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BOOK REVIEW

Währungsrecht [Monetary Law]

By Hugo J. Hahn. Munich, Germany: Beck, 1990, pp. xxxii, 528, \$115.00 (approx.).

The legal aspect of money, exchange rates, and exchange controls has always fascinated lawyers.¹ The recent irritations in the European Monetary System (EMS), which was established in 1979, and the European Exchange-Rate Mechanism (ERM) illustrate the economic volatility and political dimensions of modern monetary systems.² The present book addresses, however, primarily legal issues. In its three parts, the treatise focuses upon legal aspects of money and claims for money (Part I), monetary law (Part II), and exchange control regulations (Part III). The book is written from the perspective of German law. The Articles of Agreement of the International Monetary Fund (IMF)³ and the Treaty Establishing

1. See, e.g., F.A. MANN, *THE LEGAL ASPECT OF MONEY* (5th ed. 1992); WERNER F. EBKE, *INTERNATIONALES DEISENRECHT* (1990); *FESTSCHRIFT IN HONOR OF SIR JOSEPH GOLD* (Werner F. Ebke & Joseph J. Norton eds., 1990); JOSEPH GOLD, *LEGAL EFFECTS OF FLUCTUATING EXCHANGE RATES* (1990); HANS HARLANDT, *DIE EVOLUTION DES GELDES* (1989); *PROSPECTS FOR INTERNATIONAL LENDING AND RESCHEDULING* (Joseph J. Norton ed., 1988); RICHARD W. EDWARDS, *INTERNATIONAL MONETARY COLLABORATION* (1985); ANDREAS F. LOWENFELD, *THE INTERNATIONAL MONETARY SYSTEM* (1984); *INTERNATIONAL MONEY AND CREDIT: THE POLICY ROLES* (George M. von Furstenberg ed., 1983); KENNETH W. DAM, *THE RULES OF THE GAME* (1982); DOMINIQUE CARREAU, *SOVERAINITÉ ET COOPÉRATION MONÉTAIRE INTERNATIONALE* (1970); ARTHUR NUSSBAUM, *MONEY IN THE LAW, NATIONAL AND INTERNATIONAL; A COMPARATIVE STUDY IN THE BORDERLINE OF LAW AND ECONOMICS* (rev. ed. 1950).

2. For details of the EMS and the ERM, see the excellent study by JOSEPH GOLD, *EXCHANGE RATES IN INTERNATIONAL LAW AND ORGANIZATION* 137-94 (1988).

3. See Articles of Agreement of the International Monetary Fund, Second Amendment, *approved* Apr. 30, 1976, 29 U.S.T. 2203, T.I.A.S. No. 8937 [hereinafter Articles of Agreement].

the European Economic Community (EEC)⁴ form, however, an integral part of the present study. The book also addresses important issues of monetary law resulting from the reunification of Germany.

I. Synopsis

In the first part of his monograph, the author describes the evolution of money, its various forms from coins to credit cards and beyond, and the role of modern reserve assets such as the Special Drawing Rights (SDR) of the IMF. The rules of the Euromoney market are discussed at some length as well. The author also deals with the impact of inflation on private transactions (“principle of nominalism”) and discusses legal means, such as maintenance-of-value clauses and similar arrangements, that are available to the parties to international contracts to cope with the changing value of money and exchange rate instability.⁵ As the author points out correctly, many, although not all of these arrangements require approval of the Deutsche Bundesbank, Germany’s independent Central Bank (pp. 115–22).⁶ The approval procedures and the Deutsche Bundesbank’s approval practice are discussed in all necessary details. The last chapter of Part I of the present book is devoted to the provisions of Germany’s penal laws dealing with counterfeiting, the use of counterfeit money, and the abuse of credit cards, checks, and code cards (pp. 123–33).

Part II of the book first portrays the historical development of Germany’s monetary systems and policies from the creation of the German Reich in 1871 until today. The reader is introduced into the monetary system as well as the federal reserve system of Imperial Germany and the efforts of the German Government, after World War I, to regain autonomous control over the country’s monetary system. The author explains the Dawes Plan and the Young Plan and the efforts of the Western Allies, after World War II, to reestablish a functioning monetary system in Germany. The emphasis in Part II is, however, upon the changes wrought upon Germany’s monetary laws and policies by both the IMF Articles of Agreement and the EEC Treaty (pp. 174–219). As the author points out correctly, the exchange rate regimes under these two international agreements give rise to a great number of legal issues with respect to both private international transactions and institutional arrangements. The following chapters on Germany’s constitution and monetary stability (pp. 220–37) and on the organization, functions, legal status, and powers of the Deutsche Bundesbank (pp. 238–308) are particularly interesting in view of the current political debate within the European

4. See Treaty Establishing the European Economic Community, March 25, 1957, 298 U.N.T.S. 167 (1958), as amended by the Single European Act, Bull. Eur. Comm., Supp. 2/86 (effective July 1, 1987).

5. Hedging transactions are, however, not mentioned in the book.

6. For further details, see WERNER DÜRKE, WERTSICHERUNGSKLAUSELN (10th ed. 1992).

Community concerning the creation of a single currency for the Common Market and the establishment of a European Central Bank.

Part III of the present book is devoted to the law of exchange control regulations. The rise and fall of those regulations in Germany⁷ and the liberalization of the EEC and IMF rules concerning current international payments and capital transfers are aptly analyzed and lucidly presented. A relatively short chapter deals with the European Currency Unit (ECU) (pp. 368–81), which has gained practical significance as unit of account and which visionaries foresee as the Common Market currency of the future.

Legal problems of the use of foreign currency in international contracts are the subject of the final chapter of the book. International contracts necessarily include the use of a foreign currency by at least one party. The use of a foreign currency may give rise to legal problems resulting from the existence of exchange controls and questions as to the rights and obligations of the parties with respect to their foreign currency debt. The latter questions are to be decided in accordance with the law applicable to foreign currency contracts under established principles of conflicts of laws. As to exchange controls, article VIII, section 2(b) of the IMF Articles of Agreement⁸ is entrusted with the maintenance of the existing and future systems of exchange restrictions carrying the Fund's endorsement and with preserving the smooth functioning of these systems by means of mutual recognition of the restrictions.⁹ In view of recent publications dealing with all aspects of article VIII, section 2(b) of the IMF Articles of Agreement in comparative perspective,¹⁰ the author of the present book understandably confines himself to a short summary of some basic principles of article VIII, section 2(b) of the IMF Articles of Agreement and related German conflict-of-laws rules (pp. 390–97).

II. Exchange Controls and the IMF

Article VIII, section 2(b) of the IMF Articles of Agreement provides that “[e]xchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member.”¹¹ The legal implementation of the common law concept of

7. See also Hugo J. Hahn, *German Foreign Exchange Control—Rise and Demise*, 23 INT'L LAW. 873 (1989).

8. Articles of Agreement, *supra* note 3, art. VIII, § 2(b).

9. For details, see Werner F. Ebke, *Article VIII, Section 2(b), International Monetary Cooperation, and the Courts*, 23 INT'L LAW. 677, 683–710 (1989).

10. See, e.g., EBKE, *supra* note 1, at 158–311; EDWARDS, *supra* note 1, at 477–90; JOSEPH GOLD, *THE FUND AGREEMENT IN THE COURTS: SOME PROBLEMS OF THE UNIFORM INTERPRETATION OF MULTILATERAL TREATIES* (1989); JOSEPH GOLD, *THE FUND AGREEMENT IN THE COURTS: FURTHER STUDIES IN JURISPRUDENCE INVOLVING THE ARTICLES OF AGREEMENT OF THE INTERNATIONAL MONETARY FUND* (1986) [hereinafter GOLD, FUND AGREEMENT].

11. See Articles of Agreement, *supra* note 3, art. VIII, § 2(b).

"unenforceability" has proved to be difficult in a great number of IMF Member States belonging to the civil law tradition.¹² Hahn suggests that, under German law, the term "unenforceable" should be interpreted to mean "void" (p. 397).¹³ The German courts, by contrast, have come to the conclusion that the phrase "unenforceable" is best effectuated under German law if viewed as a "precondition to suit" (*Prozessvoraussetzung*), rather than a defense.¹⁴ As a result, the plaintiff has the burden of proving that the exchange restrictions invoked by the defendant are inconsistent with the IMF Articles of Agreement or that article VIII, section 2(b) of the IMF Articles of Agreement does not apply for other reasons.¹⁵

The procedural implementation of the term "unenforceable" by the German courts can have rather detrimental consequences for the plaintiff.¹⁶ The single most unfortunate consequence from the plaintiff's point of view, no doubt, is that an "exchange contract" that did not violate foreign exchange control regulations when entered into can become "unenforceable" as a result of subsequent modification or introduction of exchange restrictions. For, as "preconditions to suit" must be met at the time of the "last hearing" (*letzte mündliche Verhandlung*) of the case by the court,¹⁷ any change in the exchange control laws of any IMF Member State between the making of the contract and the last hearing of the case in court, including the appellate court, can render the contract "unenforceable."¹⁸ Similarly, a contract becomes "unenforceable" under article VIII, section 2(b) of the IMF Articles of Agreement if the country that promulgated the exchange control regulations was not a member of the IMF at the time the contract was entered into, but joined the Fund before the "last hearing" of the case in a German court.¹⁹

In Germany, it takes an average of 41.4 months from the filing of a lawsuit with the district court for an appeal case to be decided by the Bundesgerichtshof,

12. Ebke, *supra* note 1, at 276-308.

13. Hahn cites F.A. Mann, *Der Internationale Währungsfonds und das Internationale Privatrecht*, 36 JURISTENZEITUNG [JZ] 327 (1981).

14. See Ebke, *supra* note 9, at 700-01.

15. See the seminal decision of the German Supreme Court, Judgment of Apr. 27, 1970, Bundesgerichtshof [BGH], Ger., 1970 DIE DEUTSCHE RECHTSPRECHUNG AUF DEM GEBIET DES INTERNATIONALEN PRIVATRECHTS [IPRspr] 329, 332. In its judgment of Mar. 8, 1979, BGH, Ger., 1979 IPRspr 473, 475, the Court referred to its interpretation of the phrase "unenforceable" as "settled law."

16. Werner F. Ebke, *Der Internationale Währungsfonds und das Internationale Devisenrecht*, 37 RECHT DER INTERNATIONALEN WIRTSCHAFT [RIW] 1, 6-7 (1991).

17. See Judgment of Mar. 8, 1979, BGH, Ger., 1979 IPRspr 473, 475.

18. Ebke, *supra* note 9, at 701. The flip side of the last-hearing rule is, of course, that an "exchange contract" that did violate exchange controls of an IMF member state when entered into, but did not violate them at the time of the last hearing, is enforceable. See Judgment of Feb. 17, 1971, BGH, Ger., 1971 IPRspr 362, 363.

19. Ebke, *supra* note 16, at 7. The parties to an "exchange contract" cannot "contract out" of article VIII, section 2(b) of the IMF Articles of Agreement, *supra* note 3. See Joseph Gold, *Article VIII, Section 2(b) of the IMF Articles in Its International Setting*, in *THE LAW OF INTERNATIONAL TRADE FINANCE* 65, 86 (Norbert Horn ed., 1989). Petrification clauses are therefore unenforceable. See Ebke, *supra* note 1, at 282.

Germany's highest court in civil matters. Obviously, during this long period of time, much can happen with respect to foreign exchange controls. As a result of Germany's procedural implementation of the term "unenforceable," plaintiffs run a substantial risk that their claims may become, at least temporarily, unenforceable.²⁰ This risk goes much beyond the risk that creditors have to assume in the courts of other IMF Member States.²¹ The harsh effects of the German Supreme Court's interpretation of the term "unenforceable" appear to be particularly undesirable in view of the fact that many of the Central and Eastern European countries that recently joined the IMF continue to have exchange controls, many of which now carry the Fund's endorsement.²²

Fortunately, in a recent decision, the German Supreme Court indicated that it is ready and willing to reconsider its interpretation of the term "unenforceable" at the next possible occasion.²³ The Supreme Court may soon have the opportunity to rule on this issue. In September 1992, the court of appeals of Hamburg stated that, in its opinion, the legal consequences of the Supreme Court's interpretation of the term "unenforceable" were "doubtful" (*bedenklich*).²⁴ The decision of the court of appeals has been appealed on other grounds.

It is rather unlikely that the German Supreme Court will adopt Hahn's view according to which "unenforceable" is to mean "void."²⁵ Although, in the past, some lower courts in Germany favored the interpretation suggested by Hahn,²⁶ the German Supreme Court has made it perfectly clear that it is not prepared to treat "unenforceable exchange contracts" within the meaning of article VIII, section 2(b) of the IMF Articles of Agreement as void.²⁷ The Court thereby

20. Ebke, *supra* note 9, at 702.

21. See, e.g., GOLD, FUND AGREEMENT, *supra* note 10, at 778-81. As a result of the German Supreme Court's interpretation of article VIII, section 2(b) of the IMF Articles of Agreement, *supra* note 3, parties to international loan agreements and other major international contracts hardly ever choose German law as law governing their contractual relationship, even though Germany is a major international lender and exporting country. See Ebke, *supra* note 9, at 689-90.

22. In September 1992, Azerbaijan, a republic of the former Soviet Union, became the 170th member of the IMF. See NEUE ZÜRCHER ZEITUNG, Sept. 25, 1992, at 14. Azerbaijan is the twelfth republic of the former Soviet Union to join the IMF.

23. Judgment of Nov. 14, 1991, BGH, Ger., 38 RIW 142, 144 (1992).

24. Judgment of Oct. 2, 1992, Oberlandesgericht [OLG] [Court of Appeals], Hamburg, Ger., 39 RIW 68 (1993), *rev'g*, Judgment of Feb. 17, 1992, Landgericht [LG] [District Court], Hamburg, Ger., 46 WERTPAPIER-MITTEILUNGEN [WM] 1600 (1992).

25. See *supra* text accompanying note 13.

26. See, e.g., Judgment of Feb. 27, 1969, OLG, Frankfurt am Main, Ger., 1971 IPRspr 358, 361, *rev'd*, Judgment of Feb. 17, 1971, BGH, Ger., 1971 IPRspr 362, 363-64. See also Judgment of July 7, 1967, LG, Hamburg, Ger., 1966-67 IPRspr 626, 627; Judgment of Dec. 28, 1954, LG, Hamburg, Ger., 1954-55 IPRspr 467, 470. In more recent decisions, the District Court of Hamburg has, however, followed the views expressed in the seminal decision of Germany's Supreme Court, Judgment of Apr. 27, 1970, BGH, Ger., 1970 IPRspr 329, 330. See Judgment of Feb. 17, 1992, LG, Hamburg, Ger., 46 WM 1600, 1602 (1992); Judgment of July 26, 1990, LG, Hamburg, Ger., 45 WM 1671, 1674 (1991); Judgment of Feb. 24, 1978, LG Hamburg, Ger., 1978 IPRspr 304, 305.

27. See Judgment of Apr. 27, 1970, BGH, Ger., 1970 IPRspr 329, 330.

clearly rejected the view first expressed by F.A. Mann²⁸ that, under German law, “unenforceable should be interpreted to mean ‘ineffective, invalid or void.’ ”²⁹ It remains to be seen which route Germany’s Supreme Court will ultimately pursue.³⁰

III. Conclusion

The present book is an insightful and up-to-date account of German monetary law and policy in their international setting. The author’s thoughtful discussion of crucial legal issues, his stimulating analyses of the pertinent statutory law and seminal cases, his broad historical perspective, and his complete mastery of the relevant European and international law make the book a reliable source of information for academics, lawyers, judges, business persons, and politicians.

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28. F.A. Mann, *Der Internationale Währungsfonds und das Internationale Privatrecht*, 8 JZ 442, 445 (1953); see also Mann, *supra* note 13, at 328.

29. F.A. MANN, *THE LEGAL ASPECT OF MONEY* 397 (4th ed. 1982).

30. For a detailed exposition of possible solutions, see EBKE, *supra* note 1, at 293–308; MELANIE SEUSS, *EXTRATERRITORIALE GELTUNG VON DEISENKRONTROLLEN* 125–27 (1991).