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Otto Sandrock

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Are Disputes Over the Application of Article VIII, Section 2(b) of the IMF Treaty Arbitrable?

“Exchange contracts which involve the currency of [a] member” begins article VIII, section 2(b) of the IMF Treaty¹ are legion in the international trade of today. Though a remarkable trend towards liberalization can be observed in many countries since the beginning of the 1980s, “exchange control regulations . . . maintained or imposed consistently with [the IMF] Agreement” (article VIII, section 2(b) continues) are still in effect in many Member States of the IMF. Thus, the applicability and the actual application of article VIII, section 2(b) in the enforcement of international contracts are continuing questions.

Since international arbitration is rapidly increasing,² one can assume that international arbitral tribunals are faced, in ever greater volume, with the problems inherent in the applicability and application of article VIII, section 2(b). While only a very few arbitral awards dealing with these questions have become known until now, that scarcity is hardly a matter for wonder. Three reasons may explain this silence of arbitral rulings: First, only a very small fraction of arbitral awards are published at all. Second, article VIII, section 2(b) seems to be a legal topic often overlooked in practice.³ Finally, the arbitrability of disputes concerning article VIII, section 2(b) is in doubt,⁴ and where parties

*Professor and Director of the Institute for International Business Law at the Law School of the University of Münster, Federal Republic of Germany. J.D., 1953, University of Göttingen, Federal Republic of Germany; LL.M., 1956, Yale Law School; LL.D., 1956, University of Göttingen.

1. Articles of Agreement of the International Monetary Fund [IMF Treaty], Dec. 27, 1945, art. VIII, sec. 2(b), 1 U.N.T.S. 39, T.I.A.S. No. 1501 [art. VIII, sec. 2(b)].

2. See the statistics published in the Annual Report 1987 of the International Chamber of Commerce in Paris, with respect to its Court of Arbitration. In 1987, 285 new requests for arbitration were introduced as well as 11 new requests for conciliation. At the end of 1987, approximately 700 arbitral proceedings were pending before the ICC Court of Arbitration. In 1987 that Court approved 149 final or partial awards.

3. See W. EBKE, *INTERNATIONALES DEVISENRECHT* ch. 2, sec. C(I)(2) (1989).

4. See *id.*

are aware of this, they seem to refrain from conferring jurisdiction upon an arbitral tribunal rather than to run the risk of having an eventual award annulled.

Sir Joseph Gold, to whom this article is devoted, is one of the very few scholars to have analyzed not only the question of arbitrability, but the separate (though closely related) problem of whether an arbitral tribunal is bound to apply article VIII, section 2(b), and if so, to what extent.⁵ In discussing this problem, Sir Joseph Gold is implicitly of the opinion that disputes over that article of the Treaty are arbitrable.⁶ His view of arbitrability is shared by the author of this article, who will support their common opinion with a few arguments.

The general problem of whether a dispute is arbitrable is dealt with differently in each municipal law. Thus, the question of whether article VIII, section 2(b) is arbitrable may also be answered differently from nation to nation, depending upon which specific national law is applied to the individual case.

The purpose of this article is not to offer a comparative survey on the dozens of municipal legislations that have issued rules on the arbitrability of legal issues or whose courts have taken a position with respect to this problem. Instead, this article analyzes only the arbitrability of disputes surrounding article VIII, section 2(b) under the law of the Federal Republic of Germany and United States federal arbitration law. The legal considerations governing the solutions within these two jurisdictions will exemplify the arguments in many other legal systems. Though the definition of arbitrability may vary from jurisdiction to jurisdiction, the question of whether issues arising under article VIII, section 2(b) are arbitrable is the same under all jurisdictions concerned, and the intrinsic nature of this problem commands answers that are at least similar. Consequently, the following discussions on West German and U.S. federal arbitration law should be meaningful to the debates going on in many other jurisdictions.

I. The Respect Due by Arbitral Tribunals to Article VIII, Section 2(b)

Before analyzing the details of such arbitrability, however, a preliminary question must be answered; namely, whether an arbitral tribunal is bound to apply article VIII, section 2(b), and if so, to what extent. Four facets of this question must be examined: (1) which conflict of laws rules an arbitral tribunal has to apply generally; (2) whether such general conflict of laws rules will prevail where the application of an exchange control regulation is in question; (3) whether an arbitral tribunal must apply exchange control regulations issued by a foreign legislator; and (4) whether a state court or arbitral tribunal must apply article VIII, section 2(b) even though that article has not been pleaded by one of the parties.

5. *Art. VIII, Section 2(b), Governments, Private Parties, and Arbitration*, in 2 J. GOLD, *THE FUND AGREEMENT IN THE COURTS* 462-64 (1982).

6. *Id.*

First, which rules of conflict of laws will an arbitral tribunal apply in general? In the past the common principle seems to have been that an arbitral tribunal has to follow the conflict of laws rules in effect at its seat.⁷ The modern trend, however, in the law of international arbitration has been to grant more discretion to such tribunal in the choice of its conflict of laws rules. Thus, article 13, paragraph 3, sentence 2 of the Rules for the ICC Court of Arbitration provides: "In the absence of any indication by the parties as to the applicable law, the arbitrator shall apply the law designated as the proper law by the rule of conflict which he deems appropriate." Similar rules can be found in the rules of many other arbitration institutions,⁸ as well as in the UNCITRAL Model Law⁹ and in some international enactments.¹⁰ A general principle may be derived from them¹¹ to the effect that an arbitral tribunal is not, like a state court, bound by the conflict of laws rules in force at its seat, but has a discretion to deviate from them. This allows the tribunal flexibility to develop and apply, depending upon the particular circumstances of each case, the conflict of laws rules that, in its view, seem most appropriate to determine the proper law.¹²

7. The Resolution passed by the Institute of International Law in 1957 provided: "Les règles de rattachement en vigueur dans l'État du siège du tribunal arbitral doivent être suivies pour déterminer la loi applicable au fond du litige." (English translation by the author of this article: "The rules of conflict of laws in effect in the state where the arbitral tribunal has its seat have to be followed for determining the law applicable to the merits of the dispute.") 2 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 453 (1957). This resolution leads to a report submitted by Sauser-Hall, *L'arbitrage en droit international privé*, *id.* at 394, 420.

8. See UNCITRAL Arbitration Rules art. 33(1); Arbitration Rules for the Center of Arbitration at the Official Franco-German Chamber of Industry and Commerce in Paris art. 18.2; Arbitration Rules for the Arbitral Centre of the Federal Economic Chamber of Vienna sec. 23; Arbitration Rules of the United Nations Economic Commission for Europe art. 38. A similar, albeit not as outspoken, rule can be found in Rules for the London Court of International Arbitration art. 13(1)(a).

9. UNCITRAL Model Law on International Commercial Arbitration, June 21, 1985, art. 28(2), reprinted in A. REDFERN & M. HUNTER, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 416 (1986).

10. See, e.g., French New Code of Civil Procedure (Nouveau Code de Procédure Civile) May 12, 1981, art. 1496, para. 1; Declaration of the Algerian Government, Jan. 19, 1981, Concerning the Settlement of Claims, art. V, reprinted in 75 AM. J. INT'L L. 422, 424 (1981), 7 Y.B. COM. ARB. 257, 259 (1982); European Convention on International Commercial Arbitration, April 4, 1961, art. VII(1), second sentence.

11. See Sandrock, *Die Fortbildung des materiellen Rechts durch die internationale Schiedsgerichtsbarkeit*, in RECHTSFORTBILDUNG DURCH SCHIEDSGERICHTS sec. D(II)(1) (K. Boeckstiegel ed.) (forthcoming).

12. A. BUCHER, *LE NOUVEL ARBITRAGE INTERNATIONAL EN SUISSE* 79 (1988); W.L. CRAIG, W.W. PARK & J. PAULSSON, *INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION* § 17.01, at 74 (1984); A. REDFERN & M. HUNTER, *supra* note 9, at 95; Lando, *The Law Applicable to the Merits of the Dispute*, 2 ARB. INT'L 104, 110-12 (1986); Blessing, *The New International Arbitration Law in Switzerland*, 5 J. INT'L ARB. 9, 57 (No. 2 1988); Bockstiegel, *Anwendbares Recht in Internationalen Schiedsverfahren*, in Festschrift für Gunther Beitzke zum 75. Geburtstag 443, 452-453 (O. Sandrock ed. 1979); Croff, *The Applicable Law in an International Commercial Arbitration: Is It Still a Conflict of Laws Problem?* 16 INT'L LAW. 613, 629 (1982); Derains, *Détermination de la lex contractus*, in L'APPORT DE LA JURISPRUDENCE ARBITRALE 7, 14 (Chambre de Commerce Internationale, Institut du Droit des Affaires Internationales ed. 1986); Goldman, *Les Conflits de Lois Dans*

The second question to be examined under the conflict of laws analysis is whether this general, very basic rule can prevail where the application of an exchange control regulation is at stake. Exchange control regulations may have been issued by the *lex fori* or by a foreign jurisdiction. In the present context, both possibilities must be distinguished. First, this article considers to what extent, if at all, an arbitral tribunal must apply exchange control legislation of the *lex fori*, i.e., the law of the state on whose territory it is sitting. A subsequent section of this article then examines the other question of what respect is due by an arbitral tribunal sitting within the confines of the *lex fori* to exchange control regulations enacted in foreign jurisdictions.

The exchange control regulations of the *lex fori* always form an integral part of its public policy provisions. This explains why their application is not left to the discretion of the parties to a contract, but imposes itself *ex officio*. The parties cannot contract out of the purview of the exchange control regulations, either on the level of substantive law or on the level of conflict of laws.¹³ In other words, exchange control regulations are not only mandatory on the level of substantive law, they are also beyond the conflict of laws autonomy of the parties who cannot derogate from them by choosing a foreign law as the proper law of their contract. Exchange control regulations belong to the category of mandatory rules envisaged by article 7, paragraph 2 of the EC Convention on the Law Applicable to Contractual Obligations of June 19th, 1980,¹⁴ which provides: "Nothing in this Convention shall restrict the application of the rules of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract."¹⁵

L'arbitrage International de Droit Privé, 2 RECUEIL DES COURS 347, 366 (1963); P. Lalive, *Les Règles de Conflit de Lois Appliquées Par L'Arbitre International Siégeant en Suisse*, REVUE D'ARBITRAGE 155 (1976).

Some authors have raised objections against such a discretion of the arbitrators by criticizing the uncertainties resulting from it. See Branson & Wallace, *Choosing the Substantive Law to Apply in International Commercial Arbitration*, 27 VA. J. INT'L L. 39, 42-44 (1986); Higgins, Brown & Roach, *Pitfalls in International Commercial Arbitration*, 35 BUS. LAW. 1035, 1039 (1980); Wilner, *Determining the Law Governing Performance in International Commercial Arbitration: A Comparative Study*, 19 RUTGERS L. REV. 646, 684-87 (1965).

13. See W. Ebke, *supra* note 3, ch. 2, secs. A(II), B(II)(1); Williams, *Extraterritorial Enforcement of Exchange Control Regulations Under the International Monetary Fund Agreement*, 15 VA. J. INT'L L. 319, 373 (1975).

14. The English version of this Convention is reprinted in 19 I.L.M. 1492 (1980), 22 VA. J. INT'L L. 142 (1981).

15. See Lipstein, *Conflict of Public Laws—Visions and Realities*, in Festschrift für Imre Zajtay 357, 361 (R.H. Graveson ed. 1982); Philip, *Mandatory Rules, Public Law (Political Rules) and Choice of Law in the EEC Convention on the Law Applicable to Contractual Obligations*, in CONTRACT CONFLICTS, THE EEC CONVENTION ON THE LAW APPLICABLE TO CONTRACTUAL OBLIGATIONS: A COMPARATIVE STUDY 81, 101 (P.M. North ed. 1982); Sandrock, *Choice of Law and Choice of Forum in Civil Law Jurisdictions*, in DRAFTING AND ENFORCING CONTRACTS IN CIVIL AND COMMON LAW JURISDICTIONS 145, 171-74 (K. Yelapaala ed. 1986). For a critical approach, see Drobnig, *Comments on Article 7 of the Draft Convention*, in EUROPEAN PRIVATE INTERNATIONAL LAW OF OBLIGATIONS 82, 85

In French conflict of laws terminology such public policy rules are called "règles d'application immédiate"; in German conflict of laws terminology they carry the name of "Eingriffsnormen." Antitrust rules, securities regulations, export embargoes, prohibitions with respect to the export of cultural property, rules forming part of workmen's protective legislation, and import regulations designed to protect human health all belong to the category of mandatory provisions under discussion here. They have one feature in common: they are all the expression of a certain stringent policy of the *lex fori* to have its legislation enforced not only irrespective of the common intention of the parties but also to the exclusion of any other more lenient or more stringent policy pursued by any foreign legislation. These mandatory rules thus constitute a number of legislative prescriptions intended to be irreplaceable either by the will of the parties or by foreign legislation. Since they are part of the public and not private law of the *lex fori*, they might also be labelled "public control of business provisions."

Since exchange control regulations are part of that body of law, any state court within the territory of the *lex fori* is, as a matter of course, bound to apply them. The policy lying behind this mandate also requires an arbitral tribunal to act accordingly. It follows, therefore, that an arbitral tribunal sitting, for example, in the Federal Republic of Germany or in New York, would be bound to apply West German or New York exchange control regulations, respectively, if such regulations exist (which, fortunately, is not the case in the Federal Republic of Germany).

The third aspect of the application of article VIII, section 2(b) to be examined deals with the situation where a foreign legislature, and not a forum legislature, issued exchange control regulations. In such a case must an arbitral tribunal sitting within the *lex fori* apply those foreign exchange control regulations, and if so, under which conditions?

This same question is raised with respect to public policy provisions of all kinds enacted by foreign legislatures.¹⁶ Do arbitral tribunals have to apply such

(O. Lando ed. 1975); Van Hecke, *International Contracts and Domestic Legislative Policies*, in *INTERNATIONALES RECHT UND WIRTSCHAFTSORDNUNG*, Festschrift für F. A. Mann 183 (W. Flume ed. 1977).

16. There is one doctrine pleading for the enforcement of foreign public control of business provisions within the confines of the *lex fori* if such provisions are part of the proper law of contract. See, e.g., F. A. Mann, *STUDIES IN INTERNATIONAL LAW* 492-514 (1973); F. Vischer & A. von Planta, *INTERNATIONALES PRIVATRECHT* 188 (1982); Heini, *Die Anwendung Wirtschaftlicher Zwangsmassnahmen im Internationalen Privatrecht*, 22 *BERICHTE DER DEUTSCHEN GESELLSCHAFT FÜR VÖLKERRECHT* 37, 39 (1982); Lipstein, *supra* note 15, at 364; Mann, *Prerogative Rights of Foreign States and the Conflict of Laws*, 40 *TRANSACTIONS OF THE GROTIUS SOCIETY* 25 (1955). This also seems to be the position of the English common law. See, e.g., 2 A. Dicey & J. Morris, *THE CONFLICT OF LAWS* 91 (1980).

Many writers of German conflict of laws are opposed to this; rather, they cling to the general rule according to which foreign public control of business regulations are, in principle, unenforceable within the *lex fori*. See, e.g., G. Kegel, *INTERNATIONALES PRIVATRECHT* 714-16 (1987); O. Sandrock, 1 *HANDBUCH DER INTERNATIONALEN VERTRAGSGESTALTUNG* 88 (1980); Sandrock, *supra* note 15, at 175-77; see also *infra* note 17.

The situation in French conflict of laws appears controversial. See I. H. Batiffol & P. Lagarde, *DROIT INTERNATIONAL PRIVÉ* Nos. 248, 251 (1981).

provisions as foreign antitrust provisions, foreign securities regulations, foreign export embargoes, foreign prohibitions with respect to the export of cultural property, foreign workmen's protective legislation, and foreign import regulations designed to protect human health?¹⁷ This question has been dealt with generally for State courts in article 7, paragraph 1 of the EC Convention on the Law Applicable to Contractual Obligations, which provides:

When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and insofar as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.¹⁸

Article 7, paragraph 1 thus confers upon a State court facing such a problem discretion to apply, or not to apply, foreign public control of business provisions. This principle of conflict of laws corresponds, more or less, to the conflict of laws rules that were in effect in many continental European States before the signing of the EC Convention.¹⁹

With respect to foreign exchange control regulations, the specific purpose of article VIII, section 2(b) of the IMF Treaty has been to remove such discretion.²⁰ With the accession of their States to the IMF Treaty, courts of IMF Member States no longer enjoyed the option of applying the exchange control regulation of other Member States issued in conformity with the articles of the IMF-Agreement, but were bound to apply them. It was thus the intention of the Member States' signatories to the Agreement to replace the previous discretion by a henceforth binding obligation.²¹ This new rule was, and still is, designed to

17. The general rule seems to be that public control of business provisions by a third state (the law of which is not the proper law of the contract) are, in principle, not enforceable within the *lex fori*. See, e.g., A. DICEY & J. MORRIS, *supra* note 16, at 89-90 (Rule 3 states: "The court has no jurisdiction to entertain an action—(1) for the enforcement, either directly or indirectly, of a penal, revenue, or other public law of a foreign State; or (2) founded upon an act of State."). There is a series of exceptions to this general rule, however. For these exceptions, see, e.g., G. KEGEL, *supra* note 16; O. SANDROCK, *supra* note 16.

18. See *supra* text accompanying notes 14-16.

19. See *supra* notes 17-18.

20. As to the general unenforceability of foreign exchange control regulations within the *lex fori* (a general principle applied before art. VIII, sec. 2(b) went into effect and still applicable where art. VIII, sec. 2(b) is not applicable), see the comparative survey given by W. EBKE, *supra* note 3, ch. 2, sec. B(II)(2) for further references.

21. For further references, see W. EBKE, *supra* note 3, ch. 2, secs. B, C, and sec. C(I)(5)(a); Williams, *supra* note 13, at 373. See also F.A. MANN, *THE LEGAL ASPECT OF MONEY* 375-76 (1982) (although Dr. Mann qualifies art. VIII, sec. 2(b) as a rule not of conflict of laws, but of substantive law). The conclusion drawn in the text accompanying this footnote also follows from Decision No. 446-4, June 10, 1949, by the Board of Executive Directors of the Fund, stating:

By accepting the Fund Agreement members have undertaken to make the principle mentioned above [i.e., the unenforceability by virtue of art. VIII, sec. 2(b)] effectively part of their national law. This applies to all members . . . [A]n obvious result of the foregoing undertaking is that if a party to an exchange contract of the kind

guarantee the overall enforcement of the Member States' regulations to the extent such rules are consistent with the Agreement itself.

It is clear, therefore, from the purpose of article VIII, section 2(b), that the rules enshrined in it not only have to be followed by the state courts of Member States, but also by arbitral tribunals sitting within their territories. Otherwise the specific policy of overall enforcement pursued by article VIII, section 2(b) could be vitiated by arbitral tribunals.

The fourth aspect of the application of article VIII, section 2(b) surrounds the doctrinal discussion about whether a state court or an arbitral tribunal has to apply article VIII, section 2(b) *ex officio* irrespective of whether the parties to the litigation or arbitration have invoked the article,²² or whether its application is contingent upon a pleading by the parties or at least one party.²³

In the light of the arguments previously set forth, the solution of this problem is not in doubt. Since the specific policy pursued by article VIII, section 2(b) could be jeopardized if its application were left to the pleadings of the parties, any state court or arbitral tribunal must apply that article irrespective of whether both parties or one of them have invoked it. In that sense, article VIII, section 2(b) is self-executing.

Finally, it must be stressed that article VIII, section 2(b) has not only introduced obligations as between the Member States of the IMF, but also immediately affects the rights and duties of private parties who are, consequently, entitled to invoke it in proceedings before State courts as well as in arbitral proceedings.²⁴

referred to in art. VIII, sec. 2(b) seeks to enforce such a contract, the tribunal of the member country before which the proceedings are brought will not, on the ground that they are contrary to the public policy (*ordre public*) of the forum, refuse recognition of the exchange control regulations of the other members which are maintained or imposed consistently with the Fund Agreement. It also follows that such contracts will be treated as unenforceable notwithstanding that under the private international law of the forum, the law under which the foreign exchange control regulations are maintained or imposed is not the law which governs the exchange contract or its performance.

The text of this Decision is reprinted in J. GOLD, *THE FUND AGREEMENT IN THE COURTS* 12, 13 (1962).

22. This view seems to prevail. See, e.g., J. GOLD, *supra* note 21, at 61; 3 J. GOLD, *THE FUND AGREEMENT IN THE COURTS* 561 (1986); Gold, *The Iran-United States Claims Tribunal and the Articles of Agreement of the International Monetary Fund*, 18 GEO. WASH. J. INT'L L. & ECON. 537, 548-49 (1985) [hereinafter Gold, *Iran-United States Claims Tribunal*]; F.A. MANN, *supra* note 21, at 397 (referring to the unreported case *Batra v. Ebrahim* in which Lord Denning, M.R., made a statement to the same effect); the Judgment of Feb. 17, 1971, of the German Federal Supreme Court (Bundesgerichtshof), 55 Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 334, 337-39; Judgment of Mar. 8, 1979, 1980 NEUE JURISTISCHE WOCHENSCHRIFT 520.

23. See A. DICEY & J. MORRIS, *supra* note 16, at 1029.

24. For the opposite view, not very convincing, see the arbitral award reported by J. LEW, *APPLICABLE LAW IN INTERNATIONAL COMMERCIAL ARBITRATION* 405-09 (1978). Sir Joseph Gold has persuasively argued against it; see J. GOLD, *supra* note 5, at 463. See also F.A. MANN, *supra* note 21, at 383, and, in great detail, W. EBKE, *supra* note 3, ch. 2, sec. C, I(1).

It is true that the IMF Treaty is an international convention creating rights and duties with respect to the Member States that adhere to it. But the Member States, in their accessions to the IMF, have obligated themselves to incorporate article VIII, section 2(b) into their domestic laws and, in discharging their conventional obligations, have done so. Thus article VIII, section 2(b) has been transformed, by legislative enactments of the different Member States, into provisions of their municipal laws, thereby immediately binding all private persons subject to their jurisdictions.²⁵

The results of our preceding analysis may be summed up, therefore, as follows: an arbitral tribunal owes unconditional respect not only to the exchange control regulations forming part of its own *lex fori*, but, by virtue of article VIII, section 2(b), also to the exchange control regulations of other Member States of the IMF issued in conformity with the articles of the Treaty. In particular, such respect is not contingent upon whether both parties or one of them have invoked that article in their pleadings before the tribunal. Article VIII, section 2(b) is applied *ex officio*. It has by transformation been incorporated into the municipal laws of the IMF Member States, thereby creating rights and duties immediately as between the parties to "exchange contracts," and thus operating not only as an international convention between the Member States of the IMF.

II. The Different National Criteria Determinative of Arbitrability

The general standards determining the arbitrability of a legal issue are different from State to State. In the Federal Republic of Germany, section 1025, paragraph 1 of the Code of Civil Procedure provides: "The agreement by which the settlement of a dispute is submitted to one or more arbitrators is legally valid, *when the parties have the right to enter into a settlement on the subject matter of the dispute*" (emphasis added). Thus, the arbitrability of a legal issue is linked to the other question of whether or not the parties would have the power to clear that issue by an amicable settlement. In other words, arbitrability of the subject matter is equated with the susceptibility of being compromised.²⁶

In order to know whether, under the law of the Federal Republic of Germany, a dispute on a claim for money that is affected by article VIII, section 2(b) is arbitrable or not, one must first ask the other question of whether the parties would be allowed to enter into an amicable settlement. The answer to this question would depend upon whether overwhelming public policy considerations would vie against such susceptibility. In the Federal Republic of Germany the problem of arbitrability reduces to the following questions: (1) would the parties

25. This is also the view underlying the award of an arbitral tribunal seated in Belgium and reported in *JOURNAL DES TRIBUNAUX* 727, 728-29 (1983). See W. EBKE, *supra* note 3 (drawing the attention of the author to this award).

26. For further details, see O. GLOSSNER, *COMMERCIAL ARBITRATION IN THE FEDERAL REPUBLIC OF GERMANY* 3, 4 (1984).

to a dispute involving a claim for money that is affected by article VIII, section 2(b) be entitled to compromise on that claim? (2) if so, under what conditions and to what extent? and (3) would any public policy considerations exclude such authority to compromise? Thus, in the last resort, considerations of public policy are controlling.

One should consider that in this respect West German law is very liberal.²⁷ Private matters involving antitrust problems, for example, are generally susceptible to compromise. Furthermore, section 91 of the West German Act on Restrictive Trade Practices provides that arbitration agreements covering future legal disputes arising from restrictive trade agreements or understandings (permissible under certain antitrust provisions) shall be enforceable if and insofar as they permit each contracting party to bring their dispute before the ordinary courts instead of arbitration panels. Also, in matters of industrial property, the authority of parties to compromise and hence, arbitrability in general is recognized in West Germany.²⁸ Only in the field of labor relations are the authority to compromise and arbitrability interpreted more restrictively.²⁹

This liberal attitude vis-à-vis susceptibility to compromise as well as vis-à-vis arbitrability should be considered when, ultimately, the question whether disputes over claims affected by article VIII, section 2(b) are arbitrable or not under the laws of the Federal Republic of Germany must be answered.

The position taken in U.S. federal law with respect to arbitrability is well known. For international contracts, the path has led from *Scherk v. Alberto-Culver & Co.*³⁰ to *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*³¹ The path has been paved with the well-known statement in *Scherk*: "A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is . . . an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transactions."³² Since this liberalization of U.S. federal arbitration law

27. For more detailed information, see Sandrock, *Arbitration Between U.S. and West German Companies: An Example of Effective Dispute Resolution in International Business Transactions*, 9 U. PA. INT'L BUS. L. 27, 40-42 (1986) [hereinafter Sandrock, *Arbitration*]; Sandrock, *Dispute Resolution in International Business Transactions*, in PUBLIC INTERNATIONAL LAW AND THE FUTURE WORLD ORDER ch. 8, at 8-10 (J. Norton ed. 1987).

28. For more detailed information, see O. GLOSSNER, *supra* note 26, at 3, 55.

29. See German Code of Procedure for Labor Courts (Arbeitsgerichtsgesetz) sec. 101, which provides that employees' unions and trade unions can agree to refer their disputes on contracts concluded between them to certain arbitral tribunals. They can also agree that their members have to take their disputes to these arbitral tribunals (such agreement being binding upon their members). These arrangements may be entered into, however, only with regard to certain kinds of employees such as stage or circus artists, movie actors, or captains or sailors of the marine. From this rather restrictive provision the general conclusion is drawn that all other labor disputes are foreclosed from private arbitration. See also O. GLOSSNER, *supra* note 26, at 3.

30. 417 U.S. 506 (1974).

31. 105 S. Ct. 3346 (1985).

32. *Scherk*, 417 U.S. at 516-17.

in international matters has been described, analyzed, and praised many times³³ in other places,³⁴ it is unnecessary to repeat this exercise in the present context. Suffice it to say that, again, public policy considerations play the paramount role. Thus, in U.S. law the issue of arbitrability will have to be dealt with in a way similar to West German law.

III. Arbitrability: Article VIII, Section 2(b) Under the General Policies of West German and U.S. Federal Arbitration Laws

This section of the article focuses on the general public policy considerations controlling the arbitrability of a claim affected by article VIII, section 2(b) under West German law and under U.S. federal arbitration law. There are public policy considerations *against* the arbitrability of issues under article VIII, section 2(b) as well as *for* it.

The original legislative intent and basic policy underlying article VIII, section 2(b) certainly crusade against the arbitrability of any legal issue arising under it. Article I of the IMF Treaty defines the general purposes of the IMF as follows:

- (i) To promote international monetary co-operation through a permanent institution which provides the machinery for consultation and collaboration on international monetary matters. (ii) To facilitate the expansion and balanced growth of international trade, and to contribute thereby to the promotion and maintenance of high levels of employment and real income and to the development of the productive resources of all members as primary objectives of economic policy. (iii) To promote exchange arrangements among members . . . (iv) To assist in the establishment of a multilateral system of payments in respect of current transactions between members and in the elimination of foreign exchange restrictions which hamper the growth of world trade . . . (vi) In accordance with the above, to shorten the duration and lessen the degree of disequilibrium in the international balances of payments of members.

In view of this long list of general objectives, it must be assumed that the primary purpose of the special provision of article VIII, section 2(b) is to protect the balances of payments of its members.³⁵ Dealings in the currency of a

33. See the initial commentaries by Aksén, *Application of the New York Convention by United States Courts*, 14 Y.B. COM. ARB. 341, 348-50 (1979); Delaume, *L'arbitrage Transnational et les Tribunaux Américains*, 108 J. DU DROIT INT'L 788, 792-94 (1981); Harnik, *Recognition and Enforcement of Foreign Arbitral Awards*, 31 AM. J. COMP. L. 703, 704 (1983); Sanders, *A Twenty Years Review of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 13 INT'L LAW. 271 n.20 (1979).

34. There has been a tremendous amount of comment, in doctrine, upon the *Mitsubishi* decision. The comments are compiled in Sandrock, *Arbitration*, *supra* note 27, at 45 n.100; Sandrock, *Gerichtsstands-oder Schiedsklauseln in Verträgen zwischen US amerikanischen und deutschen Unternehmen: Was ist zu empfehlen?*, in Festschrift für Ernst C. Stiefel zum 80. Geburtstag 625, 661 n.147 (1987).

35. See the extensive discussion of the purposes of the Fund in general by 3 J. GOLD, *supra* note 22, at 367-68:

In a situation of disequilibrium in the balance of payments, restrictions on payments and transfers associated with trade may be an appropriate measure for the time being. By authorizing a member to apply this measure among the measures taken to correct

Member State are to be enforceable only if they are consistent with the exchange control regulations of that Member State and of other Member States. Each Member State thus shall be able to control the flow and transfer of its own currency and of its reserves in other Members' currencies.

The achievement of this goal could be impaired if the parties to an "exchange contract" within the meaning of article VIII, section 2(b) would be authorized to compromise on a matter subject to that article. If, for example, a sum of foreign currency was received by A, a national and resident of state X, such state being a member of the IMF, and if A in contravention of the exchange control regulations of his home state X (which provide that such sums should be tendered to the Central Bank of X), promised to pay that sum to B, a resident of state Y, the aim of article VIII, section 2(b) could be jeopardized if, in a suit by B against A for the payment of such money, both could compromise by stipulating that A would pay to B either some or all of the money. Then the money would not be paid to the Central Bank of X which badly needs it to equalize the balance of payments of X, but would go to B who would eventually spend it in a way detrimental to X's balance of payments.

Thus, to assume that a claim for money affected by article VIII, section 2(b) would be susceptible of being compromised and arbitrable would, at first glance, be subject to serious objections as far as German arbitration law is concerned.

IV. Arbitrability: The Severability of the Application of Article VIII, Section 2(b)

It is doubtful, however, whether these objections are justified. An "exchange contract" in the meaning of article VIII, section 2(b) could be in dispute in three different respects: (1) the parties to such contract may be in dispute over matters wholly unrelated to the operation of article VIII, section 2(b), the application of that article being acknowledged by both parties; (2) the application of article VIII, section 2(b) as well as other matters may be in dispute between the parties; and (3) the dispute may relate only to the application of article VIII, section 2(b) while the parties are in full agreement as to all other matters related to their contract.

It thus appears that an "exchange contract" in the meaning of article VIII, section 2(b) may be composed of issues concerning the application of that article and of other issues wholly unrelated to it. If severability were applied to these two different kinds of issues, one and the same "exchange contract" could be

the balance of payments, the objective may be the expansion and balanced growth of international trade in due course. The persistence of disequilibrium in the balance of payments will frustrate and not promote this objective.

See also the definitions of the goals of art. VIII, sec. 2(b) given by F.A. MANN, *supra* note 21, at 388; W. EBKE, *supra* note 3, ch. 2, sec. C(I)(7), III(1)(g); Judgment of Feb. 17, 1971, of the German Federal Supreme Court, *supra* note 22.

split up into two different components, one seemingly lacking arbitrability since affected by article VIII, section 2(b) and the other one fully arbitrable since it related to other legal issues. In other words, exchange contracts would be partially nonarbitrable and partially arbitrable. One possible solution is that the arbitrable components could be left to the jurisdiction of the arbitral tribunal while the nonarbitrable issues would be brought before the competent State court, leading to a "jurisdictional segregation" or "bifurcation" of the dispute. The other possibility is that all issues, whether arbitrable or not, would fall under the jurisdiction either of the competent State court (absorption of all matters by State court jurisdiction) or of the arbitral tribunal (absorption of all matters by arbitral jurisdiction).

Before this question can be answered, however, a demonstration is necessary as to the severability of the application of article VIII, section 2(b), and other matters unrelated to that problem. Is it really possible to segregate, within one and the same contract, issues concerning the application of article VIII, section 2(b) and other matters that have nothing to do with that article?

As far as this problem is concerned, the intrinsic nature of "exchange contracts" in the meaning of article VIII, section 2(b) has to be examined. In this respect, it must be remembered that an "exchange contract" in the meaning of article VIII, section 2(b) may pursue different general objectives.

The primary and only purpose of an exchange contract may be related to one or two currencies, for example, where a sum of money in one currency is exchanged into a sum of money in another currency (this would be an "exchange contract" in the literal sense of the word).³⁶ Another exchange contract is where A, a resident of state X, for a transient period needs a certain sum of money in the currency of state Y and therefore receives a promise from B, who is a resident of Y, to have this sum disbursed to him as a loan. Where the purpose of the "exchange contract" is as narrow as that, the whole performance of at least one of the parties may be affected by an exchange control regulation and hence be covered by article VIII, section 2(b).

Still, other matters wholly unrelated to the application of article VIII, section 2(b) may be in dispute with respect to such contracts. For example, disputed issues could include the following: the validity of a contract that, as one party may allege, has been entered into under duress, undue influence, or a unilateral mistake; the enforceability of a contract in view of the frustration invoked by one of the parties; the termination of a contract by the lapse of a time limit provided for in the contract; or termination by notice given by one of the parties. All of

36. There is one school of doctrine which interprets art. VIII, sec. 2(b) along those lines thereby substantially narrowing down its purview. This school of doctrine is primarily followed by English courts. Though they advocate another, more extensive interpretation of the term "exchange contract," an extensive survey on this school of doctrine is given in 3 J. GOLD, *supra* note 22, at 745-53; see also F.A. MANN, *supra* note 21, at 384-91; W. EBKE, *supra* note 3, ch. 2, sec. C(III).

these issues are clearly severable from the application of article VIII, section 2(b) and would, in principle, be fully arbitrable.

The purpose of an "exchange contract" may, however, be much broader. The contract may be a contract of sale providing for the delivery, across the border between two IMF members, of a good against a sum of money in a currency of one of the two IMF members. It may be a contract for the rendering of services, the performance of certain works, the grant of a license, or the lease of an immovable or movable where the *quid pro quo* would consist of the payment of a certain sum of money, again in the currency of an IMF member.³⁷ If, in these cases, an exchange control regulation would have to be applied by virtue of article VIII, section 2(b), only the obligation to pay money would be affected by that article.

Unlike the situation in the cases cited earlier, however, contractual stipulations beyond the legislative intent of the respective exchange control regulations would exist and thus remain outside of the purview of article VIII, section 2(b). The respective exchange control regulation and article VIII, section 2(b) would certainly not purport to prohibit the execution of a sale, the rendering of services, the performance of works, the grant of a license, or the lease of an immovable or movable provided the *quid pro quo* for such performance would not contravene their specific policies pursued by them.

In summary, the application of article VIII, section 2(b) is clearly severable from other issues wholly unrelated to that article in "exchange contracts" in the literal sense of the term as well as in "exchange contracts" in the broad sense of that term. Thus, the issues wholly unrelated to the article are, in principle, fully arbitrable.

V. Arbitrability: The Scope of the Dispute

If a contract can thus clearly be split into issues relating to the application of article VIII, section 2(b), issues that seem to be nonarbitrable, and issues that have nothing to do with article VIII, section 2(b), and thus are fully arbitrable, the question arises whether a dispute over that contract could be severed into nonarbitrable proceedings and arbitrable proceedings. In such a situation each proceeding would have to be brought before different judicial bodies (i.e., the nonarbitrable issues before a competent State court and the arbitrable issues before an arbitral tribunal). If the dispute is not severed, there is a question whether the jurisdiction of one of the two judicial bodies would absorb the jurisdiction of the other (resulting in the comprehensive and exclusive jurisdiction of either the competent State court or of the arbitral tribunal).

37. German courts as well as German scholars tend to follow a broad interpretation of the term "exchange contract." See an extensive survey on the "German" interpretation given and essentially approved of by W. EBKE, *supra* note 3, ch. 2, sec. C(III)(1)(e). Sir Joseph Gold and F.A. Mann, sources cited *supra* note 36, also adhere to such broad interpretation.

In this context three different factual situations must be distinguished: (1) only issues wholly unrelated to the application of article VIII, section 2(b) are in dispute between the parties while the latter agree upon the application itself of that article; (2) the dispute relates to the application of article VIII, section 2(b) as well as to other issues; and (3) only the application of article VIII, section 2(b) is the subject matter of the dispute. This article examines the three factual situations separately from each other.

A. THE DISPUTE INVOLVES ONLY ISSUES WHOLLY UNRELATED
TO THE APPLICATION OF ARTICLE VIII, SECTION 2(b)

Where the parties agree, for example, to be bound by a domestic or foreign exchange control regulation while they are in dispute over the amount to be paid, the joint and several liability of one of them, the entry of a limitation by a lapse of time, the voidability of their transaction, or any other issue wholly unrelated to article VIII, section 2(b), the specific policy underlying that article of the IMF Treaty is not in danger of being jeopardized. Therefore, in such a case under German arbitration law, susceptibility of being compromised and arbitrability is given. Under U.S. federal arbitration law, arbitrability also could not be denied. Since the application of article VIII, section 2(b) would not be in dispute, the arbitral tribunal could fully exercise the jurisdiction conferred upon it by the agreement of the parties.

B. THE DISPUTE SURROUNDS THE APPLICATION OF ARTICLE VIII,
SECTION 2(b) AS WELL AS OTHER ISSUES

The solution may have to be different where the dispute surrounds not only issues outside the scope of article VIII, section 2(b), but also the application of that article.

For example, the parties disagree not only on the voidability and/or the termination of an "exchange contract," but also on whether a foreign exchange control regulation affecting their contract is in conformity with the IMF Treaty. Besides the voidability and/or termination of the "exchange contract," the dispute may comprise the question of whether an exchange control regulation of the *lex fori* covers the contract. In this situation, the dispute of the parties relates to a seemingly nonarbitrable part of their contract (involving the application of article VIII, section 2(b)) and a fully arbitrable part of it (involving other questions). It is the presence of partial nonarbitrability that distinguishes this case from those dealt with in the preceding section of this article.

The question therefore arises whether the partial nonarbitrability of the dispute will lead to a segregation of the subject matter into those apparently nonarbitrable issues to be decided by the competent State court, and arbitrable issues to be dealt with by the arbitral tribunal. There is still yet another possibility: that the

jurisdiction of the competent State court or the jurisdiction of the arbitral tribunal will indiscriminately absorb all matters.

In answering this question, policies must be weighed. One will have to take into account the policies underlying article VIII, section 2(b) as well as the policies upon which the permissibility and the recognition of arbitration rests.

First, one must acknowledge that international arbitration is indispensable in the international commerce of today. Much has been said about this subject in recent years that need not be repeated here. The United States Supreme Court recognized the highly important role of international arbitration in some recent decisions.³⁸

Second, in the cases under consideration here, the contractual issues falling under the exchange control regulations and covered by article VIII, section 2(b) can be clearly distinguished and separated from the other issues that are beyond the scope of those provisions. It would hardly be convincing to deny the arbitrability of a dispute in its entirety if only one fraction of the disputed issues appears to be nonarbitrable.

This conclusion is well supported by a general policy in support of arbitration, a policy that has been pursued by U.S. courts when trying to reconcile, for example, the enforcement of U.S. antitrust laws with the principles underlying U.S. federal arbitration law.³⁹ This policy was applied where a complaint before a state court was comprised of claims resulting from statutory antitrust provisions held nonarbitrable as well as other claims capable of being arbitrated.⁴⁰ When such a combination of nonarbitrable and arbitrable claims was introduced before a federal district court, the court had discretion to stay the proceedings while directing the plaintiff to pursue his arbitrable claims before the arbitral tribunal.⁴¹ This action is proper provided that both kinds of claims were not inextricably intertwined with each other so as to exclude their proper segregation (this

38. See *supra* text accompanying notes 30–32.

39. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 723 F.2d 155, 169 (1st Cir. 1983); *Applied Digital Technology Inc. v. Continental Casualty Co.*, 576 F.2d 116, 118 (7th Cir. 1978); *Sam Reisfeld & Son Import Co. v. S.A. Eteco*, 530 F.2d 679, 681 (5th Cir. 1976); *J. Cobb v. Lewis*, 488 F.2d 41, 49–50 (5th Cir. 1974); *American Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 828 (2d Cir. 1968); *A. & E. Plastik Pak Co. v. Monsanto Co.*, 396 F.2d 710, 715–16 (9th Cir. 1968); *Janmort Leasing, Inc. v. Econo-Car Int'l, Inc.*, 475 F. Supp. 1282, 1290–94 (E.D.N.Y. 1979); see also Nissen, *Antitrust and Arbitration in International Commerce*, 17 HARV. INT'L L.J. 110 (1976).

40. The same policy has been applied by U.S. courts where nonarbitrable claims based upon U.S. federal security laws were combined with other arbitrable claims. See *Liskey v. Oppenheimer & Co.*, 717 F.2d 314, 315–20 (6th Cir. 1983); *Miley v. Oppenheimer & Co.*, 637 F.2d 318, 334–37 (5th Cir. 1981); *Dickinson v. Heinold Secs., Inc.*, 661 F.2d 638, 642–46 (7th Cir. 1981); *Sibley v. Tandy Corp.*, 543 F.2d 540, 542–43 (5th Cir. 1976).

41. Note the wording of this exception in *Dickinson*, 661 F.2d at 644: "Where the non-arbitrable issues substantially permeate the entire case and make it difficult to separate out the arbitrable issues, the district court has discretion to stay arbitration pending a judicial resolution of the non-arbitrable claims."

exception being labelled the "doctrine of permeation" or "doctrine of intertwining").⁴² This policy of segregation was aimed at enforcing party autonomy and recognizing the role that arbitration has to play in the commercial world of today.

A similar, though not identical policy must prevail in the cases under consideration here. It is hardly justifiable to deny the arbitrability of the "exchange contract" in its entirety when only one fraction of it would be affected by article VIII, section 2(b). This approach would encroach too much upon the autonomy of the parties and run counter to the role that arbitration has to play in the international commerce of today.

A third, and not unimportant, conclusion can be drawn from the preceding submissions. When the application of article VIII, section 2(b) as well as other issues are in dispute between the parties, it would be inexpedient to direct a claimant to pursue the issues involving the application of article VIII, section 2(b) before a competent State court while entertaining the remainder of his claim before an arbitral tribunal. Unlike the policy of segregation pursued by U.S. courts in arbitrations where nonarbitrable statutory antitrust claims and other arbitrable claims were concurrently at issue, a segregation in the cases under consideration here, between apparently nonarbitrable and clearly arbitrable issues does not make any sense. Issues relating to one "exchange contract" should not be dealt with by different judicial bodies. It would run counter to the postulate of effectiveness of procedural rules and would impede a speedy and efficient resolution of disputes if a claimant would have to seek the enforcement of his contract before two different tribunals. Such bifurcation in the judicial enforcement of claims should be avoided as much as possible.

Finally, an argument used by the United States Supreme Court must be considered here. In its *Mitsubishi* decision the United States Supreme Court argued that arbitral tribunals would not be less qualified to enforce statutory antitrust claims than State courts.⁴³ Suspicions as to whether private arbitral tribunals would be as inclined to give weight to public policy considerations as ordinary State courts were not justified.⁴⁴ The same argument is in point here. It should not be assumed that private arbitral tribunals, which have to decide, among other issues, on the application of article VIII, section 2(b), would feel less bound by the purposes enunciated in article 1 of the IMF Treaty than State courts. It seems unobjectionable, therefore, to recognize the jurisdiction of an arbitral tribunal insofar as the application of article VIII, section 2(b) is at stake.

42. *Id.*

43. The Court stated: "We are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of disputes resolution." *Mitsubishi Motors v. Soler Chrysler-Plymouth*, 105 S. Ct. 3346, 3354 (1985).

44. See also *American Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d at 827, 828 (2d Cir. 1968).

An arbitral tribunal, therefore, can exercise its jurisdiction on both kinds of issues: issues lying beyond the scope of the respective exchange control regulation and thus not affected by article VIII, section 2(b), as well as issues covered by the respective regulation and by that article. In other words, both kinds of issues must be regarded as arbitrable and bifurcation in the judicial enforcement of claims must be avoided as much as possible. The entire dispute may be brought before the arbitral tribunal.

This conclusion seems all the more justified since neither in the Federal Republic of Germany nor in the United States may an arbitral award be enforced that would violate public policy.⁴⁵ If an arbitral tribunal would not apply article VIII, section 2(b) properly, there would be a violation of public policy.⁴⁶ The enforcement of an award affected by such violation would be excluded.

Moreover, the argument that State courts are authorized, under article XXIX of the IMF Treaty, to submit "any question of interpretation of this Agreement arising . . . between any members of the Fund . . . to the Executive Board for its decision," while private arbitral tribunals do not enjoy this privilege, is not of paramount importance in this respect. Apart from the fact that it is highly doubtful whether arbitral tribunals would not have the power, under the arbitration rules of many States, to ask the competent State courts for their assistance in this respect, a decision of the Fund would not be binding on such court.⁴⁷ This demonstrates that the submission for interpretation is not an indispensable means of interpretation.

Finally, it must be pointed out that the U.S.-Iranian Claims Settlement Tribunal in the Hague has never uttered any doubt as to its jurisdiction over matters pertaining to article VIII, section 2(b).⁴⁸ Since this Tribunal, by its very

45. See German Code of Civil Procedure, sec. 1041, para. 1, No. 2, stating that an action to set aside a German award may be brought if recognition of the award would involve an offense against public policy; *id.* sec. 1044, sentence 2, No. 2 providing that an application for the enforcement of a foreign award shall be rejected if recognition of the award would offend public policy. As to U.S. federal arbitration law, see U.S. Arbitration Act § 201 (referring to art. V, para. 2(b) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, which excludes the recognition and enforcement of a foreign award where the competent *exequatur* authority finds that such recognition or enforcement would be contrary to the public policy of the *exequatur* country).

46. See J. GOLD, *supra* note 5, at 464, where he states: "[I]t is possible also that a court called upon to enforce an arbitral award that had ignored art. VIII, sec. 2(b) would refuse enforcement on the ground that its public policy had been flouted."

47. It must be admitted, though, that this is a highly doubtful conclusion. W. EBKE, *supra* note 3, ch. 2, sec. C(III)(4)(a) refers to a multitude of conflicting statements among authors and courts insofar. See also J. GOLD, *supra* note 22, at 331 (1986).

48. See Hood Corp. v. Islamic Republic of Iran, 7 Iran-U.S. C.T.R. 36, 44-46 (1984-III); Mark Dallal v. Iran, Bank Mellat, 3 Iran-U.S. C.T.R. 10, 13-14 (1983-II). On the second of these two decisions, see also Gold, *Iran-United States Claims Tribunal*, *supra* note 22, at 538-50. On both of the decisions, see Wuehler, *Zur Bedeutung des Iran-United States Claims Tribunal für die Rechtsfortbildung*, in RECHTSFORTBILDUNG DURCH SCHIEDSGERICHTE sec. IV(7) (K. Boeckstiegel ed.) (forthcoming).

nature, is an arbitral tribunal, this is another indication that the arbitrability of the cases under consideration here cannot be denied.

C. THE DISPUTE SURROUNDS EXCLUSIVELY THE APPLICATION
OF ARTICLE VIII, SECTION 2(b)

The third category of cases comprises proceedings where only the application of article VIII, section 2(b) is in dispute, and the parties agree as to the meaning of all other contractual issues connected with the "exchange contract."

Under German arbitration law it would be very audacious to affirm the arbitrability of those disputes since the parties have no power to compromise on such an issue. Still, one might be tempted to recognize such arbitrability since, as discussed earlier, all "exchange contracts," by their intrinsic nature, are composed not only of elements relating to the IMF Treaty, but also other legal matters that are fully arbitrable. They constitute a kind of *compositum mixtum* consisting of seemingly nonarbitrable and arbitrable issues, and the rule should be that in such *compositum mixtum* the seemingly nonarbitrable fraction would not absorb the arbitrable components of that contract, but that the reverse should prevail. It must be admitted, however, that in the cases under consideration here, this hypothesis is highly doubtful.

Under the standards of U.S. federal arbitration law set forth in the decisions of the United States Supreme Court in *Scherk* and *Mitsubishi* it would be justified to affirm the arbitrability of this third category of cases.

VI. Summary

Under the arbitration law of the Federal Republic of Germany as well as under U.S. federal arbitration law, the arbitrability of issues relating to the application of article VIII, section 2(b) of the IMF Treaty can be affirmed with respect to two categories of arbitral proceedings: (1) where only issues wholly unrelated to the application of article VIII, section 2(b) are in dispute and constitute the subject matter of arbitral proceedings; and (2) where the application of article VIII, section 2(b) as well as other issues are concurrently in dispute. Under U.S. federal arbitration law, arbitrability is also allowed in a third category of cases where the application of article VIII, section 2(b) is the sole dispute. Under the arbitration law of the Federal Republic of Germany arbitrability is highly doubtful in this third category. Since the intrinsic nature of article VIII, section 2(b) commands similar solutions in the problem of arbitrability, the submissions heretofore made and the conclusions drawn therefrom may be relevant as well under the arbitration laws of many other states.