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ENFORCEMENT OF CONTRACTS VIOLATING FOREIGN EXCHANGE CONTROL LAWS

KEITH L. BAKER*

The International Monetary Fund Articles of Agreement, the most important of the international monetary agreements, was signed at Bretton Woods in 1944 and subsequently enacted into United States law in 1945.[1] One of the fundamental purposes of the Bretton Woods Agreement is "to assist . . . in the elimination of foreign exchange restrictions which hamper the growth of world trade."[2] The Agreement recognizes the legality of certain "exchange controls" imposed by countries facing post-war economic instability to protect their foreign exchange resources. Furthermore, the Agreement contains a provision to prevent the frustration by any member nation of the legitimate exchange controls of another member nation. The provision, Article VIII (2) (b), reads as follows:

> Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member.[3]

Pursuant to Article XX (2) (a) of the Fund Agreement, members have bound themselves to give effect under their domestic laws to the undertaking in Article VIII (2) (b).

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1. 60 Stat. 1401, T.I.A.S. No. 2322, 2 U.N.T.S. 185 (1945) [hereinafter cited as Fund Agreement].

2. Fund Agreement, art. I (i).

3. The Fund Agreement does not define "exchange controls." One commentator has defined "exchange controls" as "laws which control the movement of currency, property or services in order to protect the exchange resources of a country." J. Williams, *Extraterritorial Enforcement of Exchange Control Regulations under the International Monetary Fund Agreement,* 15 VA. J. INT'L L. 319, 352 (1975). Tariffs, trade restrictions, price controls or trading with the enemy regulations are not "exchange controls" within the meaning of Article VIII (2) (b). *Cf.* Brauer & Co. v. James Clark, [1952] 2 All E.R. 497 (C.A.). (This case compares trade regulations and exchange controls.)

Because the Executive Directors of the fund have exercised their right under Article XVII(a) to interpret the provisions of the Fund Agreement only once with respect to Article VIII (2) (b),[4] leaving unresolved many issues of interpretation, and because "exchange contracts" constitute such a large part of international transactions, the latter article has been the subject of a great amount of litigation throughout the world.[5] The courts of various countries differed widely in their interpretations of the term "exchange contracts"[6] as used in Article VIII(2) (b). Furthermore, many courts have continued to utilize private international law concepts, *e.g.*, the public policy doctrine,[7] when deciding whether to recognize a foreign exchange control law. Few courts have actually sought to define which exchange controls are consistent with the Fund Agreement, as required by Article VIII(2) (b).[8]

The present paper analyzes the treatment of Article VIII (2) (b) and exchange contracts generally by the courts of several European nations and of New York state. The analysis proceeds topically and geographically, beginning with the principal case of this paper, *J. Zeevi and Sons v. Grindlays Bank (Uganda).*[9] Analysis of *Zeevi* includes the court's treatment of jurisdictional issues, conflict of laws problems, the Act of State doctrine, and, finally, consistency of the decision with Article VIII(2)(b) of the Fund Agreement.

This treatment of the Bretton Woods Agreement as a subsidiary source of decision-making doctrine is exemplified in *Zeevi*, in which the New York Court of Appeals did, in fact, reach the result dictated by the Bretton Woods Agreement, but only by a circuitous route through choice of law analysis and public policy doctrines. A more direct analytical route — and one required by statute since the Fund Agreement is part of U.S. law — would have involved the direct application of the Bretton Woods Agreement.

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4. See text accompanying note 70 *infra.*
5. See GOLD, THE FUND AGREEMENT IN THE COURTS (1962), [hereinafter, GOLD].
6. *See* Section II A p. 241 *infra.*
7. *See* Section II B p. 251 *infra.*
8. *See* Section II C p. 256 *infra.*
9. 37 N.Y.2d 220, 371 N.Y.S.2d 892, 333 N.E.2d 168 (1975).

I. J. ZEEVI AND SONS v. GRINDLAYS BANK (UGANDA)

A. FACTS

On March 24, 1972, Hiram Zeevi and Company (Uganda), an Israeli corporation, deposited with defendant, Grindlays Bank (Uganda) Ltd., Ugandan currency valued at approximately $406,846, for the purpose of establishing a fund upon which plaintiff, J. Zeevi and Sons, an Israeli partnership, could draw money. On the same date, the defendant bank opened an irrevocable credit for $406,846 in favor of the partnership and issued a letter of credit which provided that the credit of $406,846 was available against clean drafts drawn on the depositor. Banks which negotiated such drafts were authorized to claim reimbursement from the defendant's agent bank, First National City Bank, who would debit the amount from the defendant's account with First National. The letter of credit specifically stated that: "We guarantee the payment of drafts drawn in conformity with the terms and conditions stated."

On March 28, 1972, officials of the Bank of Uganda, acting with the authority of the Minister of Finance under the Exchange Control Act of Uganda, notified the defendant that foreign exchange allocations in favor of Israeli companies and nationals should be canceled and, accordingly, ordered it to make no foreign exchange payments pursuant to the credit in favor of H. Zeevi and Company. Subsequently, the defendant notified the agent bank, First National, not to effect payment against any further drafts drawn under the letter of credit. The defendant also notified the plaintiff of this action. On December 28, 1972, Chemical Bank, which had negotiated drafts for the entire amount of the credit, presented them to First National. On January 19, 1973, First National returned the drafts unpaid to Chemical Bank.

The partnership, beneficiary of the letter of credit, commenced an action in the Supreme Court of New York by an order of attachment whereby the defendant's funds with First National were attached. The supreme court denied the defendant's motions to dismiss the complaint and vacate the attachment and granted the plaintiff's cross-motion for partial summary judgment. After the appellate division affirmed, the defendant appealed to the court of appeals, arguing that: (1) the complaint

should be dismissed because the New York courts lacked subject matter jurisdiction; (2) the law of the Republic of Uganda was applicable to the case and required dismissal of the complaint; (3) the decision below was contrary to the Act of State Doctrine; and (4) the decision below violated the Bretton Woods Agreement.

B. HOLDING

1. *Jurisdiction*

The court of appeals first held that the New York courts had subject matter jurisdiction over the case.[10] This holding was based on section 200-b(2)(c) of the New York Banking Law, which provides, in pertinent part: "an action against a foreign banking corporation may be maintained by another foreign corporation or foreign banking corporation or by a nonresident in the following cases only . . . (c) where the cause of action arose within this state, ..."[11]

The court held that the cause of action arose within New York since the defendant's cable countermanding payment took effect upon receipt by First National in New York. Earlier cases supported this view by stating that "a cause of action arises where that is done which should not be done."[12] That which was done which should not have been done was the repudiation of the letter of credit; the defendant had a contractual obligation to honor the letter of credit according to its terms.

2. *Conflict of Laws*

a. Choice of Law

The court of appeals next held that choice of law principles required that New York law be applied to the transaction.[13] In

10. *Id.* at 225–26, 371 N.Y.S.2d at 897–98, 333 N.E.2d at 171–72.

11. N.Y. BANKING LAW § 200-b(2)(c) (McKinneys 1970).

12. Gonzales v. Industrial Bank of Cuba, 12 N.Y.2d 33, 38, 234 N.Y.S.2d 210, 212, 186 N.E.2d 410, 412 (1962).

13. 37 N.Y.2d 220, 226–28, 371 N.Y.S.2d 892, 898–99, 186 N.E.2d 168, 172–73.

support of this choice of governing law, the court invoked the "governmental interest" test, which it summarized as follows:

> [T]he rule which has evolved clearly in our most recent decisions is that the law of the jurisdiction having the greatest interest in the litigation will be applied and that the facts or contacts which obtain significance in defining State interests are those which relate to the purpose of the particular law in conflict. (*Intercontinental Planning v. Daystrom, Inc.*, 24 N.Y.2d 372, 383)[14]

The court held that New York law should be chosen since, as a financial capital of the world, New York had a paramount interest in applying its own law to the determination of rights under a letter of credit payable in New York, insofar as the parties to such an instrument expect the New York courts to uphold their rights thereunder.

b. Public Policy

The court of appeals stated that even if choice of law principles did not dictate that New York law governed, recognition would not be given to the Ugandan law in any event, since it was contrary to the public policy of New York.[15] The court stated that laws of foreign governments have extraterritorial effect in New York only by comity. Where the application of comity conflicts with a New York court's sense of justice and equity as embodied in public policy, public policy would prevail and New York law would be applied. The court then found that the act of the Ugandan government rendering the letter of credit unenforceable in Uganda was confiscatory and discriminatory and would not be acquiesced in by the New York courts.

3. *Act of State Doctrine*

The defendant also argued that under the Act of State Doctrine, the petitioner's compliance with the directives of the Ugandan government constituted a complete defense to the plaintiff's action for breach of contract. Under the Act of State Doctrine, the courts of this country cannot question an act of a

14. *Id.* at 226–27, 371 N.Y.S.2d at 898, 186 N.E.2d at 172.
15. *Id.* at 227–28, 371 N.Y.S.2d at 899, 186 N.E.2d at 173.

recognized foreign nation, no matter how grossly that sovereign has transgressed its own law and no matter how repugnant to the laws of the forum.[16] This doctrine, however, applies only when a foreign government acts with regard to property that has a situs within its borders.

The court held that the present case involved a debt which First National City Bank owed to the defendant since that debt had been the basis for the writ of attachment instituting the suit. Clearly, this debt was "located" within the territorial limits of New York and not Uganda, since New York alone had the power to enforce and collect it. Thus, since the Ugandan state action was with respect to a debt located outside of its borders, the Act of State Doctrine did not require New York courts to recognize it.[17]

4. *Consistency with Article VIII(2)(b) of the Fund Agreement*

The most important holding of the court of appeals, for the purposes of this analysis, was that the enforcement of the letter of credit arrangement did not violate Article VIII (2) (b) of the Fund Agreement, even though such enforcement would contravene Ugandan exchange control laws.[18] The court based this decision on its finding that the transaction in question was outside the scope of Article VIII (2) (b). The court found that the letter of credit arrangement was not an "exchange contract" within the meaning of the term as used in Article VIII (2) (b).

II. FOREIGN COURTS AND ARTICLE VIII (2) (b)

A. DEFINITION OF "EXCHANGE CONTRACT"

Article VIII (2) (b) of the Fund Agreement precludes the courts of a member state only from enforcing "exchange contracts" that are contrary to a foreign exchange control imposed by a member state and consistent with the agreement. Thus a court, in assessing its obligation under Article VIII (2) (b) in a

16. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 416 (1963); French v. Banco Nacional de Cuba, 23 N.Y.2d 46, 52, 295 N.Y.S.2d 433, 439, 242 N.E.2d 704, 708 (1969).
17. 37 N.Y.2d at 228, 371 N.Y.S.2d at 900, 333 N.E.2d at 174–75.
18. *Id.* at 228–29, 371 N.Y.S.2d at 900, 333 N.E.2d at 174.

particular case, must first determine whether the transaction in issue is an "exchange contract."

Unfortunately, the Fund has never rendered a formal interpretation of the term "exchange contract."[19] Consequently, courts of all member nations have had to decide for themselves the proper interpretation of this term, determining the scope of applicability of Article VIII(2)(b). Courts and commentators have followed two differing interpretations: (1) a narrow interpretation, based on a literal definition of the term "exchange contract;" and (2) a broad interpretation, based on the policies intended to be furthered by the Fund Agreement.

The narrow interpretation limits the term "exchange contract" to contracts, as defined in law, which have as their immediate object the exchange of one currency or international medium of payment for another.[20] This interpretation thus excludes contracts involving securities or merchandise, as well as transfers and assignments of tangibles and intangibles.[21] The narrow interpretation is supported by the argument that had the drafters intended a different meaning they would simply have used the term "contract."[22]

The broad interpretation, on the other hand, holds that "exchange contracts" are those contracts which "in any way affect a country's exchange resources."[23] That is, an exchange contract is a contract which would, when performed, increase or decrease, in an economic sense, the amount of foreign exchange or other international reserves that are under the control of the country whose currency is involved. This interpretation includes contracts for the exchange of one currency for another, as well as transnational contracts for the sale or purchase of goods or services and international loan agreements, including contracts

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19. While the court in *Zeevi* did render an interpretation of Article VIII(2)(b), this interpretation dealt only with the effect of that provision on domestic law and not with the interpretation of its terms, *e.g.*, "exchange contracts." *See* note 93 *infra* and accompanying text.

20. *See* Nussbaum, *Exchange Control and the International Monetary Fund*, 59 YALE L. J. 421, 426 (1950).

21. *Id.*

22. *Id.*

23. *See* Mann, *The Private International Law of Exchange Control under the International Monetary Fund Agreement*, 2 INT'L COMP. L. Q. 97, 102 (1953).

providing for the transfer of securities from a resident to a non-resident.[24] The broad interpretation is supported by the argument that only such an interpretation can give effect to the basic purpose of the Fund Agreement, "to promote international monetary cooperation."[25]

The remainder of this section analyzes the approach taken by courts of several European countries to the task of interpreting the term "exchange contracts" in Article VIII (2) (b). Since most decisions have been sparse on the rationale for the interpretation chosen, the main emphasis is on the particular factual context in which the court decided whether to apply Article VIII (2) (b).

1. *Federal Republic of Germany*

Lessinger v. Mirau,[26] decided by the Schleswig-Holstein Court of Appeal on April 1, 1954, adopted a broad interpretation of the term "exchange contract," as used in Article VIII (2) (b) of the Fund Agreement. In that case, the parties, both Austrian citizens, concluded a contract in Vienna under which the defendant promised to pay the plaintiff 30,000 Austrian schillings, in monthly payments, in return for a loan to be made by the plaintiff in that amount. The defendant actually received from the plaintiff one thousand U.S. dollars, the equivalent of the Austrian currency referred to in the contract. When the defendant refused to pay back the loan, the plaintiff brought suit in Germany, where the defendant had relocated, claiming the equivalent in German currency of one thousand U.S. dollars.

The defendant argued that the contract could not be enforced by the German court since Austrian exchange control regulations prohibited the export of foreign exchange without a license and in the present case one thousand U.S. dollars had been exported from Austria as a result of the transaction underlying the defendant's promise to pay.

The German court concluded that it was bound not to enforce the contract due to Article VIII (2) (b) of the Fund Agreement.

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24. *Id.*

25. Fund Agreement, art. I (i).

26. [1955] INT'L L.R. 725 (1954). The case is discussed in 5 *Jahrbuch fur Internationales Recht* 113 (1955); GOLD, *supra* note 5, at 90–94.

Regarding the definition of the term "exchange contract," the court stated:

> Undoubtedly, the contract of loan is a contract in the sense of Article VIII .... It is also an exchange contract within the meaning of this provision. *Exchange contracts are contracts which affect the currency of a member*. ... This interpretation is the only one compatible with the purpose of the regimentation of foreign exchange resources.[27]

Thus the Schleswig-Holstein Court of Appeal adopted a broad interpretation of the term "exchange contracts" as used in Article VIII (2) (b).

Also in 1954, the Commercial Court of Hamburg, in a case known as the *Clearing Dollars Case*,[28] implicitly accepted the broad interpretation of an "exchange contract" adopted in *Lessinger v. Mirau*.[29] In the *Clearing Dollars Case*, the Belgian defendants had entered into an agreement with the plaintiff, a Hamburg firm, for the purchase from the latter of chemicals at the price of 46 U.S. Clearing Dollars per 1000 kilograms, payable under Belgian-West German Clearing. When the defendants failed to purchase the chemicals, the plaintiffs brought suit in Germany. The defendants argued that the suit must fail since the defendants had never obtained an import license from the Belgian authorities as required under Belgian law.

The court, basing its decision not to enforce the contract squarely on Article VIII (2) (b), adopted the broad interpretation of the term "exchange contract." The court stated that "[t]he present purchase contract is one which, if it were fulfilled, would involve the foreign exchange holdings or the currency of a member country, i.e., Belgium."[30]

Even if the court had not made the above statement, it would have been apparent from the transaction involved, *viz.*, the sale of goods for currency, that the court had rejected the narrow interpretation of the term "exchange contract" which requires

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27. [1955] INT'L L.R. 725, 727 (1954).
28. [1955] INT'L L.R. 730 (1954) [discussed in GOLD, *supra* note 5, at 82–86.]
29. [1955] INT'L L.R. 725 (1954). *See* text accompanying notes 26–27.
30. [1955] INT'L L.R. 730, 731 (1954).

that the immediate purpose of the contract be the exchange of the currency of one state for that of another.

In a 1959 case, the Court of Appeal of Hamburg retreated somewhat from German courts' earlier adoption of the broad interpretation of the term "exchange contracts."[31] A German company contracted to sell to the defendant, a resident of French-controlled Saar Territory, pinball machines in return for payment in deutsch marks. When the defendant refused to pay after receiving the pinball machines in Saar, the plaintiff brought an action in a German court for the purchase price. The defendant argued that the court should not enforce the contract since payment by the defendant in deutsch marks would violate French exchange control laws.

The court first held that the contract was for delivery in Germany and thus was not affected by the exchange control laws of French-controlled Saar. While this holding was determinative, the court went on to find that no "exchange contract" was involved in this case. The court stated

> [E]ven if one accepts a broader interpretation and includes under "exchange contracts" all transactions that in any manner affect the exchange holdings of a member country, this concept does not cover *per se* the sale of goods for money. If as in the case in question the contractual commitment of the nonresident is solely a money debt without the debtor being required to make payment in a particular manner that would affect the exchange holdings of the country, there can even under the broadest interpretation of the term be no question that an international purchase of goods is not an "exchange contract" pursuant to Article VIII.[32]

Thus the court placed its own limiting interpretation of the broad interpretation of the term "exchange contract" by opining that a contract for the sale of goods for money does not "affect the exchange resources of a foreign country" if it merely places a pecuniary obligation on a resident of that foreign country without specifying the currency of payment.

31. Judgment of July 7, 1959 (unpublished), in [1958–59] E. DROBNIG, SUMMLUNG DER DEUTSCHEN ENTSCHEIDUNGER ZUM INTERZONALEN PRIVATRECHT No. 135A, at 369. [discussed in Gold, *IMF Agreement in the Courts-VIII*, in INTERNATIONAL MONETARY FUND STAFF PAPERS 457, 457–65 (Nov. 1964).]

32. *See* GOLD, *supra* note 31, at 458.

2. *France*

The most significant French case interpreting Article VIII (2) (b) is *Moojen v. Von Reichert*,[33] decided by the Court of Appeals of Paris (First Chamber) on June 20, 1961. The case involved an action by Mrs. Moojen, the widow of Mr. Moojen, to obtain execution in French courts of a judgment rendered by a Dutch court declaring that an assignment by Mr. Moojen, allegedly a Dutch national, of shares of stock in a French corporation to one Mrs. Von Reichert, a German citizen, was null and void. Mrs. Moojen argued that the assignment was void since it violated Dutch exchange control laws which required Dutch residents to obtain a license before they disposed of foreign assets.

The French court held that an "exchange contract" does not necessarily mean a contract for the exchange of one currency for another. Rather, the test of whether a contract is an "exchange contract" is whether the contract affects the exchange resources of that member. The court explained its holding as follows:

> The Bretton Woods Agreements have as their principal purpose, in accordance with the terms of Article I "To promote international monetary cooperation"; it is therefore necessary, in order to insure maximum effectiveness for this collaboration, to examine whether the contract can have a prejudicial effect on the financial situation of the member state; in other words, if it can effect in any way the exchange resources of this country.
>
> There is no doubt that, although the transfer was expressed in French francs, it could have an effect on the Dutch economy, for the Treasury of that country has an interest in the resident's repatriation of the foreign currency obtained after selling the shares for a just price. . . .[34]

Thus the French court adopted a broad view of the term "exchange contract" consistent with the earlier German cases of *Lessinger v. Mirau*[35] and the *Clearing Dollars Case*.[36] The French

33. 89 J. DROIT INT'L 718 (Cour d'appel Paris 1962) [discussed in GOLD, *supra* note 5, at 143–53.]

34. GOLD, *supra* note 5, at 146.

35. [1955] INT'L L.R. 725 (1954).

36. [1955] INT'L L.R. 730 (1954).

case is also not necessarily inconsistent with the 1959 Hamburg Court of Appeal decision[37] which excluded from the definition of "exchange contracts" those contracts which merely established a pecuniary obligation on a nonresident without specifying the manner of payment. In *Moojen,* the contract transferring the stock held by a Dutch resident was specifically denominated in a foreign currency, whereas the contract in the Hamburg case did not specify a particular currency. The contract in *Moojen,* on its face, had the effect of reducing Dutch foreign exchange assets.

3. *Belgium*

In 1953, the Commercial Tribunal at Courtrai, Belgium, in *Emek v. Bossers & Mouthaan,*[38] adopted a narrow construction of the term "exchange contract." The case involved an agreement between Belgian plaintiffs and Dutch defendants granting the defendants an exclusive right in the Netherlands to exploit a patent for a method of manufacturing cork soles, in return for three Belgian francs for each pair of soles manufactured. In an action on the contract, the defendants argued that the court must refuse to enforce the contract because it was contrary to Dutch exchange control regulations.

The court decided to enforce the contract, notwithstanding the Dutch exchange controls. The court supported this decision on several grounds, one of which was that the transaction involved was not an "exchange contract." The court stated that there was no general agreement among the courts that the "exchange contracts" to which Article VIII (2) (b) applied included a normal international contract involving commodities and payable in money. The court expressed in this dictum a reluctance to apply Article VIII (2) (b) in such a way as to interfere with ordinary commercial contracts.

4. *United Kingdom*

The English Court of Appeal in *Sharif v. Azad,*[39] favored a broad interpretation of the term "exchange contract." The plaintiff, Sharif, gave to Latif, a resident of Pakistan, 300 English

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37. *See* note 31 *supra.*
38. [1955] INT'L L.R. 722 (1953).
39. [1967] 1 Q.B. 605, [1966] 3 All E.R. 785.

pounds. In return, Latif transferred to Sharif a check drawn on a Pakistan bank and endorsed in blank in the amount of 3000 Pakistan rupees. Sharif then sold Latif's check to the defendant, Azad, who paid Sharif with a post-dated check for 300 English pounds. Azad then inserted the name of his brother, who was living in Pakistan, as the payee in the Latif check. When Pakistani authorities withheld payment on the Latif check, Azad stopped payment on his check to Sharif. Sharif then sued Azad on the basis of Azad's dishonored check.

The Court of Appeal, in affirming a judgment for the defendant, Sharif, distinguished between two separate transactions: (1) the agreement of Sharif to pay Latif, the maker of the check; and (2) the agreement of Azad, the transferee of the check, to pay Sharif. The court held that the second transaction, that between Sharif and Azad, the parties to the present litigation, was not contrary to Pakistani exchange controls. More significantly, though, the court stated in dictum that the first of these transactions would have been unenforceable pursuant to Article VIII(2)(b) since it was an "exchange contract" that contravened Pakistani exchange control laws.

Lord Justice Diplock stated that the term "exchange contract" should be liberally construed in view of the objects of the Bretton Woods Agreement to protect the currencies of the states who are parties.[40] Lord Denning stated that "[t]he words 'exchange contracts' are not defined, but I think that they mean any contracts which in any way affect the country's exchange resources. The contracts with which we are concerned here all are clearly exchange contracts. They affect the exchange resources of Pakistan and England."[41] Thus both Lord Justice Diplock and Lord Denning affirmatively stated their support for the broad interpretation of the term "exchange contract" as used in Article VIII(2)(b).

However, the transactions which the Justices would have held to be "exchange contracts" might have been so characterized even under the narrow interpretation, since each arguably had as its immediate object the exchange of one currency for another. The first was the exchange of sterling for a check in rupees and

40. [1967] 1 Q.B. at 618, [1966] 3 All E.R. at 789-90.

41. [1967] 1 Q.B. at 613-14, [1966] 3 All E.R. at 787.

the second was the exchange of a check in rupees for a check in sterling.

A subsequent decision by the House of Lords in 1961, adopted a much narrower interpretation of the term "exchange contracts" than that adopted in *Sharif v. Azad*. In *United Railways of Havana v. Regla Warehouses*,[42] "exchange contract" was defined as "a contract to exchange the currency of one country for the currency of another."[43]

Recently, the Court of Appeal, in *Wilson, Smithett and Cope Limited v. Terruzzi*,[44] applied the narrow interpretation of the term "exchange contracts." In that case, the plaintiffs, dealers on the London Metal Exchange, had extended credit to Terruzzi, an Italian resident. Specifically, Terruzzi instructed the plaintiffs to sell short 1200 tons of zinc for three months delivery. When the zinc price continued to rise and the defendant failed to make payments, the plaintiffs bought zinc at the prevailing price and satisfied their obligation to sell on the defendant's behalf, suffering a loss of 195,000 pounds. The plaintiff then sued the defendant in an English court for the loss incurred by them as the defendant's agent. The defendant argued that the English court was precluded by Article VIII (2) (b) from enforcing his contract with the plaintiff since Italian exchange control laws specify that no Italian resident can incur debts without ministerial authority, which the defendant failed to obtain.

The court held that the contract between Terruzzi and the metal dealers was not an "exchange contract" within the meaning of Article VIII(2) (b). Lord Denning made a complete reversal from his earlier statement in *Sharif v. Azad*[45] by stating that the words "exchange contracts" in Article VIII referred only to "contracts to exchange the currency of one country for that of another."[46] He pointed out that it would be inconsistent with the Articles of Agreement to do anything to hinder legitimate contracts for the sale or purchase of merchandise.

Lord Justice Ormond concurred by stating that the primary meaning of "exchange contracts" was "contracts concerned with exchange, with currency."[47] He also stated that "contracts in-

42. [1961] A.C. 1007.
43. [1961] A.C. 1059.
44. [1976] 2 W.L.R. 418.
45. *See* text accompanying note 41 *supra*.
46. [1976] 2 W.L.R. 418.
47. *Id.*

volving securities or merchandise could not be considered as exchange contracts except where they were monetary transactions in disguise."[48]

The third member of the court, Lord Justice Shaw, also accepted the narrow definition of "exchange contracts" by construing the term to mean "the exchange of the currency of one country for that of another." He stated that "contracts of such a nature were not of themselves productive of benefit in goods or services."[49]

The court made it clear that Article VIII(2)(b) was not to be applied in England in such a way as to prevent the enforcement of contracts for the sale of goods or services for currency. The court also indicated in dictum that the only contracts falling within the definition of "exchange contracts" were those for the exchange of the currency of one state for that of another. The only exception indicated by the court was where the transaction was in form a sale of goods or services but was in substance an exchange of the currency of one state for that of another.

The narrow interpretation of the term "exchange contracts" adopted in dictum in *Terruzzi* is clearly contrary to the broad interpretation of the term adopted by the French court in *Moojen*.[50] In *Moojen*, the contract involved the assignment of stock in exchange for currency, not the exchange of one kind of currency for another.

The decision in *Terruzzi* does not conflict with the German court's holding in *Lessinger*,[51] since that case involved a loan of money in one currency to be paid back in another currency. Such a transaction could be characterized as, in substance, the exchange of the currency of one country for that of another.

Terruzzi, however, clearly conflicts with the German *Clearing Dollars Case*,[52] which involved the sale of chemicals in exchange for currency. The fact that the transaction was to be carried out through Belgian-West German clearing does not appear sufficient

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48. *Id.* at col. 5.

49. *Id.*

50. *See* note 33 *supra*.

51. *See* note 26 *supra*.

52. *See* note 28 *supra*.

to make this transaction, substantively, the exchange of one state's currency for another's.

The *Terruzzi* decision is consistent with the 1959 German decision[53] which decided that a contract for the purchase of pinball machines was not an "exchange contract." While the court in the German case purported to retain the broad definition of "exchange contracts," it expressed a reluctance similar to that expressed in *Terruzzi* to apply Article VIII in such a way as to interfere with ordinary commercial contracts.

B. PUBLIC POLICY AND CONFLICT OF LAW

Prior to the Fund Agreement, courts determined whether to give effect to a foreign exchange control law according to their private international law rules. Courts considered exchange control laws as they would any other law affecting the contractual transaction involved, focusing on such factors as where the contract was executed, where the contract was to be performed, and what law the parties had intended to apply to the transaction. Whatever the rule for selecting the governing law, the foreign exchange control law would be recognized only if it was part of the law selected by the forum as the governing law.

Even if the foreign exchange control were acknowledged to be a part of the governing body of law, it might still not be applied if it were contrary to the "public policy" of the forum. This concept was used by courts to deny recognition to laws which they characterized as confiscatory,[54] discriminatory,[55] penal,[56] or revenue.[57] Thus an exchange control law had to pass the dual test of choice of law rules and public policy criteria in order to be recognized in another forum.

Article VIII (2) (b) of the Fund Agreement was intended to provide for greater recognition of foreign exchange control laws

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53. *See* note 32 *supra*.

54. *See, e.g.*, Bollack v. Société Général Pour Favoriser, 263 App. Div. 601, 33 N.Y.S.2d 986 (1st Dep't 1942).

55. *See, e.g.*, Glynn v. United Steel Works Corp., 106 Misc. 405, 289 N.Y.S. 1037 (Sup. Ct. 1935).

56. *See, e.g.*, Matter of Theresie Liebl, 201 Misc. 1102, 106 N.Y.S.2d 715 (Surr. Ct. 1951).

57. *Id.*

than might be allowable under the diverse rules of private international law.[58] In 1949, the Executive Directors of the Fund emphasized this point in their interpretation of Article VIII (2) (b). They stated, in pertinent part, that:

> If a party to an exchange contract of the kind referred to in Article VIII, Section 2(b) seeks to enforce such a contract, the tribunal of the member country before which the proceedings are brought will not on the ground that they are contrary to the public policy (ordre publique) 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.[59]

The remainder of this section analyzes the extent to which foreign courts have actually conformed their decisions to the obligations imposed by Article VIII(2) (b). Particular emphasis is placed on the member's duty not to refuse recognition to a foreign exchange control on the grounds that it is contrary to the public policy of the forum.

1. *Federal Republic of Germany*

Prior to the Bretton Woods Agreement, German courts applied a two-stage analysis in determining whether a foreign exchange control law would be recognized.[60] First, the court decided whether to apply, in general, the German legal system or the foreign legal system to the transaction in issue. This was decided by determining with which legal system the transaction had its most important contacts. If German law was found to

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58. *See* Note, *Foreign Exchange Control in American Courts*, 26 ST. JOHN'S L. REV. 97 (1951); DELAUME, TRANSNATIONAL CONTRACTS 41-51 (1975); Meyer, *Recognition of Exchange Controls after the International Monetary Fund Agreement*, 62 YALE L.J. 867 (1953).

59. INTERNATIONAL MONETARY FUND, ANNUAL REPORT, 1949, Appendix XIV, at 82-3.

60. [1955] INT'L L.R. 725, 726 (1954).

govern, the foreign law was disregarded. If the foreign law governed the transaction, the court would proceed to the second stage of the analysis. The court would determine whether the foreign law was a public law or a private law. If the foreign law was found to be public law, it would not be given effect.

Regarding exchange control laws, in particular, German courts and commentators were not in agreement over whether exchange control laws should be characterized as public or private.[61] Some argued that foreign exchange controls were public law, and consequently excluded from application abroad as a matter of principle, presumably since they were directed toward the governmental objective of protecting foreign exchange reserves. Others argued that exchange controls were private laws since they concerned the effectiveness in private law of unlicensed transactions.

The Federal Republic of Germany joined the Fund on August 26, 1952.[62] Initially, the German courts were reluctant to apply Article VIII (2) (b) of the Fund Agreement. However, in 1954, the Schleswig-Holstein Court of Appeal in *Lessinger v. Mirau*,[63] upheld the application of an Austrian exchange control law on the dual grounds of German public policy and Article VIII (2) (b) of the Fund Agreement.

The plaintiff, seeking enforcement of a contract that was contrary to Austrian exchange control laws, first argued that the Austrian exchange control laws could not have extraterritorial effect. The court quickly dismissed this argument,[64] holding that if such an argument ever had validity, it certainly lost validity in the post-war years of interdependent economies when the extraterritorial applicability of exchange controls was vital for a country to protect its foreign exchange resources.

The plaintiff next argued that the Austrian foreign exchange control law was contrary to German public policy. He argued that foreign exchange control laws, enacted for the protection of a foreign currency, would encroach upon creditors' vested rights and were therefore incompatible with German public policy. The court rejected this argument on two grounds: (1) the Austrian exchange control law was not contrary to German public policy;

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61. *Id.*
62. BGB 1952 II 728.
63. [1955] INT'L L.R. 725 (1954). *See* note 26, *supra*, and accompanying text.
64. *Id.* at 726.

and (2) Article VIII (2) (b) of the Fund Agreement required the enforcement of the foreign exchange control.

The court rejected the plaintiff's public policy argument by pointing out that Germany had analogous exchange control laws and that, after the war, nearly all states enacted some form of regulation of their exchange resources.[65] The court relied on the customary practices of other states and on analogous German laws as a basis for finding that the Austrian exchange control was not contrary to German public policy.

Significantly, the court went on to state that "it is not clear why Article VIII of the Fund Agreement should require the German courts to apply Austrian foreign exchange law in such cases as the one under consideration."[66] The court indicated that it was no longer necessary in all cases to show that the foreign exchange control was consistent with German public policy. At the very least, Article VIII (2) (b) was interpreted as limiting the latitude of a court to find that the exchange controls of a fellow member of the Fund were contrary to German public policy.

In a later case in 1962,[67] the German Supreme Court discussed in some detail the argument summarily dismissed in *Lessinger v. Mirau* that foreign exchange legislation has no extraterritorial effect. The court stated that the foreign exchange legislation of a country is normally only effective within that country's boundaries. However, the court then pointed out that the effect of the Fund Agreement was that: "the member countries have contractually agreed, within the field covered by the agreement, mutually to observe each other's foreign exchange regulations."[68] Thus the German courts will recognize a foreign exchange control law if it comes within the terms of the Fund Agreement. However, if the foreign exchange control is outside of those terms, it will not be given extraterritorial effect in Germany.

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65. *Id.* at 727.

66. *Id.* at 726–27.

67. Gold, *supra* note 31, at 465.

68. *Id.* at 466.

2. *Luxembourg*

A case decided by the Tribunal d'Arrondissement of Luxembourg in 1956,[69] raised the issue of whether a court could refuse on public policy grounds to recognize a foreign judgment applying a foreign exchange control law. Prior to the Fund Agreement, such a judgment could be impeached on the basis that the foreign judgment was contrary to the public policy of Luxembourg. In *Société Filature et Tissage X. Jourdain v. Expoux Heymen-Binter*,[70] proceedings were brought in Luxembourg to obtain execution of a judgment rendered by a French court. The Luxembourg court decided that the French judgment must be enforced even though it was based on French exchange controls. The court, as in the German case previously discussed,[71] based its decision on the dual grounds that Article VIII required recognition of the foreign judgment and that such recognition was not contrary to the public policy of Luxembourg.

The court first held that the French decision must be recognized because of Luxembourg's membership in the Fund. The court stated that:

> [T]he domestic courts are bound by the Fund Agreement and may not refuse to apply exchange control regulations of a member of the Fund which have been created or are being maintained in accordance with this Agreement, for the reason that they go against public policy.[72]

Thus the court agreed with the Fund's interpretation that a state may not invoke its own public policy to avoid recognizing a foreign exchange control meeting the conditions of Article VIII (2) (b).[73]

Notwithstanding the sufficiency of the Article VIII (2) (b) grounds for recognizing the French judgment, the court proceeded to examine the question of whether the foreign judgment offended Luxembourg public policy. The court decided that since Luxembourg was a member of the Fund and the French exchange

69. Société Filature et Tissage X. Jourdain v. Epoux Heymen-Binter, [1955] INT'L L.R. 727 (1956).

70. *Id.*

71. *See* note 67 *supra* and accompanying text.

72. [1955] INT'L L.R. 727, 729 (1956).

73. *See* note 59 *supra* and accompanying text.

control was consistent with the Fund, this alone made the exchange control consistent with public policy.

3. *France*

A subsequent French case[74] went one step further than the Luxembourg case by rejecting traditional public policy analysis in favor of a recognition of the unequivocal mandate of Article VIII(2)(b). The court stated that:

> [I]t results from the text [of the Fund Agreement] that the court cannot deny any effect in these Dutch decisions . . . [founded on Dutch exchange control regulations] on the grounds that they are contrary to French international public policy or that foreign courts failed to observe the rules of French conflicts of laws.[75]

The court did not find it necessary to proceed to make a separate determination of whether the Dutch exchange control was consistent with French public policy, since the court's analysis was dispositive of the issue of the enforceability of the Dutch judgment.

C. CONSISTENCY WITH THE FUND AGREEMENT

Article VIII(2)(b) imposes an obligation on a member to recognize the foreign exchange controls of a foreign country only if that exchange control is "maintained or imposed consistently" with the Fund Agreement. While the Fund has not interpreted the scope of this requirement, it offered in its 1949 interpretation of Article VIII(2)(b) "to advise whether particular exchange control regulations are maintained or imposed consistently with the Fund Agreement."[76]

Courts have differed over what is required to show that a foreign exchange control is "maintained or imposed consistently" with the Fund Agreement. Some courts have held that the Fund must have affirmatively approved the exchange control in question. However, most courts hold that an exchange control is "maintained or imposed consistently" with the Fund Agreement

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74. 89 J. DROIT INT'L 718 (Cour d'appel Paris 1962).

75. *Id.* at 720.

76. *See* note 59 *supra*.

if it is of the general type approved by the Fund Agreement. The Fund Agreement supplies examples of exchange control regulations which may be considered to be consistent with it: "such controls as are necessary to regulate international capital movements"[77]; "restrictions on the making of payments for current international transactions, provided approval of the Fund is obtained"[78]; and "restrictions on exchange transactions with nonmembers or with persons in their territories."[79]

1. *Belgium*

The Commercial Tribunal at Courtrai, Belgium in 1953 considered in *Emek v. Bossers & Mouthaan*[80] the requirement of Article VIII(2) (b) that an exchange control be "maintained or imposed consistently" with the Fund Agreement. The Dutch defendants argued that the court must refuse to enforce the contract between it and the Belgian plaintiffs for rights to exploit a patent because it was contrary to Dutch exchange control regulations.

According to the Dutch Foreign Exchange Control Decree involved in the case, contracts in foreign currency concluded without a previous administrative license were void. However, the decree also provided that if subsequent to the execution of the contract the Netherlands Bank granted a license, then the contract became enforceable.

The court refused to give effect to the Dutch foreign exchange control law and upheld the contract under Belgian law. The court held that Article VIII(2) (b) was not applicable since, *inter alia*, the defendant had not proved that the Dutch exchange control law was "maintained or imposed consistently" with the Fund Agreement. In reaching this conclusion, the court made two assertions: (1) a party who claims that a contract violates a legal provision relating to public policy has the burden of proof; and (2) a party, in order to show that a foreign exchange control law was "maintained or imposed consistently" with the Fund Agreement, must prove that the Fund has "confirmed" the foreign exchange control.[81]

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77. Fund Agreement, art. VI, sec. 3.
78. Fund Agreement, art. VIII, sec. 2(a).
79. Fund Agreement, art. XI, sec. 2.
80. [1955] INT'L L.R. 722 (1953). *See* note 38 *supra* and accompanying text.
81. *Id.*

The court's position on the burden which a party must bear in invoking Article VIII (2) (b) seems incorrect for two reasons. First, Article VIII (2) (b) appears in the Fund as a substantive provision and thus should not require the heavy burden of proof associated with the court-made public policy doctrine. Second, several provisions of the Fund Agreement give members standing authority to impose certain exchange control regulations without the necessity for the member country to obtain confirmation from the Fund that the specific regulation is within the scope of that authority.[82] One such provision is Article XIV of the Fund Agreement, under which members are authorized to "maintain and adapt to changing circumstances . . . restrictions on payments and transfers for current international transaction."

In *Emek,* the Dutch exchange control law in issue appears on its face to have satisfied the conditions of Article XIV for a valid exchange control. However, the Belgian court did correctly point out that the Dutch exchange control law could potentially be applied in such a way as to be contrary to the type of exchange controls allowed by the Fund Agreement, since the law allowed the Netherlands Bank to make a post-execution validation of the contract by merely issuing a license for the transaction. Nevertheless, it would have been preferable for the Belgian court directly to confront the issue of the consistency of the Dutch exchange control law with the Fund Agreement, than to place an unreasonable burden upon the plaintiff requiring him to prove that the Fund, itself, had approved the particular foreign exchange control law involved.

2. *Federal Republic of Germany*

A Hamburg court in the *Clearing Dollars Case*[83] in 1954 established a more liberal test for showng that an exchange control law was "maintained or imposed consistently" with the Fund Agreement. In that case, the court determined that pursuant to its obligation under Article VIII (2) (b) of the Fund Agreement, the court was required to recognize a Belgian exchange control law which invalidated the transaction in issue. With regard to the consistency of the Belgian exchange control law with the Fund Agreement, the court stated:

82. *See* notes 77–79 *supra.*

83. [1955] INT'L L.R. 730 (1954). *See* note 28 *supra* and accompanying text.

> The Belgian foreign exchange control regulations have been maintained in conformity with the Bretton Woods Agreement. In this respect, it would be sufficient if their existence and their nature have been approved by the International Monetary Fund. . . . In view of the fact that similar foreign exchange regulations exist in nearly all countries, the answers must be in the affirmative.[84]

The court, while recognizing that approval by the Fund is one way of establishing that a particular exchange control law is consistent with the Fund Agreement, also recognized that the validity of an exchange control law could be established by customary state practice. This position contrasts with the decision of the Belgian court in *Emek v. Bossers & Mouthaan* since that decision held that the only means of proving that an exchange control regulation was consistent with the Fund Agreement was to prove that the Fund had approved the exchange control.

In 1959, the Supreme Court of West Germany considered the recognition of foreign exchange control laws.[85] The case involved a loan contract entered into between two residents of East Germany. Subsequently, the lender assigned his claim to the plaintiff, a resident of West Germany, who brought suit in West German courts against the defendant, who had become a West German resident. Under an East German exchange control, which was adopted after the contract was executed, but before the assignment, the disposition of pecuniary claims against debtors resident in East Germany required a license from the East German Finance Minister. The court, in deciding not to apply the East German exchange control law, appeared to apply a special meaning to the requirement of consistency with the Fund Agreement when the exchange control involved was that of a non-member of the Fund. It emphasized that since the exchange controls of member states must conform to the Fund Agreement, there is a presumption in favor of their recognition by other members. In contrast, the exchange controls of non-members are entitled to no such presumption and thus any party seeking to have them recognized by the court must prove some special justification.

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84. *Id.* at 731.

85. GOLD, *supra* note 6, at 139–41.

3. *France*

In *Moojen v. Von Reichert*,[86] which involved the assignment of shares of stock in a German corporation to a German national, the Court of Appeal of Paris rejected an argument that only those exchange controls which fit one of the categories specifically mentioned in the Fund Agreement are "consistent" with the Fund Agreement. The Dutch assignor who lived in France obtained a judgment in the Dutch courts declaring the assignment void on the grounds that it was in violation of Dutch exchange control legislation. The defendant argued that the Dutch exchange control was not consistent with the Fund Agreement since it was neither a control on a transfer of capital in the sense of Article VI (3), nor a transfer or payment for current operations as defined in Article XIX (i).

The court rejected the defendant's argument by reasoning that while the Fund Agreement seeks to eliminate restrictions on payments and transfers for current international transactions, it allows members freedom to control other transactions, whether they be regarded as capital transfers or some third category. Thus the court indicated that it considered the categories of exchange controls mentioned in the Fund Agreement as guidelines for determining the extent of a member's freedom to impose exchange controls and not as exclusive limitations.

III. NEW YORK TREATMENT OF ARTICLE VIII (2) (b)

The New York cases dealing with the Bretton Woods Agreement have been decided on both an interpretation of the Agreement and either the choice of law or public policy grounds.[87] After more than seventy-five years of only wavering adherence to the basic purposes and principles of the Fund Agreement, it seemed the New York Court of Appeals was liberalizing its views of the Agreement until the decision in *Zeevi*.[88]

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86. *See* note 33 *supra* and accompanying text.

87. 9 VAND. J. INT'L L. 199 (1976).

88. Williams, *Enforcement of Foreign Control Exchange Regulations in Domestic Courts: Banco Frances e Brasileiro S.A. v. John Doe No. 1, et al.*, 70 AM. J. INT'L L. 101, 106 (1976).

A. DEFINITION OF EXCHANGE CONTRACT

1. *Perutz*

The first case in New York dealing with the problem of the scope of the term "exchange contract" as used in Article VIII (2) (b) of the Fund Agreement was *Perutz v. Bohemian Discount Bank in Liquidation.*[89] In that case, Mr. Perutz, while a citizen and resident of Czechoslovakia, entered into a contract with his employer under which he was entitled to a pension of 6000 Czechoslovak korunas per month. The employer, defendant in this action, had made payments into a Czech bank account. However, Mr. Perutz could not withdraw from this account since Czechoslovak exchange control regulations prohibited payments to nonresidents, in domestic or foreign currency, without a license from the exchange control authorities. The plaintiff, administratrix of the estate of Mr. Perutz, brought the present action by attaching property of the defendant in New York, claiming the amount owed to Mr. Perutz under the pension agreement.

The court of appeals held that the Czechoslovak foreign exchange laws prevented the enforcement of the plaintiff's pension agreement. Commentators on the case have disagreed on whether the decision was actually based on Article VIII (2) (b) of the Fund Agreement, since the court made no explicit mention of that section.[90] Nevertheless, the court did invoke a foreign exchange control law as a reason for not enforcing an ordinary contract of indebtedness. The case was thus significant to the development of an interpretation of Article VIII (2) (b) since the holding was inconsistent with the narrow interpretation of the term "exchange contract." For in *Perutz*, the contract involved was not one for "the exchange of the currency of one country for that of another."

2. *Banco do Brasil*

The court of appeals in *Banco do Brasil, S.A. v. A.C. Israel Commodity Co.,*[91] indicated that it was unwilling to accept the broad construction of the term "exchange contract" in Article VIII (2) (b). The case involved a Brazilian exchange control law which required exporters to surrender to Banco do Brasil, an

89. 304 N.Y. 533, 110 N.E.2d 6 (1953).

90. *See* GOLD, *supra* note 5, at 52–53.

91. 12 N.Y.2d 235, 239 N.Y.S.2d 872, 190 N.E.2d 235 (1963).

instrumentality of the Brazilian Government, all U.S. dollars received by a Brazilian importer, in return for which the importer would receive cruzeiros at the official rate of 90 cruzeiros to the dollar. The plaintiff in this case alleged that the defendants, U.S. coffee importers, had conspired with Brazilian exporters to evade the exchange control law, so that the exporters could exchange the dollars received for cruzeiros at the market rate of 220 cruzeiros to the dollar.

The court of appeals held that the complaint failed to state a cause of action for two reasons. First, Article VIII (2) (b) does not imply an obligation by member states to impose tort penalties on private parties who breach foreign exchange controls. Second, New York courts will not entertain a suit by a foreign sovereign to enforce the revenue laws of a foreign jurisdiction.

While neither of the grounds for the court's decision required an interpretation of the term "exchange contract," the court, in dictum, considered the interpretations of that term. The court made it clear that it rejected the broad interpreation which includes all contracts which affect the exchange resources of a country. The court stated that:

> We are inclined to view an interpretation of subdivision (b) of Section 2 [of Article VIII] that sweeps in all contracts affecting any member's exchange resources as doing considerable violence to the text of the section. It says "involve the currency" of the country whose exchange controls are violated, not "involve the exchange resources."[92]

The court reached its conclusion by making a strictly textual analysis of the term "exchange contracts." It opined that to interpret "exchange contracts which involve the currency" to mean "contracts which involve the exchange resources" was to rewrite the text of the Fund Agreement.

C. ZEEVI

In *Zeevi*,[93] the court of appeals held that a letter of credit arrangement was not an "exchange contract" within the meaning of Article VIII of the Fund Agreement. The court gave little support for its conclusion stating merely that:

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92. *Id.* at 375, 239 N.Y.S.2d at 874, 190 N.E.2d at 236.
93. 37 N.Y.2d 220, 371 N.Y.S.2d 892, 333 N.E.2d 168 (1975).

> In *Banco do Brasil S.A. v. Israel Commodity Co.*, this court frowned on an interpretation of said provision of the Bretton Woods Agreement which "sweeps in all contracts affecting any members' exchange resources as doing considerable violence to the text of the section."[94]

In *Banco do Brasil,* the court was confronted with an ordinary commercial transaction whereby a Brazilian exporter agreed to sell coffee for a fixed sum of U.S. dollars. The courts of Belgium[95] and the United Kingdom[96] have both held that contracts for the sale of goods and services should not be construed as falling within the definition of "exchange contracts." Even the German courts, which generally construe Article VIII(2)(b) broadly, have recognized that to render ordinary commercial contracts unenforceable due to foreign exchange controls would be disruptive of trade and inconsistent with the Fund Agreement.[97]

In contrast, *Zeevi* involved an agreement by the defendant bank to pay dollars, as reimbursement for checks drawn in accordance with the letter of credit, and to debit these amounts against a fund of Ugandan currency which had been deposited by an affiliate of the plaintiff. This contract, then, unlike that in *Banco do Brasil,* had as its immediate effect the exchange of the currency of one state (Uganda) for that of another state (United States).

Under the broad interpretation of exchange contracts, the letter of credit arrangement was clearly an "exchange contract" since it affected the exchange resources of Uganda. But even under the narrow interpretation, the contract should have been characterized as an "exchange contract," for its immediate object was the exchange of the currency of one state for that of another.

The court of appeals in *Zeevi* failed to recognize that, as Lord Denning recently pointed out in *Wilson, Smithett & Cope v. Terruzzi,*[98] a court should look at the substance of the contract and not at its form. The substance of the contract in Zeevi was

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94. *Id.* at 229, 371 N.Y.S.2d at 900, 333 N.E.2d at 174.
95. *See* note 38 *supra* and accompanying text.
96. *See* notes 39–53 *supra* and accompanying text.
97. *See* notes 31–32 *supra* and accompanying text.
98. [1976] 2 W.L.R. 418.

an "exchange contract" under either the broad or narrow interpretation of that term.

B. CONFLICT OF LAWS AND PUBLIC POLICY

1. *Perutz*

In *Perutz v. Bohemian Discount Bank in Liquidation*,[99] the New York Court of Appeals held that a Czechoslovakian exchange control law, which was the governing law under choice of law principles, could not be ignored on the basis that it was contrary to the public policy of New York. Both parties agreed that Czechoslovak law governed the transaction under the private international law of New York. However, the plaintiff contended that the Czechoslovak law should not be recognized, since it was intended merely to protect the Czech economy and was penal, confiscatory and thus, contrary to the public policy of New York.

The court recognized that New York courts may refuse to give effect to a foreign law that is contrary to public policy, even if that law would otherwise be applied as the governing law under choice of law principles.[100] However, the court went on to state that:

> . . . the Czechoslovakian currency control laws 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 established by the Bretton Woods Agreements Act.[101]

The effect of the *Perutz* decision was substantial since the court, by recognizing foreign exchange controls regardless of New York Public Policy, extended an important measure of protection to the dollar assets of other members of the Fund. However, it is not clear upon what aspect of the Fund Agreement the decision was based. The case may have been based on Article VIII (2) (b), although that section was not mentioned. Alternatively, it may have been based on the general effect of United States membership in the Fund. According to the latter reading, it would not be necessary to show, *e.g.*, that an "exchange contract" was in-

99. 304 N.Y. 533, 110 N.E.2d 6 (1953).
100. *Id.*
101. *Id.*

volved in order to argue that the Fund required recognition of a foreign exchange control. However, subsequent cases by the court of appeals have not supported such a broad reading of *Perutz.*[102]

2. *Banco do Brasil*

Banco do Brasil,[103] an instrumentality of the Brazilian government, sued to recover damages resulting from the circumvention of Brazilian foreign exchange regulations by an American exporter. The majority of the court dismissed the complaint on the grounds that even if the contract was within Article VIII (2) (b) of the Fund Agreement, that section did not require a court to enforce a foreign country's exchange control laws but merely to refrain from enforcing an exchange contract not made in compliance with the foreign exchange control law. The court relied upon the well-settled principle of public international law that no country can, by direct action, enforce its foreign exchange control regulations within the territory of another country. The court implicitly distinguished this principle from the private international law doctrine that foreign exchange control regulations which offend the public policy of the forum should not be enforced.[104]

In his dissenting opinion, Chief Judge Desmond stated:

> If there had never been a Bretton Woods Agreement and if this were a suit to enforce in this State the revenue laws of Brazil it would have to be dismissed under the ancient rule most recently restated in *City of Philadelphia v. Cohen* .... But *Cohen* and its predecessor cases express a public policy which lacks applicability here because of the adherence of the United States to the Bretton Woods Agreement. As we noted in *Perutz v. Bohemian Discount Bank in Liquidation,* ... the membership of our Federal Government in the International Monetary Fund and other Bretton Woods enterprises makes it impossible to say that the currency control

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102. Banco do Brasil v. A.C. Israel Commodity Co., 12 N.Y.2d 371, 239 N.Y.S.2d 872, 190 N.E.2d 235 (1963); Zeevi & Sons v. Grindlays Bank (Uganda), 37 N.Y.2d 220, 371 N.Y.S.2d 892, 333 N.E.2d 168 (1975).

103. 12 N.Y.2d 371, 239 N.Y.S.2d 872, 290 N.E.2d 235 (1963).

104. *Id.* at 377, 239 N.Y.S.2d at 875, 190 N.E.2d at 237.

> laws of other member States are offensive to our public policy.[105]

Chief Judge Desmond thus appeared to support a broad reading of *Perutz* concerning the obligation imposed by Fund membership.

3. *Banco Frances e Brasileiro v. Doe*

The most important New York case to date considering the effect of the Fund Agreement on traditional New York conflict of law principles is *Banco Frances e Brasileiro v. Doe.*[106] The New York Court of Appeals declined to apply the doctrine that one state will not enforce the revenue laws of another state. A private foreign bank sued for damages for tortious fraud and deceit and for rescission of currency exchange contracts based on alleged violations of Brazilian currency regulations.

The appellate division found for the defendants, on the principle set forth in *Banco do Brasil* that courts of one jurisdiction do not enforce the revenue laws of another. In effect, the appellate division held that New York courts will not recognize a claim founded on alleged violations of foreign exchange control regulations.

The court of appeals strongly criticized the conflict of laws doctrine that one state does not enforce the revenue laws of another. The court stated that the doctrine is "justifiable neither precedentially nor analytically."[107] The court doubted whether exchange control regulations which control the movement of currency, property or services in order to protect the exchange resources of a country are properly characterizable as "revenue laws" since they do not serve the purpose of producing revenue. However, the court was reluctant to hold that exchange control laws were not "revenue laws" due to the holding in *Banco do Brasil* that the same exchange control law as was involved in the present case was "clearly a revenue law."[108] The court chose instead to hold that the application of the "revenue law" principle in the present case was inappropriate.

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105. *Id.* at 377-78, 239 N.Y.S.2d at 876, 190 N.E.2d at 237-38.
106. 36 N.Y.2d 592, 370 N.Y.S.2d 534, 331 N.E.2d 502 (1975).
107. *Id.* at 599, 239 N.Y.S. at 538, 331 N.E.2d at 505.
108. 12 N.Y.2d 371, 377, 239 N.Y.S. 872, 875, 190 N.E.2d 235, 237 (1963).

The court held that even if an exchange control were a revenue law and even if a state normally did not enforce the revenue laws of another state, the membership of the United States in the Fund made it "inappropriate" to refuse to entertain the present claim which was based on the exchange control laws of a fellow member of the Fund. The court stated that:

> Nothing in the Agreement prevents an IMF member from aiding, directly or indirectly, a fellow member in making its exchange regulations effective. And United States membership in the IMF makes it impossible to conclude that currency control laws of other member states are offensive to this State's public policy so as to preclude suit in tort by a private party.[109]

The court in effect reversed the implication in *Banco do Brasil* that a member state's obligation where its own public policy might conflict with a foreign exchange control is limited strictly to the terms of Article VIII(2)(b). Rather, the court, through an expansive interpretation of a member's duty under the Fund Agreement, allowed a private tort remedy where none was specifically provided for by the Fund Agreement.

C. ZEEVI

The court of appeals in *Zeevi,*[110] while mentioning the defendant's argument that Article VIII required recognition of the Ugandan exchange control law, decided the case primarily on the grounds of traditional choice of law principles. The court approached the problem of determining whether to apply Ugandan exchange controls by first deciding that under New York choice of law principles, New York law governed.[111] The court then went on to decide whether the foreign law should be given extraterritorial application by "comity."[112] The court stated that it would not recognize a foreign law when there was a conflict between that law and the court's own sense of justice and equity as embodied in the forum's public policy.[113] The court then char-

109. 36 N.Y.2d 592, 601, 370 N.Y.S.2d 534, 539, 331 N.E.2d 506.
110. 37 N.Y.2d 220, 371 N.Y.S.2d 892, 333 N.E.2d 168.
111. *Id.* at 226–27, 371 N.Y.S.2d at 898–99, 333 N.E.2d 172–73.
112. *Id.* at 228, 371 N.Y.S.2d at 899, 333 N.E.2d at 173.
113. *Id.*

acterized the Ugandan decree denying foreign exchange allocations to Israeli entities as "confiscatory and discriminatory."[114] Consequently, the court refused to recognize the Ugandan laws since they were contrary to New York public policy.

Only after the court had determined under New York conflict of laws principles that the Ugandan laws would not be given effect did the court consider the defendant's argument that Article VIII (2) (b) applied.

The *Zeevi* case is significant for two reasons: First, the court rejected the expansive interpretation of the obligation imposed by Fund membership which had been alluded to in *Perutz* and specifically mentioned in *Banco Frances*. Second, the court avoided recognizing a foreign exchange control law by applying a liberal choice of law test to determine that New York law governed the transaction in issue.

In *Perutz,* the court of appeals held that U.S. membership in the Fund would make it inconsistent to refuse to recognize a foreign exchange control on the ground that it was contrary to public policy. It was unclear in *Perutz* whether this obligation existed only when the terms of Article VIII (2) (b) were satisfied or whether the obligation derived more generally from the Fund Agreement. The latter view was supported in *Banco Frances* since the court there spoke of the "national policy of cooperation with Bretton Woods signatories."[115] However, the decision in *Zeevi* gave no recognition to the more expansive view of the obligation of Fund membership since the defendant's argument under the Fund Agreement was dismissed by the court as soon as it had decided that the contract involved did not meet the terms of Article VIII (2) (b).

The *Zeevi* case is also significant in revealing the extent to which a New York court will go to avoid applying a foreign exchange control law. The court applied the "governmental interest" choice of law test in determining whether New York or Ugandan law should govern the transaction in issue. The court stated that test as follows:

> [T]he rule which has evolved clearly in our most recent decisions is that the law of the jurisdiction having the greatest interest in the litigation will be applied and that the facts

114. *Id.*
115. 36 N.Y.2d 592, 331 N.E.2d 502, 370 N.Y.S.2d 534 (1975).

> or contacts which obtain significance in defining State interests are those which relate to the purpose of the particular law in conflict.[116]

Applying this test, the court emphasized that checks drawn under the letter of credit were payable in New York in dollars, indicating the trust held by the parties in New York financial policies. As a result, the court stated that New York, as a financial capital of the world, had a dominant interest in protecting the expectations of those persons whose transactions flowed through the New York banks.

The court based its choice of governing law on *Intercontinental Planning v. Daystrom.*[117] In *Daystrom,* New York law was applied to determine whether to enforce an oral contract between a New York broker and a New Jersey corporation whereby the latter allegedly agreed to pay the former a fee for finding a buyer of its assets. Under New York law, the action for a finder's fee would fail since the New York Statute of Frauds requires brokerage agreements to be in writing. Under New Jersey law the action would have succeeded.

The language in *Daystrom* that was relied upon in *Zeevi* was that New York had an interest in applying its own law so as "to protect principals in business transactions from unfounded claims and thereby encourage use of New York as a national and international business center."[118] However, in comparing the governmental interests of New York and New Jersey, there was really a "false conflict."[119] Since New Jersey had *no interest* in protecting the brokers of other states by the application of its more liberal Statute of Frauds.

The *Zeevi* case stands in marked contrast. For in *Zeevi,* Uganda had a strong interest in the enforcement of its exchange control laws since those laws had the effect (though not necessarily the purpose) of protecting Uganda's foreign exchange resources. The strength of this type of interest was recognized in *Banco Frances,* where the court stated that "foreign policy reserves are of vital importance to a country plagued by balance of payments difficulties." Given the strength of the Ugandan "gov-

116. 37 N.Y.2d 220, 226–27, 371 N.Y.S.2d 892, 898, 333 N.E.2d 168, 172 (1975).

117. 24 N.Y.2d 372, 300 N.Y.S.2d 817, 248 N.E.2d 576.

118. *Id.* at 383–84, 300 N.Y.S.2d at 826–27, 248 N.E.2d at 582–83.

119. 9 CORNELL INT'L L.J. 239, 240 (1976).

ernmental interest" and the weakness of the contacts with New York, the court's choice of New York law as the governing law is questionable.

C. CONSISTENCY WITH THE FUND AGREEMENT

1. *Earlier New York Cases*

In *Southwestern Shipping Corporation v. National City Bank of New York*,[120] a New York Supreme Court in applying Article VIII (2) (b), admitted into evidence a certificate from the Fund stating that the exchange control involved in the suit was "maintained or imposed consistently" with the Fund Agreement. This certificate had been sent by the Fund to the U.S. Treasury, which was then able to certify to the court that the certificate was in its records. The court accepted the certificate as determinative of the consistency of the exchange control in issue with the Fund Agreement. Thus the court did not have to consider further what other forms of proof of the consistency of an exchange control law with the Fund Agreement might be accepted.

2. *Zeevi*

In *Zeevi*, the court had to determine whether to give effect to a Ugandan foreign exchange control decree which terminated foreign exchange allocations in favor of Israeli companies and nationals. The court determined that it was not required to give effect to the exchange control law since New York law governed and since the transaction in question was not an "exchange contract" within the meaning of Article VIII (2) (b). The latter determination was questionable since the transaction had as its immediate object the exchange of Ugandan currency for U.S. dollars. However, even if the court had not made this dubious interpretation of "exchange contracts," an independent ground existed for finding that Article VIII (2) (b) did not require recognition of the Ugandan exchange control decree, *viz.*, the Ugandan exchange control was not "maintained or imposed consistently" with the Fund Agreement as required by Article VIII (2) (b).

The Fund Agreement specifically prohibits "discriminatory currency arrangements or . . . practices."[121] At the time of the

120. 173 N.Y.S.2d 509 (Sup. Ct. 1958).
121. Fund Agreement, art. 3; 60 Stat. 1411.

Ugandan decree, it was a matter of public record that the actions taken by the Ugandan government did not follow any general monetary action but specifically were the outcome of a policy embarked on by President Amin directed solely at Israeli national-held assets and property. The anti-Semitic motivation for the action was typified by President Amin's statement that "he understands why Hitler killed six million Jews."[122]

President Amin's attempted action, directed solely at Israeli nationals, was certainly discriminatory. Thus there was no basis for the defendant's argument that the Ugandan exchange controls were within the protection of the Fund Agreement since that agreement was designed and adopted precisely to bar discriminatory practices.

The court of appeals in its decision in *Zeevi* did recognize the discriminatory nature of the Ugandan exchange controls. However, that recognition came within the context of the court's consideration of whether the exchange control was consistent with New York public policy.

The approach taken by the court in *Zeevi* typifies the lack of emphasis placed by New York courts on the requirement of Article VIII (2) (b) that an exchange control be consistent with the Fund Agreement in order to be entitled to recognition under that section. Indeed only one early case in New York, *Southwestern Shipping,* mentioned this requirement and did so only because the defendant had taken the trouble to obtain a statement by the Fund certifying that the exchange control involved in the suit was consistent with the Fund. This approach contrasts with that taken in a number of foreign cases which have analyzed exchange controls to determine whether they are consistent with the Fund.

In *Zeevi,* the New York Court of Appeals did not recognize an obligation to begin its analysis by determining whether Article VIII (2) (b) of the Fund Agreement was applicable.[123] Thus, by construing their obligation to recognize foreign exchange controls to be limited to the strict meaning of the conditions in Article VIII (2) (b), the New York courts, as well as others, were able to apply their own conflict of law rules, including the public policy doctrine.

122. New York Times, September 13, 1972, at 4, col. 1. *See also Brief in Opposition to Motion for Leave to Appeal* 9.

123. *See* note 102 *supra.*

By taking such a narrow approach to the obligations imposed by the Fund Agreement, courts have neglected the obligation of monetary cooperation imposed by the Fund Agreement. Recognition of this obligation does not imply that courts must enforce all foreign exchange controls regardless of their nature, since the Fund Agreement does not require recognition of all exchange control regulations, but only of those that are "maintained or imposed consistently" with the Fund Agreement. Courts, by more closely examining this requirement, might avoid recognizing those foreign exchange controls that are grossly in variance with public policy.

It might be argued that were courts to take a more active role in deciding whether or not exchange controls are consistent with the Fund, they might be motivated by parochial interests in not recognizing certain exchange controls. That is, the situation might return to the pre-Fund situation where courts decided whether to recognize a foreign exchange control according to the forum's perception of its own best interests. However, this argument is unconvincing for two reasons: (1) The Fund Agreement provides guidelines as to what exchange controls are consistent with the Fund Agreement; (2) Litigants may request from the Fund an interpretation as to whether a particular foreign exchange control law is "imposed or maintained consistently" with the Fund Agreement.

Were courts to consider more frequently whether a foreign exchange control was consistent with the Fund Agreement in the first place, they might avoid excessively restrictive interpretations of other terms in Article VIII (2) (b). Such restrictive interpretations have the unfortunate effect of completely exempting from Article VIII (2) (b) certain types of transactions, *e.g.*, a letter of credit arrangement as was involved in *Zeevi*, when such transactions clearly must be covered by Article VIII in order for a member country to carry out its obligation to cooperate with other countries in the management of their exchange resources.