CHAPTER 35

Special Problems of Money Obligations

The extreme instability of the monetary systems in the entire world has caused a great number of difficulties involving conflicts law. Recent writers have felt compelled to devote a separate chapter to money obligations.

Fortunately, one principle may be claimed to prevail over occasional objections: the law of the contract governs the amount due. The special law of the place of payment has influence only on the "mode of performance," while exceptions to the principle may be made for the sake of public policy.

I. MUNICIPAL LAWS

A. NOMINALISM

1. Devaluation

A monetary sign has the value printed on its face. This is the nominalistic principle. In the discharge of obligations,


no heed is given to the oscillations of monetary value that continually accompany international financial intercourse. In periods where a currency is stable, fluctuating within a small margin in a free exchange market, nominalism has a sound inner foundation. Throughout history, however, innumerable embarrassed rulers have enforced the principle in the wildest crises by manipulating the weight and metal composition of their stamped coins and, in more recent times, under the modern pattern by releasing floods of paper money from their printing presses. A quite different devaluation in the United States has accomplished the same result by making a dollar of 15 5/21 grains of nine-tenth fine gold the same legal tender as the former dollar of 25 8/10 grains, and by legally equalizing a dollar bill to a gold dollar coin.

When in November, 1923, the German "mark" was degraded to one billionth of its former value, the German Supreme Court could no longer restrain its rebellion against the rule that "mark" is equal to "mark." The Second World War has left all of Europe in the clutches of inflation, which in the case of Hungary for a time reached the proportions of quintillions.

Inflation and its opposite, deflation, when carried to such extremes, are sooner or later adjusted by stabilization of the nominal money values or ended outright by a new currency. The rules that in such cases determine the relation between the old and new monetary units pertain to domestic public law, but imply a change in the rules of domestic private law. Consequently, the conflicts problem arises: to what persons and obligations do the latter rules apply?

Some old codes,² reflecting the sentiment of natural justice, have expressly put the losses suffered through debase­ment or alteration of coined money on the borrower. The

² E.g., Austria: Allg. BGB. § 988 in fine.
creditor should receive exactly the value represented by
the indicated sum of coins of a certain standard, weight,
and fineness. Thus, nominalism has been partly replaced by
a "metallistic" doctrine. In the United States, since the
monetary catastrophes of the Civil War, a highly stereo­
typed stipulation has served in place of such a rule. In
present legislation, the nominalistic doctrine is firmly and
universally settled. In a vain effort to draw an analogy, a
few writers, in the desperation of inflation, invoked the old
rules regarding the loan of coined money.

2. Protective Stipulations

Gold coin clause. Customary usage has produced various
formulas. In the United States, the clause generally em­
ployed before 1933 read: "to pay X dollars in gold coin
of the United States of, or equal to, the standard of weight
and fineness existing on (the day of contracting)." The
analogous clause in France and Germany more briefly stipu­
lated for X francs in gold or X marks in gold or in Reichs-
Goldwährung, or the like.

Thus, in the "gold coin clause," clause espèces-or, clausula
curso-oro, Goldmünz-Klausel, the debtor promises to pay
gold coins of the currency specified. But although this suffices
so long as gold coins are available in addition to depreciated
bills, a crisis usually tends precisely to chase the precious
metal out of circulation, often causes prohibitions of gold
exportation and trade, and sometimes leads to seizure by
the state, as happened in the Roosevelt era.

In one opinion, the doctrine of impossibility was em­
ployed; the requirement of paying in gold coins was con­
sidered a frustrated specification of the modality of per-

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8 For literature, see Nussbaum, Vertraglicher Schutz gegen Schwankungen
des Geldwertes (Beiträge zum ausländischen und internationalen Privatrecht,
Heft 1) (1928); Nussbaum, Money 301 n. 1.
formance; hence, the debtor could simply discharge his obligation in bills of the stipulated currency. 4 This leaves the clause ineffective in the very case where it is most needed and makes it almost senseless. In the words of the World Court, “The treatment of the gold clause as indicating a mere modality of payment without reference to a gold standard of value, would be, not to construe but to destroy it.” 5

The highest courts of almost all countries 6 have finally rallied to the view that gold coin clauses induce a tacit additional agreement that in any event the creditor should receive in actual currency the value embodied in the original amount, or, in other words, imply a gold value clause, as described hereafter.

The House of Lords, then, construed a promise to pay 100 pounds “in sterling in gold coin of the United Kingdom

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Belgium: Cass. (June 12, 1930) Pasicrisie 1930.I.245; (April 27, 1933) Clunet 1933, 739.
Germany: RG. (Jan. 11, 1922) 103 RGZ. 384; (March 1, 1927) 107 RGZ. 370; (May 24, 1924) 108 RGZ. 176 (overruled).
5 Publications Permanent Court (1929) Series A, Nos. 20/21 at 32; Clunet 1929, at 996.
6 Most decisions, it is true, wind up by declaring the clause invalidated by the Joint Resolution of Congress.
Austria: OGH. plenary decision of the “large senate” (Nov. 26, 1935) Clunet 1936, 442, 717; OGH. (June 1, 1937) 37 Bull. Inst. Int. (1937) 245.
Denmark: S. Ct. (June 21 and Oct. 6, 1933) Ugeskr. Retsv. 1933, 703, 1028, 7 Z. ausl. PR. (1933) 960, 962.
Germany: RG. (May 28, 1936) JW. 1936, 2058.
The Netherlands: H. R. (March 13, 1936) two decisions, W. 1936 Nos. 280, 281, 34 Bull. Inst. Int. (1936) 304, one of which, the Royal Dutch case, applies Dutch law, see infra n. 49.
of or equal to the standard of weight and fineness existing on September 1, 1928," as though the clause ran thus: "pay in sterling a sum equal to the value of 100 pounds if paid in gold coin of the United Kingdom of or equal to the standard, etc."^7

**Gold value clause (clause valeur-or, Goldwert-Klausel).** Earlier American contracts expressly provided for payment alternatively of gold coins or of the amount in paper necessary to purchase the gold at the place of payment. In modern practice, the same result, thus reached directly, is generally obtained by a promise to pay a quantity of money determinable according to the value of gold coins of a certain currency: gold pounds, gold dollars, etc. These expressions and the implied meaning of gold coin clauses just mentioned have dominated the documents of loans and insurance in recent decades. Hence, the often emphasized difficulty of discerning the exact nature of a gold clause has no longer any considerable practical importance.

Commonly the unit referred to in the first place belongs to a certain currency, English pound, Argentine peso, etc., but during the German crisis of 1923 the clause was usually based on a purely imaginary unit, the "gold mark," equal to 10/42 United States dollars. It was held that this clause was not linked with the American currency and that therefore after as well as before the devaluation in the United States, it meant an obligation to pay a sum of German money equivalent to the value of the original gold dollar.\(^9\)

Analogous decisions were rendered in other countries.\(^{10}\)

^7 Feist Case, *supra* n. 6, per Lord Russell of Killowen, at 172.


^9 RG. (Dec. 14, 1934) 146 RGZ. 1, 5; (July 5, 1935) 148 RGZ. 42, 44; Clunet 1936, 472; cf. Stoeber, 52 Z.int.R. (1938) 240.


Gold bullion clause. The early protective clauses, as well as recent attempts to avoid the dangers of money claims, resorted to plain obligations to pay a quantity of fine gold. In an American case of 1936, an ancient contract of long term lease fixed the yearly rent at 557,280 grains of pure unalloyed gold. The court held that this clause did not fall within the Joint Resolution of June 5, 1933, since no reference was made to American currency. As delivery of gold bullion was impossible, the equivalent in paper dollars was awarded as damages. The Supreme Court of the United States, however, dealing with another lessee's promise to pay "a quantity of gold which shall be equal to $1500 of the gold coin of the United States, etc.," held the Joint Resolution applicable on the ground that the contract intended the payment of money rather than the delivery of a commodity. The lessor was a corporation which had nothing to do with gold transactions and wanted simply a safe amount of money. This decision, despite the difference in the clauses, overrules the first case and leaves open, as mere commodity obligations, only those stipulations of a quantity of gold that treat gold as merchandise for industrial or dental purposes, or presumably, those concluded between gold dealers.

The French Code and several followers have recognized loans given in bars (lingots) as independent of money changes. Apart from this special and rare case, no authority in Europe is known to treat the question. In the writer's opinion, the Supreme Court of the United States has evidently found the right solution.


13 French C. C. art. 1896; Italian C. C. (1865) art. 1823, repealed in C. C. (1942); Spanish C. C. art. 1754 (2); the Netherlands C. C. art. 1795.

14 See supra n. 12. Contra, as it seems, MANN, Money 55 n. 2 (i); M. WOLFF, Priv. Int. Law 475 n. 2.
Other clauses. Commodities such as wheat, rye, coal, and kalium have temporarily been used as objects not susceptible of devaluation by monetary depreciation. More important are the clauses establishing sliding prices.

3. Legislation against Protective Clauses

(a) Gold clauses of all kinds are destined to be swept away in one way or another in time of crisis. In the wake of the First World War and of the depression, gold coin clauses not frustrated by the disappearance of gold succumbed, like the pure gold value clauses, to emergency legislation in all but a few countries. The exceptions include England, where it has been held that gold value clauses are not affected by public policy; and no statute has affected their force. It is known, however, that gold clauses are uncommon in England and therefore offer no threat to the currency. Other countries in which devaluation did not affect gold clauses are Czechoslovakia and Switzerland.

(b) French doctrine. From the 18th century, the
French writers protected the monetary maneuvers of the kings by a theory that all stipulations evading prescriptions of legal tender are void. When a Law of August 12, 1870, invested the notes of the Banque de France with *cours légal* and freed the bank of its obligation to cash the notes (*cours forcé*), the Court of Cassation held previous stipulations for payment in gold or silver coins to be void, because they would impair the "liberating effect of the paper money" and thus conflict with the compulsory legal tender of the paper bills.\(^\text{22}\) During the continuous downward trend suffered by the French franc after the First World War, this practice was maintained and fortified. In the whole range of domestic contracts, clauses protecting the creditor against the depreciation of the French currency are regularly declared ineffective.

This doctrine, however, has not been extended to "international payments," to be discussed with the international scope of gold clause restrictions.

The French theory that a compulsory legal tender is necessarily opposed to protective clauses, is not shared anywhere else. Its effect distinguishes the French law in the twofold respect that, in the domestic field, gold clauses are retroactively invalid without express legislative provision, while, in the international field, their validity is maintained without restriction.

B. FOREIGN MONEY DEBTS

Rules concerning the payment of debts expressed in terms of foreign currency are of two categories. English courts have developed rules of procedure tending to exclude awards of foreign money; in the United States these rules have generated effects in the field of substantive private law.

\(^{22}\) Cass. civ. (Feb. 11, 1873) D. 1873 I. 177.
Continental codes have determined the extent to which a party may modify a contractual promise to pay in foreign money, in rules of a purely substantive character.

No consideration will be given here to emergency laws which go so far as to annul contracts for payment in foreign money, as for instance, the French Law of April 17, 1942, prohibiting resident individuals and juristic persons established in France from signing insurance contracts in foreign money.

I. Right to Conversion

If foreign coins or notes are bought, either in specific pieces or as unascertained goods, they are a commodity. But when foreign money is the object of a debt, it is not a commodity, as was sometimes believed by American courts. The obligation is "a monetary obligation couched in terms of a foreign currency".

The debtor, however, in an old commercial tradition, enjoys the option (facultas alternativa) of paying the debt in equivalent units of the local currency in force at the place of payment. This rule has been elaborated in the Geneva uniform laws on bills of exchange and on checks.

This unilateral privilege of the debtor, however, may be waived by agreement of the parties, ordinarily expressed by the clause of "effective" payment.

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24 German C. C. § 244; 106 RGZ. 77.
25 Scaccia, Tractatus de commerciis et cambio (ed. 1669) § 2 gl. 5 Nos. 185, 188; L. GOLDSCHMIDT, Handbuch des Handelsrechts (1868) 1153 n. 35; Ascarelli in Riv. Dir. Com. 1923 I 447, and in his book, La Moneta 24.
26 E.g., Allg. Wechselordnung (1848) art. 37; German BGB. § 244; Swiss C. Obl. art. 84 par. 2; Scandinavian Law of Bills of Exchange, of 1886, art. 35. See the list of laws in F. MEYER, Weltwechselrecht 290; Vivante, 4 Trattato Dir. Com. § 1566 n. 106.
27 Treaty on Bills of Exchange, art. 41; on Checks, art. 36.
28 E.g., art. 41 sub III, supra n. 27; BGB. § 244 par. 1 cit.; "lending" of foreign money implies a sufficient agreement, 153 RGZ. 385.
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Business conceptions in the United States agree with these rules.  

A great controversy, however, has often arisen with respect to the date determining the rate of conversion from the foreign into the domestic currency. In theory and in practice in civil law countries the just view prevails: conversion must be made with reference to the time of actual payment, in order to give the creditor the exact value of his claim, no more and no less. Unfortunately, the language of the Geneva Uniform Law on negotiable instruments points to the date of maturity. An older laborious attempt by the International Law Association to unify the views on this question failed.

2. Judicial Conversion

In contrast to most civil law courts, English and American courts do not allow themselves to order payment of

29 See the proposal of Commissioners on Uniform State Laws, National Conference Handbook (1933) 160.
Belgium: App. Bruxelles (June 8, 1921) Pasicrisie 1921.2.111.
France: Cass. req. (Nov. 8, 1923) Clunet 1923, 576; civ. (Dec. 5, 1927) id. 1928, 660; req. (March 19, 1930) id. 1931, 1082; civ. (July 8, 1931) id. 1932, 721, but contra, for the date of maturity, Cass. req. (Feb. 13, 1937) Clunet 1937, 766. The latter solution with the additional damages for default is advocated by HAMEL, 2 Banques 470.
Germany: RG. (Feb. 20, 1920) 98 RGZ. 160; Plenary Ct. (Jan. 24, 1921) 101 RGZ. 312.
Switzerland: BG. (June 27, 1918) 44 BGE. II 213; (May 23, 1928) 54 BGE. II 257; (Feb. 11, 1931) 57 BGE. II 69. When speaking of the date of maturity, the court has awarded damages for debtor's default between maturity and payment, see NUSEBAUM, Money 425 n. 14.
31 See German RG. (July 1, 1924) 108 RGZ. 337; (March 17, 1925) 110 RGZ. 295, commenting on the identical German provision.
33 See MCCORMICK, Damages 190 and cited literature; Note, 40 Harv. L. Rev. (1927) 619; also 2 BEALE 1341 ff.
foreign money.\textsuperscript{34} The date for determining the rate of conversion into the domestic currency raises difficult questions. It has been settled by the House of Lords that damages in tort should be converted as of the date of wrong,\textsuperscript{35} and a similar rule prevails with regard to damages for breach of contract.\textsuperscript{36} The case of a liquidated debt was doubtful,\textsuperscript{37} but has been decided as of the date when the debt matured.\textsuperscript{38}

The Supreme Court of the United States has developed this theory into a rule of substantive law by which an obligation expressed in foreign currency is converted \textit{ipso jure}, at the rate in effect on the day of breach or default of the debtor, so as to give the creditor an optional right to be paid in dollars.\textsuperscript{39} This automatic transformation by American law, however, depends on the fact that the obligation is governed by American law and, in the case in which it was proclaimed, seems to have been grounded in addition

\textsuperscript{34} England: Manners v. Pearson & Son \cite{1898} 1 Ch. 581, 587; Graumann v. Treitel \cite{1940} 2 All E. R. 188.

United States: Statute of April 2, 1792, c. 16 § 20, 1 Stat. 250, 31 U. S. C. A. § 371: "... all proceedings in the courts shall be kept and had" (in dollars).

Canada: Rev. Stat. 1927, c. 40 s. 15 (1).

\textsuperscript{35} Celia, S. S. v. The Volturno, S. S. \cite{1921} 2 A. C. 544, 563 f. per Lord Wrenbury, as interpreted in several cases, last, Ottoman Bank v. Chakarian \cite{1930} A. C. 277—P. C.

\textsuperscript{36} Di Ferdinanda v. Simon, Smits & Co. \cite{1920} 2 K. B. 704, aff'd \cite{1920} 3 K. B. 409—C. A.; Barry v. Van den Hurk \cite{1920} 2 K. B. 709; Lebeauvin v. Crispin and Co. \cite{1920} 2 K. B. 714—C. A.; Madeleine Vionnet et Cie. v. Wills \cite{1940} 1 K. B. 72—C. A.; Privy Council in Ottoman Bank v. Chakarian, \textit{supra} n. 35.

Australia: McDonald v. Wells \cite{1931} 45 Commw. L. R. 506—High Court of Australia.

\textsuperscript{37} See the discussion by Mann, Money 291-302.

\textsuperscript{38} Lloyd Royal Beige v. Louis Dreyfus & Co. \cite{1927} 27 Ll. L. Rep. 288; Graumann v. Treitel \cite{1940} 2 All E. R. 188; \textit{cf. ibid.} editorial note; Cheshire \cite{ed. 3} 858 n. 3. Also for promissory notes and bills of exchange, Salim Nasrallah Khoury v. Khayat \cite{1943} A. C. 507.


Canada: Simms v. Cherrenkoff \cite{1921} 62 D. L. R. 703.

Australia: \textit{In re} Tillam Boehme and Tickle Pty., Ltd. \cite{1932} Vict. L. R. 146.

\textsuperscript{39} Mr. Justice Holmes in Hicks v. Guinness \cite{1925} 269 U. S. 71, even in a case of an account stated.
on the fact that the place of payment was in the country. In another case, where just to the contrary German law governed and the debt was payable in Germany, Mr. Justice Holmes, speaking for the majority, subjected the obligation to conversion only "at the moment when suit was brought," or as this should be understood, at the date of the judgment. The courts of New York have a different theory, that under ordinary circumstances the rate on the date of breach would control the effect of the breach on foreign debts, but they admit exceptions in favor of the rate of exchange at the time of the judgment.

The mystic power of territorial law in the theory of Mr. Justice Holmes, the doubts and, above all, the hardships caused by all these premature conversions have been sufficiently criticized. It follows that calculation according to the rate at the time of judgment is the lesser evil, so long as no satisfactory machinery is found for leaving the conversion to the enforcement officer or a supervisory court.

C. INTERNATIONAL BOND ISSUES

Numerous American bonds, like the shares of certain American corporations, circulate all over the world, but their legal characteristics are untouched by any foreign law. Indeed, neither the fact that they are bought in mass and quoted on foreign stock exchanges, nor still less that a


43 NUSBAUM, Money 431; MANN, Money 306; M. WOLFF, Priv. Int. Law 470 § 447.

44 On the contrary tendency of certain courts, see infra ns. 49, 91.
loan is floated in a country other than that of the debtor,\textsuperscript{45} alter the purely domestic character of the bonds. The normal distinctive characteristic of an issue relevant for international consideration is the alternative fixation of the money amount in two or more currencies, by a “multiple currency” clause, at the option of the bondholder. Such clauses, however, are of different classes. Their two main types, known under their French names, may be termed here option of currency and option of collection.

1. Option of Currency (\textit{Option de Change})

In the typical international loan which is to be offered to the capital markets of several countries, the sum of interest and principal is fixed from the start in the currencies of all participating places and payable, at the option of the holder, at any of these places. Thus, the bonds and coupons of a loan of the municipality of Vienna in 1902 expressed the principal sum as 100 kronen—85 marks—105 francs—4.3 pounds sterling—20 dollars of the United States, in gold coin.\textsuperscript{46} Here there are several obligations, each independent of the others, as alternative obligations are. Devaluation of one or more of the currencies does not affect the right of the creditor to ask payment at the place where the money has full value. Although this clause is intended to induce the prospective investors of a certain place by offering payment also at this place, no restriction to the original subscribers of this place or their successors is attached, because the bonds are also intended to be negotiated throughout the world. This makes it possible for all holders to claim the sum at the place of least devaluation.

\textsuperscript{45} In discussions of the International Law Association on suretyship for international loans, the reporter, B. Van Nierop, contended that just this was the criterion of an international loan, 40th Report (1938) 192, also Nouv. Revue 1940, 368. This view may be exact from a purely financial point of view, but is misleading in legal respects.

\textsuperscript{46} 126 RGZ. 196, 208.
The loan, in fact, despite the currency option is "indivisible," granting every holder exactly the same rights. Whether the Joint Resolution of the United States Congress, of June 5, 1933, affected multiple currency clauses, is controversial.

2. Option of Collection (Option de Place)

The American loans of the 1920's to European corporations usually contained a clause that both principal and interest of the bonds as well as any premium on the principal shall, in addition to being payable in Manhattan, also be collectible at the option of the holders, at the city office of a New York bank in London, and at certain indicated banks in Amsterdam, Zürich, Stockholm, etc., in each case at the then current buying rate of the respective banks for sight exchange on New York. This means that the amounts are not only primarily expressed in, but based on, the American currency, which is therefore decisive in all future events. The holder has the choice of several places for his convenience, to obtain substantially the same value at all times. This situation has been universally recognized with respect to many loan issues despite numerous objections drawn from forced interpretation of stipulations or code provisions, or from an ambiguous wording of certain contracts.

Austria: OGH. (June 1, 1937) 37 Bull. Inst. Int. (1937) 245.
France: Cass. civ. (June 19, 1933) Clunet 1934, 939. To the same effect:
Germany: RG. (July 1, 1926) JW. 1926, 2675; (Dec. 22, 1927) 27 Bankarchiv 162.
Switzerland: BG. (May 23, 1928) 54 BGE. II 257, Clunet 1929, 497.
48 See cases infra ns. 104-108.
France: Cass. (Feb. 24, 1938) Revue Dr. Int. (Bruxelles) (1938) 323.
50 The ambiguous formulations would fill a voluminous chapter. See Nussbaum, Money 454, 455 ff.; Mann, Money 138, 140 ff.
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But a few courts have, indeed, incorrectly attempted to help creditors evade the American Joint Resolution by contending that any place of issue suffices to subject the debt to the local law.51

The character of the option of collection, just explained, is not only certain if the bonds are issued at one place, but also in case the bonds are issued in several countries when an identical external form of the bonds is employed.52 Even though several "tranches" (divisions of the issue) may be formed, the languages being different, the collection clause exclusively decides the rate and therefore the content of the obligation. Such view alone, "giving deciding weight to the wording of the clause, conforms to the significance of bonds as incorporating rights and to the needs of international intercourse."53

II. CONFLICT OF LAWS

A. LEX PECUNIAE

By indicating the currency of a state, the parties refer, or the law refers, to the legal prescription defining certain units of measurement. What a French franc is, is decided at any time according to the French legal provisions then in force, that is, under the principle of nominalism, those of the numerous French currency laws which are in force at the time of the payment or judgment respectively, including the provisions determining legal tender.54

51 Infra ns. 85, 90, 91.
52 This refutes the main defense argument based on the nationality of the holder. See the convincing reasoning of the Plenary Opinion of the Austrian Supreme Court (1935) 9 Z.ausi.PR. (1935) 899.
53 RG. (July 1, 1926) JW. 1926, 2675; (Dec. 22, 1927) 27 Bankarchiv 162, against former decisions; see RABEL, 10 Z.ausi.PR. (1936) 505.


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This reference, however, indicates the only importance of the foreign currency laws as such. Even provisions on legal tender do not affect the obligation except by the fact that they are a part of the law governing the mode of performance.

A contrary theory, establishing a veritable "law of currency" (Währungsstatut), i.e., a conflicts rule providing that the fate of an obligation should be decided by the changes of the monetary system referred to, has been suggested. The discussion of this problem took place with particular respect to revalorization (see infra B 3).

B. LEX CONTRACTUS

The copious discussion of the law governing money debts and notably bonds, has developed a wholesome unifying tendency, in ascribing to one law the great bulk of problems. What local connection serves to determine this law, depends on the nature of the contract—which would seem trite if it were not forgotten all too often. As shown before, in the case of bonds, this is the law of the country of the financing institution and the principal market. We are thereby enabled to deal shortly with a variety of subjects to which the principle ought to extend.

1. Content of Debt

Currency in which the debt is payable. Whether a clause is meant as option of place of payment or only as option of collection, and what amount of money is "in obligatione"

55 Theory of Neumeyer and Nussbaum, see infra n. 65.
56 Even a recent book by Gutzwiller, Der Geltungsbereich der Währungsvorschriften (Freiburg 1940) 92 ff. looks for a law applicable to "obligations expressed in a determinate currency" (p. 103) without distinguishing the nature of the contracts. He believes that "currency debts" do not show a lex causae in numerous cases (p. 107). This makes for more uncertainty (pp. 107 ff.) than is conceded in the present book.
(money of account, *monnaie de compte*) depends on the law of the contract. What constitutes payment sufficient to discharge the obligation is an almost identical question and is certainly not to be decided under any other law. English cases, after hesitation, have taken the same view when after accord and satisfaction, the question was whether an offer for nonliquidated damages has a basis in a still-existing obligation. Also the faculty to deposit the sum due with the court follows the governing law.

2. Default

The qualification and effect of default is governed by the same law. This extends to the question whether damages on the ground of default are awarded in excess of interest; whether damages are granted because of a loss through devaluation of the currency in which the obligation is expressed; how unliquidated damages are to be measured; and whether rescission may be based on the diminution of the purchasing power of the money equivalent.

3. Revalorization

Evidently, the law of the contract also governs the question whether a subsequent statute or judicial equity adjusts depreciated money debts. In a contrary isolated opinion,

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58 *Melchior* 277 ff.; *Mann*, Money 138; *Batiffol*, Traité 623 n. 3.
59 *Dicey* (ed. 5) 678; *Cheshire* 281, but incorrectly at 660 (*lex fori*), in ed. 3, 353, 857.
Germany: RG. (Jan. 8, 1930) IPRspr. 1930 No. 48 and others.
63 *Mann*, Money 201, 215; *contra*: *Cheshire* 660 (*lex fori*), 857 in ed. 3.
64 Prevailing opinion adopted by the courts in:
England: *Anderson v. Equitable Assurance Society of the United States*
the law of the currency rather than that of the obligation applies.\(^65\) Hence, French rules would decide against any revaluation of a debt couched in French francs, although the debt arises from a German contract and its amount under the German rules is transformed into certain percentages of the new currency. An English debt of German marks would have to be revalorized in American courts. The currency, however, in which a debt is expressed, has nothing to do with the equitable increase of the debt to a higher content.

4. Gold Clause

The law applicable to the obligation in general naturally determines the existence and construction of a gold clause;\(^66\) its character as a gold coin or gold value clause;\(^67\) and the legislative measures upholding or impairing the clause.\(^68\)


Austria: OGH. (Sept. 11, 1929) JW. 1929, 3519, Clunet 1930, 750; (March 12, 1930) JW. 1930, 2480, Clunet 1931, 196 (Austrian law on mark debts); (April 24, 1927) JW. 1927, 1899 (German law on a German debt).

Czechoslovakia: S. Ct. (Nov. 11, 1924) JW. 1925, 574; (Jan. 19 and Dec. 16, 1934) 10 Z.ausl.PR. (1936) 172.

Germany: 119 RGZ. 259, 264; 120 id. 70, 76; 121 id. 337; see MELCHIOR 294 and constant practice. The currency reform in the Western Zone of Germany has raised new questions; on the municipal problems, see von CAEMMERER, 3 Südd. Jur. Zeitg. (1948) 497.


Switzerland: 51 BGE. II 303; 53 id. II 76; and constant practice.

\(^{(1928)}\) RG. (March 5, 1928) 120 RGZ. 277, 279; (Feb. 9, 1931) JW. 1932, 583; NEUMEYER, 1 Int. Verwaltungs R. III 368 ff.; NÜSSBAUM, D. IPR. 254. Contra: SCHLEGELBERGER, 3 Z.ausl.PR. (1929) 869 and the overwhelming majority of German writers.


The last-mentioned application gave an excellent method for treating the very numerous intra-European transactions in which gold dollars were promised merely for the reason that the American currency appeared the most constant measure of value, without any thought of submitting to American law. In these cases, the American Joint Resolution was correctly discarded. In other categories of cases, however, the application of the general law of the contract has encountered various obstacles, particularly in the extraordinarily wide repercussions of the Joint Resolution.

The international scope of the Joint Resolution. The Congressional Act of June 5, 1933, was evidently intended for the broadest conceivable application. According to its text, it extends to all gold clauses attached to obligations payable in money of the United States; no mention is made of the law governing the debt, nor is a domestic place of payment or a domestic domicil of the parties required. This wide scope has been recognized by the courts.


Denmark: See decisions supra Ch. 34 n. 49, and this Ch. n. 67.


Germany: RG. (Oct. 6, 1933) JW. 1933, 2583.


Czechoslovakia: S. Ct. (Oct. 22, 1937) 4 Z. osteurop. R. (1938) 467: the clause serving only to protect against a devaluation of the Czecho-crown does not justify the payment of a reduced amount in Kc in case of a dollar decline.

Germany: Cf. supra n. 9 on "goldmark" clauses.


Compania de Inversiones Internacionales v. Industrial Mortgage Bank
Attempts repeatedly made in foreign courts to claim the full gold value of a debt on the ground that the Joint Resolution was not meant to cover bonds issued or payable in a foreign country, were futile.\textsuperscript{72}

It would seem that Congress, without considering the problem closely, intended to give the Act the largest possible territorial scope, without, however, wishing to transcend the traditional limits of sovereignty.\textsuperscript{73} In fact, no such transgression has been committed in judicial decisions. In the outstanding New York case of a loan between foreign parties, where the court declared the broad domain of the Resolution, the loan had been floated and the bonds were payable in New York; it was expressly stated that the law of New York governed the obligation.\textsuperscript{74}

Another unfounded attempt has sometimes been made to bar the Joint Resolution from the applicable American law because the parties did not contemplate the possibility that the apparently safest currency of the world would be depreciated by such an extraordinary measure, and their intention therefore was restricted to the American law previous to the Resolution. But since the parties definitely excluded the European laws as unreliable, they could not limit the American law to certain cases and leave the others without applicable law.\textsuperscript{75}

\textit{Exceptional statutes.} In two countries, gold clauses have been invalidated if the law of the currency so stated.\textsuperscript{76} A

\begin{itemize}
\item of Finland (1935) 269 N. Y. 22, 198 N. E. 617, cert. denied, 297 U. S. 705.
\item Notes, 45 Yale L. J. (1936) 723, 34 Mich. L. Rev. (1936) 726.
\item Such arguments have been rejected in Germany, OLG. Düsseldorf (Sept. 26, 1934) IPRspr. 1934 No. 93 (b); RG. (May 28, 1936) JW. 1936, 2058.
\item \textsuperscript{73} RABEL, 10 Z.ausl.PR. (1936) at 507.
\item \textsuperscript{74} Supra n. 71.
\item \textsuperscript{75} RABEL, 10 Z.ausl.PR. (1936) at 509; for English dicta, see MANN, Money 228. \textit{Cf.} Vol. II p. 393.
\item \textsuperscript{76} Austria: Law of April 4, 1934, 11 Z.ausl.PR. (1937) 267, Clunet 1937, 643, \textit{cf.} KOESSLER, \textit{id.} 496.
\item Poland: Law of June 12, 1934, 1 Zosteueop.R. (1935) 499; 2 \textit{id.} 439.
\end{itemize}
National Socialist German law even declared that all bonds issued abroad for sums expressed in a foreign currency, should be devaluated according to the devaluation of the foreign currency, irrespective of a gold clause attached. The German state thus undertook to invalidate a gold clause valid under all foreign laws involved, merely because a domestic court was seized of the matter. The law was a countermovement against a questionable judgment of the Reichsgericht excluding the application of the Joint Resolution to American bonds circulating in Germany, on the ground of alleged National Socialist principles, but is itself guilty of an outrage. It has rightly been refused recognition in Switzerland.

**French doctrine of international payment.** Despite the practice of considering gold clauses void as offending the *cours forcé* of French bank notes, the French Supreme Court in 1920 held the New York Life Insurance Company bound to the contractual gold value promised in an insurance policy to a Frenchman. The *cours forcé* based on French national interest should not prevent the importation of gold from a foreign debtor into France. The courts subsequently have elaborated a doctrine of "international payment," which is two-sided so as to obligate also a French debtor to a foreign creditor, at least in theory. An international payment has been defined as a double transfer of funds between France and a foreign country; the contract must "produce, as a movement of flux and reflux across the frontiers, reciprocal consequences in either country." The Court of Cassation...
considers "the nature and elements of an operation" rather than the place of payment, or the domicil of the parties, and inquires whether the scope of domestic economy is surpassed.\(^8^2\) The currency laws have expressly recognized gold and similar clauses in such cases.\(^8^3\) The validity of the clauses concerning the money of account, thus, does not depend on the law governing the debt.\(^8^4\)

**Law of place of payment.** In many foreign courts, among other attempts to bar the application of the Joint Resolution, creditors contended that the question belonged not to the law governing the contract but to the law of the place of payment as governing the mode of performance. In the meaning of the Restatement it would even be categorized as a problem of discharge of the obligation, and therefore be subject to the *lex loci solutionis* (§ 358 d).

The courts, in general, have resisted this theory. Among inconclusive exceptions, the English Court of Appeals has enforced a Canadian mortgage bond, payable in London in sterling gold coin of Great Britain, despite the abrogation of gold clauses by the Canadian Gold Clauses Act, 1937.\(^8^5\) Although the justices relied on the *lex loci solutionis* for the "mode" of payment, their opinions were probably more influenced by the text of the clause in the contract at bar, which could be read as entitling the bearer to British, in contrast to Canadian, money, if ever there should be a difference. This would amount to a partial reference of the parties to a special law, a construction occurring also elsewhere;\(^8^6\) but it is a forced construction. The House of Lords

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\(^8^4\) BATIFFOL, Traité 624.


\(^8^6\) Austria: See decisions in 9 Z.ausl.PR. (1935) 891, 897; 10 id. 680; 11 id. 269.
avoided the problem, but Lord Romer approved the wrong theory.\textsuperscript{87}

The judgments of the Permanent Court of International Justice in the cases of the Serbian and Brazilian loans\textsuperscript{88} stressed somewhat the place of payment, but in reality applied the law governing the loans which was identified with that of the borrowing government.\textsuperscript{89} This view follows tradition but does not satisfy modern needs.

\textit{Public policy (situs of the bond)}. In the above-mentioned lawsuit which attracted great attention in Germany, the Reichsgericht decided that the American Joint Resolution did not apply to such American-governed bonds as were in German circulation at the time when the Act came into force.\textsuperscript{90} This decision, if it had remained in effect, would have caused an impracticable discrimination and violated the equality of the holders of bonds belonging to the same issue. The German government's repudiation of the decision was justified, although as noted above the repudiation decree itself was highly objectionable.

\textit{Public policy (place of collection)}. The Dutch Supreme Court, too, resorted to public policy when it denied effect to the Joint Resolution with respect to bonds of the Royal Dutch Company which showed a promise "to pay" in New York and the promise of "collectibility" in Amsterdam at the dollar rate of exchange, the suit seeking to recover florins in Amsterdam.\textsuperscript{91} The court maintained its view even

\textsuperscript{87}New Brunswick Ry. Co. v. British and French Trust Corp. [1939] A. C. 1, 43 f., criticized by Cheshire (ed. 3) 345.

\textsuperscript{88}Publications Permanent Court (1929) Series A, Nos. 20/21.

\textsuperscript{89}Correctly so, Mann, Money 224.


after the Netherlands had legislated against gold clauses.\textsuperscript{92}

The courts of other countries have rejected specious arguments of such kind.\textsuperscript{93} Neither the physical presence of a bond instrument in a country nor the mere facility of collection are sufficient contacts for the use of the public policy doctrine, which, moreover, should be excluded when the devaluation is due to a currency reform for assumedly cogent reasons and carried out without discriminating against foreign creditors.\textsuperscript{94} It is inconsistent with the very nature of international loans that any material differences should be made between the holders of identically shaped instruments. No sound public policy is served by disturbing this necessary machinery.

C. SCOPE OF LEX LOCI SOLUTIONIS

On the strength of the settled special rule that the law of the place of performance governs the "mode" of performance, that law decides what money is legal tender. It is also reasonable to include the question whether, in the absence of a party agreement, the debtor of foreign money may, at his option, pay in the currency of the place where the obligation is to be discharged. This is a recognized rule

\textsuperscript{92} Cf. Dutch Law of June 24, 1938; H. R. (April 28, 1939) W. 1939, No. 895, French tr., 41 Bull. Inst. Int. (1939) 291 (Canadian law, but Canadian Gold Clauses Act, 1937, criticized as too restricting); H. R. (May 26, 1939) W. 1939 No. 896, German tr., 41 Bull. Inst. Int. (1939) 90 (Osram loan, under German law; but gold clause prohibition, the law of 1936 on foreign currency restriction, and the currency transfer restrictions are against Dutch public order).

\textsuperscript{93} Austria: OGH. (Nov. 26, 1935) 9 Z.ausl.PR. (1935) 891, 897; (July 10, 1936) Rspr. 1936, 114.

Belgium: App. Bruxelles (Feb. 4, 1936) S. 1937.4.1; aff'd, Cass. (Feb. 24, 1938) 64 Revue Dr. Int. (Bruxelles) (1938) 323.


Switzerland: BG. (Sept. 26, 1933) 59 BGE. II at 360; BG. (July 7, 1942) 68 BGE. II 203, also in 1 Schweiz. Jahrb. I. R. (1944) 168.

\textsuperscript{94} This is the prevailing opinion of German writers, cf. MANN, Money 232 ff., but see NUSBAUM, Money 393, regarding the Royal Dutch case as "not arbitrary."
in Switzerland\(^{95}\) and, with certain doubts, in Germany.\(^{96}\) It is included in the numerous, often too broad, French references to "the mode of payment, particularly the money."\(^{97}\) It also seems to lie within the theory of the English cases.\(^{98}\) Finally, the Restatement with reason refers the question of which of several debts payable in the same state should be deemed discharged by a payment, to the law of that state.\(^{99}\)

The same, however, cannot be said of the next question, whether the parties may agree on effective payment in foreign money, nor of all other questions determining the *quid* rather than the *quo modo* of the obligation. The law of the place of payment should only come in, if at all, on the ground of public policy.

The adequate scope of *lex loci solutionis* has so far been discussed critically by only a few writers.\(^{100}\) A special point has found more attention. During the long periods when

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95 Switzerland: C. Obl. art. 84, speaking of money not being legal tender at the place of payment.
96 Germany: BGB. § 244 par. 2, providing that the debtor can pay in domestic currency if the place of payment is in Germany, contains a concealed conflicts rule, as the literature recognizes. For the literature, see Melchior 287 n. 1. This conflicts rule should be construed as characterizing the question as one of the mode of payment. See Nussbaum, D. IPR. 259. But the rule has been said to yield to any foreign law of the contract (Enneccerus, Recht der Schuldverhältnisse (ed. 1927) § 231 p. 21 n. 4) or to the foreign law of the contract, if the place of payment is outside Germany (M. Wolff, IPR. 97) or, on the contrary, to belong to public policy (Melchior 285 § 190). The Reichsgericht, which seemed to adopt the normal rule (Sept. 29, 1919) 96 RGZ. 270, 272, strangely deviated in the Plenary Meeting of the Civil Chambers of Jan. 24, 1921, 101 RGZ. 312, 316, where the place at which the payment is made rather than that in which the payment is due is regarded as decisive, following the isolated view of Neumeyer, 3 Int. Verwaltungs R. II 318.
97 Weiss, 4 Traité 397; Radouant in Planiol et Ripert, 7 Traité Pratique 526 § 1193 and n. 2; 2 Arminjon § 132; Batiifol, Traité 623 n. 1.
98 See infra n. 100.
99 Restatement § 368. This rule has been extended to the apportionment of income as between successive life beneficiaries, in Safe Deposit and Trust Co. of Baltimore v. Woodbridge (1945) 184 Md. 560, 42 Atl. (2d) 23x, 159 A. L. R. 580, criticized by Henderson, J., *ibid.*, dissenting.
100 Melchior 277 ff.; Weigert, *supra* ns. 1, 2, 20; Mann, Money 169-179, 249-251.
sterling currency indiscriminately obtained in the British Commonwealth and the Latin Monetary Union dominated many countries, contractual obligations of money were often expressed simply in pounds or francs. How to construe stipulations couched in pounds after these had been devaluated to different levels in the various territories, was an issue in several decisions of the House of Lords and the Privy Council. The decisions were of uncertain argument and difficult to reconcile with each other. They made it at least certain, however, that on one hand the local money at the place of payment was decisive, but on the other, that this was a special function of the lex loci solutionis, the use of which had to serve only a restricted purpose.

Where payment in "francs" and "dollars" becomes an ambiguous indication, courts have often referred to the currency of the place of payment. But equitable considerations have also led to judgments awarding a creditor payment only in his own lower currency, or a specification was inferred from premium payments in insurance contracts.

D. OPTION OF CURRENCY

An option de change granting the creditor choice of the currency in which he may recover a sum fixed in the con-


104 See the list of cases, NUSBAUM, Money 440 n. 10.
tract, such as one pound sterling or five United States dollars, constitutes a promise independent of the factual relation of the currencies involved at the time of suit. Each alternative right remains unaffected if all other currencies are devaluated or the protective clauses with regard to them are abrogated by the laws of the countries to which the currencies belong. This view rests, of course, on the law governing the contract inasmuch as it sanctions the intention of the parties. This, however, does not answer all doubts.

In the United States, it has been held that on a bond payable in dollars in New York or guilders in Amsterdam a bondholder of any nationality, including that of the United States, is entitled to sue for the full value of guilders payable in Amsterdam, irrespective of the existing prohibition to sue for gold dollars payable at any place. However, subsequently another federal circuit court with reference to the same loan decreed that dollars could not be demanded for the value in guilders. Opinions were divided also on the occasion of another loan. The Supreme Court of the United States took the more rigorous stand. In its appraisal, promises in alternate currency were not separate and independent contracts or obligations, but were parts of


one and the same monetary obligation of the debtor "which was under American law and fell within the terms of the Joint Resolution: 'obligations payable in money of the United States.'" This decision may be regarded as an unwarranted extension of the Joint Resolution which does not mention foreign currency debts. In any case, the Court ignored the faculty of the parties to stipulate in a contract governed by American law obligations subject to a special law.

In fact, foreign courts have taken a different view of such clauses. The problem, of course, is directly concerned with the amount of the debt. It would be a mistake to include the right in question in the domain of modalities of payment belonging to the law of the place of performance. Nevertheless, the former German Commercial Supreme Court and the Reichsgericht have entertained a theory that the contract with its alternative currency clause submits the obligation conditionally to the law of the place the creditor should select for presenting his bond for payment. In the case of the Viennese Investment Loan, the Reichsgericht held Austrian law to govern the debt but Swiss law to govern the payment in Swiss francs in Zürich so as to discard an Austrian legislative act authorizing the city of Vienna to pay exclusively in valueless Austrian crowns. Similar constructions have been adopted in other countries. Some related arguments have also been used by the Permanent

109 Weigert, supra n. 1, at 33.
110 24 ROHGE. 388; RGZ.: 1, 59, 61; 5, 254; 100, 79; 126, 196.
112 Canada, Quebec: La Corporation des Obligations Municipales Limitée v. La Ville de Montréal Nord (Super. Ct. 1921) 59 Que. S. C. 550.

In France, a similar decision was wrongly rendered in a case of option of place, Trib. civ. Seine (Nov. 16, 1938) Mouren et Comité de la Bourse d'Amsterdam v. Soc. des Services Contractuels des Messageries Maritimes, Gaz. Pal 1938 II 728, 40 Bull. Inst. Int. (1939) 98.
Court of International Justice and the English Court of Appeals.\textsuperscript{113}

This reasoning has been acutely criticized.\textsuperscript{114} However, all these cases point to the intention of the parties. The problem may demonstrate the opportunity of recognizing an appropriate sphere, not of the law of the place of performance, but of the choice of law by the parties. It seems a sound case for conceding that the parties may agree on the applicable law under condition subsequent. A multilateral currency clause constitutes the right to recover a money value despite depreciation of the other currencies and should not be frustrated by subsequent statutes of the states controlling these currencies. Judge Learned Hand's opinion mentioned above\textsuperscript{115} is entirely agreeable to this construction. We might submit, therefore, that a genuine multiple currency clause includes an implied choice of law under the condition of its exercise. This small corner of refuge in the international field ought to be left to the victims of the governmental money manipulators.

\textbf{E. MORATORIUM AND EXCHANGE RESTRICTIONS}

(a) \textit{Moratorium.}\textsuperscript{116} Moratorium is a temporary statutory postponement, for all debts, or those of a certain kind, of the date when payment is due. Such exceptional deferment may be so short that its effect can be assimilated to the "terms of grace" of the law merchant, traditionally


\textsuperscript{114} NUSSBAUM, D. IPR. 261; NUSSBAUM, Money 383: "bad law," citing decisions in his favor. \textit{Contra:} WEIGERT, \textit{supra} n. 1, 37, basing the decision on the "law of the currency," which is also questionable.

\textsuperscript{115} See \textit{supra} n. 105.

\textsuperscript{116} GHIRON, "Moratorie e regressi nel diritto internazionale privato," 9 Rivista (1915) 152.
subjected to the law of the place of payment or of the forum. Otherwise, the matter is controversial.

In England, it has been held that the law of the place of payment as such is decisive, because the matter relates to the mode of performance. Beale advocates this view despite a contrary decision of New York, which applied the law of the place of contracting. M. Wolff supports this opinion by the equitable consideration that a debtor should not be required to pay in a country where he cannot collect his own claims.

In civil law countries, the French Law of 1870 granting prorogations to the payment of bills of exchange and notes, expressly claimed extraterritorial force. This law once gave rise to a widespread but unsuccessful debate and to conflicting decisions in numerous countries. A frequent doctrine limited any statutory moratorium to the territory of the state issuing it, even though it was intended to be applied to debts payable abroad. In a similar view, public policy is always repugnant to the defense of a foreign moratorium. But the French statute, in fact, merely prohibited the making of protests, an entirely special matter regarding enforcement of obligations flowing from negotiable instruments.

Recent cases of moratoria, decreed in close connection

117 Dezand, 10 Répert. 176 § 25.
118 Cour Paris (June 25, 1931) Clunet 1932, 993 declares inapplicable the French moratorium to a bill of exchange accepted in Switzerland for a payment in Paris. The decision is approved by Prudhomme, ibid., but questioned by Batiffol, Traité 622 n. 1.
119 Rouquette v. Overman (1875) L. R. 10 Q. B. 525, 535; In re Francke and Rasch [1918] 1 Ch. 470, 482.
120 2 Beale 1270.
122 Priv. Int. Law 479 § 455.
123 Ghiron, supra n. 116, at 161.
124 Ghiron 176 ff.; contra: 2 Frankensteim 242 n. 27.
125 2 Meili 351.
with exchange restrictions, depend on the treatment of such restrictions. We may say that the character and motivation of the individual statutes relaxing the strict observation of contracts have always influenced consideration of such statutes in other countries.

(b) Exchange restrictions. The main principle, again, must be that the law of the contract decides the force of any restriction. This includes two rules: (a) where the governing law itself sets up an obstacle to the discharge of money obligations, the parties are bound to it, irrespective of where the payment is to be performed and where the suit for payment is brought, and (b) restrictions by a state whose law does not govern the contract are immaterial.

This natural principle seems to have become the accepted basis of the international literature of the 1930's and 1940's. The emphasis, however, has not been on the principle at all but on the possible exceptions. These are varied and the over-all picture is confused.

Procedural theory. One of the arguments supporting the disregard of foreign restrictions has been their allegedly territorial nature. Assets within the forum, it has been said, cannot be exempted from enforcement by virtue of a foreign prohibition. Sometimes it has been added that the German restrictions especially, despite their immense scope and ruthless elaboration, expressly refrained from affecting the substance of the creditor's right, in that they limited themselves to the temporary prevention of payment, either voluntary or enforced. Thus, enforcement in England would only be a procedural matter, dependent on English rules.


127 Thus, Mann, Money 266 ff. A new surprising position in recognizing Czechoslovakian restrictions has been taken by the English Court of Appeal in Kahler v. Midland Bank [1948] 1 All E. R. 811. Comment is reserved for Volume IV.
man and other compulsory systems, however, if allegedly not cancelling the obligation, in fact vitally impair its substance. On the other hand, it is of cardinal importance that we should not extend jurisdiction, based merely on the local situation of an asset, so as to impregnate a foreign-governed obligation with local policy.\textsuperscript{128}

\textit{Public policy.} Foreign legislation on currency exchange has very often been discarded as "political," as confiscatory, or as penal—a rather vague approach.\textsuperscript{129} Moral indignation repudiating the foreign restrictions has been embarrassing when statutes of the forum resorted to similar methods. The best support of a reaction against such foreign measures is afforded by the argument that they pursue in a unilateral manner economic purposes of a state to the detriment of foreign interests. On this ground, rather than on all others alleged, German, Austrian, and Swiss courts have correctly rejected debtors' excuses based on Hungarian, Yugoslavian, and German currency restrictions, respectively.\textsuperscript{130}

This view, advocated in the United States,\textsuperscript{131} is better suited than a rigid condemnation of all extraordinary foreign measures for the safeguard of national economy.

\textsuperscript{128} An unwarranted objection to this proviso has been raised by RASHBA, \textit{supra} n. 126, who warns against exaggeration of the principle that substantial contact with the forum is indispensable for the application of the local law considered as public policy.

\textsuperscript{129} See for details, RASHBA, 41 Mich. L. Rev., \textit{supra} n. 126, at 1089 ff.

\textsuperscript{130} Germany: KG. (Oct. 27, 1932) JW. 1932, 3773, IPRspr. 1932 No. 9; LG. Berlin I (Feb. 19, 1932) JW. 1932, 2306, IPRspr. 1932 No. 10.


Switzerland: 60 BGE. II 294, 310; 62 \textit{id.} 242, 246; 62 \textit{id.} II 108. The rejection extends to the case where the debt is governed by German law, see BG. (March 2, 1937) 63 BGE. II 42. In its decision of July 7, 1942, 68 BGE. II 203, \textit{supra} n. 93, the court agreed with an American judgment because of analogous policy.

In the Swedish case, S. Ct. (June 10, 1942) Nytt Jur. Ark. 1942, 389, 394, as cited in MICHAEL! 311 f., Bagge applied the same approach, whereas the majority resorted to Swedish law as the law of the contract.

It is also superior by far to a third view which holds the debtor responsible for not being able to pay, since his own state has caused his inability; he should bear the risk of damage occasioned by such legislation while he enjoys the benefits procured by the national economy of which he is a part.  

*Is the law of the place of payment influential?* This question carries us back to the pretended importance of illegality under the law of a foreign place of performance. By abandoning this dogma, a court may easily defy a foreign currency restriction imposed in an incompetent state.

On the other hand, no one can reasonably be expected to pay English pounds in Chile while this is prohibited there.  

In the two *Baarn* cases, the court did not resort to the Chilean law of obligations and had no need to do so for the purpose of excusing the debtor. The law governing the contract, whatever it is, will provide for the effect of nonpayment as well as for the question whether payment in local money is to be accounted for at the exchange rate.

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133 This against MANN, Money 255-258.  
134 The Baarn (No. 1) [1933] P. 251; (No. 2) [1934] P. 171.