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FOREIGN EXCHANGE CONTROL IN AMERICAN COURTS

Foreign exchange control is generally defined as strict governmental supervision of foreign money and all relations involving foreign creditors and debtors. Such control normally takes the form of restrictions on contract and property rights. Depending upon the extent of the economic crisis, and the political structure of the country involved, these restrictions vary from slight infringements on existing rights to overwhelming encroachments upon the nation's economic life and legal system. The wisdom or unwisdom of foreign exchange control is beyond the scope of this comment. However, it may be mentioned in passing that it is arguable whether exchange restrictions do not ultimately do more harm to economic life through destruction of foreign trade than do the evils which such restrictions seek to remedy.

The usual types of foreign exchange control start out with these premises: (1) in an era of depression, it is a natural reaction of the people to resort to foreign money which is supposedly more stable; (2) in order to maintain some balance in foreign economic relations, it is essential that the government subject all foreign money to more or less immediate control. Legislation effecting such control usually contains the following main categories of restrictions:

1) **Restrictions on property rights.** Foreign exchange must be surrendered to the government. Prohibitions are imposed against exportation of foreign money (and sometimes even of domestic money). The rate at which foreign exchange is to be surrendered is fixed.

2) **Restrictions on contract rights.** Contracting in foreign money is forbidden. Contracting with respect to the value of foreign money, though technically in domestic money, may be forbidden as well. Payment in foreign money is forbidden. Payment to foreign creditors is regulated in such a manner that sums owed to foreign creditors cannot be transferred, but rather must be deposited with an agency of the government on so-called blocked accounts. Disposal of such accounts is subject to various restrictions.\(^1\)

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\(^1\) The following facts are worthy of note: (a) These categories are by no means constant and settled forms of foreign exchange control. They constitute frequent, usual, standard measures. But from country to country, and from time to time, they may vary considerably. (b) The same or similar rules
Although this entire system is characterized by strong governmental interference in the realm of private rights, it is by no means limited to totalitarian governments. It had been introduced in numerous countries many years before a totalitarian system was installed, and during and after World War II it was introduced on a large scale in countries which had consistently opposed totalitarianism (e.g., England, France). It is true, however, that totalitarian governments usually introduce exchange control, even apart from economic difficulties, as part and parcel of government-planned economies. Further, the criminal consequences of contravention of control rules are much harsher in countries under a totalitarian regime.

Most of the modern methods of foreign exchange control appeared in distinct forms in past centuries. Such measures, previously only an incidental concomitant of wars and particular crises, became a general and permanent part of the legal system in some European countries affected by the steady economic crises of the nineteen-twenties and the early thirties. Other European and several South American countries quickly followed. Countries which introduced such restrictions, seldom, if ever, gave them up, but instead made as outlined above usually prevail with regard to gold. The reasons for, and purposes of, restrictions on gold are the same as those on foreign currency. (c) The restrictive measures are necessarily coupled with, and obviously preceded by, obligations imposed on the parties in interest to report to the government all particulars on foreign exchange in their control. (d) Contracts entered into in contravention of the restrictions are usually held void. (e) Frequently these prohibitions are not worded in absolute terms. They are oftentimes subject to exceptions by subsequent laws or a special license from a government agency. (f) Contravention of the above prohibitions usually constitutes a crime. (g) The distinction between foreigners and non-foreigners in this particular branch of law does not follow citizenship but rather domicile. (h) In order to secure obedience to these measures, collateral prohibitions against assignment or guaranteeing of rights affected by foreign exchange control are usually enacted. (i) The outlined rules frequently have retroactive effect.

2 For discussion of foreign exchange control before and in the early stage of World War II, see Einzig, Exchange Control (1934); Ellis, Exchange Control in Central Europe (1941); Salera, Exchange Control and the Argentine Market cc. II-VIII (1941).

3 In such countries the death penalty for certain grave violations of foreign exchange laws is not uncommon. See, e.g., German Law Against Sabotage of National Economy of Dec. 1, 1936, [1936] I Reichsgesetzblatt 999 (death sentence against those "... whose gross selfishness or other base motives in shifting or leaving assets abroad..." had caused "... grave damage to the national economy.").

4 In the sixteenth to eighteenth centuries many European countries, among them France, Portugal and Spain, prohibited the exportation of gold, silver, and gold and silver coins. Foreign traders, after having sold their merchandise in these countries, were not allowed to export the purchase money received, but were instead compelled to spend these amounts for the purchase of merchandise produced within the country. Exporters were obligated to bring home money received abroad. Deschamps, Histoire des doctrines économiques (1933).
every attempt to make them more inclusive and complete. Economic difficulties in the aftermath of World War II prompted the introduction of these measures even in countries which had previously ignored them. Hence foreign exchange control is no longer the caprice of a few nations. On the contrary, it has become worldwide and has been recognized by important international agreements and organizations. An outstanding French expert has called this system of the law of economic crises, “a system of violations of contracts.” But regardless of what it is called, it has existed for many years in a large part of the world, and courts of this country frequently have had to cope with it.

Decisions Dealing with Foreign Exchange Control

I

Courts, when dealing with cases in which foreign exchange restrictions are referred to, must first ascertain the substantive law governing the particular transaction, and then decide what, if any, extraterritorial recognition will be given to the foreign laws containing exchange restrictions. As will appear from a review of the pertinent cases, the authorities on these questions are by no means consistent or settled. A growing trend is indicated by recent decisions which attempt to settle the issue by determining the law or laws by

5 “... the efficiency of exchange restrictions tends to increase in the course of time through experience. Although the mind of the authorities works more slowly than that of the highly subtle and ingenious opponents with whom they have to cope, the chances are that they will gradually succeed in blocking most of the loopholes.” EINZIG, op. cit. supra note 2, at 114-115.

6 According to Professor Nussbaum, today the sole jurisdiction free from any kind of foreign exchange control is the zone of the City of Tangier, North Africa. The United States and Switzerland are countries which, on the whole, do not control foreign exchange but do control gold which is included in the broader meaning of foreign exchange control. NUSSBAUM, MONEY IN THE LAW 448, n. 9 (1950).

7 See UNITED NATIONS MONETARY AND FINANCIAL CONFERENCE: FINAL ACT AND RELATED DOCUMENTS, No. 2187 (U. S. Dep’t State 1944). See also note 44 infra.

8 Capitant, Le Régime de la Violation des Contracts, DALLOZ HEBDOMADAIRE 1 (France 1934).

which the parties intended, or may fairly be presumed to have intended, the contract to be governed.\textsuperscript{10} The problem arises, in most cases, when a creditor, who has attached funds in the United States belonging to a foreign debtor, meets the defense of foreign restrictive statutes which prohibit the debtor from satisfying the creditor’s claim in American money.\textsuperscript{11} This problem first arose in American courts in the Thirties. The early cases involved bonds and debentures which had been issued in the United States by various German corporations. Such securities were sold in this country and made payable here in United States legal tender or gold currency. However, German exchange authorities refused permission to pay dollars in the United States on these bonds on the due date. Consequently, the German corporations defaulted and the bondholders sued for the amounts due. The defendant corporations relied on German exchange laws as a defense, but American courts were unanimous in holding that the defense was without merit.

Central Hanover Bank & Trust Co. v. Siemens & Halske Aktiengesellschaft\textsuperscript{12} is the famous case of that period. Defendant issued bonds in the United States, payment to be made in New York. When sued for payment defendant relied on German laws under which debts owed by Germans to foreigners had to be paid to the proper agency of the German government instead of being transmitted to foreign countries where they were originally payable. Upon such payment the obligation was deemed discharged, and the government agency was to issue a special certificate of indebtedness to the foreign creditor.\textsuperscript{13} The court held that the bond transaction was clearly intended to be governed by United States law, and that therefore the German statute did not constitute a legal excuse for non-payment. Impossibility of performance, due to a subsequent change of law, is usually not regarded as an excuse for non-performance if due to a change in foreign law.\textsuperscript{14} However, defendant claimed that


\textsuperscript{11} DOMKE, \textit{TRADING WITH THE ENEMY IN WORLD WAR II} 314 (1943).

\textsuperscript{12} 15 F. Supp. 927 (S. D. N. Y.), aff'd mem., 84 F. 2d 993 (2d Cir.), cert. denied, 299 U. S. 585 (1936).

\textsuperscript{13} The German statute was enacted June 9, 1933. A subsequent statute of June 26, 1936 extended the scope of the law to those transactions covered by a gold clause.

an exception to that rule should be made where the change in foreign law destroyed the means of performance contemplated by the parties. It was held that payment under the bond contract need not necessarily come from Germany; it could come from deposits outside Germany, i.e., from funds already within this country. The underlying theory seems to have been that while the court should refrain from compelling defendant to actively violate its own domestic law, it could properly apply the *lex fori* to property located here. The pertinent German statute was discussed simply as a possible factual excuse for non-performance, rather than as the substantive law controlling the transaction.

The cases concerning bond issues floated by German corporations through New York financial houses are all substantially the same. This country was both the place of the contract and the place of performance. As a result only American law was held applicable, and German law, preventing the German debtor from performance, was disregarded. For this reason, the opinions of the courts con-


15 6 Williston, *Contracts* §§ 1938, 1951-1953 (rev. ed. 1938). Central Hanover Bank & Trust Co. v. Siemens & Halske A.G., 15 F. Supp. 927, 929 (S. D. N. Y. 1936). The court distinguished Canada Southern Ry. v. Gebhard, 109 U. S. 527, 539 (1883), wherein it was held that a plaintiff cannot complain about effects of the Canadian insolvency laws unfavorable to him, if such laws were within "the known and established policy" of the Canadian Government at the time when the plaintiff voluntarily contracted with the defendant Canadian corporation. In the Siemens & Halske case, in 1925 when the bonds had been issued, no such *supervenient* German policy could have been foreseen.

16 National City Bank of New York v. Allgemeine Elektricitats-Gesellschaft, 9 N. Y. S. 2d 780 (Sup. Ct. 1939), *aff'd mem.*, 239 App. Div. 578, 20 N. Y. S. 2d 1015 (1st Dep't 1940); Pan-American Securities Corp. v. Fried, Krupp A.G., 169 Misc. 445, 6 N. Y. S. 2d 993 (Sup. Ct. 1938), *aff'd mem.*, 256 App. Div. 953, 10 N. Y. S. 2d 265 (2d Dep't 1939) (alternative clause as in the *Lann* case, see *infra* this footnote); Barnes v. United Steel Works Corp., 11 N. Y. S. 2d 161 (Sup. Ct. 1939); Deutsch v. Gutehoffnungshutte, 163 Misc. 872, 6 N. Y. S. 2d 319 (Sup. Ct. 1938), *subsequently* Finn v. Brown, 257 App. Div. 51, 12 N. Y. S. 2d 150 (2d Dep't 1939) (proceedings for the benefit of Deutsch, plaintiff in the original action, under Sections 916, 922 and 943 of the New York Civil Practice Act resulted in summary judgment for defendant Brown, the fiscal agent of the defendant German corporation in the previous case, because the cash and scrips in the hands of defendant were held to be impressed with a trust in favor of the couponholders, and plaintiff sought an undue preference over them); *Lann* v. United Steel Works Corp., 166 Misc. 465, 1 N. Y. S. 2d 951 (Sup. Ct. 1938) (German bonds with an optional clause permitted the holder to demand payment in either Germany, Holland or Sweden. Plaintiff demanded payment in Holland. Held, by exercising the option, plaintiff made Holland the place of payment. Consequently, Dutch law governed,
tain only some vague dicta reflecting the personal opinion of the particular judge with regard to foreign exchange legislation. These dicta, however, present widely conflicting ideas. We find in one opinion the statement that German foreign exchange laws "... are highly repugnant to our sense of honor and decency and reflect financial sadism at its worst...". Another opinion in the same court, in the same year, and in an analogous statement of facts, held that such laws, necessitated by economic reasons, must be respected since "... what we deem right for the preservation of our financial structure cannot be wrong when employed by others." In that case, the court gently reprimanded those who, in search of high percentage rates, invested their assets in foreign bonds, and when confronted with later unpleasant developments reacted violently. As stated by the court: "... the American flag is raised and even the marines are asked to be sent to help to collect," and "[f]ortunately, it is not necessary here to assume the pharisaical posture and thank Providence we are not like other people when it comes to observance of the letter of the bond." It seems, however, that the court in this case tended to observe the letter of the bond too literally. Apart from these observations, the court ruled that New York law should apply to the case, although it would seem that the parties concerned had stipulated that German law should control the transaction. The court held that since the contract had been made in New York, the parties should have unambiguously provided for the transaction to be controlled by German law if such was their intent. According to the court, the bond involved, which contained the stipulation that it should be "covered" by German law, did not unequivocally show such intent. In order to establish such unequivocal intent, the language and under Dutch law, German currency legislation was no defense. Defendant offered opinions of experts on the laws of Holland, according to which, under the conflict of laws rule of Holland, the bonds in suit would be governed by the internal laws of Germany. This was held by the court to be immaterial for our conflict of laws rule directs us to the internal laws of Holland, and not its conflict of laws rule. The opposite view would involve acceptance of the "renvoi" doctrine, which has been almost unanimously rejected.) ; Glynn v. United Steel Works Corp., 160 Misc. 405, 289 N. Y. Supp. 1037 (Sup. Ct. 1935); Shepperd v. Hamburg-Amerikanische Packetfahrt A.G., 91 N. Y. L. J. 1232, col. 2 (Sup. Ct. March 14, 1934); Perry v. Norddeutscher Lloyd, 150 Misc. 73, 268 N. Y. Supp. 525 (N. Y. Munic. Ct. 1934), aff'd mem., 91 N. Y. L. J. 1653, col. 3 (Sup. Ct. April 6, 1934) (the mere fact that the defendant is a German corporation does not involve application of German law. Impossibility of performance due to a foreign law was no excuse.).


18 Goodman v. Deutsch-Atlantische Telegraphen Gesellschaft, 166 Misc. 509, 510, 2 N. Y. S. 2d 80, 81 (Sup. Ct. 1938). The court might have had in mind the conflicting opinions in European jurisdictions on the extraterritorial effect of the abolition of the gold clause in the United States in 1933.

19 Ibid.

20 Ibid.
"governed" by German law should have been used. The soundness of such interpretation is, of course, questionable. Technical incidents of legal draftsmanship should not be given undue weight in establishing the true intent of contracting parties. Moreover, the result which the court seems to have achieved, namely, that the contract was "covered" by German law and "governed" by New York law is indeed puzzling.

Some English cases of the same period should be mentioned. In *Kleinwort, Sons and Co. v. Ungarische Baumwolle Industrie Aaktiengesellschaft*, the Hungarian debtor corporation sent bills of exchange to the plaintiff, a London firm. The bills were guaranteed by a Hungarian bank which simultaneously, in a separate letter, drew the attention of the plaintiff to the fact that cover could not be provided at maturity, unless Hungarian exchange regulations at that time made it possible. At the time the bills and the letter were sent, statutes in Hungary had already provided for full scale foreign exchange restrictions. The court, taking the view that the accompanying letter did not constitute part of the contract and did not limit its clear provisions, applied the "proper law of the contract," a highly emphasized doctrine in English law, and held that such "proper law" was English law. Hence Hungarian foreign exchange laws could not be invoked as a defense. The court emphasized that, in order to satisfy the plaintiff, defendants were not obliged to perform any act in Hungary and thereby distinguished *de Beeche v. South American Stores, Ltd.* There the House of Lords had refused to compel defendants to remit rent to London from Chile when the remittance was prohibited by Chilean foreign exchange laws enacted subsequently to the contract. In the *Kleinwort* case, the court indicated that in the *de Beeche* case, the remittance, the act which subsequently became illegal, was required to be performed in Chile, whereas in the *Kleinwort* case no illegal act was expressly required to be performed in Hungary. In this manner the court succeeded in overcoming the rule followed in the *de Beeche* case, and in some other cases, that an English court will not compel the fulfillment of an obligation when it requires an act which must be performed in, and is illegal by the laws of, some foreign country.

A case decided subsequent to the *Kleinwort* decision, and after the outbreak of the war, involved two members of a former Berlin partnership. They had agreed between themselves that amounts

21 Id. at 512, 2 N. Y. S. 2d at 83.
due to plaintiff partner (who had emigrated to England) should be paid in marks in Berlin by defendant partner who remained there. The debtor, himself, later moved to England where suit was brought. In part his defense consisted of a contention that since the agreement stipulated Berlin as the place of performance, the prohibitions of German foreign exchange laws could be invoked. However, this defense failed, the court holding that 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 provisions.

During the period immediately preceding World War II, and at its outbreak, the courts of this country devoted increased attention to the economic warfare of Germany and her allies. It was quickly recognized that, in many cases, the alleged impossibility of performance of an obligation abroad because of the debtor's domestic law would preserve foreign assets for use in this economic war. Such a consequence was quickly eliminated by Executive Order No. 8389 of 1940, which froze the assets of the Axis powers and their citizens. However, as usually happens in an age of political upheaval, public policy and economic and political considerations were frequently invoked by the courts, and as a result, judicial decisions pursued a somewhat unsteady course during these years.

*Werfel v. Zivnostenska Banka* is perhaps the most famous case of that period. In 1936, plaintiff deposited money in Prague with defendant, a Czechoslovak bank. It was intended that these amounts should be transferred to plaintiff's sons in the United States. Part of such transmittal had been effectuated, by virtue of licenses granted by the Czechoslovak exchange authorities. The invasion of Czechoslovakia by the Germans followed, and the plaintiff later became a resident of the United States. In an action to recover the amounts so deposited, the plaintiff contended that the Czechoslovak exchange decrees had become a nullity, since, due to the German occupation in 1939, the recognized Czechoslovak government no longer had *de facto* control of that country. Plaintiff further contended that the German foreign exchange restrictions and laws of confiscation based on racial reasons should be disregarded as the United States had not recognized the *de facto* government established by the Ger-

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26 See Domke, op. cit. supra note 11, c. 20.
mans in Czechoslovakia. The Appellate Division held the complaint demurrable on the basis that the foreign exchange decrees of the *de facto* government were restrictive and regulatory to approximately the same degree as those of the old Czechoslovak government at the time when the deposits had been effected. Thus, the Appellate Division reasoned that, had the Germans not invaded Czechoslovakia, the plaintiff still would have been forbidden to recover in this country and that he should not be permitted to profit from the fact that the Germans had taken over. The Court of Appeals reversed the summary judgment granted for defendant, stating: "Among the issues to be tried are the terms of the contract, what is the foreign law which either party claims to be applicable and in what respect may such law have been rendered inoperative by reason of events happening subsequent to the making of the contract." The reversal did not affect the reasoning of the Appellate Division on the merits of the case. The reversal may possibly be attributed to the comprehensive brief, filed by the United States, *amicus curiae*, in which was outlined the official policy toward laws of *de facto* governments not recognized by the United States.

While the Appellate Division decision in the *Werfel* case stressed the substantial identity of the former Czechoslovak and later German foreign exchange restrictions, it did not sufficiently consider the effect of the German confiscatory laws. In other cases which arose during World War II, the courts carefully scrutinized the foreign decrees involved to determine if, though having the outward appearance of exchange statutes, they in fact contained confiscatory measures. If so, they were consistently denied extraterritorial effect. In some cases these were decrees issued by *de facto* governments of countries occupied by the Germans at times when the United States recognized *de jure* governments in exile.

The ship passage cases, considered by courts in those years, comprised another large area of litigation. Usually in those cases,

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31 See note 28 *supra*.
an emigrant from one of the countries having foreign exchange restrictions bought his ship passage to the United States from an agency within such a country, and there appeared on the ship ticket a warning that any refund would be made only in the country where the ticket had been sold. It would seem that such warning was not only part of the contract but also notice of the law to which the parties were subject. Despite the fact that the ship company later cancelled the trip because of the outbreak of war, the buyer of the ticket eventually managed to get to this country somehow. Here he sued the ship company for a refund of the fare, and in some cases for damages, such as additional hotel and travel expenses, arising out of an alleged breach of contract. Damages for breach of contract were denied, since the courts found the outbreak of the war an acceptable excuse for the cancellation of the journey. But, the question of whether refund was to be made in dollars or in the original currency on blocked account was, of course, controversial. The courts did not lay down any universal rule. Only small amounts were involved, and none of the cases (all of which were tried in New York courts) reached the Court of Appeals. In most of them the trial court granted summary judgment for plaintiff, and the appellate courts, relying largely on the decision in the Werfel case, reversed and granted summary judgment for the defendant. The theory underlying most of these de-

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34 See note 28 supra.
35 Eck v. N. V. Nederlandsch Amerikaansche Stoomvaart Maatschappij, 183 Misc. 691, 52 N. Y. S. 2d 367 (Sup. Ct. 1944); Baer v. United States Lines Co., 180 Misc. 456, 43 N. Y. S. 2d 212 (Sup. Ct. 1943) (no ticket had been issued when the voyage was cancelled. The court held that, in order to get a refund in this country, the plaintiff had the burden of proving that the specific amount he deposited had been transferred to this country. Proof that defendant corporation, by special license of the German government, was permitted to withdraw and did withdraw its funds from Germany, was held insufficient. Query: is it sound to impose the burden of proof on plaintiff, when it is practically impossible for him to satisfy such requirement? Also, is it justifiable to disregard the basic feature of money debts, the substitutive quality of money, and try to trace money as other chattels?) ; Translatueur v. United States Lines Co., 179 Misc. 843, 42 N. Y. S. 2d 117 (Sup. Ct. 1943); Spiegel v. United States Lines Co., 178 Misc. 993, 37 N. Y. S. 2d 31 (N. Y. Munic. Ct. 1942) (as distinguished from the fare, the "on board money" can be recovered by plaintiff in our currency, since, with regard to the latter, it was not incumbent on plaintiff to make demand for refund in Germany. In the Translatueur case, supra, even a refund of "on board money" was refused); Lowenhardt v. Compagnie Generale Transatlantique, 35 N. Y. S. 2d 347 (Sup. Ct. 1942); Bleiweiss v. Cunard White Star Ltd., 34 N. Y. S. 2d 172 (Sup. Ct. 1942); Schlein v. N. V. Nederlandsch Amerikaansche Stoomvaart Maatschappij, 34 N. Y. S. 2d 720 (Sup. Ct. 1942); Ornstein v. Compagnie Generale Transatlantique, 31 N. Y. S. 2d 524 (N. Y. Munic. Ct. 1941), aff'd mem., 52 N. Y. S. 2d 243 (Sup. Ct. 1942); Steinfink v. North German Lloyd Steamship Co., 176 Misc. 413, 27 N. Y. S. 2d 918 (Sup. Ct. 1941) (commented upon in Note, Conflict of Laws: Foreign Exchange: Blocked Marks, 27 CORNELL L. Q. 267 [1942]); Zimmern v. N. V. Nederlandsch Amerikaansche Stoomvaart Maatschappij, 177 Misc. 91, 28 N. Y. S. 2d 824 (Sup. Ct. 1941); Branderbit v. Hamburg-American Line, 31 N. Y. S. 2d 588 (Sup. Ct. 1941), aff'd mem., 266 App. Div. 1011, 45 N. Y. S. 2d 188 (2d Dep't 1943); Goldarbeiter v. Cunard White Star Ltd.,
cisions 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 restrictions (usually German currency laws), "however objectionable" they were found to be. A similar result was reached in suits involving the cash surrender value of life insurance policies. The courts again felt obligated to apply the law of the contract and left the plaintiffs to whatever rights they may have had against the defendants in other countries "with the hope which the court entertains that in the after-war world justice may be done, even within Germany, to the victims of German aggression."37

In some suits based on employment contracts which came up during the war, American courts clearly refused to recognize the defense of foreign exchange laws. It would seem, therefore, that, with respect to claims of employees, the courts took a different approach than in cases which were primarily money relationships, such as those of banker and depositor, or those in which the parties expressly contracted with regard to the restrictive exchange regulation, such as ship passage and life insurance cases. In *Sabl v. Laenderbank Wien Aktiengesellschaft* the plaintiff, a former employee of the Vienna branch of a French bank, sued for damages for the breach of his employment contract. Prohibitions of payment abroad, established both

27 N. Y. S. 2d 920 (Sup. Ct. 1941). *Contra*: Rosenblueth v. N. V. Nederlandsch Amerikaansche Stoomvaart Maatschappij, 27 N. Y. S. 2d 922 (Sup. Ct.), aff'd mem., 262 App. Div. 1002, 30 N. Y. S. 2d 843 (1st Dep't 1941); Kassel v. N. V. Nederlandsch Amerikaansche Stoomvaart Maatschappij, 177 Misc. 92, 24 N. Y. S. 2d 450 (Sup. Ct. 1942) (*Held*, since the plaintiff did not make the voyage, the restrictive terms of the contract do not apply, and plaintiff is entitled to a refund here, in Germany, or elsewhere.).

36 The statement that foreign law "however objectionable" would apply was first used in Dougherty v. Equitable Life Assurance Society, 266 N. Y. 71, 83, 193 N. E. 897, 900 (1934) with regard to the Soviet provisions governing life insurance relations. The same language was used with regard to German laws in Holzer v. Deutsche Reichsbahn-Gesellschaft, 277 N. Y. 474, 479, 14 N. E. 2d 798, 800 (1938) involving the Nazi laws on the dismissal of employees. The ship passage cases repeat this language frequently. See, e.g., Branderbit v. Hamburg American Line, *supra* note 35.

37 Kleve v. Basler Lebens-Versichcrungs-Gesellschaft, 182 Misc. 776, 783, 45 N. Y. S. 2d 882, 888 (Sup. Ct. 1943). "As for the very obnoxious and offensive character of the German decrees, the court is obliged to hold that governing law is not less controlling because it is bad law." *Id.* at 882, 45 N. Y. S. 2d at 887. The *Klve* decision was followed in an analogous situation four years later. Bloch v. Basler Lebens-Versicherungs-Gesellschaft, 73 N. Y. S. 2d 523 (Sup. Ct. 1947). Here again, the court expressed uneasiness over its disposition of the case. It denied recovery, because the German foreign exchange laws, "however objectionable" (*Id.* at 530) were part of the law governing the contract. The dismissal was without prejudice to any rights the plaintiff might have against the defendant in other jurisdictions.

in French and German law, constituted part of the defense. The court granted recovery and distinguished the Werfel case. There an application for a license to pay the deposit had been made and denied, whereas here no application had been made at all. The court felt that "... such regulations do not in themselves prevent an adjudication of liability by means of a judgment...", and expressed hope that the judgment might facilitate procurement of the license to pay, if that were necessary. In David v. Veitscher Magnesitwerke Aktiengesellschaft, defendant, an Austrian (at that time German) corporation and former employer of plaintiff, relied inter alia on German laws which forbade payment to any foreign creditors. The court held that the laws of Germany were not controlling. It found for plaintiff under Pennsylvania law, and relied largely upon the theory advanced in Central Hanover Bank & Trust Co. v. Siemens & Halske Aktiengesellschaft. Considerations of public policy, it seems, played an important part in the decision.

II

Postwar decisions display a distinctly more tolerant approach to the problem. There would seem to be three reasons for this attitude. First, funds held abroad and withdrawn from foreign creditors had ceased to be used for economic warfare. Consequently, the argument for denial of extraterritorial recognition of exchange laws for that particular reason, became obsolete. Secondly, financial difficulties not only continued in countries in which foreign exchange restrictions had formerly existed, but also caused a considerable number of other countries to introduce such measures. Thirdly, probably partly as a result of the foregoing facts, foreign exchange control, formerly a bastard of the law, had become legitimate. Thus the Bretton Woods Agreement of 1944, on the International Monetary Fund, recognizes the necessity for these restrictions. The Charter of the International

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40 See note 28 supra.
44 Arts. VIII § 2(a), I(ii), VIII § 2(b) (1): "Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of any member, maintained or imposed consistently with this Agreement, shall be unenforceable in the territories of any member."
Monetary Fund admits that exchange control is temporary and recognizes that these restrictions are manifestations of the basic unbalance of world trade, although by far not its remedy. On the whole, the Fund Agreement, though, of course, not commending foreign exchange restrictions, realizes their necessity, and permits such restrictions during the "transitional period." The Agreement has the effect of a multilateral treaty between its signatories. It has become part of the corpus juris of the signatory countries, including the United States, and with it, the idea of exchange restrictions became a concept included in United States law.

The first postwar case, *Kraus v. Zivnostenska Banka*, emphatically refers to the Bretton Woods agreements. It holds, in brushing aside the usual arguments against extraterritorial enforcement of foreign exchange laws, that such laws have been "... almost universally adopted" and points out that both countries involved, namely the United States and Czechoslovakia, are parties to the Bretton Woods Agreement, which recognizes the necessity of such laws. Again, however, the court denied recovery for securities deposited with the defendant Czechoslovak bank, on the basis of the doctrine of the *Werfel* case. When the assets were deposited with the defendant bank before the German occupation of Czechoslovakia, there already had been foreign exchange restrictions in Czechoslovakia, subject to which the deposit had been effected. No substantial change of these laws had been made since then, and the mere fact that at the time of the commencement of the suit, Czechoslovakia was in the hands of a foreign invader could not give plaintiff any additional rights. Shortly after the *Kraus* decision was rendered, it was distinguished in *Marcu v. Fischer*, where Belgian restrictive decrees were relied upon as a defense for not delivering claimed securities. The defendant offered blocked and non-transferable securities instead. The court held such procedure confiscatory and the Belgian exchange laws inapplicable since the absentee, whose temporary administratrix sued,

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47. *59* YALE L. J. 421 (1950).

48. Arts. VII § 3(b), VIII § 2(a), XIV § 2.

49. *59* Stat. 512 (1945), 22 U. S. C. A. § 286-286k (Supp. 1950), adopted on July 31, 1945. Other important international agreements referring to foreign exchange restrictions are the peace treaties of Paris, of Feb. 10, 1947 (compensation paid to United Nations nationals for war damages shall be freely usable in former Axis satellite countries, but shall be subject to the foreign exchange regulations which may be in force in those countries from time to time); peace treaties with Bulgaria, Art. 23(4c); Finland, Art. 25(4c); Hungary, Art. 26(4c); Italy, Art. 78(4c); and Rumania, Art. 24(4c). Further, the Charter of the International Trade Organization, Havana, March 24, 1948, *Dept of State Publ.* No. 2598, Commercial Policy, series 93 (1948). Arts. XXIII(1b) and XXIV(6) refer to exchange restrictions in the transitional period.


48. *Id.* at 685, 64 N. Y. S. 2d at 211.

49. See note 28 *supra*.

was not a domiciliary of Belgium but had merely sought temporary refuge there from the Nazi peril.\textsuperscript{51}

Some other recent cases clearly follow the Kraus case. Where the law governing the transaction is the law of the restricting country, foreign exchange restrictions are held to be a valid defense.\textsuperscript{52} In Egyes \textit{v. Magyar Nemzeti Bank},\textsuperscript{53} where the Hungarian "\textit{morate}rium" decrees of 1931 and 1935 were involved, the plaintiff, assignee of a bondholder, sued for amounts accrued on bonds issued by Hungarian municipalities and payable in dollars. As in \textit{Central Hanover Bank \& Trust Co. v. Siemens \& Halske Aktiengesellschaft},\textsuperscript{54} the Hungarian decrees had ordered the amounts due under the bonds to be paid to central government agencies. In this case, however, the plaintiff made these agencies defendants. The court conceded that plaintiff had a lien on the Hungarian currency deposited with the defendants, but held that these defendants—not the original obligors of the bond but simply payees under it by virtue of the Hungarian decrees—were not liable to plaintiffs.\textsuperscript{55} The court was not squarely called upon to decide whether to follow \textit{Central Hanover Bank \& Trust Co. v. Siemens \& Halske Aktiengesellschaft}, since the plaintiff had not sued the original obligors.\textsuperscript{56}

Two recent cases, sometimes cited as refusing to recognize foreign exchange laws, do not seem to justify such citation. In Cermak \textit{v. Bata Aksicva Spolecnost},\textsuperscript{57} the plaintiff sued on a settlement made with the defendant with regard to claims for services performed. True, \textit{dicta} in the opinion certainly did not favor foreign exchange control; still, it would seem that the judgment for the plaintiff did

\textsuperscript{51}Id. at 893.
\textsuperscript{52}In South American Petroleum Corporation \textit{v. Colombian Petroleum Company}, 177 Misc. 756, 31 N. Y. S. 2d 771 (Sup. Ct. 1941), and Matter of Mason, 194 Misc. 308, 86 N. Y. S. 2d 232 (Surr. Ct. 1948), the court did not apply the restricting foreign law (Colombian and Italian) because it had not been satisfactorily proved. In the latter case, due to an amendment to the New York Civil Practice Act in 1943 (§ 344-a), the court, if it had so desired, could have taken judicial notice of the foreign (Italian) law.
\textsuperscript{53}165 F. 2d 539 (2d Cir. 1948).
\textsuperscript{54}See note 12 supra.
\textsuperscript{55}A similar case was decided in the same way, more than ten years before the Egyes decision. Mayer \textit{v. Hungarian Commercial Bank}, 21 F. Supp. 144 (E. D. N. Y. 1937).
\textsuperscript{56}The Hungarian decree referred to in the Egyes case permits payment on the bond to foreign creditors only if such payment does not endanger "... the continuity of the country's economic life or other vital interests. ..." The court referred to an affidavit of a Hungarian Government official according to which the defendant bank (a government agency) "... was to determine when payments could be made compatible with the economic well-being of Hungary. ..." Egyes \textit{v. Magyar Nemzeti Bank}, 165 F. 2d 539, 540 (2d Cir. 1948). The soundness of admissibility of such evidence, obviously a kind of self-serving declaration, has been questioned. Domke, Some Aspects of the Protection of American Property Interests Abroad, 4 \textit{The Record}, Ass'N of the Bar of the City of N. Y. 268, 271 (1949).
\textsuperscript{57}80 N. Y. S. 2d 782 (Sup. Ct. 1948), aff'd mem., 275 App. Div. 919, 90 N. Y. S. 2d 680 (1st Dep't 1949).
not rest on a refusal to recognize the Czechoslovak foreign exchange laws which had been raised as a defense. Rather it rested on the recognition of such laws: namely, on the uncontroverted deposition given in Brazil by the president of the defendant firm, in which it was stated that the defendant had been granted a general license from the proper authorities, under the Czechoslovak foreign exchange laws, to use its foreign exchange freely. In Perkins v. De Witt, the court did not apply a moratorium decree of the Philippine Republic since it was found that the decree applied only to payments to be made within the Philippines, whereas in the case at bar, payment was to be made in this country. Other recent cases tend to apply foreign exchange laws liberally if the law of the restricting country governed the transaction.

Finally, two widely discussed English cases, decided almost simultaneously, must be mentioned. Both cases involved Czechoslovak restrictions and were decided at a time when England had already joined the large group of countries which had foreign exchange controls. In Kahler v. Midland Bank the plaintiff sought to recover securities deposited by him with a Prague bank and placed by it in deposit with defendant bank, without mentioning plaintiff's name. Plaintiff sued both ex contractu and in rem (in replevin). The House of Lords held that there was no contractual nexus between the plaintiff and the defendant, nor had the plaintiff any enforceable right in rem, since he was not entitled to immediate possession. The proper law of the contract was Czechoslovak law, and English courts would not compel performance of a contract where, by its proper law, performance was illegal. Since under the law of Czechoslovakia the Czechoslovak bank could not lawfully part with the securities by delivering them to the plaintiff, the defendant bank could not be ordered to perform such delivery. In Zivnostenska Banka v. Frankman.

58 197 Misc. 369, 94 N. Y. S. 2d 177 (Sup. Ct. 1950).
60 1950 A. C. 24; 2 All E. R. 621 (1949).
61 Id. at 57, 2 All E. R. at 642, Lord Radcliffe: "... I should not regard the application of this principle to this case as a concession of extra-territorial operation to foreign currency regulations. I should regard it rather as an insistence that in applying the proper law of a contract—a conception which is inescapable in private international law—it is the full complex of substantial law that must be applied. ... I should not have been prepared to treat such currency regulations as we are concerned with here as if they were no more than the 'penal or revenue laws' of another State the existence of which our courts are traditionally disposed to ignore."
the 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’ decision for the plaintiff and adopting the view of the King’s Bench division, denied recovery. The House held that Czechoslovak law was the proper law of the transaction, and that performance of the contract would involve the doing of an act illegal under the laws of Czechoslovakia. Said Lord Simmons: “It was sought to apply to the circumstances of the present case the principle that an English Court will not enforce 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 the case of a law which does not appear to differ in material respects from the legislation contemplated in the Bretton Woods Agreement which is now part of the law of this country.”

Conclusion

After this brief chronological survey of pertinent cases the question arises: Will local courts recognize foreign exchange restrictions? Although the question does not seem to have been definitely settled, particularly in view of the present world situation, it would appear that at least some principles may be deduced.

In any such case, the first task of the court is to ascertain the applicable substantive law. There is, of course, no general rule about the law which is applicable in cases involving foreign exchange restrictions. General principles and devices of the law of conflicts, such as the law stipulated by the parties, the law intended, or presumed to have been intended, by the parties, the lex loci solutionis, eventually the lex loci contractus, etc., are determinative. The specific facts and elements of the particular case will be decisive with regard to the choice of the applicable law, and the court will proceed in making that choice under the general and elastic principles of the law of conflicts, however vague they may be.

Should the court arrive at the conclusion that it will apply the local substantive law, it is likely to mean that foreign exchange restrictions, which probably constitute the defense or part of the defense, will be disregarded. However, foreign exchange restrictions might gain extraterritorial effect under a more liberal view than has thus far been generally taken with respect to impossibility or impracticability of performance due to foreign law. While English

64 [1948] 1 All E. R. 337 (K. B.).
68 For a more liberal view, see Sokoloff v. National City Bank, 239 N. Y.
cases sometimes refer to the principle that an English court will not compel a defendant to perform an act illegal under its own domestic law, it is not clear how far this doctrine would be carried in a case where the court would clearly consider English law as the "proper" law of the case.

Naturally, where the court decides to apply the substantive law of the restricting country, extraterritorial effect will be granted the foreign exchange restrictions, unless some special reason for refusing such effect exists. Nonrecognition of foreign exchange restrictions has been advocated more in law review articles than in judicial decisions, and a variety of theories have been advanced. Foreign exchange laws have been called revenue, penal, confiscatory, discriminatory, retroactive, political, public-administrative, and procedural laws. In the opinion of recognized authorities, foreign laws falling under any one of these categories will be disregarded by our courts. Last, but not least, foreign exchange laws have been held to violate public policy—a term probably broad and elastic enough to include all the above categories as well.

In reality it would appear that, except for the public policy objection, foreign exchange laws are not precisely covered by any one of the above mentioned categories. Doubtless, our courts will not enforce revenue laws of another country. But, foreign exchange laws are not foreign revenue laws, within the common usage of that term as synonymous with tax laws. Recognition of foreign transfer prohibitions as a valid defense would not involve "acting as a collector of taxes" for another country. Laws promulgated for rea-
sons of economic and currency policy are not necessarily revenue laws.

The maxim that our courts will not enforce penal laws of another country is likewise well settled.\(^2\) Foreign exchange laws, however, are not penal laws in the usual meaning of the words, and extraterritorial recognition of foreign exchange restrictions would not be equivalent to the enforcement of penal laws or to the execution of penalties imposed by a foreign country. Clearly, statutes establishing foreign exchange restrictions are part and parcel of a country's substantive law of contracts and property. They regulate the formation and discharge of some specific types of contracts and contain specific restrictions on property. Thus, it would not seem that a mere imposition of criminal penalties for violation is sufficient reason for refusal to grant extraterritorial recognition. The objections that the foreign exchange laws are political and public-administrative are concerned with the ultimate reasons of such laws rather than with their contents and regulatory effect. Nor are foreign exchange laws necessarily retroactive. Moreover, the general reluctance to recognize retroactive laws has considerably relaxed. The argument that foreign exchange laws must be excluded for being procedural (since they merely prevent actual payment without affecting the right thereto) fails to realize that these restrictions substantially affect both the formation and the discharge of contracts.

It is true, however, that foreign exchange laws may under some circumstances be confiscatory and discriminatory although this is by no means the rule. Our courts will not grant extraterritorial effect to foreign confiscatory laws,\(^3\) but in order to come within this rule, a case of confiscation must be made out. In the average case, the mere deprivation of important incidents of ownership will hardly suffice. Nor are foreign exchange laws usually discriminatory since, ordinarily, they govern certain types of transactions, irrespective of the citizenship of the persons involved.

The argument that foreign exchange laws must be denied extraterritorial effect, since they violate, or may violate, our public policy is, generally speaking, more controversial.\(^4\) Whether or not recognition of specific foreign laws violates our public policy depends on

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\(^{3}\) For discussion of the problem, see RE, Foreign Confiscations in Anglo-American Law (1951).

\(^{4}\) See Restatement, Conflict of Laws § 612 (1934); Lorenzen, Territoriality, Public Policy and the Conflict of Laws, 33 Yale L. J. 736 (1924).
the question of what public policy is, both in its general theoretical sense, and in its local and actual meaning. Public policy is certainly not an absolute notion, either in time or in area. As stated by the Permanent Court of International Justice, it is a concept, "... a definition of which in any particular country is largely dependent on the opinion prevailing at any given time in such country itself." Consequently, public policy is a very relative, elastic and dynamic concept. What violated public policy yesterday need not necessarily violate it today. Judge Cardozo stated the broad principle that a foreign law should not be applied if in so doing "... some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal ..." would be violated. Or, in the language of Story: "... no nation can justly be required to yield up its own fundamental policy and institutions in favor of those of another nation .... There would be extreme difficulty in saying that other nations were bound to enforce laws, institutions, or customs of that nation, which were subservive of their own morals, justice and policy. ..."

Does recognition of the extraterritorial effect of foreign exchange laws violate our public policy? The answer depends on the specific foreign exchange laws. In the late thirties, some articles and court opinions contained statements to the effect that foreign exchange restrictions do conflict with our public policy. At that time, however, foreign exchange measures had not yet world-wide application, and cases coming up in our courts were chiefly concerned with foreign exchange restrictions of a totalitarian government. Arguments for the denial of extraterritorial effect of foreign exchange restrictions were simply manifestations against recognition of laws of countries, which themselves deliberately ignored fundamental principles of law. This situation might well be changed today. Foreign exchange control has evolved from a temporary, emergency device into a permanent aspect of economy and law. It is applied by a far greater number of countries than at any time in the past. International agreements, recognizing the need for such restrictions, form part of the United States Code. In addition the Military Government for the American Zone in Germany has enacted legislation providing for large scale foreign exchange control in that part of Germany. This again means that United States authorities have recognized that, under certain circumstances, such laws may have utility.

75 Judgments Nos. 14, 15, P. C. 13, Ser. A, No. 20/21 (1939); 2 HUDSON, WORLD COURT REPORTS 344, 375, 404 (1935).
77 STORY, CONFLICT OF LAWS 24 (7th ed. 1872).
78 See note 67 supra.
79 See note 46 supra.
All the aforesaid, of course, does not mean that foreign exchange control is advocated, but it probably does indicate that such restrictions will not be ignored a limine. Exchange control is one of many tentative and supposed remedial devices for clear and present evils. It is the hope of all who long for a free world that all artificial obstacles hampering free communication among the nations of the world will be abolished and, of course, foreign exchange restrictions are a species of such artificial hindrances. Still, for the time being, they do exist all over the world—even in many countries which apply standards of thinking, morality, and freedom similar to those applied here.

A cautious approach to the problem is recommended. Since the effect given in our courts to foreign exchange restrictions is closely bound up with international relations, no position should be taken without careful consideration of possible repercussions in that sphere. On the other hand, the protection of American interests, and the basic principles of our public policy should not be sacrificed to this latter consideration.

Andrew Friedmann.*

Duty of a Director Not to Compete

Manifestly, free enterprise is vital to the position of the United States as a world power. For this reason, encouragement of competition is deemed to be in the best interests of the community, and monopolies and combinations in restraint of trade are prohibited as contrary to public policy. Notwithstanding the obvious advantages of free competition, certain business and personal relationships are carefully scrutinized by the courts because in some circumstances, by nature of the trust reposed in one individual by another, unfair advantage may be taken by the one in whom the trust is reposed unless he act in utmost good faith.

The corporation, as an institution, was created to serve business needs, and has proved extremely valuable to businessmen. In fact, in the manufacturing, communication and service industries, over 90% of the business volume is carried on by corporations.

The question naturally arises: What is a corporation? Various definitions have been advanced, but perhaps the one that best expresses the vacillating concepts indicative of the relations between the artificial person [the corporation] and the natural persons who neces-

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