Title:
V.2.4 - Distribution of currency transfer risk

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The currency transfer risk concerning a payment to be made by one party under a contract follows from Art. VIII (2)(b) IMF-Agreement.

Commentary:
1 Art. VIII (2) (b) IMF-Agreement of July 1944 provides that exchange 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 the IMF-Agreement shall be unenforceable in the territory of any member. The Article serves to protect and implement the currency transfer restrictions of the IMF Member States as long as these restrictions are consistent with the IMF-Agreement. The Article therefore requires courts, international arbitral tribunals and domestic administrative authorities to accept and enforce the extra-territorial effect of such exchange control regulations in order to ensure a uniform treatment of these provisions throughout the Member States of the IMF. At the same time, the second sentence of Art. VIII (2) (b) shows that this provision reflects notions of reciprocity and inter-state cooperation ("comitas") in the common struggle of the IMF Member States to enforce exchange control regulations which are consistent with the objectives and policies of the IMF-Agreement. For that reason, contracts have to be treated as unenforceable under Art. VIII (2) (b) IMF-Agreement notwithstanding that the law under which the foreign exchange regulation is maintained or imposed is not the law which governs the contract. Due to the fundamental nature of these policy considerations underlying Art. VIII (2) (b) IMF-Agreement and its significance for the global currency system, its content must be regarded as part of transnational law.

2 Only those measures fall within the ambit of Art. VIII (2) (b) IMF-Agreement which have been issued by an IMF Member State for the sole purpose of protecting the balance of payment and currency reserves of that particular country. Thus, measures which are not based on such purely economic motives but which appear to be foreign policy related or based on concerns for the national security of that country fall outside the scope of Art. VIII (2) (b) IMF-Agreement. This view is supported by the fact that the Fund has established a special notification procedure for "restrictions on payments and transfers of current international transactions that are solely related to the preservation of national or international security". In this procedure, the Fund does not examine the contents and substance of the regulation but merely indicates to the member state that "it has no objection to the imposition of the restrictions". This refusal to scrutinize such "measures for nonbalance of payments reasons" reveals that they fall outside the scope of the IMF Agreement and the general competence of the Fund. It would be inconsistent with this general policy underlying the IMF-Agreement if Art. VIII (2) (b) would require courts and arbitral tribunals to enforce such measures of member states for which the Fund refuses to take over any substantive responsibility. An exception applies only in those cases where an exchange control regulation that is issued solely for the purpose of protecting the national security of the country that has enacted it is sanctioned by UN Security Council Resolutions. This follows from Art. VI of the Agreement between the IMF and the United Nations of 1947 and the rights and duties of the UN Member States under Art. 41, 42 and 48 of the UN-Charter. It should be noted that this approach to the practical application of Art. VIII (2) (b) IMF-Agreement is not achieved by reference to the rather vague notion of public policy, but by a narrow and policy-oriented interpretation of that Article itself.

3 The currency transfer risk must be distinguished from the currency conversion risk. That risk stems from the fact that the price or any other sum to be paid by one contract party is fixed in the contract in a certain currency, e.g. the currency of the payee, but the payor pays it in a different currency. In such a scenario, Principle V.2.2 applies unless the parties include a clause in their contract to deal with the currency conversion risk. Such currency conversion clauses avoid problems of payment by one party in currencies other than the one agreed upon in the contract and caused by exchange rate changes by fixing in advance the exchange rate for the price or other payment to be made under the contract.

4 The currency transfer risk must also be distinguished from scenarios in which a contracting party which is to receive a payment under the contract bears an exchange rate risk in the transaction, e.g. if the contract price or any other payment to be made under the contract is to be effected in a currency other than the currency of the country in which that party is located. In such situations, that party may either enter into hedging arrangements with its bank or, if the other party
agrees, include an exchange rate adjustment clause ("value-stabilization clause" or "index-linking clause") into the contract. Such a clause provides for an identified fixed exchange rate between the currency of the payee and the currency in which payment is to be made and for an adjustment of the contract price if the exchange rate differs by more than x% on the date the payment is to be made or on another date fixed by the parties. The effect of such a clause is to provide for an exception to the Principle of nominalism pursuant to which a claim for payment in a certain currency entitles the creditor only to its nominal value, i.e. the contractually specified amount of that currency, irrespective of any fluctuations of the currency in which the debt is expressed between the date of concluding the contract out of which the claim arises and the date of payment.