2. Article VIII, Section 2 (b) of the IMF Articles of Agreement in Practice

a) “Exchange Contracts” and “Capital Transfers"

The highly controversial debate over the “narrow” versus the “broad” interpretation of the term “exchange contracts”, a key element of article VIII, section 2(b) of the IMF Articles of Agreement, vividly illustrates this point.21 The discussion of the equally contentious issue whether article VIII, section 2(b) of the Fund Agreement applies to international capital transfers or only to payments for current international transactions (cf. article XXX[d] of the Fund Agreement)22, too, shows that a growing number of courts of capital-exporting Member States of the IMF favor a rather restrictive interpretation of article VIII, section 2(b) of the Fund Agreement on order to foster the interests of the forum as well as domestic creditors and investors.23

By construing the phrase “exchange contracts” narrowly and not applying the provision to international capital transfers (e.g., international lending transactions or issuance of sovereign bonds), English courts, like their American counterparts, have limited the scope of article VIII, section 2(b) “almost to the point at which the provision vanishes”.24 As a result, article VIII, section 2(b) of the Fund Agreement plays almost no role in alleviating the effects of the current international state debt crisis.25 As a further consequence, the impact of exchange control regulations approved by the Fund or authorized under the IMF Articles of Agreement to assist IMF Members with balance of payments difficulties is unevenly distributed among IMF Members.26

b) “Shall be unenforceable"

The phrase “shall be unenforceable” is yet another example of a key element of article VIII, section 2(b) of IMF Articles of Agreement the meaning of which is so obscure (especially for lawyers trained in the civil law tradition)27 that the Fund, Belgium, France and Switzerland could not even agree on a mutually acceptable translation of the term “unenforceable” into French.28 The term “unenforceable” appears to be rooted in the Roman and common law notions of action.29 Yet, as Krispis has pointed out correctly, the “fact that, linguistically, the term… happens to coincide with a principle of the Anglo-Saxon system is not, of itself, a reason to accept the proposition that it bears the same meaning as the similarly-sounding Anglo-Saxon term. Nor is such a reason constituted by the fact that Article VIII resulted from the initiative at Bretton Woods of the U.S. and British representatives.30 While the need to transpose the term “unenforceable” into Member State law, regardless of common or civil law, to give legal effect to article VIII, section 2(b) of the Fund Agreement is generally recognized,31 the actual transposition and the ensuing legal effects vary widely from one legal system to another.32 As a result, IMF Member State courts disagree on central issues such as the validity of an exchange contract that violates foreign exchange control regulations of an IMF Member State, the burden of proof, and the retroactive applicability of article VIII, section 2(b) of the Fund Agreement to exchange contracts which when entered into did not violate exchange control regulations of an IMF Member State but did so at the time of performance or the last hearing in a law suit arising out of or in connection with the exchange contract, or vice versa.33

21 For a thorough historical and comparative analysis of the debate concerning the “narrow” versus the “broad” interpretation of the term “exchange contracts”, see, e.g., Ebke, supra note 2, at pp. 203-246; Ziegler, Russische Kapitalverkehrs- und Kulturgüterschutzbestimmungen im deutschen Internationalen Privatrecht, 2006, pp. 179-190; Baker, Enforcement of Contracts Violating Foreign Exchange Control Laws, 3 Int’l Trade L.J. 247, 252-262 (1977). For the current state of law on the meaning of the term “exchange contracts”, see Ebke, supra note 19, Anh zu Art 9 Rom-I VO at 23-32. For a summary of the different views in English, see, e.g., Booysen, supra note 7, at pp. 354-356 (arguing himself in favor of a narrow interpretation).

22 For details of this discussion, see, e.g., Ebke, supra note 19, Anh zu Art 9 Rom-I VO at 4, 26, 31 and 43; see also Ebke Article VIII, Section 2 (b) of the IMF Articles of Agreement and International Capital Transfers: Perspectives from the German Supreme Court, 28 Int’l Law. 761 (1994); Müller, Staatsbankrott und private Gläubiger, 2015, pp. 85-92 and 97-99. It is difficult to draw an exact line between payments for current transactions and capitals transfers (cf. article...
XXX(d) of the Fund Agreement). For details, see Ebke, supra note 11, at pp. 28-30; Evans, Current and Capital Transactions: How the Fund Defines Them, 5 Fin. & Dev. 30 (1968); Gold supra note 20, at p. 97. The distinction between capital transfers and payments for a current issue, for example, in Hood Corp. v. The Islamic Republic of Iran, Bank Markazi Iran and Bank Mellat, Case No. 100, Case No. 142-100-3, signed July 13, 1984, 7 Iran-U.S. Claims Tribunal Reports 36, 45-46 (1984) [Iran-U.S. Cl. Trib.]. A related and equally controversial issue is whether payments due as interest on loans are covered by article VIII, section 2(b) of the IMF Articles of Agreement. This issue came up, for example, in Germany in connection with the recent debt crisis of Argentina. See Ebke, supra note 19, Anh zu Art. 9 Rom-I VO at 31 and 43a. In light of article XXX(d)(2) of the IMF Articles of Agreement, interest payments would seem to belong within the ambit of article VIII, section 2(b) of the Fund Agreement, regardless of whether the interest is due on “normal short-term banking and credit facilities” (cf. article XXX(d)[1] of the Fund Agreement) or economically substantial, long-term loans. See Ebke, supra note 11, at p. 29; contra District Court (Landgericht) of Frankfurt am Main, judgment of March 14, 2003, 57 WM 783, 785 (2003), affd, Court of Appeals (Oberlandesgericht) of Frankfurt am Main, judgment of June 13, 2006, 59 NJW 2931 (2006).

See Mann/Proctor, Mann on the Legal Aspect of Money, 6th ed., 2005, p. 423 n. 93 (“Those of a cynical mindset may feel that courts in England and in New York had good reason of adopting a narrower approach to the term. A broader approach might have provided grounds for a challenge to the validity of some of the financial contracts which are made and traded in the London and New York markets”); accord Zamora, Recognition of Foreign Exchange Controls in International Creditor’s Rights Cases: The State of the Art, 21 Int’l Law. 1055, 1065 (1987). In reviewing U.S. American court cases that have favored a narrow interpretation of the phrase “exchange contracts”, Professor Zamora conclude that “[t]his creditor-oriented view may be seen to strengthen U.S. Financial markets, but it does not necessarily accord with the goal of international monetary cooperation that the Fund Agreement was intended to foster.” But see also Yianni/de Vera, The Return of Capital Controls?: 73 Law & Contemp. Pros. 357, 363 (2010), arguing that “[i]n practice, the narrow construction can provide efficacy to the international financial system in those jurisdictions where it prevails.


See Folsom/Gordon, International Business Transactions, vol. 2, 1995, p. 209 n. 2 (“This word may seem meaningful to a common law trained lawyer, but it has no clear meaning in civil law tradition nations”).

See Ebke, supra note 19, Anh zu Art 9 Rom-I VO at 9 (“n’auront pas force obligatoire”, “ne seront pas exécutoires”, “ne sont pas exécutoires”)

Ebke, Die Rechtsprechung zur “Unklagbarkeit” gemäß Art. VIII Abschnitt Satz 1 IMF-Übereinkommen im Zeichen des Wandels, 47 WM 1169, 1170.


See, e.g., Court of Appeals (Oberlandesgericht) of Frankfurt am Main, judgment of Feb. 27, 1969, IPRspr. 1971 No. 116a, pp. 358, 361 (Übertragung und Anpassung an die innerstaatlichen Rechtsbegriffe der jeweiligen Vertragsstaaten”). See also Ebke, Das Internationale Devisenrecht im Spannungsfeld völkerrechtlicher Vorgaben, nationaler Interessen und parteiautonomen Geschäftsfreisheit, ZVgRWiss 100 (2001) 365, 379-380.

See, e.g., Ebke, supra note 7, 23 Int’l Law. 677, 700-702 (1989); Ebke, supra note 19, Anh zu Art 9 Rom-I VO at 48-80; cf. Booyesen, supra note 7, at pp. 361-364.

See, e.g., Ebke, supra note 19, Anh zu Art 9 Rom-I VO at 52-62; Booyesen, supra note 7, at pp. 361-364.
Referring Principles:
V.2.4 - Distribution of currency transfer risk