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# PERSPECTIVES

WERNER F. EBKE\*

## Article VIII, Section 2(b) of the IMF Articles of Agreement and International Capital Transfers: Perspectives from the German Supreme Court

The German Supreme Court (Bundesgerichtshof) recently held that article VIII, section 2(b) of the Articles of Agreement of the International Monetary Fund (IMF)<sup>1</sup> does not apply to international capital transfers, but only to “payments for current transactions” within the meaning of article XXX(d) of the IMF Articles of Agreement.<sup>2</sup> The Court’s decision brings light to a controversial issue that has been debated for a long time not only in Germany but also in other member states of the IMF.

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1. Article VIII, section 2(b) of the 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 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.”

2. Judgment of Nov. 8, 1993, Bundesgerichtshof [BGH], Ger., 40 RECHT DER INTERNATIONALEN WIRTSCHAFT [RIW] 151 (1994); *see also* Judgment of Feb. 22, 1994, BGH, Ger., 40 RIW 327, 328-29 (1994).

## I. Facts and Procedural History

The case before the Court involved the transfer of funds from Bulgaria to Germany in connection with the increase of the capital of a limited partnership formed under German law. The limited partners of the German limited partnership had agreed to increase the capital of their financially troubled company. One of the limited partners, a Bulgarian banking corporation, had agreed to increase its interest in the partnership by DM 6.8 million (approximately US\$4 million). The transfer of funds from Bulgaria to another country for the purpose of increasing the capital of a foreign, that is, non-Bulgarian, company required approval by the Bulgarian Government.<sup>3</sup> The necessary approval had never been granted in this case, however.

Two months after the partners' decision to increase the partnership's capital, the Bulgarian partner deposited an amount of almost DM 18,000 (approximately US\$10,500) in the partnership's bank account in Germany. On the deposit slip, the Bulgarian partner wrote the words "Increase Capital." Four months later, the partnership fell into bankruptcy. The trustee in bankruptcy demanded payment of the agreed upon amount from the Bulgarian partner. The Bulgarian partner, however, refused to make additional payments asserting, among other things, that the limited partnership's claim was unenforceable under article VIII, Section 2(b) because the transfer of the agreed upon amount from Bulgaria to Germany would have violated Bulgarian exchange control regulations.

According to German case law, the term "unenforceable" in article VIII, section 2(b) cannot be interpreted to mean "void" or "voidable." Rather, the courts are of the opinion that the term "unenforceable" is best effectuated under German law if viewed in procedural terms as a "precondition to suit" (*Prozessvoraussetzung*).<sup>4</sup> As a consequence, a German court cannot hear a case and rule on its merits if the case falls within the ambit of article VIII, section 2(b) because the enforceability of the plaintiff's claim is a precondition to suit.

In the present case, however, both the district court (Landgericht)<sup>5</sup> and the

3. See Judgment of Oct. 9, 1992, Oberlandesgericht [OLG] [Court of Appeals], Hamburg, Ger., 39 RIW 68 (1993). For details of this decision, see Werner F. Ebke, *Devisenrecht als Kapitalaufbringungssperre?*, 39 RIW 613 (1993); Carsten Th. Ebenroth & Rüdiger Woggon, *Einlageforderungen gegen ausländische Gesellschafter und Art. VIII Abschnitt 2(b) IWF-Abkommen*, 3 PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS [IPRax] 151 (1993). For a discussion of Bulgaria's evolving legal framework for private sector development, see Cheryl W. Gray & Peter G. Ianachkov, *Bulgaria's Evolving Legal Framework for Private Sector Development*, 27 INT'L LAW. 1091 (1993).

4. For details, see Werner F. Ebke, *Article VIII, Section 2(b), International Monetary Cooperation, and the Courts*, 23 INT'L LAW. 677, 700-01 (1989), revised and reprinted in Festschrift in Honor of Sir Joseph Gold 63, 81-83 (Werner F. Ebke & Joseph J. Norton eds., 1990) [hereinafter Ebke, Article VIII, in Festschrift]; see also JOSEPH GOLD, *THE FUND AGREEMENT IN THE COURTS*, VOL. III: FURTHER STUDIES IN JURISPRUDENCE INVOLVING THE ARTICLES OF AGREEMENT OF THE INTERNATIONAL MONETARY FUND 268-70 (1986).

5. Judgment of Feb. 17, 1992, Landgericht [LG] [District Court], Hamburg, Ger., 46 WERTPAPIER-MITTEILUNGEN [WM] 1600 (1992).

court of appeals (Oberlandesgericht)<sup>6</sup> concluded that article VIII, section 2(b) was not applicable. In the opinion of both courts, the increase of a limited partnership's capital was outside the scope of article VIII, section 2(b). The Bulgarian partner appealed, arguing that the Supreme Court should reverse the lower court's judgment and instruct the lower court to dismiss the action on procedural grounds. The only issue before the Supreme Court's Second Panel for Civil Matters (Zivilsenat) was the question of whether the transfer of funds from one IMF member state to another IMF member state for the purpose of increasing the capital of a company in the latter member state is caught by article VIII, section 2(b).

## II. The Decision

The Supreme Court had, it seems, no doubt that the agreement between a limited partnership and one of its limited partners to increase that partner's interest in the partnership constitutes an "exchange contract" within the meaning of article VIII, section 2(b). Citing with approval a recent law review article,<sup>7</sup> the Court stated that an agreement concerning the increase of a limited partner's interest in the partnership "may" constitute an "exchange contract" within the meaning of article VIII, section 2(b).<sup>8</sup> The Supreme Court was, however, of the opinion that an "exchange contract" that relates to the transfer of capital, as opposed to current international payments, does not fall within the ambit of article VIII, section 2(b).<sup>9</sup>

### A. INTERPRETATION

In reaching this conclusion, the Court relied heavily upon the language of article VIII, section 2(b) and its context within the IMF Articles of Agreement. Neither the language of article VIII, section 2(b) nor the particular position of this provision within the IMF Articles of Agreement would, however, seem to support the Court's conclusion. Article VIII, section 2(b) is silent as to whether

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6. Judgment of Oct. 9, 1992, *supra* note 3, at 69.

7. Ebke, *supra* note 3.

8. Judgment of Nov. 8, 1993, *supra* note 2, at 152.

9. The Supreme Court correctly assumed that capital increases do not constitute "payments for current transactions" within the meaning of article XXX(d) of the IMF Articles of Agreement. In the case under discussion here, the acquisition of the partnership interest was intended by the parties concerned to be a long-term capital investment. It would therefore not seem to be persuasive to treat the Bulgarian partner's first payment of DM 18,000 as "other current business" and the rest of the amount to be "due in connection with it" within the meaning of article XXX(d). In part article XXX(d) reads as follows:

Payments for current transactions means payments which are not for the purpose of transferring capital, and includes, without limitation:

- (1) all payments due in connection with foreign trade, other current business, including services, and normal short-term banking and credit facilities;
- (2) payments due as interest on loans and as net income from other investments;
- (3) payments of moderate amount for amortization of loans or for depreciation of direct investments; and
- (4) moderate remittances for family expenses.

IMF Articles of Agreement, *supra* note 1, art. XXX(d).

it is to be applied to current international payments or capital transfers or both. Only the heading of article VIII, section 2 of the IMF Articles of Agreement appears to support the Court's proposition that article VIII, section 2 deals solely with the avoidance of restrictions on current payments.<sup>10</sup> The heading is, however, not sufficient to support the conclusion that article VIII, section 2(b) does not apply to exchange control regulations that relate to capital transfers—the heading of article VIII, section 2, like the title of article VIII, section 3, is obviously incomplete.<sup>11</sup>

The importance of the contextual position of article VIII, section 2(b) should not be overestimated either. While courts and commentators disagree on the interpretation of virtually every element of article VIII, section 2(b), they agree that the recorded history of the drafting of article VIII, section 2(b) is inadequate to draw any reliable conclusions from the provision's particular position in the IMF Articles of Agreement. As Sir Joseph Gold, the IMF's former General Counsel, has pointed out correctly, "the record is silent at the very point at which an explanation of the transfer of the provision from a context dealing with exchange rates to one dealing with the general obligations of members would be invaluable."<sup>12</sup> One can only speculate about the implications of this transfer.<sup>13</sup>

The Supreme Court was therefore well advised to take into consideration the objectives of the IMF Articles of Agreement in general and the purpose of article VIII, section 2(b) in particular. The Court noted that article VI, section 3 of the IMF Articles of Agreement authorizes Fund members to impose capital controls that are necessary to regulate international capital movements, provided that controls are not exercised in a manner that restricts payments for current transactions or unduly delays transfers of funds in settlement of commitments.<sup>14</sup> The Court also pointed out that as a result of the sweeping revision of the IMF Articles of Agreement that culminated in the Second Amendment,<sup>15</sup> capital movements

10. IMF Articles of Agreement, *supra* note 1, art. VIII, § 2 is headed "Avoidance of restrictions on current payments."

11. See JOSEPH GOLD, *THE FUND AGREEMENT IN THE COURTS*, VOL. IV: SOME PROBLEMS OF THE UNIFORM INTERPRETATION OF MULTILATERAL TREATIES 130 (1989).

12. JOSEPH GOLD, *THE FUND AGREEMENT IN THE COURTS*, VOL. II: FURTHER JURISPRUDENCE INVOLVING THE ARTICLES OF THE INTERNATIONAL MONETARY FUND 434 (1982) [hereinafter *FUND AGREEMENT II*]; see also Joseph Gold, *The Restatement of the Foreign Relations Law of the United States (Third) and Monetary Law*, in *COMMENTARIES ON THE RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* 243, 257-60 (Werner F. Ebke, Joseph J. Norton & Janet P. Balch eds., 1992).

13. For a detailed exposition of the implications of the transfer, see *FUND AGREEMENT II*, *supra* note 12, at 434-38.

14. IMF Articles of Agreement *supra* note 1, art. VI, § 3 reads as follows:

Members may exercise such controls as are necessary to regulate international capital movements, but no member may exercise these controls in a manner which will restrict payments for current transactions or which will unduly delay transfers of funds in settlement of commitments, except as provided in Article VII, Section 3(b) and in Article XIV, Section 2.

For details of article VI, section 3 of the IMF Articles of Agreement, see, e.g., WERNER F. EBKE, *INTERNATIONALES DEISENRECHT* 89-94 (1990); Joseph Gold, *Capital Movements, International Regulation*, in *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 64-70 (Rudolf Bernhardt ed., 1985);

are referred to in article IV, section 1 of the IMF Articles of Agreement<sup>16</sup> and in the Fund's decisions on its procedures for surveillance over the exchange rate policies of members.<sup>17</sup> According to the Court, these references cannot be interpreted, however, to suggest that the IMF member states surrendered their sovereign powers over capital movements and that the Fund may find a member's capital controls inconsistent with the IMF Articles of Agreement even though the capital restrictions or regulations are authorized by article VI, section 3.<sup>18</sup>

## B. PRACTICE OF THE COURTS OF OTHER IMF MEMBER STATES

Whether one agrees with this conclusion of the Supreme Court depends upon the meaning of article IV, section 1 and its implication for the authorization that IMF member states have under article VI, section 3 to control capital transfers.<sup>19</sup> In view of the different opinions as to this question that have developed in the forty-five-year history of the IMF Articles of Agreement,<sup>20</sup> it would have been preferable, if the Court had taken into account the extensive practice under the IMF Articles of Agreement, including the numerous decisions of courts of IMF member states that have interpreted and applied article VIII, section 2(b).<sup>21</sup>

It is an internationally accepted principle of interpretation that in the construction and application of provisions of international treaties courts may take into account the practice of the parties to the treaty in question.<sup>22</sup> The same principle of interpretation should apply in cases where, as in the case of the IMF Articles of Agreement, the international treaty is not directly applicable in the member states, but where it has been incorporated in the member state's law. Only if the construction of the treaty by the member states' courts is taken into consideration in the interpretation and application of a provision of an international treaty can the ultimate goal of an international treaty, i.e., uniformity of the law, be accomplished.

A closer look at the practice of the courts of all major member states of the

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JOSEPH GOLD, *INTERNATIONAL CAPITAL MOVEMENTS UNDER THE LAW OF THE INTERNATIONAL MONETARY FUND* (1977); see also JOSEPH GOLD, *EXCHANGE RATES IN INTERNATIONAL LAW AND ORGANIZATION* 196-97 (1988).

15. For a thorough analysis of the Second Amendment, see JOSEPH GOLD, *THE SECOND AMENDMENT OF THE FUND'S ARTICLES OF AGREEMENT* (1978).

16. IMF Articles of Agreement, *supra* note 1, art. IV, § 1 recognizes that an "essential purpose of the international monetary system is to provide a framework that facilitates the exchange of . . . capital among countries, and that sustains sound economic growth."

17. Judgment of Nov. 8, 1993, *supra* note 2, at 152.

18. *Id.* at 152-53.

19. For details, see Ebke, *supra* note 3, at 619-23.

20. Cf. GOLD, *supra* note 4, at 538-42, with RICHARD W. EDWARDS, *INTERNATIONAL MONETARY COLLABORATION* 483 (1985), and MICHAEL POTACS, *DEVISENBEWIRTSCHAFTUNG* 459 (1991).

21. For a more detailed exposition of this view, see Ebke, *supra* note 3, at 622-23; see also Judgment of Oct. 9, 1992, *supra* note 3, at 69.

22. See Vienna Convention on the Law of Treaties, May 23, 1969, art. 31, § 3(b), *reprinted in* 63 AM. J. INT'L L. 875 (1969).

IMF reveals that while they do not agree on the meaning of the term "exchange contract,"<sup>23</sup> the vast majority of courts seem to agree that, in view of article VI, section 3, capital transfers do not fall within the ambit of article VIII, section 2(b).<sup>24</sup> The decision of the German Supreme Court under discussion here seems to be driven by the desire to bring the construction by German courts of the term "exchange contract" in line with the practice of the courts of other major IMF member states, particularly those in the United States and the United Kingdom.<sup>25</sup>

### III. Implications

The holding of the Supreme Court in the present case will have far-reaching implications with respect to the interpretation and application of article VIII, section 2(b) by German courts in future cases. German courts have traditionally been more receptive to defenses based upon article VIII, section 2(b) than have, for example, American and English courts.<sup>26</sup> Almost thirty article VIII, section 2(b) cases have been reported in Germany since Germany became a member of the IMF some forty years ago. These cases favor a broad, debtor-oriented interpretation of article VIII, section 2(b), especially of its key term "exchange contracts."<sup>27</sup> As early as 1954 the Court of Appeals of the State of Schleswig-Holstein stated that only a broad construction of the term "exchange contracts" is consistent with the objectives of the IMF.<sup>28</sup> Twenty years later the Court of Appeals of Berlin also made it clear that only a broad reading of article VIII, section 2(b) "takes an adequate account of the economic sense of the Fund Agreement."<sup>29</sup>

Based upon this line of arguments, the German Supreme Court's Ninth Panel for Civil Matters did not hesitate to hold that article VIII, section 2(b) applies to a long-term corporate loan.<sup>30</sup> The loan in question clearly did not constitute a "normal short-term banking and credit facility" within the meaning of article

23. For a discussion of the different views, see, e.g., EBKE, *supra* note 14, at 203-46; GOLD, *supra* note 4, at 747-53; MELANIE SEUSS, EXTRATERRITORIALE GELTUNG VON DEISENENKONTROLLEN 5-47 (1991); EDWARDS, *supra* note 20, at 484-86.

24. See EBKE, *supra* note 14, at 227-28, 230-32.

25. The narrow interpretation by the courts of major IMF member states of the term "exchange contract" was also used in this case by the court of appeals as an argument to exclude capital transfers from the scope of article VIII, section 2(b) of the IMF Articles of Agreement. See Judgment of Oct. 9, 1992, *supra* note 3, at 69.

26. See Joseph Gold, *Exchange Controls and External Indebtedness: Are the Bretton Woods Concepts Still Workable?*, 7 HOUSTON J. INT'L L. 1, 10-11 (1984).

27. Ebke, *Article VIII*, in Festschrift, *supra* note 4, at 75.

28. Judgment of Apr. 1, 1954, OLG, Schleswig-Holstein, Ger., 1954-1955 DIE DEUTSCHE RECHTSPRECHUNG AUF DEM GEBIET DES INTERNATIONALEN PRIVATRECHTS (IPRspr.) 463, 465.

29. Judgment of July 8, 1974, Kammergericht [KG] [Court of Appeals], Berlin, Ger., 1974 IPRspr. 364, 366.

30. Judgment of Nov. 14, 1991, 116 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ] 77, 83 (1991).

XXX(d)(1) of the IMF Articles of Agreement.<sup>31</sup> Consequently, it constituted a capital transfer rather than a payment for current transactions.

In light of these court decisions, it was fair to assume that the agreement to increase a limited partner's interest in the partnership would be considered by Germany's courts to fall within the ambit of article VIII, section 2(b).<sup>32</sup> The decision of the Supreme Court's Second Panel for Civil Matters in the case under discussion here, however, moves in a different direction. This decision is the first reported German Supreme Court opinion that narrowly construes the phrases "exchange contracts."<sup>33</sup> Specifically, the Court was not willing to apply article VIII, section 2(b) to contracts relating to international capital transfers. As a result, German courts can no longer apply article VIII, section 2(b) to international loan agreements other than "normal short-term banking and credit facilities," that is, short-term loans.<sup>34</sup>

#### IV. Unenforceability

The Supreme Court's decision is also important in that the Court expressly left open for future consideration the question of whether the Court's settled interpretation of the term "unenforceable" in article VIII, section 2(b) should be overruled.<sup>35</sup>

31. For the text of IMF Articles of Agreement, *supra* note 1, art. XXX(d)(1), see *supra* note 9.

32. See Menno Aden, Comment, 1992 WIRTSCHAFTS- UND BANKRECHT [WuB] VII B.2-2.92 at 1468.

33. The Second Panel had a statutory obligation to refer the issue of whether or not article VIII, § 2(b) applies to capital transfers to the Supreme Court's Upper Panel for Civil Matters (Grosser Senat für Zivilsachen) for a ruling, if the holding of the Supreme Court's Ninth Panel for Civil Matters that long-term corporate loans fall within the ambit of article VIII, § 2(b) was not an obiter dictum only. The ruling of the Upper Panel would have been binding upon the Second Panel. See Werner F. Ebke, *Die Rechtsprechung zur "Unklagbarkeit" gemäss Art. VIII Abschn. 2(b) Satz 1 IWF-Übereinkommen im Zeichen des Wandels*, 47 WM 1169, 1177 n.143 (1993). In a recent decision, the German Supreme Court's Eleventh Panel for Civil Matters stated that in its opinion the Ninth Panel's holding in question was merely an obiter dictum. See Judgment of Feb. 22, 1994, *supra* note 2, at 329.

34. See IMF Articles of Agreement, *supra* note 1, art. XXX(d)(1). American courts that have addressed the question have favored the view that article VIII, section 2(b) of the IMF Articles of Agreement should not be applied to international loan agreements. See, e.g., Ebke, *supra* note 14, at 214-28; Troland S. Link, *Article VIII, Section 2(b) of the IMF Articles—The Current Practice and Outlook*, in THE LAW OF INTERNATIONAL TRADE FINANCE 143 (Norbert Horn ed., 1989); Joseph Gold, *IMF: Some Effects on Private Parties and Private Transactions*, in PROSPECTS FOR INTERNATIONAL LENDING AND RESCHEDULINGS 13-73 to -80 (Joseph J. Norton ed., 1988); Joseph Gold, *Exchange Control: Act of State, Public Policy, the IMF's Articles of Agreement, and Other Complications*, 7 HOUSTON J. INT'L L. 13 (1984); Robert S. Rendell, *The Allied Bank Case and Its Aftermath*, 20 INT'L LAW. 819 (1986); see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 822 cmt. b (1987).

35. Judgment of Nov. 8, 1993, *supra* note 2, at 152.



### A. THE TRADITIONAL VIEW

As mentioned above,<sup>36</sup> it was well settled until recently that the term “unenforceable” is to be understood in procedural terms. The procedural implementation of the term “unenforceable” by the German courts can have rather detrimental consequences for the plaintiff. The 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 modifications or the subsequent introduction of exchange controls. Preconditions to suit must be met at the time of the last hearing (*letzte mündliche Verhandlung*) of the case by the court. Consequently, 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, at all stages of the procedure including the appellate level, can render the contract unenforceable.<sup>37</sup>

Similarly, an exchange contract becomes unenforceable under article VIII, section 2(b) 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.<sup>38</sup> In the case under discussion here, there is some indication that the partners’ decision to increase the capital, but also the Bulgarian partner’s promise to increase its interest in the limited partnership by DM 6.8 million were made before Bulgaria became a member of the IMF.<sup>39</sup> Consequently, according to the prevailing interpretation of the term “unenforceable” in Germany, article VIII, section 2(b) was applicable despite the fact that Bulgaria was not a member of the IMF when the Bulgarian banking corporation made its promise to increase its interest in the limited partnership.

### B. POSSIBLE FUTURE DEVELOPMENTS

Both the Court of Appeals of Hamburg<sup>40</sup> and the German Supreme Court’s Ninth Panel for Civil Matters<sup>41</sup> have stated in obiter dicta that the procedural construction of the term “unenforceable” should be reconsidered. Both courts have indicated that they favor an interpretation of the term “unenforceable”

36. See *supra* text accompanying note 4.

37. Werner F. Ebke, Book Review, 27 INT’L LAW. 563, 566 (1993). 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.

38. Ebke, *supra* note 37, at 566.

39. The partners decided on the capital increase on August 9, 1990. Bulgaria did not join the IMF until September 25, 1990. The first payment by the Bulgarian banking corporation of DM 18,000 was not made, however, until October 15, 1990. See Ebke, *supra* note 3, at 615, 624.

40. Judgment of Oct. 9, 1992, *supra* note 3, at 69.

41. Judgment of Nov. 14, 1991, *supra* note 30, at 84.

advanced by a growing number of German and other European commentators<sup>42</sup> and at least two German Supreme Court justices.<sup>43</sup> In the opinions of these writers, the term "unenforceable" should be construed in terms of the substantive law defense of *obligatio naturalis* or imperfect obligation (*Einrede der unvollkommenen Verbindlichkeit*).<sup>44</sup> Such a construction would, in effect, exclude from the coverage of article VIII, section 2(b) exchange controls that were promulgated or modified after the exchange contract was made.<sup>45</sup> The construction of the term "unenforceable" as a substantive law defense would also exclude from the ambit of article VIII, section 2(b) those exchange contracts that were entered into before the country whose exchange controls are being violated became a member of the Fund.<sup>46</sup>

This interpretation of the term "unenforceable" would not only solve unsettled problems that result from the procedural implementation of the phrase in the German legal system, but also narrow the gap that exists between the interpretation and application of article VIII, section 2(b) by German courts and the courts of other major IMF members, including the United States and the United Kingdom.<sup>47</sup> It remains to be seen which route the German Supreme Court will ultimately pursue with respect to the interpretation of the key term "unenforceable."

## V. Final Comments

The most recent decision of Germany's highest court in civil matters concerning the scope of the controversial article VIII, section 2(b) is a milestone on the way to bringing the German article VIII, section 2(b) case law in line with the interpretation and application of that provision by the courts of other IMF member states. In Germany, it is now settled that international capital transfers do not fall within the ambit of article VIII, section 2(b). Further, language in the German Supreme Court's recent decision that suggests that the traditional interpretation of the term "unenforceable" by German courts will be reconsidered if the opportunity arises. The ultimate goal of such a reconsideration will be to narrow the gap that has existed, and continues to exist, between the construction of article

42. See, e.g., Ebke, *supra* note 14, at 293-305; Ebke, *supra* note 33, at 1176-77; Dieter Martiny, Book Review, 26 INT'L LAW. 255, 257 (1992); MATTHIAS NIYONZIMA, LA CLAUSE DE MONNAIE ÉTRANGÈRE DANS LES CONTRATS INTERNATIONAUX 173 (1991).

43. Siegfried Bross, Book Review, 46 WM 83, 84 (1992); Reinhold Thode, *Commentary*, in 2 MÜNCHENER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH § 284 cmt. 12 (3d ed., Kurt Rebmann & Franz-Jürgen Säcker eds., 1994); Reinhold Thode, Book Review, 5 ZEITSCHRIFT FÜR BANKRECHT UND BANKWIRTSCHAFT [ZBB] 53, 54 (1993); Reinhold Thode, Book Review, 56 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT [RabelsZ] 382, 385 (1992).

44. See also GOLD, *supra* note 11, at 281-82; Oliver Remien, Book Review, 21 INT'L J. LEGAL INFORMATION 89, 91 (1993); Eberhard Schwark, Book Review, 41 AM. J. COMP. L. 341, 344 (1993).

45. See Ebke, *supra* note 33, at 1176-77.

46. See *id.*

47. Martiny, *supra* note 42, at 257.

VIII, section 2(b) by American and English courts on the one hand and German courts on the other hand.

Germany's legal profession will appreciate this development. Due to the broad construction of article VIII, section 2(b), substantial international contracts, including major international loan agreements involving a German party, have more frequently been made subject to New York or English law, rather than German law.<sup>48</sup> As a result, the German legal profession has lost a fair amount of business. Parties to economically and financially less significant international agreements will also be pleased with the Supreme Court's decision as it allows German courts to determine their attitude to foreign capital transfers by their conflict-of-laws rules without reference to article VIII, section 2(b).<sup>49</sup>

Nevertheless the German Supreme Court's holding in the case under discussion here is only a first step in bringing the interpretation of article VIII, section 2(b) by German courts on a par with that of American and English courts. German courts have traditionally interpreted the term "exchange contracts" to include not only contracts for the exchange of the currency of one IMF member state for the currency of another IMF member,<sup>50</sup> but also contracts for the exchange of goods or services for money.<sup>51</sup> Thus far, German courts have not indicated that they will eventually follow the path of U.S. and English case law where the courts have construed the phrase "exchange contracts" in a way that article VIII, section 2(b) has become almost completely inapplicable.<sup>52</sup>

The single most important issue, however, remains unsolved at this point. That is the question of how the term "unenforceable" should be interpreted by German courts. A growing number of courts and commentators in Germany agree that the German courts' current interpretation of "unenforceable" is unacceptable. Present German case law results in a competitive disadvantage for parties to international agreements if a dispute arising out of or in connection with the agreement is tried before a German court. In light of obiter dicta in several recent court decisions and the strong opposition of a growing number of commentators against the current construction by German courts of the term "unenforceable," it is fair to assume that the German Supreme Court will overrule

48. See Ebke, *Article VIII*, in Festschrift, *supra* note 4, at 77; Otto Sandrock, *Prejudgment Attachments: Securing International Loans or Other Claims for Money*, 21 INT'L LAW. 1, 5 (1987); Hugo J. Hahn, Book Review, 58 RabelsZ 194, 197 (1994).

49. It will be interesting to see whether and how the Court of Appeals of Hamburg will give effect, in the present case, to the capital transfer regulations of Bulgaria. For a discussion of the effect, under Germany's conflict-of-laws rules, of exchange controls and capital transfer restrictions that do not fall within the ambit of article VIII, section 2(b) of the IMF Articles of Agreement, see Ebke, *supra* note 14, at 312-34; Udo Unteregge, *AUSLÄNDISCHES DEVISENRECHT UND INTERNATIONALE KREDITVERTRÄGE* 59-153 (1991).

50. This interpretation was first advanced by Arthur Nussbaum, *Exchange Controls and the International Monetary Fund*, 59 YALE L.J. 421, 426-27 (1950); see also ARTHUR NUSSBAUM, *MONEY IN THE LAW, NATIONAL AND INTERNATIONAL* 543 (1950).

51. See Ebke, *Article VIII*, in Festschrift, *supra* note 4, at 73-78.

52. See Gold, *supra* note 26, at 10-12.

its previous decisions in order to bring Germany's case law concerning article VIII, section 2(b) in line with that of other major IMF member states.

Needless to say, the IMF will not be pleased with this development as it reduces the scope and the practical significance of article VIII, section 2(b). Yet, the IMF has long realized that the judges of the IMF member states do not share a common orientation towards most issues to which article VIII, section 2(b) gives rise.<sup>53</sup> The reality is that in the courts of many member states, national pressures and perceived national interests have been so great as to become the dominant forces.<sup>54</sup> It was foreseeable that it would be only a matter of time until courts that traditionally were oriented towards international monetary cooperation and assistance to IMF members in deficit in their interpretation of article VIII, section 2(b) would eventually follow suit.<sup>55</sup>

The unsatisfying development of the interpretation and application of article VIII, section 2(b) in the member state courts requires a concerted action of all IMF member states and the Fund itself. Such action should include the possibility of a revision of article VIII, section 2(b) that goes beyond the smallest common denominator that is characteristic of the present practice in the member states. A new approach, no doubt, would require all concerned to wipe the slate clean of all principles and theories, start fresh, and search for new conflict-of-laws rules that are useful and workable in light of today's better understanding of the monetary intertwining that cannot be disentangled without some hardship and increased international monetary cooperation.<sup>56</sup>

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53. See Gold, *supra* note 11, at 29.

54. Gold, *supra* note 26, at 10-11.

55. See Ebke, *Article VIII*, in Festschrift, *supra* note 4, at 80 ("[R]estrictive interpretations of article VIII, section 2(b) by the courts of some IMF Member States may also spread gradually to countries that are in a completely different situation").

56. Accord Stephen Zamora, *Recognition of Foreign Exchange Controls in International Creditors' Rights Cases: The State of the Art*, 21 INT'L LAW. 1055, 1082 (1987).

