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German Foreign Exchange Control—Rise and Demise

Time-honored tradition has it that Johann Sebastian Bach terminated his "Art of Fugue"¹ by setting forth the commencement of a fugal score² on the musical components of his name "b-a-c-h."³ A composition using the name of Sir Joseph Gold as the theme would be unlikely for reasons flowing from the structure of music. Yet his name could give rise to a series of retrospects ensuing from his professional activity. The present effort will not deal with the monetary functions of gold, which marked the international payments system before and immediately after the First World War. Rather it will trace the subsequent era of freely shapable currencies the use of which for bordercrossing transfers was progressively limited, reduced in volume, and finally suspended by an ensemble of foreign exchange restrictions of most national governments. To Sir Joseph the dismantling of these obstacles to bordercrossing economic questions has been one of the main objectives of the International Monetary Fund whom Sir Joseph has served as General Counsel and Director of its Legal Department, and to which he remains close.

Historically exchange control ensued from the scarcity of foreign exchange reserves available to Germany under the Weimar Republic at the very outset of the nineteen-thirties and their insufficiency for complying with Germany's international monetary liabilities. This article traces the rise and demise of this normative and administrative discipline in the German legal system, which a League of Nations Report described as a completely equipped model of currency control even before the Second World War, and its progressive decomposition and winding up in the Federal Republic of Germany.

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1. Bach-Werke Verzeichnis [BWV] 1080.

2. *Id.* at 19.

3. To this effect his son C.P.E. Bach in the original of *The Art of Fugue*, Deutsche Staatsbibliothek Berlin, Mus. ms. Bach P 200, stated that the composer died while working on the fugal score mentioned in the text.

I. German Foreign Exchange Control Until 1945

A. RESTRICTIONS ON THE USE OF FOREIGN EXCHANGE DURING WORLD WAR I

World War I entailed limitations of bordercrossing economic activity. Yet these were neither very important in terms of volume nor did they take a systematic approach required to obtain tangible results. Soon after the end of the war they were relinquished.⁴ Apart from the interdiction of gold export,⁵ the central issue was the introduction of the compulsory monopoly of the Reichsbank for trading in foreign exchange.⁶ Dispositions over means of payment, accounts receivable, and credits denominated in foreign currency could henceforth only be made in favor of the Reichsbank,⁷ while the transfer of means of payment denominated in imperial currency to a foreign destination required the authorization of that bank.⁸ The assumption of monetary obligations vis-à-vis nonresidents, that is persons resident in a foreign monetary jurisdiction, was contingent on the assent of the Reichsbank or of a commercial bank having received a mandate from the former to extend such permission. The Chancellor of the Reich received statutory powers to order the remittance of means of payment and accounts receivable denominated in foreign currency to the Reichsbank. He made use of that facility on May 22, 1917, by the ordinance providing for the remittance of Swedish, Danish, and Swiss securities to the Reichsbank and by the ordinance of August 31, 1917, providing for the remittance of foreign means of payment and accounts receivable denominated in foreign currency to that bank generally.⁹

In order to ensure the amounts required for the payment of reparations due from Germany under the Treaty of Versailles,¹⁰ foreign exchange control was re-initiated in 1922 on the model of the scheme just outlined and with the same scope as applicable during World War I. The limited restraint ensuing from this reinitiation of wartime foreign exchange control was also due to article 24 of the Treaty of Versailles in conjunction with section 24(8) of the German statute implementing that treaty. Section 24(8) prohibited the Reichsbank from disposing of its gold reserves, an interdiction that in the course of time fell into disrespect. Surveillance by the federal authorities over bordercrossing move-

4. R. KÜHNE, *DEISENZWANGSWIRTSCHAFT IM DEUTSCHEN REICH IN DEN JAHREN 1916-1926*, at 2 [1970].

5. Statute prohibiting the Export and Transit of Gold, Nov. 13, 1915, *REICHSGESETZBLATT* [RGBL], 763 (1915).

6. Ordinance Regarding Payments to and from Foreign Countries, Feb. 8, 1917, RGBL 105 (1917) [hereinafter Ordinance Regarding Payments], *cancelled by* Ordinance of July 22, 1919, RGBL 1539 (1919). These provisions also did away with the earlier Ordinance Regarding Transactions in Foreign Means of Payment of Jan. 22, 1916, RGBL 49 (1916), which had established the foreign exchange monopoly of the Reichsbank.

7. Or in favor of a foreign exchange bank appointed to that effect by the Reichsbank.

8. Ordinance Regarding Payments, *supra* note 6, § 3(II).

9. Ordinance of May 22, 1917, RGBL 429 (1917); Ordinance of Aug. 31, 1917, RGBL 741 (1917).

10. Treaty of Versailles, June 28, 1919, 28 L.N.T.S. 11.

ments of means of payment became increasingly incisive due to the progress of inflation. The development began with a public law of February 3, 1922, dealing with operations in foreign means of payment, which however did not establish a compulsory obligation to deliver foreign exchange to the Reichsbank as soon as it became available.¹¹ It was followed by the ordinance on speculative deals in foreign means of payment dated October 12, 1922, and a number of measures enforcing the enactment during 1923, which subjected the acquisition of foreign means of payment to a procedure of prior authorization. Thereafter the ordinance of June 22, 1923, on trading in foreign exchange at a unitary rate permitted dealings in foreign exchange only at the rate of the official quotation in Berlin; the subsequent ordinance prohibiting the sale of German marks to nonresidents of August 9, 1923, was designed to outlaw the transfer of marks to foreign countries.¹² Yet the stabilization of the mark by the launching of a new mark currency, called Rentenmark, and thereafter the creation of the new Reichsmark, allowed a termination of foreign exchange controls by an ordinance of November 8, 1924. That ordinance changed the foreign exchange control legislation, which was ultimately invalidated by the ordinance on the relinquishment of foreign exchange control regulations, dated February 22, 1927.¹³

B. THE BANKING CRISIS OF 1931 AND THE BEGINNING OF FOREIGN EXCHANGE CONTROL

1. *The Banking Crisis of 1931*

The experience gained during World War I and during the post-war incisive German inflation served as a point of reference in the choice of measures enacted by Germany when in 1931, in the wake of the collapse suffered by the Österreichische Credit-Anstalt and the economic breakdown in the United States, large amounts of short-term foreign deposits were withdrawn. As a result, the Darmstädter and Nationalbank (Danatbank) became the most important German victim of the crash.¹⁴ Two days after the crisis forced the Danatbank to shut down its counters, the President of the Reich authorized its government by ordinance on the basis of article 48 of the Weimar Constitution to enact provisions regarding the handling of foreign means of payment and accounts receivable denominated in foreign currency "along the lines of the foreign exchange ordinance of November 8, 1924."¹⁵ This ordinance of the President of the Reich dated July 15, 1931, served as the legal basis of its government's

11. RGBI.I 195 (1922).

12. RGBI.I 195 (1922); RGBI.I 795 (1922); RGBI.I 991 (1923); RGBI.I 765 (1923).

13. RGBI.I 729 (1924); RGBI.I 68 (1927).

14. Irmeler, *Bankenkrise und Vollbeschäftigung*, in *WIRTSCHAFT UND WÄHRUNG IN DEUTSCHLAND 1876-1975*, at 284 (Deutsche Bundesbank ed.) (2d ed. 1976).

15. RGBI.I 365, § 2 (1931).

ordinance regarding transactions in foreign currency.¹⁶ Section 1 reintroduced the compulsory monopoly of the Reichsbank for operations in foreign exchange. The acquisition and the sale of foreign means of payment was lawful only where the Reichsbank served as intermediary or had authorized the operation; the means of payment under that ordinance were coins, banknotes, cash payments, virements (bank transfers), cheques, and bills of exchange.¹⁷ Likewise accounts receivable in foreign currency could be bought for, or sold against, German currency only through the intermediary of the Reichsbank or with its authorization.¹⁸ Forward transactions involving foreign exchange and precious metals were prohibited under section 2. Trading in foreign exchange was linked to the official Berlin quotation (sections 4 and 5).

This set of limitations was confirmed by the ordinance enacted by the President of the Reich on August 1, 1931,¹⁹ regarding foreign exchange control. By and large it continues to be considered as the beginning of a systematic system of rationing foreign exchange.²⁰ Under section 3 (II) of that ordinance, accounts receivable denominated in foreign currency were considered to be claims whose creditor was entitled to payment in foreign currency, which accordingly, served as currency of payment as well. The decisive new element was the requirement of an authorization regarding the use of foreign currency. Section 2(II) subjected the acquisition of foreign means of payment to prior written permission of the foreign exchange rationing authority. The same applied to dispositions over foreign exchange or its countervalue that had been acquired by other means, that is to say without authorization and before the requirement of prior written permission came into force (section 3). Pertinent jurisdiction was not vested in the Reichsbank but assumed by the tax-collecting agency for the Land in which the applicant resided. In that capacity, the inland revenue regional agency decided in accordance with directives emanating from the German Minister of the Economy in conjunction with the German Minister of Finance and the German Minister of Agriculture (section 17(I)). In addition to the limitations set forth thus far, the foreign exchange rationing authority had the power to endorse or disallow the granting of credits denominated in German marks to nonresidents and the assignment of accounts receivable located in a foreign country to nonresidents (section 6(I)). The dispatch or the physical remittance of means of payment and securities to a foreign country also required authorization of the foreign exchange rationing authority (section 7).

One of the major aims of the policy of foreign exchange rationing, at least at its beginning, was the servicing of foreign creditors on as equal a level as

16. Ordinance of July 15, 1931, RGBI.I 366 (1931).

17. Ordinance Regarding Payments, *supra* note 6, § 3(I).

18. *Id.* § 3(II).

19. RGBI.I 421 (1931).

20. W. FLAD, G. BERGHOLD & H. FABRICIUS, *DAS NEUE DEISENRECHT XXXIV* (2d ed. 1939); E. HOCHE, *DEISENRECHT* 6 (1954); J. VON STAUDINGER-WEBER, *KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH* prefatory remarks to §§ 244, 245, Rz. 59 (11th ed. 1967).

possible.²¹ This objective was to be attained by the standstill agreements concluded by the Reichsbank and its subsidiary Deutsche Golddiskontbank²² as well as by the committee comprising German banks together with trading companies and industrial enterprises (Deutscher Ausschuss—German Committee)²³ with foreign banking committees²⁴ since 1931, also called German Credit Agreements.²⁵

The functions of these understandings²⁶ was the maintenance of specific, in particular short-term, credits of foreign creditors to German private debtors. However, unused credit lines could be reduced in part. The agreements dealt with claims denominated in foreign currency as well as Reichsmark deposits of the standstill creditors, but did not concern Reichsmark credits extended to residents by standstill creditors. By way of counter-prestation the credit-giving banks received the assurance that no other creditor would be entitled to a better treatment than that accorded to them and that in particular no other creditor could obtain preferential compliance with his claim. In addition, the standstill agreements set forth a guarantee of the frozen claims, at least in part, by the Deutsche Golddiskontbank. The standstill agreements as such provided the basic understandings only between the committees on either side. They became applicable to the individual creditor and debtor upon adherence by means of a declaration to be made by each adherent. While the foreign banks did not assume any commitment, the German debtor was considered as adhering under German legislation as soon as the creditor had declared his adherence in the form provided for by the general standstill agreement.²⁷ In order to comply with the principle of creditors' equal treatment and to avoid preferential treatment of persons and entities not participating in the standstill agreements, the German participants had assumed the obligation to bring about regulations to that effect under German public law²⁸ while in all other respects the agreements were considered as private law transactions.²⁹ Similarly, bordercrossing monetary

21. M. LION & H. HARTENSTEIN, *STEUER- UND DEISENNOTRECHT* 366 (1932).

22. Irmeler, *supra* note 14, at 301.

23. Nonbanking participants from Germany became signatories of the understandings concluded after the first Basle Standstill Agreement of 1931 only.

24. For references to these agreements as well as a list of the special agreements concluded with Switzerland, see W. FLAD, G. BERGHOLD & H. FABRICIUS, *supra* note 20, § 2 Devisengesetz [DevG] n.2.

25. The name became the official designation in 1931.

26. Cf. E. WENZEL, *DIE DEUTSCHEN STILLHALTEABKOMMEN UND IHRE AUSWIRKUNGEN AUF DIE SCHWEIZERISCHEN BANKEN* (Thesis Geneva 1940); W. JUNG, *DIE DREI STILLHALTEABKOMMEN VON 1931, 1932 UND 1933* (1934). Current comment on these agreements are found in *BANK-ARCHIV* by Simon, house counsel of a German Bank, beginning with *DAS BASELER STILLHALTEABKOMMEN*, *BANK-ARCHIV* xxx, at 506 (1930/31).

27. Ordinance Implementing the German Credit Agreement Feb. 27, 1932, § 2, RGBI.I 86, § 2 (1932).

28. Ordinances by the President of the Reich, Sept. 9, 1931, RGBI.I 489 (1931); Ordinance of Feb. 27, 1932, RGBI.I 85 (1932).

29. On similar phenomena today, see H. HAHN, *VÖLKERRECHTLICHE DARLEHENS- UND GARANTIEABKOMMEN*, *FESTSCHRIFT FÜR SEIDL-HOHENVELDERN* 173–95 (1988).

liabilities of public authorities were reviewed. A review was brought about by the credit agreements for German public debtors that were concluded annually from 1932 on.³⁰ Contrary to the German credit agreements they secured directly³¹ the maintenance of credits extended to German Länder, municipalities, and districts, provided for the reimbursement of these credits and interest payable thereon.

2. *The Extension of Foreign Exchange Legislation up to and Including the Statute of Foreign Exchange Rationing 1935*

At the outset, the reintroduction of foreign exchange rationing was considered as a mere emergency measure.³² It proved so durable, however, that it could be relinquished only a whole generation later upon the enactment of the external trade statute by the parliament of the Federal Republic of Germany. It is impossible here to describe the evolution in detail.³³ Suffice it to recall that authors of learned writings on the law of foreign exchange rationing considered the subject of such a temporary nature as to avoid specific statements on that law only, but dealt with the new discipline always in conjunction with more traditional legal domains, such as taxation. It remains indubitable, however, that foreign exchange rationing had already expanded systematically during the Weimar Republic notably by the establishment of a permanent obligation to offer whatever foreign means of payment had been earned or could be disposed of otherwise. This was brought about by an ordinance of the President of the Reich dated October 2, 1931.³⁴ Even before, foreign exchange exceeding specified amounts had to be so offered to the foreign exchange rationing authorities. Yet while initially sums up to 20,000 marks were this privileged, the facility was gradually reduced to 10 marks.³⁵ On June 9, 1933, the German law regarding monetary obligations vis-à-vis foreign countries was enacted.³⁶ Its short title, "Moratorium Statute," provides a more precise idea as to its substance, as it suspended payments to foreign countries both as to reimbursement of capital and the remittal of interest in their entirety (section 1(I)), to the extent the amounts due were not included in the standstill agreements (section 4). Occasional

30. Survey and references by W. FLAD, G. BERGHOLD & H. FABRICIUS, *supra* note 20, § 2 DevG n.2.

31. Ordinances of the President of the Reich, May 24, 1932, RGBI.I 246 (1932); Ordinances of the German Government Implementing the Presidential Ordinance, May 24, 1932, RGBI.I 247 (1932).

32. As reflected in the title of the first pertinent commentaries M. LION & H. HARTENSTEIN, *supra* note 21, i.e., Foreign Exchange Emergency Law.

33. W. FLAD, G. BERGHOLD & H. FABRICIUS, *supra* note 20, at XXXVIII; H.F. SCHULZ, AUSSENWIRTSCHAFTSRECHT, Einl., Rz. 6 (1965/66); J. VON STAUDINGER-WEBER, *supra* note 20, prefatory remarks to §§ 244, 245, Rz. 60.

34. RGBI.I 533 (1931).

35. *Id.* at 533, 373, 461.

36. RGBI.I 349 (1933).

payments for which a foreign exchange authorization had not been delivered could be paid by resident debtors into a blocked account, the latter then being considered to have lawfully complied with the monetary obligation concerned. Following a decision of the Reichsgericht (volume 151/116), which denied the aforementioned benefit of such an operation to the debtor, the legal issue thus acknowledged was decided by a statute of May 27, 1937,³⁷ which recognized the deposit into a blocked account as liberating the debtor (section 1(IV)). At the same time a Konversionskasse for German external debts had been established by the Moratorium Statute (section 2). Though it was a corporation under public law, in fact it was an internal subdivision of the Reichsbank as it was subject to the bank's surveillance, the Reichsbank directorate being empowered to appoint its organs.³⁸ Resident debtors had to pay the countervalue in German currency of their bordercrossing liabilities and thereupon were considered to have complied with their obligation (section 1(I) and (II), Moratorium Statute). The amounts thus deposited were held in the name of the creditors.³⁹ The disbursement of the amounts to foreign creditors was contingent on a decision to the Reichsbank to that effect.⁴⁰ Yet the Konversionskasse in part relinquished such liabilities by the remittal of bonds for the redemption of which it was exclusively liable. The bonds thus issued were in part repurchased by German authority with a considerable abatement.

A first codification of the provisions on foreign exchange rationing⁴¹ took place in 1935. Foreign exchange law reached its normative climax with the foreign exchange statute of December 12, 1938.⁴² That statute served as model for foreign exchange rationing and pertinent provisions after World War II as well.⁴³

C. FOREIGN EXCHANGE RATIONING UNDER THE FOREIGN EXCHANGE STATUTE 1938

The Foreign Exchange Statute 1938, which affected neither the Moratorium Statute nor the standstill agreements,⁴⁴ was subdivided in seven parts. Part I contained the general provisions regarding the foreign exchange rationing authorities and definitions of terms. The most important element of the statute was part II, which specified the operations requiring authorization and the prohibitions of foreign exchange operations. The obligation to offer foreign exchange to the authorities followed in part III, while part IV was an attempt to

37. RGBI.I 60 (1937).

38. Irmeler, *supra* note 14, at 309.

39. This was made possible by provisions in the Charter of the Konversionskasse, DEUTSCHER REICHSANZEIGER No. 152, July 3, 1933.

40. Irmeler, *supra* note 14.

41. RGBI.I 106 (1935).

42. RGBI.I 1733 (1938).

43. Silard, *Money and Foreign Exchange*, in 20 INT'L ENCYCLOPEDIA OF COMP. L. 54 (1973).

44. Cf. J. VON STAUDINGER-WEBER, *supra* note 20, prefatory remarks to §§ 244, 245, Rz. 66.

prevent capital flight. The consequences under private law and civil procedure ensuing from foreign exchange rationing were dealt with in part V while penal sanctions followed in part IV. Part VII finally contained transitory and procedural provisions regarding the coming into force of the text.

Amendments to the Foreign Exchange Statute 1938 were brought about by ordinances implementing it. These ordinances significantly made foreign exchange law more incisive by introducing further limitations, prohibitions, and commitments (section 96, Foreign Exchange Statute 1938).⁴⁵ Moreover, they determined the directives for foreign exchange rationing, which included published circulars of the German Minister of the Economy. Because of its legal quality these directives took the form of an ordinance dated December 22, 1938.⁴⁶ Section 97(I), Foreign Exchange Statute 1938 served as the basis of legislative jurisdiction empowering⁴⁷ the German Minister of the Economy not only to enact, but equipped him with the faculty to interpret, the provisions of the foreign exchange statute by means of directives with compulsory effect or to secure its nonapplication by exempting certain factual situations from adjudication under the foreign exchange statute, thus innovating with regard to the latter's scope (section 97(I)(2), Foreign Exchange Statute 1938). To that extent they were deemed to be genuine ordinances.⁴⁸ Moreover the directives set forth instructions addressed to the authorities carrying out foreign exchange legislation (sections 3(II), 97(I)(1), Foreign Exchange Statute 1938); as such they were classified as administrative regulations.⁴⁹

Integrated foreign exchange rationing systems purporting, as a rule, to assign available or maturing foreign exchange amounts to the government in order to satisfy the latter's needs depending on their urgency, to increase the volume of foreign exchange at hand, and to prevent the emergence of unnecessary foreign exchange supply requirements,⁵⁰ have a number of typical properties in common.⁵¹ These include the duty to surrender foreign exchange, the prohibition to dispose of claims vis-à-vis foreign residents, the interdiction of exporting foreign means of payment, and the banning of exporting or importing of

45. *Id.* at Rz. 64.

46. RGBl.I 1851 (1938).

47. A. NUSSBAUM, *MONEY IN THE LAW—NATIONAL AND INTERNATIONAL* 452 n.24 and accompanying text (2d ed. 1950).

48. *Id.* at 458 n.53.

49. On the legal classification of the directives, see W. FLAD, G. BERGHOLD & H. FABRICIUS, *supra* note 20, § 97 DevG n.3; Flad, *Die Rechtsnatur der Richtlinien für die Devisenbewirtschaftung vom 22 Dez. 1938*, 4 DEISENARCHIV 625 (1938); J. VON STAUDINGER-WEBER, *supra* note 20, prefatory remarks to §§ 244, 245, Rz. 65.

50. E.g., this is borne out by the Austrian Foreign Exchange Statute, July 25, 1946 RGBl 162 (1946), which uses the German version of the formula set forth in the text. For comments see A. SCHWARZER, W. CXOKLICH & W. LIST, *DAS ÖSTERREICHISCHE WAHRUNGS- UND DEISENRECHT* 369, 380 (4th ed. 1987).

51. F.A. MANN, *THE LEGAL ASPECT OF MONEY* 356 (4th ed. 1982); A. NUSSBAUM, *supra* note 47, at 449.

domestic currency. The transfer from accounts of nonresident creditors to another foreign country is lawful upon authorization of foreign exchange authorities only. These may require instead a deposit into a blocked account. The exchange rates for foreign currencies are determined by executive fiat. Split foreign exchange markets are frequent. These traits can be traced in the Foreign Exchange Statute 1938 in their entirety.

The Foreign Exchange Statute 1938 confirmed the Reichsbank monopoly in respect of trading in foreign exchange (section 10(I)).⁵² The purchase and sale of foreign means of exchange⁵³ and of accounts receivable in foreign currency⁵⁴ against domestic money⁵⁵ were only lawful through the intermediary of the Reichsbank. To round off its jurisdiction and to include whatever foreign exchange was available the statute decreed the duty of residents to surrender all available foreign exchange.⁵⁶ The statute extended on the basis of section 46 to foreign means of exchange and accounts receivable in foreign currency as well as bills of exchange and cheques denominated in domestic currency but payable in a foreign country, Reichsmark claims against foreigners, and gold and foreign securities.⁵⁷ These items were to be offered within three days after becoming available to the Reichsbank and, at its request, had to be sold and to be transferred to that institution (sections 48, 51). Residents, that is, persons residing or generally sojourning domestically and legal entities with a domestic site or headquarter (section 5(I)), were subject to the duty of surrendering such values (section 46). As nationality was irrelevant to the notion of resident⁵⁸ for the purpose of the foreign exchange law, the duty to surrender applied as well to nationals of foreign states sojourning in Germany unless they were exempt under specific provisions.⁵⁹ Notably, section 47 thus exempted diplomatic representatives of foreign states from the duty to surrender.

Foreign exchange could be acquired against domestic currency only with an authorization of the foreign exchange rationing authority (section 13).⁶⁰ The acquisition of foreign exchange in consideration of the delivery of goods,

52. The Reichsbank could authorize other banking institutions to serve as foreign exchange banks under the Foreign Exchange Stat. 1938, § 6, No. 11.

53. The definition is set forth in *id.* § 6, No. 2.

54. *Id.* § 6, No. 4.

55. Pt. I(1) of the directives.

56. W. FLAD, G. BERGHOLD & H. FABRICIUS, *supra* note 20; Foreign Exchange Stat. 1938, §§ 46–53.

57. A debtor having foreign exchange with a countervalue of less than two marks remained exempt from the duty to surrender.

58. A. Nussbaum, *supra* note 47, at 449.

59. "Privilegierte Fremde," "privileged aliens," as defined by e.g., 1 F. BERBER, *LEHRBUCH DES VÖLKERRECHT* 430 (2d ed. 1975).

60. Acquisition meant the acquisition of property, that is to say the entitlement *ad rem*. W. FLAD, G. BERGHOLD & H. FABRICIUS, *supra* note 20, at advance n.II(D)(1) preceding pt. II; *cf.* Foreign Exchange Stat. 1938.

services, and other prestations was not contingent on such authorization, but subject to the duty to surrender.⁶¹ Administrative authorization was required not only for the acquisition of foreign exchange, but also for a considerable number of other legal transactions, in particular disposal of items having a value expressed in foreign exchange or⁶² objects that could be used in lieu of means of payment. The latter comprised gold, securities, and real estate, where a foreign resident participated in the transaction or where foreign values were affected, for example real estate in a foreign country.⁶³ Similarly, prohibitions dealing with all claims of a resident against a nonresident or of a nonresident against a resident were designed to prevent an evasion from foreign exchange rationing independent of the currency of account, place of payment, and any clause providing for effective payment in foreign exchange. Thus, payment to a nonresident creditor by the transfer to him of a claim held by the debtor against another nonresident was no longer possible because of the prohibition to dispose of such a claim set forth in section 14(III) of the Foreign Exchange Statute. Where a prestation was not rendered by means of the disposal of a claim,⁶⁴ section 15 required an authorization for payments by a resident to another resident,⁶⁵ where it operated in favor of a nonresident who in turn was subject to foreign exchange rationing.⁶⁶

To prevent the departure of money to foreign countries credits to nonresidents were subject to authorization as well. Under section 44 the currency in which the loan was to be paid and reimbursed was irrelevant. This prohibition constituted an exception in so far as foreign exchange law applied in principle to *ad rem* transactions only, while in the present instance contractual operations were equally disallowed. In this context it may be noted that liabilities could not be assumed where compliance with them would have required an authorization by the foreign exchange authorities that, however, had already been definitely refused (section 45).

As a matter of course the Foreign Exchange Statute 1938 set forth the "classical" nucleus of foreign exchange rationing provisions, namely the prohibition to export foreign means of payment, extended by the interdiction of transmitting coins and bank notes denominated in Reichsmark to a foreign country (section 16). To prevent the reflux of domestic means of payment

61. W. FLAD, G. BERGHOLD & H. FABRICIUS, *supra* note 20, at advance n.II(D)(1) preceding pt. II; Foreign Exchange Statute 1938, § 13 n.2.

62. This applied as well to foreign means of payment. This authorization was required in addition to the permit allowing the acquisition.

63. Foreign Exchange Stat. 1938, §§ 21, 24, 39.

64. Transfer by means of bank virements.

65. C.H. MÜLLER, *GRUNDRISSE DER DEISENBEWIRTSCHAFTUNG* 105 (2d ed. 1939); J. VON STAUDINGER-WEBER, *supra* note 20, prefatory remarks to §§ 244, 245, Rz. 186.

66. For particulars see REICHSGERICHT [RG], JW 2410 (1937); W. FLAD, G. BERGHOLD & H. FABRICIUS, *supra* note 20; Foreign Exchange Stat. 1938, § 15 n.4.

unlawfully transmitted to a foreign country,⁶⁷ section 17 permitted their import or their dispatch to a domestic destination only on the basis of an authorization by foreign exchange authorities.⁶⁸ Judicial holdings of the Reichsgericht reasoned that section 17 was also destined to make a foreign debtor pay the amount due in foreign currency and therefore to increase the amount of foreign exchange available.⁶⁹

Foreign exchange law prohibitions provided for a considerable number of exceptions in favor of nonresidents,⁷⁰ though the interdiction to dispose of claims against residents was applicable to them as well and spelled out the general rule that entails the creation and maintenance of so-called blocked claims or blocked accounts.⁷¹ Where domestic items of property were sold by a nonresident or credits dating from the period before foreign exchange rationing were repaid to him, no administrative authorization was required for the domestic use of free Reichsmark or currency deposits from accounts held with resident banks. Such deposits ensued on the one hand from the payment of foreign currency to a German bank and were then called currency deposits,⁷² and on the other hand due to the rendition of amounts in Reichsmark freely usable under the terms of an express authorization⁷³ or resulting from general directives establishing free Reichsmark accounts.⁷⁴ The use of these accounts ensued from the authorization of foreign exchange purchases that were exempt from general principles otherwise applicable, in particular were such purchases not contingent on their registration according to the time at which the request for foreign exchange had been made.⁷⁵ Among blocked accounts⁷⁶ the separate accounts for nonresidents had special importance regarding domestic payments.⁷⁷ Their short name ASKI stood for the possibility of a widened possibility of carrying out compensatory transactions.⁷⁸ ASKIs received the amount that nonresidents earned by importing

67. W. FLAD, G. BERGHOLD & H. FABRICIUS, *supra* note 20; Foreign Exchange Stat. 1938, § 17 n.1; J. VON STAUDINGER-WEBER, *supra* note 20, prefatory remarks to §§ 244, 245, Rz. 189.

68. RG, JW 319 (1937); M. LION & H. HARTENSTEIN, *supra* note 21; A. NUSSBAUM, *supra* note 47, at 450 n.16, which states, "This would have been an unlawful and immoral kind of pressure where the debtor was obligated in German currency."

69. W. FLAD, G. BERGHOLD & H. FABRICIUS, *supra* note 20; Foreign Exchange Stat. 1938, § 17 n.3, to the effect that as a matter of principle authorization will be refused.

70. In addition, the moratorium statute continued to apply.

71. J. VON STAUDINGER-WEBER, *supra* note 20, prefatory remarks to §§ 244, 245, Rz. 184.

72. Pt. II(1) of the directives for foreign exchange rationing.

73. This included the countervalue of foreign exchange bought by the Reichsbank, Directives for Foreign Exchange Rationing pt. II(4)(a).

74. *Id.* pt. II(3).

75. *Id.* pt. II(2)(II).

76. On the various categories of blocked claims and blocked accounts, see *id.* pt. II 32; see also C.H. MÜLLER, *supra* note 65, at 166.

77. A. NUSSBAUM, *supra* note 47, at 452.

78. This is stressed by W. FLAD, G. BERGHOLD & H. FABRICIUS, *supra* note 20, pt. IV(14), (15) of the directives.

their goods to Germany.⁷⁹ These deposits could then be used without authorization for the acquisition of German goods destined for exportation. ASKIs however were also transferable,⁸⁰ but the rate at which they were traded in foreign countries was clearly less than that of the so-called "free" Reichsmark. As in the case of other transferable blocked accounts, their value depended on the different limitations of their use,⁸¹ so that a very considerable number of different rates for blocked marks⁸² was practiced.⁸³

In order to maintain German foreign trade in spite of incisive foreign exchange rationing, Germany in the period before World War II concluded numerous bilateral intergovernmental payments agreements⁸⁴ that took either the form of genuine settlements or clearing agreements or were concluded as payments accords.⁸⁵ The first category in general provided that debtors in both participant states needed no longer to fulfill their liabilities vis-à-vis the foreign creditor in the latter's currency, but could pay the countervalue in their national currency to a central clearing office. From the funds thus received, each central clearing office satisfied the creditors within its own jurisdiction by remitting to those creditors the amounts in domestic currency equivalent to what the debtors had paid to their own central clearing office.⁸⁶ The amounts paid would be settled between the two central clearing offices concerned; surplus amounts, called "Spitzen," were usually offset in gold, unless a respite of payment was granted up to an agreed maximum amount.⁸⁷ The payments agreements concluded by Germany⁸⁸ before World War II had, however, another structure, ensuing generally from the refusal of one contracting party to cancel the free regime of payments⁸⁹ as required under the clearing agreements. In line with the agreement, amounts due had therefore to be paid directly to the creditor in foreign currency.⁹⁰ Bilateral trade in goods was continued within numerical limits agreed

79. A resident paying into such an account needed a foreign exchange authorization.

80. A. NUSSBAUM, *supra* note 47, at 453.

81. Mann, *Problems of the Rate of Exchange*, 8 MOD. L. REV. 177, 178 (1944).

82. The term should not veil that these were not exchange rates, i.e., the assessment of one currency in the unit of account of another one, but only the price for the acquisition of claims collected by transfer. F.A. MANN, *supra* note 51, at 442.

83. A. NUSSBAUM, *supra* note 47, at 452.

84. Hahn, *Clearing Agreements*, 8 ENCYCLOPEDIA PUB. INT'L L. 78, 79 (1985).

85. W. FLAD, G. BERGHOLD & H. FABRICIUS, *supra* note 20, under D 70 provide a rundown of the situation in 1939.

86. E.g., Agreement Between Germany and Greece, Sept. 24, 1937, RGBI.II 569, arts. 1, 6, 7 (1937).

87. On clearing agreements *cf.* F.A. MANN, *supra* note 51, at 500; A. NUSSBAUM, *supra* note 47, at 517; Hahn, *supra* note 84, at 78.

88. After World War II arrangements also called payment agreements were concluded which however had a quite different legal structure; F.A. MANN, *supra* note 51, at 501; W. WABNITZ, *DER ZWISCHENSTAATLICHE ZAHLUNGSVERKEHR AUF DER GRUNDLAGE INTERNATIONALER ZAHLUNGSABKOMMEN* 3 (1955); Hug, *The Law of International Payments*, 79 RECEUIL DES COURS (1951).

89. Hug, *supra* note 88, at 571, on the attitude of the United Kingdom.

90. Of course, existing foreign exchange control regulation had to be respected.

in advance under which one of the two contracting parties committed itself to spend a specific percentage of its income in foreign exchange for purchases on the spot.⁹¹ Any surplus could be freely disposed of. Thus, residents of one party to the agreement could wind up payments without foreign exchange restrictions, while on the other side bordercrossing economic transactions had to be limited somehow in order to make compliance with its purchasing obligations on the spot possible.⁹² For the purpose of carrying out these agreements Germany by legislation established die Deutsche Verrechnungskasse as a corporation of public law.⁹³ It assumed the functions of the Reichsbank in the field of settlements, and for that purpose maintained close links with the central bank.⁹⁴

II. Foreign Exchange Rationing Under Legislation Enacted by Military Government

A. MILITARY GOVERNMENT LAW NO. 53 (MGL 53)

After the end of World War II, the occupying powers replaced the existing legal basis of foreign exchange rationing by providing for new normative equipments.⁹⁵ This was attained by MGL 53, by which military governments⁹⁶ assumed the power to ration foreign exchange immediately after the invasion of occupied German territory by allied forces. The coming into force of MGL 53 did away with the Foreign Exchange Statute 1938 for the purposes of legal practice.⁹⁷ In the different parts of Germany currency reform took diverging forms and led to the emergence of two currency areas. This entailed the need to review foreign exchange legislation in its entirety. On September 19, 1949, a revised version of MGL 53 for the American and British zones of occupation and ordinance No. 235 for the territory under French occupation came into force.⁹⁸ The new texts were pronounced as acts of the military governments.⁹⁹ Until

91. R. KÜHNE, *HANDBUCH DES DEISENRECHTS* 10 (1952); C.H. MÜLLER, *supra* note 65, at 335; *cf.* Agreement to Facilitate Payments, Nov. 1, 1934, Germany-Great Britain, 163 L.N.T.S. 81 (spelling out pertinent provisions in art. I(ii), (iv)).

92. Hug, *supra* note 88, at 572.

93. RGBI.I 997 (1934); RGBI.I 1047 (1938).

94. R. KÜHNE, *supra* note 91, at 13.

95. The following text deals only with legal instruments concerning the territory of the Federal Republic of Germany.

96. For particulars, see R. KÜHNE, *supra* note 91, at 14.

97. Regarding the continued applicability of the Foreign Exchange Stat. 1938, see J. VON STAUDINGER-WEBER, *supra* note 20, prefatory remarks to §§ 244, 245, Rz. 72 with further references. The formal abolition of that statute was brought about by Military Government Law [MGL] 53 art. XII (1949).

98. Bundesanzeiger [BAnz] No. 2, July 27, 1949; for a comparative exposition of the two versions of MGL 53, see J. VON STAUDINGER-WEBER, *supra* note 20, prefatory remarks to §§ 244, 245, Rz. 76.

99. On the basis of Occupation Statute, art. 2(g), the quality of MGL 53 Occupation Law continues to be of the corresponding restraint on the power of the Federal Constitutional Court to abolish such an act. With regard to MGL 53, *cf.* Bundesverfassungsgericht [BVerfGE] 62, 169.

today, they continue to serve as the decisive legal basis for intra-German trade.¹⁰⁰ Apart from MGL 53, section 3 of the currency law set forth a prohibition, still in force, to enter into monetary obligations denominated in a foreign currency or to combine it with a value maintenance clause referring to foreign currency.¹⁰¹

MGL No. 53 not only pursued the objective of rendering possible German foreign trade, but was also destined to secure the availability of German property, in particular items sited in a foreign country, for reparation payments.¹⁰² As a matter of legal technique it amounts to a general prohibition in conjunction with the power to exempt legal transaction and business operations between residents of occupied Germany and nonresidents.¹⁰³ Three categories of items fell within the scope of the law: (1) property, defined by article X(c), MGL 53 as property rights and other pertinent entitlements of whatever kind, including entitlements to foreign exchange; (2) real estate, defined as immovables as well as pertinent rights and interests; (3) foreign exchange values, defined by article X(d), MGL 53 as values sited in a foreign country, foreign means of payment, bills of exchange by nonresidents' checks and similar securities, and furthermore amounts due to residents from nonresidents, without regard to the currency of account, or claims of residents against other residents denominated in a foreign currency, and amounts receivable from nonresidents where residents have a legally tangible interest in such amounts, securities issued in a foreign country, and precious metals.¹⁰⁴

Transactions concerning these items require an authorization. Article X(b), MGL 53 defines the concept of transaction in such a way as to comprise both the contractual obligation (contrary to Foreign Exchange Statute 1938, which did not apply to the contract) and its implementation, together with certain factual conduct such as transportation and other acts of execution. Article I(a) prohibits transactions regarding foreign exchange values of residents and regarding domestic foreign exchange values (which in part contradicts the prior statement) irrespective of whether they are carried out by residents or nonresidents (article I(b)). Residents must not transact with nonresidents in respect of foreign exchange nor in respect of property rights or real estate (article I(c), (d)). German real estate values can be transacted between nonresidents only on the

100. BVerfGE 62, 169, 184.

101. *Id.*

102. *Id.*

103. H. GURSKI, DAS REVIDIERTE DEVISENRECHT, BETRIEBSBERATER 561 (1949); E. LANGEN, ERLÄUTERUNGEN ZUM GESETZ 53, intro. Rz. 1 (1953); H.F. SCHULTZ, *supra* note 33, Rz. 18; J. VON STAUDINGER-WEBER, *supra* note 20, prefatory remarks to §§ 244, 245, Rz. 72.

104. For particulars, see E. HOCKE, *supra* note 20, at 11; R. KÜHNE, *supra* note 91, at 23; E. LANGEN, *supra* note 103; J. VON STAUDINGER-WEBER, *supra* note 20, prefatory remarks to §§ 244, 245 Rz. 72.

basis of an administrative authorization (article I(f)).¹⁰⁵ Domestic items that are subject to registration and delivery may be transacted between residents on the basis of a like authorization only.¹⁰⁶ Operations regarding German means of payment or monetary claims denominated in German currency destined to be transferred from residents to nonresidents are disallowed (article I(a)). The individual factual situations thus declared unlawful cannot always be kept separate from each other. In their entirety they render indubitable, however, that the bordercrossing economic activity of the western zones of occupation and of the Federal Republic of Germany could have been suspended, though a flood of authorizations by the allied powers, and thereafter by the German authorities exercising pertinent jurisdiction, prevented this.¹⁰⁷

MGL 53 is applicable in the western zones of occupation (article XIII). In Berlin substantively identical provisions were put into force by Ordinance No. 500 regarding foreign exchange rationing and control of traffic in goods.¹⁰⁸ Accordingly, Ordinance No. 500 makes the basic distinction between residents and nonresidents on the basis of the ordinary sojourn, the central administration, or the site of a person or company within or outside the "territory" that is defined as the Länder of the Federal Republic of Germany exclusive of Berlin or the German Democratic Republic (article X(g)).¹⁰⁹ As regards economic transactions involving Berlin, the general authorization 31/50¹¹⁰ places West Berlin on an equal footing with the Federal Republic of Germany and thus guarantees freedom of economic activity. Law No. 33 of the Allied High Commission dated August 10, 1950,¹¹¹ set forth a sweeping delegation of functions regarding foreign trade and commerce to German executive authorities.¹¹² It also required recourse to officially determined exchange rates in the purchase and sale of foreign exchange against German currency (article IV).

B. THE DISMANTLING OF FOREIGN EXCHANGE RATIONING

In the Federal Republic of Germany MGL 53 has not been changed after its reenactment in the version of 1949. This, however, has not prevented the progress of liberalization of capital movements and current payments between

105. For detail, see MGL 53 art. II. As a matter of law, the surrender obligation was a compulsory purchase. E.-R. HUBER, 2 WIRTSCHAFTSVERWALTUNGSRECHT 246 (2d ed. 1953).

106. Cf. *infra* note 107.

107. J. VON STAUDINGER-WEBER, *supra* note 20, prefatory remarks to §§ 244, 245, Rz. 78.

108. Ordinance of May 17, 1950, Verordnungsblatt für Berlin, I, Westausgabe 304 (1950).

109. As to the Saar territory, see J. VON STAUDINGER-WEBER, *supra* note 20, prefatory remarks to §§ 244, 245, Rz. 83.

110. BAnz No. 57, Mar. 22, 1950.

111. AMTSBLATT DER ALLIIERTEN HOHEN KOMMISSION 514 (1950).

112. They are listed in R. KÜHNE, *supra* note 91, at 19; J. VON STAUDINGER-WEBER, *supra* note 20, prefatory remarks to §§ 244, 245, Rz. 80.

the Federal Republic of Germany and foreign countries. The real scope of foreign exchange rationing indeed became contingent on acts of the executive that took the form of various instruments not identical in legal rank. The most pertinent ones were the circulars on foreign trade and commerce enacted by the Federal Minister of the Economy and the general authorizations rendered by the Bank Deutscher Länder, thereafter the Bundesbank. Gradually this entailed a legal situation that reversed foreign exchange rationing legislation and in substance did away with it.¹¹³ Statutory prohibition at present is the exception. The freedom of foreign trade and commerce as well as of any other bordercrossing economic activity is the rule; it is however subject to specifically defined exceptions by means of executive fiat.¹¹⁴

Important steps towards the liberalization of foreign exchange were the general relinquishment of the interdiction disallowing investments by German enterprises,¹¹⁵ corporate and otherwise, in foreign countries as well as vice versa. The requirement of authorization for the transfer of profits ensuing from foreign direct investments in the Federal Republic of Germany was dropped.¹¹⁶ With effect from April 1, 1954, banks operating foreign trade accounts and postal giro offices had the faculty to open freely convertible Deutschmark accounts as well as convertible Deutschmark accounts for nonresidents subject to mild restraints,¹¹⁷ which permitted an almost entirely free payments regime under existing payments agreements.¹¹⁸ Blocked Deutschmark accounts that had come into existence before the beginning of foreign exchange rationing in 1931 were transformed into liberalized capital accounts that could be disposed of to the same extent as by means of a convertible Deutschmark account for nonresidents.¹¹⁹ The terminal point was reached with the enactment of a circular on foreign trade and commerce 60/58 that did away, with effect from December 29, 1958,¹²⁰ with any restrictions on payments and on the transmittal or dispatch of means of payment. Thus foreign exchange rationing for practical purposes was relinquished.

A decisive share in the termination of the foreign exchange rationing took the form of legal instruments in the domain of public international law. While those prevalent before World War II were almost exclusively bilateral in nature, the fifties brought about a multilateral system of settlements called the European Payments Union.

113. The development is sketched by H.F. SCHULZ, *supra* note 33, Rz. 20.

114. This is traced in the federal government's submission introducing the draft of the foreign commerce statute to the Federal Parliament, Bt-Drucksache, 3d Legislature No. 1285.

115. BAnz No. 189, RA 66/56 of Sept. 28, 1956, which had been preceded beginning on Jan. 30, 1952, with RA 15/52, BAnz No. 20.

116. Beginning with RA 89/53, Oct. 5, 1953, BAnz No. 192.

117. BAnz No. 58, RA 24/54 of Mar. 24, 1954; cf. W. WABNITZ, *supra* note 88, at 21.

118. Cf. E. HÖCKE, *supra* note 20, at 92.

119. BAnz No. 177, RA 77/54 of Sept. 15, 1954.

120. BAnz No. 248, RA 60/58, No. 3 of Dec. 30, 1958.

Bilaterally, aside from clearing agreements that were still used,¹²¹ a new kind of payments agreement¹²² developed providing for a decentralized regime of payments with compensatory offsetting as among participating central banks.¹²³ Contrary to settlements agreements, they permitted the operation of whatever initiative was required to further bordercrossing economic activity between those immediately concerned with the transactions. True, the latter had to respect the foreign exchange legislation applicable in their respective country of residence. Amounts in foreign currency were made available by the central banks, which the latter settled mutually to begin with. If demand increased thereafter, the institutes of issue sold among each other specific amounts up to an agreed maximum of their own currency by way of a swing. During the validity of the agreement, swing positions were not required to be settled. When maximum amounts were exceeded, further deficit or deficits had to be set off in gold.¹²⁴

The most important step for the restoration of convertibility for Western European currencies and the termination of foreign exchange rationing was the opening of a multilateral system of settlements within the European Payments Union (EPU).¹²⁵ The bilateral clearing agreements had measured the scope of international exchange in goods and services in terms of the capacity of the weaker of the two partners, since excedents from bilateral trade and commerce as a rule could not be transferred, so that there was a coercion to keep the balance of payments between the parties at an equal level. This was fundamentally changed upon the establishment of the EPU, since the regular monthly settlement of all deposits and liabilities and their transformation into one claim or one liability vis-à-vis the EPU entailed equal convertibility of the currencies of all Member States and thus interchangeability. The coercion to keep the bilateral balance of payments on an equal level was thus relinquished.¹²⁶ "Spitzen" that had become available in the course of the procedure, that is to say claims or liabilities vis-à-vis the EPU, were offset up to the limit of specific quotas by the automatic granting of credits unless these excedents were honored by payments in U.S. dollars from Marshall Plan Funds¹²⁷ or by the remittal of gold. Beyond the quotas just mentioned was an unlimited obligation to offset in gold.¹²⁸ When

121. E. HOCKE, *supra* note 20, at 81.

122. In specific cases, traditional payments agreements were concluded; cf. W. WABNITZ, *supra* note 88, at 3 n.1.

123. *Id.*

124. *Id.*; F.A. MANN, *supra* note 51, at 501.

125. Agreement for the Establishment of a European Payments Union, Sept. 19, 1950, RGBI.II 31 (1952) [hereinafter EPU Agreement]; comments by H. HAHN & A. WEBER, DIE OECD 240 (1976).

126. Mann, *Money in Public International Law*, 96 RECEUIL DES COURS 29 (1959).

127. The first case of remedial action concerned the Federal Republic of Germany, which was soon to become an extreme creditor country within the EPU. Comments by Emminger, *Geld und Währungspolitik*, in WIRTSCHAFT UND WÄHRUNG IN DEUTSCHLAND 1876-1975, at 489 (Deutsche Bundesbank ed.) (2d ed. 1976).

128. EPU Agreement, *supra* note 125, art. 11.

convertibility had been attained at the end of 1958, the EPU ceased its activity. It was replaced by the European Monetary Agreement,¹²⁹ which, due to the convertibility of participants' currencies and the ensuing market development, had only insignificant tasks in the field of settlements.¹³⁰

In conclusion, reference must be made to the London Debt Agreement of February 27, 1953.¹³¹ It settled German pre-war and post-war foreign debts together with the reparation payments after World War I in their entirety and thus contributed most pertinently to the restoration of the Federal Republic's standing as a debtor in foreign countries and internationally.¹³²

It might be a blessing of history if the London Debt Agreement could serve as a model for dealing with monetary liabilities that require management by means of rescheduling, adjustment, and surveillance in order to attain definitive settlement. The lessons to be drawn from the multilateral instrument signed on February 27, 1953, and from thirty-five years of wholesome practice thereunder should aid in resolving the present international debt crisis as well.

129. F.A. MANN, *supra* note 51, at 502.

130. H. HAHN & A. WEBER, *supra* note 125, at 242; D. CARREAU, T. FLORY & P. JUILLARD, *DRÖIT ECONOMIQUE INTERNATIONALE* 186 (2d ed. 1985).

131. Bundesgesetzblatt II 333 (1953). The precise title was "Agreement on German External Debts."

132. Most recent comments by Schaffner, *Die Regelung der verbrieften Auslandsschulden des Deutschen Reiches innerhalb des Londoner Schuldenabkommens—Ein taugliches Modell zur Bereinigung gouvernementaler Auslandsschulden?* (Thesis Würzburg 1987); for a short statement compare Coing, *London Agreement on German External Debts*, 8 *ENCYCLOPEDIA PUB. INT'L L.* 364 (1958).