from July 1-22, 1944, at the Bretton Woods, New Hampshire, U.S. The conference was attended by representatives of forty-four states. The agreement on the Fund came into force on December 27, 1946, when thirty governments had declared their accession. Based on the International Monetary Fund Report on Exchange Restrictions in 1958, there are 67 members at present.

11 Fund Agreement, *supra*, Art. 1, (ii) to facilitate the expansion and balanced growth of international trade, and to contribute to the promotion and maintenance of high level of real income and employment and the development of productive resources of all members as primary objectives of economic policy, (iii) to promote exchange stability, to maintain orderly exchange arrangements among members, and to avoid competitive exchange depreciation.

12 Rene Leon, Bretton Woods, The Monetary Fund Agreement viewed from the Angle of Exchange 1945, Princeton, New Jersey.

out the consent of the members concerned.[13] The members are duty bound to observe the proclaimed parities in transactions of foreign exchange. They must arrange "appropriate measures" vis., through exchange controls, that private transactions in their territories will be made only within the limits set by the Fund.[14] Restrictions on transactions are permitted only in two occasions, namely, (a) if a currency becomes so scarce that the fund will have to apportion its supply among the members, and (b) during the transitional period.[15] These restrictions are of paramount importance in the study of the extraterritorial effects of foreign exchange controls. More particularly, that in regard to scarcity of a particular currency (dollars), for here the exception is a more general one, and therefore valid even after the transitional period.[16] Under this provision (Art. VIII), exchange controls may be maintained or reintroduced by a given member state with the approval of the Fund, and the other members are bound to cooperate with it for the purpose of making such exchange control regulations effective, provided that they are consistent with the Agreement. In addition, all member states are under obligation to refuse legal recognition in their territories to contracts which involve the currency of any member, if such contracts are contrary to the exchange control regulations of that member imposed or maintained consistently with the Agreement.[17]

In this way the Agreement leaves the door open to the problems of recognition and enforcement of exchange restrictions in the territories of member states. This is so because the Agreement on the one hand aims at the removal of currency restrictions in the matter of current transactions imposing on its members appropriate international obligations, and on the other hand provides for the cooperation of member states in the effective enforcement of such restrictions whenever they are deemed necessary by the International Monetary Fund.

C. *Purpose*

This article will attempt to draw a comparative study of the law on extraterritoriality of foreign exchange controls obtaining in different jurisdictions. Reliance is made on comments and interpretations of recognized authors for translations into English of actually litigated cases in German, French and Italian. However, resort to the original is always made whenever possible under the circumstances.

13 Fund Agreement, supra, Art. IV, ecs; 5 (b) and 7. Regardin the first fixation of par values of exchange, see Art. XX, Sec. 4 (b). For consenting to a change in the dollar parity some countries require Congressional authorization, e.g., United States, Act of July 31, 1945, Sec. 5, 59 Stat. 514, 22 U.S.C. 286 (c); Philippines, Central Bank Act (R. A. 265) Sec. 49 (c) providing that any modification in the gold or dollar value of the peso must be in conformity with the provisions of all executive and international agreements subscribed to and ratified by the Republic of the Philippines, and modification shall be made only by the President upon proposal of the Monetary Board and with the aproval of Congress.

14 See Fund Agreement, supra, Art. VIII, Sec. 2 (a); cf. Nussbaum, Money in the Law, pp. 533-535.

15 Ibid., Sec. 2 (b).

16 Hug, op. cit., pp. 593-594.

17 Fund Agreement, supra, Art. VIII, Sec. 2 (b).

The legal problem of extraterritorial application would be dealt with firstly by an analysis of the legal structure of Foreign Exchange Controls in general, its bases, scope and administration, and finally its validity, application and enforcement in jurisdictions other than that of the restricting states. Due consideration will be made of the existing customary international law, prevailing *Conflict of Laws* rules, and also conventional international law concluded on the subject — the International Monetary Fund Agreement.[18]

In analyzing the legal structure of Foreign Exchange Controls a brief economic background, illustrative of the balance of payment difficulties, is indispensable in order to establish the initial validity of a given control device in the field of private and public international law. This is nothing more than the requirements of genuine economic necessity. We can not, however, assume the task of analyzing the economic causes and effects of controls; nor can we go lengthily into specific control techniques, e.g., import and export licensing, quota allocations, impositions of exchange tax, etc. Suffice it for this purpose to lay stress on the genuineness of the economic policies sought to be implemented by each Foreign Exchange Control.[19]

After the legal structure of the Foreign Exchange Control shall have been established, decided cases will be examined with emphasis on the extent to which a restricting state may demand recognition of its control regulations, and the techniques resorted to by other states in modifying, restricting or even suppressing the enforcement of the given exchange control. This will involve the application of *Conflicts* rules on the proper law of the exchange contract, the doctrine of public policy ("ordre public"), territoriality and a host of other devices as an excuse for non-recognition of foreign exchange controls. Relative bases under the "usage of nation" will be traced insofar as it may determine or modify territorial notions akin to foreign laws in general and to exchange control legislations in particular.

Correlatively, jurisprudential materials available on the subject would be grouped according to positions taken on this legal problem having regard to varying legal and economic persuasion as a possible factor, and finally, the effect of Art. VIII, Sec. 2 (b) of the International Monetary Fund Agreement as a means of predicting future extraterritorial application of exchange controls between members on the one hand, and members and non-members on the other.

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18 Hug, op. cit., p. 595

19 See, In re: Helbert Wagg Ltd., case (1950) 1 Ch. 323, "...courts must recognize the right of every foreign state to protect its economy by measures of foreign exchange control... (that) this however is subject to the qualification that this court is entitled to satisfy that the foreign law is genuine foreign exchange law.

II. LEGAL STUCTURE OF EXCHANGE CONTROL REGULATIONS

A. *Economic Background*

Monetary controls originating as a direct measure intended to provide revenue, have grown as a result of upheavals of the Great Depression and two World Wars into complex system integrated with trade restrictions for the purpose of allocating foreign exchange resources in accordance with governmental plan.[20] Under such system, transactions productive of foreign exchange are controlled in order to increase a central pool of hard currency necessary for the balance of payments in International Trade of the state concerned.

As an illustrative example, the Philippine economy faced with the dual burden of reconstructing the ravages of the last war, and the needs of stepped-up industrial development had generated tremendous demands for hard currency (dollars) which caused an accelerated decline of its international reserves. The country's international reserves reached the lowest point and domestic wholesale prices for consumer goods rose steadily creating thereby economic unrest and consequent, though perhaps remotely, political instability. To forestall these serious trends from developing into unmanageable proportions, determined efforts were made by the government, especially during the last quarter, to bridle inflation and there occurred the widest deployment and the most intensive use of monetary measures ever carried out since the establishment of the Philippine monetary system. Parallel measures of restraint were adopted by the fiscal authorities in the import and export trade giving rise to the apparently rigid exchange restrictions now obtaining in the Philippines[21]

B. *Municipal and International Law*

Existing exchange control regulations are generally based on statutes promulgated by the legislature pursuant to its power to control the currency of the state. It can not be doubted that a state as sovereign has the power to regulate its own currency and to protect the same through exchange control regulations. Examined under th constitutions of most states, these measures are admissible provided they do not violate the fundamental principles contained

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20 Meyer, "Recognition of Exchange Control After the International Monetary Fund Agreement," 62 Yale L. J., pp. 867-868 (May 1953).

21 See, Central Bank of the Philippines, Ninth Annual Report, 1957, Chapter I; also, Central Bank Act, (Phil.) June 15, 1958, which provides, "...in order to protect the international reserves of the Central Bank during an exchange crisis... the Monetary Board ...with the approval of the President, may temporarily suspend or restrict sales of exchange by the Central Gank and may subject all transactions in gold and foreign exchange to license by the Central Bank"; also, Circular No. 20 (47 O. G. 5567), December 9, 1959 (of same Central Bank).

therein.[22] The question arises, however, whether such rules or regulations do not exceed the bounds of national sovereignty, and therefore whether they are not an infringement of international law.

As far as international treaty law is concerned, our judgment must always be based on the treaty arrangement between the two interested states; each case must be judged on its own merits. It can, however, be stated that as a rule ordinary commercial, treaties are not incompatible with exchange controls. This holds good even when such treaty provides for equal treatment to the residents of each of the contracting states, protection of their property and free disposal of it, etc., because the restrictions primarily affect each contracting party's own residents.[23] Nor is exchange control incompatible with most-favoured-nation clause.[24]

With regard to international customary law the problem is a general one and, as such, independent of individual treaties. No decision of any court has found exchange control a priori incompatible with customary international law.[25] In the doctrine it has been stressed that international law is no barrier to exchange control.[26] Whether or not a contradiction exists depends on the features of each individual case. It is of the very essence of exchange control that it introduces inequality into international relations, first and foremost because it imposes import restrictions, a scarce foreign currency being reserved for the import of essential goods. But to the extent that exchange control answers the economic needs

22 In the case of United States v. Von Clemm, 186 F. 2d 968, the United States Court of Appeals for the Second Circuit was called upon to consider whether a transaction involving the importation of diamond from Netherlands by a person within the United States, and the payment therefore of U.S. dollars made by the purchaser in the United States for the account of the seller who was not a resident of the U.S. constituted a "transaction in exchange" for which the U.S. Treasury had legal authorithy to require a license in accordance with the provisions of Executive Order 8405 of May 10, 1940, issued pursuant to the Act of October 6, 1917, as amended.

On appeal from a judgment of conviction for a failure to obtain a Treasury license imposing a penalty of a fine of $10,000 and two years imprisonment, defendant argued that the provisions of the Exec. Order which required licensing for this "transaction in foreign exchange" were unconstitutional. Three Judges of the Second Circuit Court of Appeals, including Judge Learned Hand, unanimously rejected this contention, and held the provision of the Exec. Order requiring the license to be constitutional. Perry v. U. S., 294 U. S. 330; Commission on Polish Relief v. Banca National a Rumanici, 288 N. Y. 332, 336, 43 N.E. 2d 345; see also, Lim Hu, petitioner, v. Central Bank of the Philippines, respondent., G. R. No. L-8157, July 31, 1956. This case involved a license to import certain commodities from Hongkong which petitioners contend did not require a license. Lower Court rendered judgment for the petitioner, and annulled the circular concerned requiring the license. The circular provides, "Now therefore, the Monetary Board; in pursuance of Central Bank Circular No. 20 (47 O. G. 5567), and other circulars and notifications issued in pursuance thereto, hereby require any person or entity who intends to import or receive goods from any foreign country for which no foreign exchange is required or will be required by the Bank, to apply for a license from the Monetary Board to authorize such import." (Circular No. 45 dated June 25, 1953 (49 O. G. 2189). Defending the validity of its Circular No. 45 the Bank maintained that "it has authority to issue such regulations as may be necessary to exercise its power to license (temporrily) all transactions in gold and foreign exchange" (Section 14 (a) in connection with Sec. 74 Rep. Act. No. 265); and that the term foreign exchange is applicable to "foreign currency and notes and coin letters of credit drafts, bills of exchange, or other instruments having international financial implications." (Sec. 2 par. (l) Central Bank Circular No. 31 (49 OG 5567). Supreme Court did not decide the issue of validity as it became moot upon the passage of R. Act No. 1296 and R. Act. No. 1410 pending decision of the case. Judgement was rendered holding that the Central Bank may not be required to grant petitioner's application for license.

23 Hug, op. cit., p. 591.

24 Nussbaum, Money In The Law, p. 475.

25 Hug, op. cit., p. 592.

26 Nussbaum, op. cit., p. 475.

of a country, it is admissible.[27] The opposite is true when such restrictions assume an offensive and arbitrary character, as they did in the case of Germany's foreign exchange policy after 1933, when the exchange control became a typical weapon in the hands of a totalitarian regime.[28]

Again, under the Agreement on International Monetary Fund, the Fund places some definite restrictions on the freedom of its members to maintain and introduce exchange controls. These states are subject to its supervision in all that concerns their foreign exchange policies, even towards non-members (Art. XI). In the field of exchange restrictions, the Monetary Fund distinguishes between current transactions and capital transfers.[29] In current transaction (commonly referred to as international trade) member states are bound by the Agreement to abolish, sooner or later, all restrictions on current payments and may not impose new ones without the consent of the Fund (Art. VIII, Sec. 2).

There are, however, two important exceptions to the principle that current transactions should be freed from all restrictions. The first concerns the post war transitional period, and as stated expressly in the Agreement, members whose territories had been occupied by the enemy may maintain and adopt restrictions on payments and transfer for current international transactions.[30] These restrictions, however, were intended merely as emergency measures. Member states are to be constantly mindful of the purpose of the Fund, i.e., the promotion of international monetary cooperation and the establishment of a multilateral system of payments (Art. I).[31] The second exception (Art. VIII, Sec. 2, paras. 2 and 3 (a) operates when the Fund declares that a certan currency is scarce and therefore acts as an authorization to any member, after due consultation with the Fund, temporarily to impose limitations on freedom of exchange operations in the scarce currency. This second exception is valid even after the transitional period is over. This exception officially expires when the Fund formally declares under Art. VII, Sec. 3(b) that the currency in question is no longer scarce.

The objectives of the Agreement in connection with exchange restrictions are apparently flouted in two respects. First, Art. VIII, Sec. 2 (b) encourages members to "cooperate" in effectuating their mutual exchange controls. Second, and most important in its effects on the conflict of laws problem, is the following provision of Art. VIII, Sec. 2 (b) 1; "Exchange contracts which involve the

27 In re: Helbert Wagg Co., Ltd. (1956) 1 Ch. 323, "...must be a law passed with the genuine intention of protecting the economy in times of national stress and for that purpose regulating (inter alia) the rights of foreign creditors, and not a law passed ostensible with that object, but in reality with some object not in accordance with the usage of nations.

28 See Frankfurter v. W. L. Exner, Ltd. (1947) 1 Ch. 629, involving a law passed under the Hitler regime in Austria with the apparently innocent object of providing fer receivership in certain cases, but with the real object of confiscating the property of Jews and other foreigners. Romer, J., expressed the view that this court (English) is entitled to see what was done under it and if satisfied that it is "confiscatory" deny its application; also, Allegemeine v. Journaliag (1938) 64 11 B.G.E. 88.

29 International Monetary Fund Articles of Agreement (1945), 2 U.N.T.S., Art. XIX (i).

30 Ibid., Art. XIV.

31 Hug, The Law of International Payments, pp. 503-504.

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] The efficacy of international treaties on domestic institutions is generally treated with circumspection by the courts. The Fund Agreement is no exception, for, though its applicability is often urged by the litigant, courts have thus far found other more convenient grounds for decision (refusal).[33]

C. *Characteristics of Exchange Control Regulations*

Exchange control regulations consist essentially of commands and prohibitions addressed to private persons. They impose on the latter obligations toward the state which are enforced by the remedies of public law, viz., state control, administrative coercion, and penalties. However, it also affects legal relations between individuals, and so bears upon private law.[34]

1. *Prohibitions*

Exchange control regulations, everywhere, prohibit certain acts and transactions, the most important of them being: payment to foreign exchange aliens either within or outside the country concerned; the export or import of bank notes, gold or precious metals; the purchase, lending or borrowing of gold or foreign means of payment; the transfer of securities or bank accounts belonging to foreign exchange aliens, the disposal of assets situated abroad; the disposal of assets situated within the country of the restricting state and owned by non-residents.[35]

The effect of these prohibitions is the seizure of aforesaid assets in favor of the government imposing the restriction. They establish on the latter's part a kind of sovereign right with regard to such objects.[36] These prohibitions, however, are only relative but

32 Cabot, "Exchange Control and the Conflict of Laws: An Unsolved Puzzle," 99 U. Pa. L. Rev. pp. 494-495; cf. Nussbaum, loc. cit., pp. 542-546. A discerning analysis of this section has been made by Professor Nussbaum in "Exchange Control and the International Monetary Fund," 59 Yale L. J. 421 (1950).

33 E.g., Kraus v. Zivnostenska Banka, 187 Misc. 681, 64 N. Y. S. 2d 782 (Sup. Ct. 1948), "... the courts of no country executes the penal or revenue laws of another... (I)f the... Bretton Woods Agreement are to change that rule, I will at least await a decision of some appellate court blazing that trail or a case before me in which that point is briefed and decision of it is actually necessary," Cabot, loc. cit., n. 100 at p. 495; cf. Nussbaum, loc cit., pp. 542-544; see also, Werfel v. Zivnostnska Banka, 260 App. Div. 747, 23 N. Y. S. 2d 1001 (1940), Kahler v. Midland Bank, Ltd. (1950) A.C. 24 (1948).

34 Hug, op. cit., p. 595.

35 E.g., Central Bank (Philippines) Circular No. 20 (47 O. G. 5567), December 9, 1949, and Manual of Foreign Exchange and Trade Controls (Phil. 1950), Chapters III and IV; see also, Art. 2 of the French decree of July 15, 1947; Nussbaum, loc. cit., p. 607.

36 E.g., Societa Thea Impex v. Unger (Foro Italiano, 1951-No. 1, p. 536, 40 Italiano Repertorio, p. 299, facts as follows:

A, a citizen of Italy, entered into an agreement with B, a citizen of Czechoslovakia, for the purchase by A of merchandise from B. The agreement provided that payment for for the purchase by A of merchandise from B. The agreement provided that payment for the goods was to be made in U.S. dollars by C, a resident of New York, A in turn agreed to reimburse C by crediting his accounts in Italy with a sum of lira equivalent to the amount of dollars paid by C to B.

Held: Such transaction was in violation of the foreign exchange laws in Italy, and as such absolutely void and unenforceable, the Genoa Court saying, "...As a result of the government monopoly on foreign exchange existin in Italy, payments abroad can not be made directly by private individuals or firms but must be made in accordance with an authoriza-

not absolute. They may be abrogated by the approval or permission of the authorized agency.[37] This step may be taken by a general repeal of the statute or through licensing which may be general or specific. Specific when it covers only particular transaction or transactions.[38]

2. *Commands*

Whereas exchange prohibitions forbid to private persons certain acts or transactions which, according to the general principles of law, they are at liberty to perform, exchange control commands impose on them legal obligations of a positive character. Thus they are required to notify the competent authorities of their holdings or acquisitions of gold or foreign currency,[39] to furnish information thereon,[40] to account for the use of licensed foreign exchange and to return amounts not used,[41] to keep account of the amount of foreign currency held, received and disposed of[42] to transfer into the country amounts acquired abroad, etc.[43] But most important of all is the obligation to offer and surrender all foreign currency assets to authorized agents.[44]

3. *Territorial Scope*

Exchange controls are applicable within the territory of the state concerned.[45] The question of territorial scope must be determined by specific rules.[46] It is true that British Exchange Control Act stipulated that only persons actually in the United Kingdom were to come under its purview,[47] but in order to be effective, such measures were to apply to the whole sterling area including British territories, protectorates and protected areas.[48]

4. *Scope Over Persons*

Exchange Control regulations, as part of public law, are as a rule applicable only to persons subject to the sovereignty of the state in question, as may be deduced from the principle that the

tion of the Italian Exchange Office which provides for the opening of a credit with a foreign bank. These rules of law are imperative and a contract made in violation thereof is absolutely void. (underscoring supplied).

37 E.g., Central Bank (Philippines) Circular No. 20 (47 O.G. 5567) December 9, 1949, supra, pursuant to R. A. No. 265.

38 Ibid., Circular No. 44 (49 O.G. 2189)., June 12, 1953, Circular No. 45 (49 O.G. 2189), June 25, 1955.

39 See, Ibid., Circular No. 20 (47 O.G. 5567), December 9, 1949, Sec. 4 (a).

40 See, Ibid., also British Defense (Finance) Regulation of November 23, 1939, Art. 8 (1), S. R. & O. 1939, Nos. 950 and 1620 reg. 2A.

41 See, Circular No. 20 (47 O.G. 5567), December 9, 1949, (Philippines Central Bank).

42 See, Ibid; also Art. 50 (1) of the Decree of the Swiss Federal Department of Finance and Customs on the control of gold transactions and the import and export of gold.

43 See, Manual of Foreign Exchange and Trade Controls (Phil.), 1952, Chapter IV.

44 See, Circular No. 20 (47 O.G. 5567), December 9, 1949, (Phil.); also, Art. II (2) of the German Law No. 53; French Decree of July 15, 1947, Art. 32; British Exchange Control Act, Art. 2; Hug. op. cit., p. 611.

45 E.g., German Exchange regulations (Law No. 53 of the allied Military Government) determined the territorial scope of the German exchange controls.

46 E.g., Italian Exchange control is not excercised over payments from Italian Republic of San Marino. There are special arrangements for payment between Italy and the Somaliland under Italian administration (Intetrnational Monetary Fund, Report on Exchange Restrictions, 9th, 1958).

47 See, British Exchange Control, 1st Schedule, S. R. & O. 1939, Nos. 950 and 1620 reg., 2A.

48 Hug, op. cit., pp. 590-599.

state is sovereign in the matter of currency. Accordingly exchange control regulations distinguish between two categories of persons: those who belong to the state in question, and other persons.[49] The Philippine Law draws the distinction between persons resident in the Philippines and non-residents.[50] The criterion, however, by which these persons are grouped is not based always on nationality. Germany laid great stress on the places of domicile, while France and England on habitual place of residence.[51]

Juridical persons have the status of residents as a general rule in the country where they have been incorporated or where their principal office is located. Thus if they conduct their trade across the boundaries of several states, they are subject to the exchange restrictions of all these states.

5. *Scope As To Objects*

Exchange control regulations usually apply to a clearly defined group of objects owned either by the resident or non-resident and designated as "foreign exchange" in the expanded sense.[52] It follows that the assets to which control regulations apply include much more than actual foreign currency, and that they may be affected very intimately if they belong to residents of the restricting state. Assets belonging to non-residents or "foreign exchange alien" however are only affected by exchange control regulations insofar as they are subject to the territorial sovereignty of the state concerned.

6. *Administration of Exchange Control Regulations*

The enforcement of exchange regulations means a new task for the executive branch of the government in many countries. It may be either entrusted to the existing administrative bodies or assigned to new ones created for the purpose.

In the Philippines exchange controls are operated by the Central Bank of the Philippines, whose Monetary Board determines, in a semi-annual basis, the amount of exchange to be allocated for various purposes, including the payment for imports.[53] Both import and export transactions are subject to licensing. United Kingdom administers her exchange controls through the Bank of England on behalf of the treasury. However, much of the authority for approving normal payments is delegated to commercial banks, practically all of which are authorized for this purpose.[54]

49 Ibid., p. 597.

50 Manual of Foreign Exchange and Trade Control (Phil.) 1952, defines "resident" as" and person, firm, partnership or association, branch office, agency, company or other unincorporated body or corporation residing or located within the Philippines," and "non-residents," as "any person, firm, partnership or association branch office, agency, company or other unincorporated body or corporation residing or located outside of the Philippines."

51 Fench decree of July 15, 1947, Art. 1, para (3) cited by Hug, op. cit., p. 597.

52 Manual of Foreign Exchange and Trade Control, supra, defines "foreign exchange assets" as "all money, checks, draft, bullion, bank drafts, deposit accounts (demand, time and savings) all debts, indebtedness, or obligations, financial securities commonly dealth in by brokers and investment houses, notes, debentures, stocks, bonds, coupons, bank acceptances, mortgages, pledges, liens or rights in the nature of security expressed in foreign currency.

53 Philippine Central Bank Act (R. A. No. 265), June 15, 1948.

54 International Monetary Fund, Report on Exchange Restrictions, 9th., p. 300.

III. EXTRATERRITORIAL EFFECT OF FOREIGN EXCHANGE CONTROLS

Exchange control prohibitions, as a matter of principle, affect all and any acts of disposal relating to objects defined as foreign currency (exchange). The mere conclusion of contracts, however, under which obligations are entered into by the parties remain valid even if they concern assets subject to the foreign exchange control. As a rule, exchange control regulations are without influence on the conclusion of legal transactions (as distinct from the performance of contractual obligations).[55] There are however exceptions to this rule. If the conclusion of the contract coincides with its performance, as for instance in cash purchase, the exchange control regulation will affect the validity of the contract creating the obligations.[56] The contract creating the obligation will also be considered void if it was concluded with the intent to evade exchange control restrictions.[57]

A. *Effects Under Private International law or Conflict of Laws*

Exchange control regulations necessarily intrude on numerous legal relationships of private law of international character. The question therefore arises whether exchange control regulations of one state must be recognized or even applied by the courts of other states.[58]

Two issues arise from this problem. The first is, whether a court is bound directly to apply the exchange control regulations of a foreign country, i.e., actually to base its decision on them whenever the law of that country is applicable; the second is whether the court should consider a situation created by foreign currency regulations as a factual impediment and form its decision accordingly.[59] This question is of particular importance for those countries which have no exchange control regulations of their own, or only very few, and whose residents enjoy complete freedom with regard to international payments. It was the German legislation of the

55 See, Art. 33 of the British Exchange Control Act which provides: "It shall be an implied condition in any contract that where by virtue of this Act the permission or consent of the Treasury is at the time of the contract required for the performance of any term thereof, that term shall not be performed except insofar as the permission or consent is given or is not required." It is therefore tacitly understood in the contract that inasmuch as its performance necessitates, by virtue of the Act, any permission or consent, the contract may not be performed without the relevant permission or consent. Hug, op. cit., p. 620 n. 3; also Art. 7 of the German Exchange Controls, Law No. 53 (1945), provides, "...any transfer, contract or other arrangement concluded or performed in violation of this Law or with intent to evade its provisions has no legal effect whatever unless subsequently authorized by the Military government. The parties may be required to restore the status quo ante in all that concerns the assets which were the object of the prohibited transaction."

56 Ibid., German Exchange Control, Art. 7. see also, Societa Thea Impex v. Unger, supra, n. 36.

57 Id., the contract was held void in view of the failure to comply with the exchange restrictions of Italy.

58 Cf. Nussbaum, Money In The Law, p. 401, et seq.; Wolf, Private International Law, Oxford, 1950, p. 472; Mann, Legal Aspect of Money, p. 258 et. seq.; ug, Law of International Payments, p. 622.

59 In the case of Central Hanover Bank v. Siemes and Halske, infra, p. 25 the pertinent German statute was discussed simply as a possible factual excuse for non-performance rather than a substantive law controlling the transaction.

nineteen-thirties which originally provoked the discussion of this problem. Foreign courts predominantly decided not to recognize German exchange control laws. The arguments adduced to support this point of view, however, varied from one country to another and often, though to a lesser degree, even within one and the same country.

1. *Avoidance of Foreign Exchange Controls*

a) *Public Policy*

The question to what extent foreign exchange controls must be recognized by local courts is in many respects similar to the problem arising from foreign gold clause obligations. There the issue of "public policy" is in the fore. Generally, public policy considerations recognized in that connection are applicable also in the case of foreign exchange control.[60]

"Public Policy" may be used in conflict of laws in two radically different ways. Used in the first way, it will lead to a refusal by the forum to entertain plaintiff's suit. Used in the second way, it will lead to a determination of the rights of the parties under the law of the forum.[61] Pubic policy in the second sense may be used further in two different situations. In one situation, the forum relies upon the concept to justify the application of its law to determine the rights of the parties, though it has no contact with the occurence sued upon.[62] In the other situation, the forum state has some contacts with the occurrence or the parties beyond its interest as forum. Because of these additional contacts the court may decide that it should choose the law of its own state to govern the rights of the parties and give final judgment accordingly. In such a case the court may justify its action by appealing to its public policy without further analysis or a more precise statement of the choice of law rule it is applying.[63]

A historical approach to the public policy rule of avoiding foreign exchange controls will reveal the countries that have adhered to this consideration. This was the case in France, Italy, Norway, the Netherlands, Switzerland and to some extent in the United States,[64] also, and even in Germany itself, despite the fact that precisely the latter country had preceded all others in the matter of exchange restrictions.[65]

The Swiss Federal Court was quite explicit on this point in a number of cases. It followed the old practice of "refusing to apply in Switzerland any exceptional spoliatory laws of a character prompt-

60 Nussbaum, op. cit., p. 461.

61 Cheatham, Griswold, et. al., **Conflict of Laws**, Cases and Material, 1957, 4th Ed., p. 373.

62 Fox v. Postal Telegraph Cable Co., 138 Wis. 648, 120 N.W. 399 (1909).

63 **Conflict of Laws**, supra, n. 61, p. 373; cf. "Public Policy in the Conflict of Laws," 56 Col. L. Rev. 969 (1956)

64 For citation of detailed cases see, Nussbaum, **Money in The Law**, p. 462.

65 The German Reichsgericht, for instance, in a decision of 1923, refused to apply the Polish foreign exchange control laws because a moratorium declared by a foreign country on debts to alien creditors was held to disturb the financial relations between that country and Germany and, incidentally, grievously to impair German economy; Hug, op. cit., p. 624.

ed in foreign country by warlike or revolutionary events."[66] In a decision in 1934 (DSFC 60 II 310) the Swiss Federal Court, concurring with the lower court, took the view that a substantial modification of contractual obligations due to prohibition of payments embodied in exchange control regulations constituted an incursion of the rights of creditors and was thus incompatible with certain fundamental concepts of Swiss Law, namely, the inviolability of lawfully acquired rights even by acts of state. The court therefore refused to apply the German exchange control regulations in question. It declined moreover to tolerate these regulations even indirectly by admitting the impossibility of performance allegedly caused by them. According to the court it amounts to the same thing, whether foreign regulations which are incompatible with the law of the land are applied directly or indirectly by virtue of their actual effects. This view, elaborated in detail, has been upheld in a number of subsequent decisions.[67] In Allgemeine Elekrizitaetsegesellschaft (Berlin) and Siemens and Halske A.G. (Berlin) v. Journaliag A.G., Clarus,[68] the Swiss Federal Tribunal held that "... (I)t has already been pointed out that, as a matter of principle, and in accordance with previous rulings of this court, neither the German foreign exchange restrictions nor their factual impact can be taken into consideration by the Swiss courts, since this German legislation violates Swiss "ordre public." Briefly the case is as follows:

> Plaintiff (Journaliag) in this case, a Swiss national, filed an action to recover payment of certain debenture bonds issued by a Berlin corporation and guaranteed by defendants (Allegemeine and Siemens), both German corporations. Under the terms of the bond, both interest and principal were payable in U.S. gold dollars in Amsterdam, Rotterdam and Stockholm. The lower court rendered judgment in favor of plaintiff (Journaliag) for U.S. gold dollars, and attached defendants Swiss patents. On appeal defendants moved to vacate judgment and to be allowed to pay only in paper dollars. Tribunal was confronted with the problem of applying U.S. law of June 5, 1933 (restricting payment in gold dollars) or the German law of June 26, 1936. Having arrived at the conclusion that gold clauses represent promises going to the very essence of the debt and must in principle be governed by the law of the obligation, i.e., by the legal system which determines the effects of the contract promise which was German law, the Tribunal held the latter to be unenforceable. It provides, "...If the loan is evidenced in negotiable debentures floated abroad and is redeemable in foreign currency (which in this case was U.S. dollars) —regardless of whether or not the obligationo is tied up to a gold clause — and that currency is devalued, the payments are due in the devalued currency at the devalued rate.

The Tribunal then proceeded to say "... it should be added that the courts are not designed to carry out or determine economic policies. Only political authorities are competent to determine whether there is an imperative need in the interest of Swiss economy to preserve German royalty claims against Swiss patent licenses...and not for

66 DSFC 64 II 100.
67 DSFC 61 II 246, 62 II 110, 62 II 44, 68 II 210, cited in Hug, op. cit., pp. 622-623.
68 Swiss Federal Tribunal, Civil Chamber (1938) 64 II B.G. 88.

the judiciary to take the necessary remedial steps if it should appear desirable for these or other reasons to invalidate gold clauses in Switzerland as well."

In England, as an early predecessor of these holdings, the case of *Boucher v. Lawson* (1735),[69] may be cited. The court here denied recognition of a Portuguese export embargo for reasons of public policy, i.e., interest of English trade. This was a case involving the prohibition of gold export by Portugal.

American courts have also had occasion to deal with the same problem. They qualified German exchange control legislations as "highly repugnant to our sense of honor and decency" and as "reflecting financial sadism at its worst."[70] Doubtlessly it was the conception of public policy which underlay this vigorous refusal even though it was not expressly mentioned.[71] In other court decisions we find a more direct reference to the doctrine of public policy.[72]

On the whole the doctrine of "public policy" as understood specially by Anglo-American courts in this connection covers many varying bases for decision. The courts can refuse recognition on the ground that the foreign exchange control is confiscatory.[73] The English court for instance in the case of *Folliot v. Ogden*[74] decreed that "... (E)nglish law will not recognize the validity of foreign legislation intended to descriminate against nationals of this country in time of war by legislations which purport to confiscate wholly or in part movable properties situated in the foreign state. As long ago as 1817, such confiscation was described as 'not conformable to the usage of nations'." It may also be stricken down as being penal or revenue or fiscal in character and therefore unenforceable beyond the territory where it was promulgated.[75] Thus in *In re: Fried Krupp Actien-Gesellschaft*,[76] the English court while recognizing the validity of a German legislation which prohibited payment

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69 Cas. Temp., Harwicke 85 & 194, 95 Eng. Rep. 58 & 12 (K.B. 1735) cited in Nussbaum, op. cit., p. 463.

70 Pan American Securities Corp. v. Fried Krupp Aktiengesellschaft, 169 Misc. 445, 451, 6 N.Y.S.2d 993 (Sup. Ct. 1938), aff'd 26 App. Div. 955, 10 N.Y.S.2d 205 (Dep't 1939).

71 See, Cabot, "Exchange Control and Conflict of Laws," 99 U. Pa. L. Rev. 476, 496 (January 1951).

72 E.g., Glynn v. United Steel Works Corp., 16 Misc. 405, 289 N.Y.S. 1037 (Sup. Ct. 1935); confiscatory decrees as being contrary to "public policy" as fundamental legal notions as understood in the various states of the Union, see Vladikavkazky Ry. v. New York Trust Co., 263 N.Y. 369, 189 N.E. 456 (1934); Moscow Fire Insurance Co. v. Bank of New York & Trust Co., 280 N.Y. 286, 20 N.E.2d 758 (1939); on the other hand, Russian legislation, including confiscatory decrees, was given effect with regard to the operation of such decree within Russian territory: Dougherty v. Equitable Life Assurance Society, 266 N.Y. 71, 193 N.E. 897 (1934); also, Holzer v. Deutsche Reichsbahn-Gesellchaft, 277 N.Y. 474, 14 N.E.2d 798 (1938).

73 E.g., Bollack v. Societe General, 263 App. Div. 601, 33 N.Y.S.2d 986 (1942), appeal denied, 264 App. Div. 707, 35 N.Y.S.2d 717 (1942); Plesch v. Banque Nationale de la Republica D'Haiti, 273 App. Div. 224, 77 N.Y.S.2d 43, aff'd 298 N.Y. 573, 81 N.E.2d 106 (1948); Feuchtwanger v. Central Hanover Bank, 288 N.Y. 342, 43 N.E.2d 454 (1942).

74 (1789) 1 H. BL. 124, 135. See also, Banco de Viscaya v. Don Alfonso de Borbon, (1935) 1 K.B. 140; Anglo-Iranian Oil Co. v. Jaffrata (Rose Mary case) (1953) 1 Weekly L. R. 246, 251, 252. For American cases see, e.g., Glynn v. United States Steel Works Corp., 160 Misc. 405, 289 N.Y.S. 1037 (Sup. Ct. 1935); and Pan American Securities Corp. v. Fried Krupp Aktiengesellschaft, 169 Misc. 445, 451, 6 N.Y.S.2d 205 (2d Dep't 1939).

75 For American cases see, e.g., Matter of the Estate of Theresie Liebl, 201 Misc. 1102, 106 N.Y.S.2d 715 (Surr. Ct. 1951); Marcu v. Fischer, 65 N.Y.S.2d 802 Sup. Ct. 1946).

76 (1917) 2 Ch. 188, 192.

to enemy nationals in time of war, held that the German law passed shortly after the outbreak of the war which purported to cancel and not merely to suspend liability for payment of interest by a German to a British firm would not be recognized in these courts although the proper law of the contract was German. "...This ordinance... have their intention to penalize particular classes of persons, and incidentally to injure the enemy countries to which these persons belong."

b) *Territorial Limitations of Controls*

French courts generally prefer the formula that Foreign exchange control is inapplicable as "strictly territorial" in nature.[77] The Paris Court of Appeals, for instance refused in 1933 to take Russian exchange control regulations into consideration on the ground that these were regulations of such "penal and political consequences that its application can not be other than territorial."[78]

This conception is based on a doctrine widely prevalent in Latin countries which qualifies as "territorial" all laws which call for exclusive applicaton within the country in which they are enacted. Consequently, the only possible meaning of "territoriality" is that foreign exchange regulations affecting relations within the jurisdiction and applicable there under general Conflicts norms can not be recognized because of thir particular character. This is nothing but an aspect of the public policy, obfuscated by the cryptic territoriality concept.[79]

Closely related to this approach is that doctrine developed from the Anglo-American common law which refuse recognition to foreign penal and revenue laws. Under this rule some courts in the United States have managed to disregard the relevant exchange legislations on the ground that exchange restrictions are in their nature revenue and penal and therefore could not be enforced beyond the territory of the restricting state.[80] This view clearly disregards the true character of exchange regulations, for they are neither primarily for tax or revenue purposes nor penal in the sense of "designed to punish offenses against the public."[81]

(c) *Avoidance of Exchange Controls Through The Use of Conflicts Rules*

The majority of English and American decisions, however, rest on the non-application of foreign exchange controls in what appears to be a normal use of general Conflicts rules. A survey of

77. App. Paris, June 30, 1933, J. D. Int'l 1933, 963: App. Colmar, Feb. 16, 1937, J. D. Int'l 1937, 784. App. Colmar, March 11, 1938, Revue Juridique d'Alsace et de Lorraine 1938, 511, suggest the public policy notion by speaking policy notion by speaking of the "Caractere fiscal, monetaire et politique" of German exchange control laws, Nussbaum, Money In The Law, n. 10 at p. 468.

78 Ibid. (Nussbaum).

79 Nussbaum, Principal of Private International Law, 1943, n. 29 at p. 40.

80 Bollack v. Societe Generale, 263 App. Div. 601, 33 N.Y.S. 2d 986 (1942), appeal denied, 264 App. Div. 767, 35 N.Y.S. 2d 717 (1942).

81 Cabot, "Exchange Control and Conflict of Laws," 99 U. Pa. L. Rev. 489.

the cases indicate a number of grounds relied upon by the courts. These are: application of the proper law, namely, *lex loci contractus, lex fori, lex loci solutionis, lex loci intentionis;* distinction between procedural and substantive nature of controls; impossibility of performance, and sometimes even the interpretation of the contract involved. The courts however in discharging this function seldom use any one particular ground independently of the others but to the extent ample reliance is made on the applicability of a particular Conflicts rule, the following cases may be used as illustrations.

(1) *The Proper Law — Lex Loci Contractus*

English courts usually approach this problem from the angle of whether the control regulation pertains to the same legal system as governs the contract or the *lex loci contractus.*[82] Under English law therefore exchange control regulations of foreign countries have to be applied if the law from which those regulations are derived is at the same time the proper law of the contract. In *De Beeche v. South American and Chilean Stores,*[83] the law governing the contract was the law of Chile. The Chilean exchange control forbade the debtor to pay the sum due in sterling in London. His payment of rent in pesos in Chile according to Chilean law was held valid to discharge his obligation under the contract. The British court dismissed the claim of the creditor for payment in sterling in London. Briefly the facts of the case is as follows:

> South American and Chilean Stores, respondents in this case, were British corporations that became jointly bound to fulfill certain obligations contained in the lease of premises in Santiago, Chile, granted by predecessors in interest of Appellants, Chilean citizens. The lease provided for the following way in which the rents should be payable: '. . . payment shall be effected monthly in advance in Santiago, Chile, on the first day of each month by first class bills in Lond.' In 1931 Chilean legislation supervene which respondents maintained prevented them from acquiring foreign exchange in Chile or from paying rents in Chile by first class bills in London without authorization by Chilean authorities. Request for such authorization was denied and payment was made in pesos under Chilean law.
>
> Held: The contract must be construed acording to Chilean law, even if part of the performance of it was to be made in England, and since payments were made in pesos the obligation under the lease is considered discharged.

According to Professor Wolff[84] the following general rule may be deduced from this decision. "The inevitable inference from this is a general rule to the effect that foreign currency restrictions must

82 See, Cabot, op. cit., p. 480, ...the British position is by no means unanimous, particularly as regards the problems of illegality.

83 (1935) A.C. 148; 152 L. T. 309, 51 T.L.R. 189; 40 Com. Cas 157, H.L., considered in Kleinwort Sons & Co. v. Ungarsiche Baumwoulle Industrie (1939) 2 K.B. 678.

84 Wolff, Private International Law, Oxford, 1950, p. 474, ...exceptions will, however, be admitted where in the particular circumstances of the case before the court the result of an application of a particular restriction enacted by a particular state offends against English principles of justice... if the currency regulations of the proper law prevent the debtor from paying his debt out of property situated abroad.

always be applied where the proper law of the contract is the restricting law. A general repudiation of all foreign restrictions would seem particularly unfair where the municipal law of the forum has enacted an exchange control similar to that of the foreign state."

(2) *Lex Loci Solutionis*

The traditional place-of-payment theory likewise plays a role, and has often been resorted to, in this matter. There are English and American cases in which foreign exchange controls were brushed aside mainly because of the rule of *lex loci solutionis* although the contracts were avowedly governed by the legal system of which the exchange control formed a part. The cases of *Grauman v. Treitel* (German law) and *South American Petroleum Co. v. Colombia Petroleum Co.*[85] (Colombian law) are outstanding in this respect. In either case the court based the elimination of foreign exchange control on the theory that the place of payment was London or New York, respectively. In the Grauman case this agreement was the result of misunderstanding on the part of the court as, under the applicable German law, Berlin was the place of payment. Briefly the case is as follows:

> Two partners of a Berlin partnership agreed between themselves that the share of the plaintiff partner, who migrated to England, should be paid in marks in Berlin by defendant partner who remained there. The debtor partner later, himself, moved to England where suit was brought to recover the shares in question. Defendant invoked the prohibition of German foreign exchange controls since the agreement stipulated Berlin as the place of performance.
>
> Held: This defense is untenable because Berlin was not intended to be the sole place of performance. Moreover, having emigrated to England, the partners were no longer bound by German currency restrictions.

In the Colombia case there were two alternative place of payment, Colombia and New York. Hence the emphasis on New York place of payment in order to discard Colombian exchange control was unconvincing in the case of a Colombian debtor.[86]

The majority of American position represents the rule of *lex loci solutionis* or place of performance. As an illustrative example, in the case of *Hartman v. United States*[87] the court did not find

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85 Grauman v. Treitel (1940) 2 All Eng. R. 188, 200 (K.B.) South American Petroleum Corp. v. Colombian Petroleum Co., 177 Misc. 756, 31 N. Y. S. 2d 771 (Sup. Ct. 1941), see also, Kassel v. N. V Nederlansch Amerikaannsche Stoomvaart Maatschappij, 177 Misc. 92, 24 N. Y. S. 2d 450 (Sup. Ct. 1940).

86 Nussbaum, op. cit., pp. 465-466.

87 65 F. Supp. 897 (Ct. Cl. 1946).

any difficulty in holding that aliens who acquired bonds issued in the United States are subject to the law of the United States to the same extent as American citizens. Briefly the case is as follows:

> This claim involved the claim of a non-resident alien for balance on bonds issued and bought in the United States. Executive Orders of 1934 and 1935 effectuating America's relinquishment of the gold standard prevented payment of issued bonds in gold.
>
> Held: The Court of Claims denied recovery of balance in gold, holding that an alien who acquires bonds in United States and subject to the laws of United States becomes, so far as the bond is concerned, subject to the same extent as an American citizen.[88]

(3) *Impossibility of Performance*

Closely connected to the use of the proper law is the rule that impossibility of performance is a ground for refusing exchange controls. Parties, in a regime of exchange restrictions, remain in principle free to conclude contracts and to determine the stipulations thereof. However, exchange controls interfere with private law and restricts contractual freedom: namely, to the extent contractual obligations bear on objects which come within the scope of exchange controls. This gives rise to the problem whether an exchange control regulation which makes impossible the performance of the obligation should be considered valid and enforceable in the court of performance or invalid on the ground that it nullifies contracts entered into freely by the parties.

Impossibility of performance created by foreign law was considered a good defense[89] in common law and was relied upon by German debtors. The leading American case, *Central Hanover Bank v. Siemes and Halske*,[90] (briefly as follows):

> In this case defendant issued bond in U.S. payment to be made in New York. Suit was brought for collection and defendants argued that German exchange law prevented payment and destroyed the means of performance contemplated by the parties.
>
> Held: The German restriction had no application since the contract in general is governed by U.S. law and that payment could be made from funds outside of Germany just as well. Moreover, the fact that the defendants might incur German penalty was immaterial.

and the leading English case of *Kleinwort v. Ungarische Baumwoulle Industrie*[91] both tried hard to overcome this defense.[29] Here the Hungarian defendant company was ordered to pay despite Hun-

88. Cabot, op. cit., 99 U. Pa. L. Rev., 482, 483 (1951).

89 Hug, op. cit., p. 619; cf. Nussbaum, op. cit., p. 475 et seq.

90 15 F. Supp. 927 (S.D.N.Y. 1936) aff'd 84 F.2d 993, cert. denied, 299 U.S. 585 (American assets not affected by German control).

91 (1939) 2 K.B. 678, commented on in 3 Mod. L. Rev. p. 228 and cases in nos. 20 and 24

92 Friedmann, "Foreign Exchange Control in American Courts," 20 St. John's L. Rev., pp. 100-101. See also, Standard Silk Dyeing Co. v. Roseler and Hasslacher Chemical Co. 244 Fed. 250, 252 (S. D. N. Y. 1917); Tweedie Trading Co. v. James MacDonald Co., 114 Fed. 985, 988 (S. D. N. Y. 1902).

garian exchange control to which it was subjected. Briefly the case is as follows:

> The Hungarian debtor corporation sent bills of exchange to the plainntiff, a British firm. The bills were guaranteed by a Hungarian bank which simultaneously provided that payment could not be made unless Hungarian exchange controls at that time made it possible. When the bills matured the Hungarian exchange controls were already in full operation.
>
> Held: The court taking the view that the accompanying letter (providing that payment could not be made unless allowed by Hungarian Exchange control) did not constitute part of the contract and did not limit its clear provisions. The 'proper law of the contract,' a highly emphasized doctrine in English law is that of England and held that such 'proper law' was controlling.

Impossibility of performance, due to a subsequent change of the law, is usually not regarded as an excuse for non-performance if the cause is due to a change in the foreign law. However if the impossibility created by the foreign law is such that failure to excuse non-performance would be oppressive to obligor, the defense would be sustained. Thus, the defendant in *Central Hanover* case claimed that an exception to the rule should have been made where the change in the foreign law destroyed the means of performance contemplated by the parties.

2. *Recognition and Enforcement of Foreign Exchange Controls*

Exchange controls, as mentioned earlier, necessarily intrude on numerous legal relations of private law of an international character. We may also add at this juncture that the commercial practice of trading nations at present has made exchange restrictions as part of a greater body of law — treaty or conventional international law. This brings us into the necessity of recognition and ultimately of the application of foreign exchange controls.

Numerous reasons may be advanced why local courts ought to enforce a foreign exchange law. To preserve the integrity of the contract, legal writers agree that as between the parties the principle of "protecting the justified expectations" should warrant application of a foreign law. This is the raison d'etre too of many *Conflicts* cases dealing with the proper law of contracts.[93] It is not suggested however that the principle of protecting the justified expectations of the parties is the only explanation of the fact that domestic courts occasionally apply a foreign law. In the international sphere, for instance, the policy to assist other friendly nations in the enforcement of their economic and social policies[94]

93 Cf. "Rheinstein," The Place of Wrong: A Study in the Method of Case Law, 19 Tulane L. Rev. 4, 17-2 (1944).
94 Ibid.

has never been completely questioned. In a Swiss case[95] Germany strongly advocated the recognition of her exchange control regulations even if it violated the domestic "ordre public" of Switzerland. The reason the Reichsgericht maintained is that in times of extreme economic emergency the life of the nation stands above the sphere of individual interest and the private owners thereof should not be heard to complain in case of violation. The court however denied recognition but more on the fact that the control was confiscatory than as not being genuine and real.

a) *Recognition Through the Use of Conflict Rules*

(1) *Proper Law of Contract*

Although authorities are not entirely agreed as to the number and significance of the elements of a contract, for conflicts purposes, the four elements usually treated are: formalities, capacity, essential validity, and performance. Most cases involving recognition of exchange control legislations center on the proper law of the two last mentioned elements of contract, i.e., essential validity — what is the obligation, and the place of performance. Various jurisdictions differ in their interpretation of what is essential validity and performance of the contract, but there is reasonable agreement among decided cases that for purposes of applying a foreign law the performance of the obligation under the contract is the controlling element.

In England as typical of cases decided on the application of the proper law, the case of *Zivnostenska Bank National Corp. v. Frankman (1949)*[96] is illustrative. Briefly the case is as follows:

> A Czech national and resident in Czechoslovakia, before 1935, bought in London through a Czech bank with head office in Czechoslovakia, certain debenture bonds issued by a Czech Co., and with his consent these were deposited in London. On his death in 1935 his sister, P.F. who was a Czech national, then domiciled and resident in Czechoslovakia became entitled to them. In 1938 she opened a current account with the Bank's Prague branch and was informed that the bonds which she was the owner, were deposited at the London branch; she was also given the bank's condition of business. Condition 11 was as follows: 'As regards such stock and securities as were purchased at a stock exchange other than that of Prague . . . we shall not have the same sent to us unless the customer has ordered the transmission thereof at his own expense and risk, but will have the same at the risk and expense of the customer, deposited with our correspondent where they shall be subject to the legal measures of the respective country . . . . ' Condition 50 was as follows: 'The place of performance and payment in respect of all obligation resulting from the business connection between us shall be considered to be the place of that department of our establishment which has carried out the relevant transaction . . . ' In March 1939, P.F. came to London, residing there until her death in 1945, when her son H.F. who was residing in England

95 Allegeine Elektrizitaetsegesellschaft. Berlin & Siemes v. Journaliag, Swiss Federal Tribunal, Civil Chamber (1938) 64 II B.G.E. 88; see also, Helbert Wagg Co. Ltd. (1956) 1 Ch. 323.
96 (1950) A.C. 57 (1949).

> and was a naturalized subject became administrator of the estate of P.F. He asked the London branch to deliver the bonds to him. This was refused on the following grounds: ' . . . that H.F. was an "exchange foreigner"; that by Czech foreign exchange law of 1946, an "exchange citizen" (Head office of Bank) could only transfer securities to an "exchange foreigner" with the permission of the National Bank of Czechoslovakia; that since permission is necessary but was refused the London branch can not deliver the bonds.'
>
> Held: The law of Czechoslovakia is the proper law of the contract and since by that law the bank could not legally deliver up the debentures, delivery should therefore be withheld.

In an earlier case decided in the same year, the English court also enforced the exchange control regulations of Czechoslovakia. Lord Simonds in *Kahler v. Midland Bank Ltd.*,[97] said ". . . (I)t is necessary only to say that the relevant law relating to foreign exchange, under which the delivery without a consent that was in fact withheld would be illegal, is not in my opinion a law of such a penal or confiscatory nature that it should be disregarded by the courts of this (England) country. The proper law of the contract is the law of Czechoslovakia and that law may not merely sustain the contract but also modify or dissolve the contractual bond."[98]

Similarly American courts have faced this problem through the application of the proper law of the contract. For instance in the case of *South American Petroleum Corp. v. Colombia Petroleum Co.*,[99] the court held among other things that in matters of the performance of a contract, it is well settled that the law of the place of performance governs the transaction especially with respect to the medium of payment. Thus when the place of performance is optional, the applicable law, when the option is exercised, is the law of the place which the party having the option has chosen. Briefly the case is as follows:

> Plaintiff and defendant are corporations, organized under the law of the State of Delaware. Plaintiff seeks to recover the sum of $81,938.76 with interest, alleged to be due to him pursuant to the terms of a written agreement dated at New York on 29th of April, 1932. This agreement was subsequently translated into Spanish and was registered in Colombia. The contract provided that the payments were to be made by plaintiffs in pesos (or kind) in Colombia, or in American dollars in New York, at the option of the plaintiff. The sole defense interposed is based on the foreign exchange control laws of Colombia by virtue of which it is claimed that the defendants is prohibited from making the payment to the plaintiff in American dollars.
>
> Held: The claim urged by the defendant that property rights having a situs in Colombia should be governed by Colombian law is untenable. The terms of the contract between plaintiff and defendant

97 (1949) 2 All.E.R 621 (1950) A.C. 24 (1949).

98 Ibid., in this case certain exchange control regulations of Czechoslovakia which had in effect been in force since 1934 made unlawful without the permission of the Czechoslovakian National Bank transfer of foreign securities from (among other cases) currency "inlanders" to currency "foreigners."

99 177 Misc. 756, 31 N. Y. S. 2d 771 (1941); see also, Restatement, Conflict of Laws, Sec. 356 & 364.

> gives the plaintiff a right . . . and whether or not the contract as a whole in its interpretation and significance is governed by Colombian law or New York law, it is manifest that insofar as it requires performance to any extent by the defendant in New York, that aspect of defendant's obligation is governed by the New York law. The result is that plaintiff was entitled to be paid in American dollars.

In *Hartman v. United States*,[100] the American court did not find any difficulty in holding that aliens who acquired bonds issued in the United States are subject to the same extent as American citizens. Likewise in "passage money" cases, where plaintiff, a refugee, purchases a ticket from defendant, a steamship company, entitling him for passage from Europe to New York, and thereafter passage is cancelled because of war, the numerical weight of authority is in favor of sustaining the defense of exchange controls.[101]

Decisions on the choice of law in this connection have also arisen when the restricting exchange control law in question is the same law of the forum. The fact that contact, directly or indirectly, is present with a foreign law does not altogether alter the rule that the municipal law is superior. The application of exchange restriction in this situation is generally accepted under the rule of *lex fori*. Certain limitations of course are imposed by the "due process" clause and related provisions of the constitution of the state concerned, but beyond this the only standards are those imposed by international law.

(2) *Intention of the Parties*

When the choice of the proper law is attended with conflicting points of contact such that reliance on *lex loci contractus* or *lex loci solutionis* and other rules becomes unsafe, the law governing the intention of the parties should rightfully be sought. The intention of the parties, if there is no stipulation to that effect, must be ascertained in each case on a consideration of the terms of the contract, the situation of the parties and generally on all the surrounding facts of the contract.[102]

The English court in *In Re: Russo-Asiatic Bank*[103] held that "although as a general rule the location of the simple contract debts is the place in which the debtor resides or can be found, that rule does not apply here where the obligation is in terms to pay sterling in London." It is to be noted that in this case the debtor resided both in Russia and England, and in those circumstances it was a perfectly accurate statement of the law, whatever interpretation is to be placed on the contract that the intention of the parties was to have its performance in London.

100 Ibid., p. 24.

101 E.g., Lowenhardt v. Compagnie General Transatlantic, 35 N. Y. S. 2d 347 (Sup. Ct. 1942), but many cases have reached the opposite result, e.g., Bleiweiss v. Cunard White Star Ltd., 34 N. Y. S. 2d 172 (Sup. Ct. 1942); see also, Welden, "Foreign Exchange Restrictions," Contemporary Law Pamphlet; Meyer "Recignition of Exchange Control," 62 Yale L. J. 872.

102 Mount Albert Borough Council v. Australian Temperance Society Ltd. (1938) A.C. 224, 240 (1939).

103 [1934] 1 Ch. 720, 737, 738.

In the United States, the ship passage cases[104] mentioned above indicate reliance placed by American courts on the intention of the parties. On the question of whether refund was to be made in view of the cancellation of the journey as a result of the outbreak of the war in dollars or in original currency on blocked accounts was decided by the trial courts in favor of the plaintiff. On appeal, the Appellate Courts reversed the lower courts and granted summary judgment for defendants. The theory underlying most of these decisions according to Friedman[105] was that the parties themselves made the law of the restricting country the law of the contract, thus the courts on the whole, felt compelled to apply the restriction (usually German exchange control laws), however "objectionable" they were found to be.

(3) *Time of Imposition*

While not often explicitly referred to, the time of imposition of the regulation in relation to the transaction in question has a discernible bearing on its application. Professor Domke demonstrates that the court more often refuse application to a later restriction than apply it, and more often apply an earlier restriction than refuse application.[106] Sometimes the issue in the application of a subsequent law may take the nature of an "ex post facto" regulation for which local courts are generally insulated, nevertheless unless the foreign exchange restriction is clearly penal, confiscatory or revenue, as the German moratorium law of 1933 was often times interpreted, extraterritorial response seems to be indicated.

b) *Recognition Under Customary International Law*

In the last analysis, however, despite controversy among legal writers as to the ultimate effect of foreign exchange laws, the reasonable attitude should be in favor of their recognition.

The courts must recognize the right of every foreign state to protect its economy by measures of exchange control and by altering the value of its currency. Effect must be given to those measures where the law of the foreign state is the proper law of the contract or where movables are situated within the territorial jurisdiction of the restricting state. That, however, is subject to the qualification that this court is entitled to be satisfied that the foreign law is a genuine foreign exchange law, that is, a law passed with the genuine intention of protecting its economy in times of

104 E.g., Eck v. N. V. Nederlandsch Amerikaansche, 183 Misc. 691, 52 N.Y.S.2d 367 (Sup. Ct. 1944); Baer v. United States Lines Co., 180 Misc. 456, 48 N.Y.S.2d 212 (Sup. Ct. 1943).

105 Friedmann, op. cit., pp. 106-107

106 Domke, "Foreign Exchange Restriction" (A Comparative Survey) 21 J. Comp. Leg. (3d Series) 54 (1939), cited by Meyer,, 62 Yale L.J. 871 n. 15.

national stress and for the purpose of regulating (inter alia) the rights of foreign creditors, and is not a law passed ostensibly with that object, but in reality with some object not in accordance with the usage of nations.[107]

c) *Recognition Under the Bretton Woods Agreement On International Monetary Fund*

(1) *Case Law*

Postwar decisions display a distinctively more tolerant approach to the problem of exchange control. There seems to be three reasons for this attitude. First, funds held abroad and withdrawn from foreign creditor had ceased to be used for economic warfare. Consequently, the argument for denial of extraterritorial recognition of exchange control laws for that particular reason, became obsolete. Secondly, financial difficulties not only continued in countries to introduce such measures. Thirdly, assimilation of these restrictions to the International Monetary Fund Agreement, giving it thereby legal recognition.[108]

The Agreement has the effect of a multilateral treaty between signatories. It had become part of the corpus juris of the signatory countries.[109] Municipal courts of some of the signatory members have already resorted to the Fund provisions in upholding the validity of foreign exchange controls. Thus, in *Kraus v. Zivnostenska Banka,*[110] the first post war case, dated June 19, 1946, the New York Supreme Court specifically referred to the Bretton Woods Agreement in dismissing the usual argument against the extraterritorial enforcement of foreign exchange law by holding that such laws have been "almost universally adopted," and points out that both countries involved, namely, United States and Czechoslovakia, are parties to the Bretton Woods Agreement which recognize the necessity of such law. Briefly the case is as follows:

> Prior to the invasion of Czechoslovakia by Germany, plaintiff deposited in Prague, with defendant, a Czechoslovakian Bank, certain money and securities pursuant to deposit contracts. In this action to recover value of securities and for money had and received, defendant's answer sets forth affirmative defenses to the effect that the contracts were made in Prague, Czechoslovakia, and were here to be performed. The laws of Czechoslovakia before and at the time of the contract forbade a resident of the country, such as defendant, from making any payment to a non-resident, such as plaintiff, without a permit from the foreign exchange control authorities and that no such permit has been granted.
>
> Held: Defendant's office in Prague, Czechoslovakia, is the place of performance and the place of payment agreed to by the parties themselves, and therefore the liabilities arising therefrom should be

107 In re: Helbert Wagg Co., Ltd. [1956] 1 Ch. 323.
108 Fiedmann, "Foreign Exchange Control in American Courts," 26 St. John's L. Rev. pp. 108-105
109 E.g., United States by Virtue of 59 Stat. 512 (1045), 22 USCA Sec. 286 K (Supp. 1950).
110 187 Misc. 681. 685, 64 N.Y.S.2d 208 (Sup. Ct. 1946.)

> governed by Czechoslovakian law. Accordingly, under the terms of the contract and the exchange control laws then in force (which is " . . . unanimously accepted . . . and the Bretton Woods Agreement to which both the United States and Czechoslovakia were parties), the plaintiff fails to state a cause of action and defendant is granted summary judgment.

Shortly after the *Kraus* decision another case came up involving this time the Belgian exchange restrictions.[111] The court in this case however struck down the restriction on the ground that it was confiscatory. Two other cases[112] may be cited as holding contrary to the intent of the Agreement. But the ratio decidendi of these cases do not warrant a complete repudiation of the principle of recognition enshrined in the Agreement.

Notwithstanding the vacillation of the courts toward a more liberal interpretation of the Fund Agreement, the New York Court of Appeals came down in January 1953, with a decision in *Perutz v. Bohemian Discount Bank*[113] in a stronger application of the treaty. Briefly the case is as follows:

> This case involved a pension payable by its terms in Czechoslovakia by a Czechoslovakian company. The plaintiff had worked for the company in Czechoslovakia, but moved to the United States. Czechoslovakian exchange control laws forbade the payment except in Czechoslovak money in that country. The plaintiff attached properties of the defendant company in the United States and sought a judgment in dollars.
>
> Held: Recovery can not be granted.

The court said "... (A) contract made in a foreign country by citizens thereof and intended by them to be performed there is governed by the law of that country . . . . (O)ur courts, however, may refuse to give effect to a foreign law that is contrary to (our) policy . . . but the Czechoslovakian currency control law in question cannot here be deemed to be offensive on that score, since our Federal government and the Czechoslovakian government are members of the International Monetary Fund Agreement established at Bretton Woods." The plaintiff's claim was dismissed, the court holding that under Czechoslovakian law plaintiff can not recover.

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111 Marcu v. Fisher, 05 N.Y.S. 2nd 892 (Sup. Ct. 1046)

112 Cernak v. Bata Ackiova Spolenost, 80 N.Y.S.2d 782 (Sup. Ct. 1948), aff'd mem., 275 App. Div. 919, 90 N.Y.S.2d 680 (1949), and Perkinds v. DeWitt, 107 Misc. 869, 94 N.Y.S.2d 177 (Sup. Ct. 1950).

113 304 N.Y. 533, 537, 110 N.E.2d 6 (1053). Note, Friedmann, op. cit., pp. 110-11, "... in the Cernak case," plaintiff sued on a settlement made with the defendant with regard to claims for services performed. True, dicta in the opinion certainly did not favor foreign exchange control; still, it would seem that the juddgment for the plaintiff did not rest on a refusal to recognize.

114 11Misc. 2d 897, 411, 173 N.Y.S.2d 509 (Sup. Ct. 1958). "The Board of Directors of the Fund have by letter dated August 8, 1957, addressed to the Secretary of the Treasury of the United States, determined that the six (6) Italian decree laws involved in this case have since Italy joined the Fund on March 27, 1947, and particularly during the year 1951, been maintained and imposed consistently with the Bretton Woods Agreement. Although the case was decided squarely under the provisions of the Bretton Woods Agreement, specifically Art. VIII, Sec. 2 (b), it would seem that the court also took into consideration the fact that plaintiff could not recover, as a matter of law, without proving before the court the illegal basis on which his claim is predicated. (underscoring supplied).

In March of 1958, the New York Supreme Court came out in the case of *Southwestern Shipping Corp. v. National City Bank* with an unequivocal affirmation of the binding effect of the Bretton Woods Agreement. The court held " that when both Italy and the United States, are parties to Bretton Woods Agreement which expressly prohibits furnishing assistance to enforcement of any agreement made in violation of the foreign exchange control laws of Italy maintained or imposed consistently with the fund," the agent could not recover from the American bank. Briefly the case is as follows:

> The first Italian entity (Garmoja) paid 23,310,000 lire to an Italian bank for the account of the second Italian entity (Corti). The latter was instructed by the former to transmit $37,272 to a third person (Anlyan) who assigned the dollars to Garmoja's agent, American bank. In an action brought by Anlyan to recover the amount in dollars from American bank, the latter interposed defense of Italian exchange restrictions.
>
> Held: The transaction which is predicted on an illegal Garmoja-Corti agreement under Italian exchange control is also void. Hence, agent can not recover from American bank.

In England a similar trend is noticeable. In the case of *Zivnostenska Banka v. Frankman*[115] (1949), plaintiff sought to recover London sterling issue bonds deposited with the London branch of a Czechoslovak bank. The House of Lords reversing the court of appeals decided against the recovery for the plaintiff. It held that Czechoslovak law was the proper law of the transaction, and that the performance of the contract would involve the doing of an act illegal under the laws of Czechoslovakia. Lord Simonds said, " . . . (I)t was sought to apply to the circumstances of the present case the principle that English court will not apply a penal or confiscatory law of another country, I do not exclude the possibility of this principle applying where it appears that the law, which is sought to be enforced or relied on is in reality confiscatory though in appearance regulatory of currency. But I see no reason why it should be applied in this case of a law which does not differ in material respects from the legislation contemplated in the Bretton Woods Agreement which is now part of the law of this country."

(2) *Interpretation, Effect and Binding Force of IMF Agreement*

For the purpose of determining the effect of the IMF Agreement on exchange controls, the provision of Art. VIII, Section 2 (b) should not be overlooked. It provides:

> 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

115 [1950] A.C. 57 (1949), for facts see supra, p. 38.

> unenforceable in the territories of any member. In addition, members may, by mutual accord, cooperate 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.

The clear effect of this provision is to remove foreign exchange restrictions from the realm of private international law into conventional or treaty International law.[116]

Since the Fund pursuant to Art. XVIII of the Agreement through the Board of Executive Directors has the authority to give official interpretations on the binding efect of exchange control regulations maintained or imposed consistently with the Fund Agreement,[117] countries like the United States and France where treaty is the law of the land, and presumably England, could no longer resort freely to "public policy" in avoiding exchange controls.[118] The policy of all members is now determined by or under the Fund Agreement. It will be noted in the letter to members of unenforceability of exchange contracts, dated June 14, 1946, by A. N. Overly, Acting Chairman of the Executive Board, that,

> . . . the obvious result of the foregoing undertaking is that if a party to an exchange contract of the kind referred to in Article 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 the public policy (ordre public) of the forum, refuse recognition of the exchange control regulations of the other member which are maintained or imposed consistently with the Fund Agreement. It also follows that such contracts will be treated as unenforceable notwithstanding that under the private international law of the forum, the law under which the foreign exchange control regulations are maintained or imposed is not the law which governs the exchange contract or its performance.

Each government that has thus accepted the Fund as the arbiter of policy and of the penalties to be exacted for violation of the policy, can no longer allow its judiciary to interpret the law on extraterritorial effect of Foreign Exchange controls freely beyond the legislative determination of such policy. Given only consistency with the Agreement, no distinction can be drawn among various controls.[119]

IV. CONCLUSION

The law of Foreign exchange controls is a fast growing body of jurisprudence. Borne by economic difficulties of the Great Depression and War years, the system of controls has come to evolve a new concept of law in international relations. As a uninque crea-

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116 Meyer, "Recognition of Exchange Controls After International Monetary Fund," 62 Yale L.J., p. 896. . . .thus the agreement has now superimposed the law of the currency on the pre-existing rules (on private internationa law); of. Mann, "Money in Public International Law," 26 Brit. Y.B. Int't Law, 259, 279 (1949).

117 Meyer, op. cit., p. 897.

118 Ibid.

119 Ibid.

tion of national competence, exchange controls have both the qualities of supremacy of fiscal measure in municipal law, and compulsion of a treaty in international law. Viewed from the broader question of extraterritorial application of legal systems, the law of foreign exchange controls transcends traditional concepts of international law, both private and public. Thus in the field of conflicting and overlapping municipal economic and social principles, e.g., enforcement of foreign tax laws, penal law or tort, monopolistic regulations, and expropriation, the issues although assuming a similar extraterritorial "reach" are not quite controlling on the question of effectiveness of foreign exchange controls.

Appearing in the statutes and case law of many countries, foreign exchange controls are bound to remain, whether we like it or not, at least insofar as the imbalance of world's resources and Foreign Trade exist. Rightfully it may be said that the wisdom for its continuance should cease when its goal is achieved as the case was in Germany a year ago upon the attainment of stability in her foreign trade. But for many of the countries undergoing at present extreme economic and political readjustments the objective is still a matter devotedly to be wished. Hence, it is not farfetched to conlude that exchange controls would reman as a necessary feature of international transactions even in the future.

The Law

Where statutes have given way to more prolific enactments of administrative rules and regulations, as the practice has assumed lately, the force and effect of these control devices are nonetheless widely recognized. Indeed, the United Nation's Monetary and Financial Conference at Bretton Woods have stamped legitimacy to this hitherto questionable pronouncements. Fortunately we can now formulate a general abstract or supposed rule of law based on decisions of different national courts on a subject once reputed to be murky and conflicting.

As it stands today, it need only be said that when an issue involving the extraterritorial effect of a foreign exchange control regulation arises, the court on whose lot the faith of the law depends may review the precedents obtaining in its jurisdiction and be guided accordingly by the authoritative expositions of similar courts in other jurisdictions and legal persuasion.

The Rule In Conflict Of Laws

By and large, the task of enforcing foreign exchange controls lies in the determination by the courts of the applicable substantive law of the exchange contract under private international law. In this connection, a distinction may be made of the different national approaches to the problem.

American courts and *Restatement*[120] alike usually talk in terms of immutable choice of law rule regarding the validity of contracts in *Conflict of Laws*. Thus, the *Restatement* advocates application of the law of the place of contracting or *lex loci contractus* to determine all questions of capacity, formality and essential validity. The language of many American decisions is in accord with this position, others purport to apply the law of performance and still others the law intended by the parties. These differences of opinion as to the ultimate law to be applied are, of course, well known; the decisions however point, with rare exception, that each court uses but one choice of law in deciding all questions of validity for all types of contracts.[121]

On the other hand, according to Lord Wright speaking of English law,[122] "English courts take the view that the proper law of the contract means that law which English courts apply in determining the obligations under the contact. English law in deciding these matters has refused to treat as conclusive, rigid or arbitrary criteria, such as *lex loci contractus* or *lex loci solutionis;* and has treated the matter as depending on the intention of the parties to be ascertained in each case on a consideration of the terms of the contract, the situation of the parties and generally on all surrounding facts. (It may be that the parties have in terms in their agreement expressed what law they intend to govern, and in that case prima facie intention will be effectuated by the court.)[123]

In continental Europe, the application of the *lex loci solutionis* or law of the place of performance to questions of validity and effects of contracts seem reasonably dominant. The foremost champion of this approach is Savigny who contends that a contract has its "seat" at the place where it is to be performed, and that the parties must be deemed to have contracted with reference to the law of the place of performance unless the parties have expressed their intention to be governed by some other laws.[124]

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120 Restatement, Conflict of Laws (1934,

Sec. 333 Capacity to Contract: The law of the place of contracting determines the capacity to enter into a contract.

Sec. 334 Formalities for Contracting: The law of the place of contracting determines the formalities required for contracting.

Sec. 358 Law Governing Performance: The duty for the performance of which party to a contract is bound will be discharged by the compliance with the law of the place of performance of the promise with respect to:

(a) the manner of performance,
(b) the time and locality of performance,
(c) person or persons by whom or to whom performance shall be made or rendered,
(d) sufficiency of performance,
(e) excuse for non-performance.

On the other hand, under Sec. 332, the "nature and extent of the duty for the performance" of the contract shall be governed by the lex loci contractus.

121 See, Nussbaum, "Conflicts Theories of Contracts; Cases versus Restatement," 5 Yale L. Rev. 893 (1942).

122 Mount Albert Burrough Council v. Australian Temperance & Mutual Life Assurance Society, Ltd. [1938] A.C. 224, 230.

123 See, De Geeche v. South American Stores, supra. Cf. Morris and Cheshire, "Proper Law of a Contract in the Conflict of Laws," 56 L.Q.Rev. 320 (1940); Dicey, Conflict of Laws, 579-604 (6th Ed. 1949).

124 Saving, Private International Law (1861), pp. 108-199.

Havinng made a brief survey of the different approaches in some of the legal systems as to what law should regulate the essential validity and effect of contract, it now becomes opportune to consider the question of enforcing or avoiding the exchange control involved. Assuming that the court applies the substantive law of the restricting state as the proper law of the contract, the reasonable inference would be toward sustaining the restriction. However, the exchange control regulation may still be refused for special reasons. For instance, foreign exchange controls have been construed sometimes as revenue laws, penal, confiscatory, discriminatory, retroactive, fiscal or public-administrative, and procedural laws. In the opinion of recognized authorities, foreign exchange laws falling under any one of this categories will be disregarded by American courts.[125] The same may be said with respect to the courts of other countries notwithstanding the fact they have similar foreign exchange controls.

The determination of "public policy" or "order public" of the forum is very crucial to the recognition of foreign exchange laws. While this consideration vary from one country to another and in some cases often conflicting within one and the same country, the general trend of decisions in case of conflict is to deny application. This is so notwithstanding comity between nations and for that matter membership in the Fund Agreement. Whether or not recognition of a specific foreign exchange law violates the public policy of the forum depends on the question of what public policy is, both in its general theoretical sense, and in its local and actual meaning.[126]

In Switzerland, for instance, the Federal Tribunal has shown considerable restraint in defining this concept of "ordre public." It was stated in a case " . . . that the concept can not be defined but its function can nevertheless be stated quite definintely: the "ordre public rule" brings about the application of foreign law in instances where the latter would normally be applicable but domestic concepts of due process would thereby be unduly offended."[127] The same result is attained by French judicial practice, though in a different manner and to a greater extent. Thus French courts have on occasions refused to give effect, as being contrary to their conceptions of public policy, to foreign confiscatory legislation even when not contrary to International Law and even when affecting solely the nationals of the legislating country within its territory.[128]

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125 For a review of arguments against extraterritorial recognition of foreign exchange restrictions and their sources, see Rashba, "Foreign Exchange Restrictions and Public in Conflict of Laws," 41 Mich. L. Rev. 2709 (1942-43).

126 Friedmann, op. cit., p. 155.

127 B.G.E. 41 II 141

128 See, e.g., Union des Republiques Socialistes Sovietiques V. Intendant General, Sirey, 1920, Part I, p. 217; Annual Digst 1927-28, Case No. 43 (and the comment thereon and other similar cases by Domke in A.J. 36 (1942), pp. 26-29); Societe Potasas Ibericas v. Nathan Bloch, Dallos, 1939, p. 329; Annual Digest, 1938-40, Case No. 54.

129 224 N.Y. 99 111, 120 N.E. 198, 202 ((1918).

In the United States, Judge Cordozo in *Loucks v. Standard Oil Co.*,[130] said " . . . that the broad principle that a foreign law should not be applied if in doing so . . . some fundamental principle of justice, some prevalent conception of good morals, some deep rooted tradition of the commonweal . . . would be violated." In England, it was held in the case of *Boucher v. Lawson*,[131] that the interest of English trade is sufficient consideration of public policy to avoid a Portuguese gold export restriction.

Under Public International Law

Any discussion of Foreign Exchange Controls innevitably brings forward certain accepted usages of nations. It is often maintained as an elementary principle of international law that the courts of one state do not, as a rule, question the validity or legality of the official acts of another sovereign state insofar as those acts purport to take effect within the sphere of the latter state's own jurisdiction. This is based on the well-recognized doctrine of the equality or independence of states. It is not clear, however, whether the rule in question can properly be regarded as a rule of Public International Law or whether it belongs to the province of Private International Law. According to Oppenheim there is probably no international judicial authority in support of the proposition that recognition of foreign official acts is affirmatively prescribed by international law.

With the advent of the Fund Agreement the status of Foreign Exchange Controls in internationanl law have considerably been strengthened. Despite controversy among legal writers as to the interpretation and scope of Art. VIII, Sec. 2 (b) of the Fund Agreement, the impact on recognition of foreign exchange laws is clear and convincing. Henceforth, it may be fairly predicted that courts would no longer strike down foreign exchange laws on the basis of public policy indiscriminately. In the words of Fund Circular No. 8, March 15, 1950, "parties entering into exchange contracts involving the currency of any member of the Fund and contrary to exchange control regulation of that member which are maintained or imposed consistently with the Fund Agreement will not receive the assistance of other members in obtaining the performance of such contract, . . . and by accepting the Fund Agreement members have undertaken to make the principle mentioned above effectively part of their national law." The clear implication is that each member state is bound in its own territory to enforce such exchange regulations of other states as have been approved by the Fund; that such regulations are binding on its judicial and administrative authorities, and public policy may no longer be invoked

130 95 Eng. Rep. 53, 12 K.B. (1785).
131 Oppenheim, International Law, Vol. I, 8th Ed., p. 267.

to repudiate them. It is also the manifest intention of the Fund Agreement to make this position universal, and in unmistakeable terms have extended its application even to non-members.

Thus there has been evolved a supposed rule of law for the recognition or non-recognition of exchange control regulations. How much is there in the decisions laid down by the courts measured by the spirit of the Bretton Wood Agreement that can not be avoided, even by a later court that wishes to restrict the rule that it lays down, is in the last analysis the real question.