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THE CUBAN INSURANCE CASES AND THE ARTICLES OF THE FUND

Joseph Gold

International Monetary Fund
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PREFATORY NOTE

The opinions expressed in this paper are those of the author, who is the General Counsel and Director of the Legal Department of the International Monetary Fund, and not necessarily those of the Fund.

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The Cuban Insurance Cases and the Articles of the Fund

I. Introduction

THE CHANGE of regime in Cuba in 1959 led to a considerable migration of citizens from that country. Many of these émigrés held insurance policies issued by U.S. or Canadian companies that had been doing business in Cuba. A wave of litigation based on these policies flooded into courts in the United States against both groups of companies.[1] One company alone had more than 6,000 policies outstanding that had been issued through its Havana branch. "The pending suits involve all kinds of policy claims, including death claims, suits for cash surrender values of policies, annuity benefits and endowment proceeds, as well as actions to force insurers to accept premiums and maintain policies in force." [2]

The actions instituted by policyholders involved a wide range of legal problems including issues of the act of state doctrine, nationalization, and private international law. They also raised many questions relating to Article VIII, Section 2(*b*), of the Fund's Articles of Agreement:

> 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 this Agreement shall be unenforceable in the territories of any member. In addition, members may, by mutual accord, co-operate in measures for the purpose of making the exchange control regulations of either member more effective, provided that such measures and regulations are consistent with this Agreement.[3]

[1] There has been some litigation in Canada also. See *Colmenares v. Imperial Life Assurance Co. of Canada*, (1965) 51 D.L.R.(2d) 122; (1966) 54 D.L.R.(2d) 386.

[2] Brief of petitioners on a petition to the U.S. Supreme Court for a writ of certiorari to the Supreme Court of Louisiana in *Pan American Life Insurance Co. v. Theye y Ajuria*, p. 11.

[3] The Fund's interpretation of this provision (Decision No. 446–4, June 10, 1949) is reproduced in the Appendix, p. 53. See also *Selected Decisions of the Executive Directors and Selected Documents*, 3rd issue (Washington, 1965; hereinafter cited as *Selected Decisions*), pp. 73–74.

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Indeed, they raised almost all the questions that had already been discussed in the growing body of case-law involving that provision, together with a number of questions that were considered for the first time. The cases were remarkable not only because of the issues that were involved but also because of the amount of money at stake. Estimates of the total maturity values of the policies range from US$100 million to US$250 million, but it is doubtful that any estimate can be regarded as reliable. "Never before in a series of cases has the potential effect, both legal and economic, of the Fund Agreement on the rights of individuals and private corporations been more clearly brought into focus than in the suits brought by Cuban refugees seeking to recover the cash surrender value of their policies of life insurance in this country." [4]

All aspects of the cases deserve close study, and one detailed examination of them in relation to the Fund's Articles has already appeared.[5] The present pamphlet also is confined to that aspect of the cases; the only cases considered are those in which the courts dealt expressly in some way with the Articles. In other cases the briefs of counsel discussed the Articles, but the courts did not react overtly to these arguments. The implications of this silence are, on the whole, too problematical to warrant speculation here. It must be said at the outset, although the point will be discussed later, that the issues involving the Articles of the Fund disappeared with the withdrawal of Cuba from the Fund and ceased to affect those cases that had not yet been finally decided. But the judicial treatment of these issues while they remained active deserves study because of the possible impact of these cases on future litigation, in the United States or elsewhere, in which Article VIII, Section 2(*b*), is relevant.

Cuba and the Fund

Cuba became a member of the Fund on March 14, 1946 and notified the Fund, in accordance with Article XIV, Section 3, that it intended to avail itself of the transitional arrangements of Article

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[4] Richard R. Paradise, "Cuban Refugee Insureds and the Articles of Agreement of the International Monetary Fund," *University of Florida Law Review*, Vol. 18 (1965), pp. 29–77, particularly pp. 37–38.

[5] Paradise, *op. cit.*

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XIV, Section 2. On December 18, 1953, Cuba notified the Fund that it was prepared to accept the obligations of Article VIII, Sections 2, 3, and 4. As a result, Cuba was required, inter alia, to avoid the imposition, without the approval of the Fund, of restrictions on the making of payments and transfers for current international transactions (Article VIII, Section 2(*a*)). On April 2, 1964 the Fund received Cuba's notice of withdrawal from the Fund, and, in accordance with Article XV, Section 1, the withdrawal became effective at once.

From time to time in the course of the litigation discussed in this pamphlet, the Fund was asked by counsel about the consistency with the Fund Agreement of the exchange restrictions applied by Cuba. The Executive Directors of the Fund authorized the following reply:

> This is in response to your inquiry concerning the consistency with the Articles of Agreement of exchange restrictions maintained or imposed by Cuba.
>
> A member of the Fund, like Cuba, which has accepted the obligations of Article VIII is required to obtain Fund approval of exchange restrictions on payments and transfers for current international transactions, multiple currency practices and discriminatory currency arrangements pursuant to Article VIII, Sections 2 and 3 of the Fund's Articles of Agreement. The Fund has approved the maintenance by Cuba of a two per cent exchange tax on remittances abroad. Any other existing restrictions on current transactions, multiple currency practices or discriminatory currency arrangements do not have the Fund's approval.
>
> In accordance with the Articles of Agreement, Fund approval for controls of capital transfers is not required. Thus, to the extent any controls are confined to capital transfers, they are maintained or imposed consistently with the Fund's Articles of Agreement.

Cuban legislation and decrees

The Cuban laws and decrees that have been regarded in the cases as relevant to the issues are a mixture of enactments dealing with legal tender, exchange control, and nationalization.[6] They begin with Law No. 13 of December 23, 1948, which established the National Bank of Cuba as the central bank and dealt with the national currency. Article 90 provided that the banknotes of the National Bank would be legal tender and have unlimited power to discharge obligations. Under Article 95 the national currency would be the only legal tender currency in Cuban territory and would have to be accepted in payment of obligations contracted or payable in Cuba. Article 97 provided that U.S. currency would cease to be legal tender in Cuba

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[6] This is not to say that all of the laws and decrees were relied on by the defendants in each of the cases.

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one year after the National Bank began operating or for an additional period of not more than one year thereafter if that was decreed. Decree No. 1384 of April 9, 1951 established June 30, 1951 as the effective date under Article 97. From that date, U.S. currency would cease to be legal tender in Cuba, and "all obligations contracted or payable in the national territory shall be expressed and settled in national currency," the substitution of pesos for dollars to be at par.

Law No. 568 was enacted on October 2, 1959, after the Government of Dr. Castro had taken office, in order to establish a sweeping exchange control. Article 1 declared a list of actions to be "felonies of monetary contraband," and those treated as relevant in the cases were set forth in paragraphs 6 to 12:

> 6. To export currencies or securities, or to transfer funds to points abroad by means of checks, transfers, drafts, letter-orders, orders of payment, compensations, travellers checks, letters of credit, reimbursements of collections, purchases or sales of passage tickets or through any other similar means, regardless of the origin or source of the funds, except for those cases authorized by the Currency Stabilization Fund, through a member bank or a firm duly authorized by Banco Nacional de Cuba.
> 7. To export or import national currency in excess of the limit that [*sic*] set now or hereafter by the Currency Stabilization Fund.
> 8. To establish credits in national currency for persons residing abroad or for residents of Cuba for the account of residents abroad.
> 9. To assign or transfer credits in national currency to residents abroad, make payments for their account in national currency and set up credits in bank accounts the holders whereof reside abroad without first complying with the rules issued by the Currency Stabilization Fund in this respect.
> 10. To receive and credit to bank accounts kept abroad, or to transfer to third parties collections made abroad for business transacted or services rendered in Cuba, regardless of the source of the respective funds.
> 11. To secure financing payable abroad in foreign currency without the prior authorization of the Currency Stabilization Fund, except for transactions of banks associated to the Banco Nacional de Cuba with their home offices or foreign correspondents, for the establishment of letters of credit, overdrafts and other normal activities of the banking business.
> 12. Any other violation or infringement of the rules of the Currency Stabilization Fund under which funds are transferred or remitted abroad in violation of the prohibitive rules of the same Fund or in a larger amount than is permitted thereby.[7]

Law No. 851 of July 6, 1960 was adopted in order to permit the nationalization of all businesses and properties of natural or juridical persons of the United States or in which they had a majority share or interest even though the enterprise was organized under Cuban law. The payment for nationalized properties was to be made in bonds of the Republic of Cuba, which would be amortized from a fund

[7] This translation has been quoted, notwithstanding some obvious infelicities, because it is the one used in most of the cases.

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constituted by annual allocations of foreign exchange based on a formula related to purchases of sugar in each calendar year by the United States from Cuba in excess of a stated price. Interest also was to be payable from this fund. The bonds were to be amortized in a period not less than 30 years from the date of nationalization.[8]

Resolution No. 3 of October 24, 1960 was promulgated under Law No. 851 for the purpose of effecting the nationalization of all the properties and firms in Cuba of U.S. persons. Among these were the U.S. insurance companies that were the defendants in the cases. The Canadian insurance companies were not affected and continued to do business under policies issued in the past. The Resolution declared that the Cuban State was "subrogated in place and grade of the natural and juridical persons referred to . . . with respect to the properties, rights and rights of action mentioned, as well as the assets and liabilities constituting the capital of the concerns referred to." [9]

Finally, Law No. 930 of February 23, 1961 provided that operations involving foreign currencies were a monopoly of the State, which would carry them out exclusively through the National Bank. Only the Bank was authorized to hold foreign currencies, and any foreign exchange received in Cuba had to be surrendered to the Bank. Only the Bank might authorize the acquisition and holding of foreign currencies within or outside Cuban territory by persons domiciled in Cuba (Article 23). "All receipts and payments in foreign currency and, similarly, all settlements with foreign countries and natural or juridical persons abroad shall be carried out only through and under the control of the National Bank of Cuba" (Article 24). "Holdings in local currency maintained at credit institutions or other agencies which belong to natural or juridical persons domiciled abroad may be utilized only by these persons with the express authorization of the President of the National Bank of Cuba or such officers as he may designate" (Article 26). "All exports and transfers to foreign countries of foreign exchange, checks, securities or other kinds of monetary instruments or instruments representing foreign means of payment are prohibited without au-

[8] *American Journal of International Law*, Vol. 55 (1961), pp. 822–24.

[9] Richard C. Allison, "Cuba's Seizures of American Business," *American Bar Association Journal*, Vol. 47 (1961), pp. 48–51.

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thorization of the National Bank of Cuba" (Article 42). Coins and notes issued by the National Bank "shall be the only currency of legal tender status and shall be accepted in payment of all obligations payable" in Cuba (Article 14). "When other currency has been or is specified, the obligations shall be liquidated and paid necessarily in legal tender currency" (Article 14).

II. The Cases

The plaintiff succeeds

Pan American Life Insurance Co. v. Blanco

In 1945 the defendant company, a Louisiana corporation, issued to the plaintiff three single premium annuity contracts under which his daughters were the annuitants and under which monthly payments were to begin as each of the plaintiff's three daughters reached the age of 21. The signatures of the defendant's officials executing the policies were authenticated before a notary in Havana, and the policies were delivered to the plaintiff there on payment of the premium in dollars by the plaintiff. The contracts provided that the annuities were to be paid in dollars, and that all liquidations were to be paid at the defendant's head office in New Orleans on delivery of the contract to the defendant. The plaintiff, who was vested with control of the contract, demanded its cash surrender value in Florida after he became a resident of that state. On the defendant's refusal to pay, the plaintiff sued and the defendant counterclaimed for a declaratory judgment of nonliability. One policy matured in May 1957 before suit was brought, and another in May 1961 in the course of the litigation.

The U.S. District Court for the Southern District of Florida struck out the defendant's answer and counterclaim, which argued that the defendant was relieved of liability because of Law No. 13 and Decree No. 1384 thereunder, Law No. 568, and Law No. 851 and Resolution No. 3 thereunder. An interlocutory appeal was taken to the U.S. Court of Appeals, Fifth Circuit, on a question certified by the District Court.[10] In support of its contention that

[10] 311 F.2d 424 (decided November 7, 1962).

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> . . . the Blancos' rights to enforce payment in dollars in the United States were made unenforceable by Cuban Law No. 568 of September 29, 1959 requiring payments to Cuban nationals to be made in Cuba in pesos, Pan American argues that Cuban Law No. 568 is valid and binding under The Bretton Woods Monetary Agreement of 1945 to which Cuba and the United States are signatories, which was incorporated into the laws of the United States in 22 U.S.C. §286; that the annuity policies in controversy are "exchange contracts" within the meaning of such Agreement and subject to the exchange control regulations of Cuba. In this connection Pan American's Reply Brief states that "only one other question remains: Is Cuban Law 568 'maintained or imposed consistently with' The Bretton Woods Agreement?" It then quotes portions of a letter from the General Counsel of the Monetary Fund which Pan American contends establishes the fact "that Law No. 568 is a currency control regulation which is 'maintained or imposed consistently with' The Bretton Woods Agreement." No such letter appears in the record. Application of The Bretton Woods Agreement involves other questions of fact and law as to which there is no proof in the record.

These questions were stated in a footnote as follows:

> . . . Has Cuba incorporated the Bretton Woods Agreement into its law as did the United States, in Title 22 U.S.C. §286? Has Cuba complied with its obligations under such agreement? Did Cuba's withdrawal from the International Bank for Reconstruction and Development, on November 14, 1960 . . . constitute such a breach of the purposes of the fund as set forth in Art. I as to render such Agreement ineffective as to Cuba? Are the annuity policies in question "exchange contracts" within the meaning of Art. VIII, Sec. 2(b) of the Bretton Woods Agreement? [11]

The Court of Appeals noted that, with the exception of Resolution No. 3, none of the Cuban laws or resolutions had been placed in the record, and the court decided that it would not take judicial notice of them. It followed that the defendant must lose on that part of its case which rested on Article VIII, Section 2(*b*). However, the Court of Appeals held that the action of the District Court was wrong in striking out the defendant's counterclaim based on Resolution No. 3 and the alleged substitution of the Cuban Government for the defendant. The Court of Appeals held, therefore, that the District Court should not have dismissed the counterclaim and should now decide the case on the merits.

The *Blanco* case was then consolidated for trial by the U.S. District Court for the Southern District of Florida with two other cases against *Pan American Life Insurance Co.*, by *Conill* and by *Aguirregaviria Zabaleta*, and a fourth case, *Lorido y Diego v. American National Insurance Co.*[12] The three further cases involved actions by plaintiffs on certain policies of life insurance for a declaratory judg-

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[11] *Id.* at 427, fn. 8.

[12] 221 F.Supp. 219 (decided July 15, 1963).

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ment that the policies were in full force and effect; that the cash surrender value where applicable was payable on demand; or that where there were annuity or endowment features, these would be payable on maturity. In the *Blanco* case there was, as already noted, a counterclaim by Pan American for a declaratory judgment.

American National was a corporation organized and existing under the laws of Texas, with a principal place of business in Galveston. Both defendants had conducted life insurance business in Cuba until some time in October 1960, Pan American through a branch office and American National through a general agent. Cuban law did not require the companies to maintain a certain volume of assets in Cuba, beyond an initial deposit of $25,000, as a condition of doing business there.

All the plaintiffs were Cuban nationals and refugees residing in Florida. None of the contracts provided that the policyholder would be paid solely from assets of the defendant located in Cuba, and the District Court found that all of the defendants' assets were available for payment under the policies issued by them. All applications for the policies had been made in Cuba in Spanish and had been sent to the defendants' home offices in the United States, where they were accepted and where the policies were issued. The Pan American policies were in Spanish and the American National policies in English. The policies were forwarded to the defendants' representatives in Cuba, who had them authenticated and delivered them to the policyholders. Except as noted below in the *Zabaleta* case, all the Pan American policies provided that all payments, whether of premiums or benefits, were to be made in New Orleans. The Cuban peso was the designated currency in the American National policies, but all payments were to be made in Galveston.

In the *Conill* case, the defendant issued to the plaintiff in 1941 a life insurance policy under which, in consideration of annual payments, the defendant would pay a stipulated amount to the plaintiff's beneficiary on proof of the plaintiff's death. The plaintiff demanded, and was refused, the cash surrender value of the policy.

In the *Zabaleta* case, the defendant issued a life insurance policy to the plaintiff in 1938 which provided various life insurance and endowment benefits and other options at the plaintiff's election. The policy had a maturity value and various cash surrender values. In

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1952 the plaintiff agreed with the defendant that payments to or by the plaintiff should be made in Cuban pesos in Havana. Before that date, the plaintiff had paid all premiums in U.S. dollars. In October 1958 the plaintiff exercised an option to cease paying premiums and to receive an endowment payment 15 years thereafter. In July 1962 the plaintiff demanded the cash surrender value of the policy. The defendant refused the demand and also refused to consider that the policy had full force and effect.

In the *Lorido y Diego* case, the plaintiff received two policies of life insurance in 1950 which provided that stipulated amounts be paid to the plaintiff, if living, or to his named beneficiary on the maturity dates. The plaintiff demanded, and was refused, the cash surrender value of the policies.

By pre-trial stipulation it was agreed that the issues of law were the same as stated by the Circuit Court of Appeals in the *Blanco* case, i.e., whether or not

> . . . Pan American is relieved of liability and performance of its obligations under the contracts by reason of certain Cuban laws and decrees, referring to: (1) Cuban Law No. 13 of 1948 and Cuban Monetary Decree of 1951 under Law No. 13, which Pan American alleged "required all contracts theretofore payable in dollars to or by Cuban nationals in Cuba to be payable in Cuban pesos." (2) Cuban Law No. 568 of September 29, 1959, which Pan American alleges prohibited the defendant from paying any monies to Cuban nationals anywhere except in Cuba, (3) Cuban Law No. 851 of July 6, 1960 and Cuban Resolution No. 3 of October 24, 1960 under Law No. 851 "which in substance and effect" expropriated the Cuban assets of Pan American "and substituted the Cuban government as the obligor" in "the annuity contracts herein sued on."

District Judge Choate observed that on December 18, 1953 Cuba had notified the Fund, in accordance with Article XIV, Section 3, that Cuba accepted the obligations of Article VIII, Sections 2, 3, and 4, of the Fund's Articles of Agreement. He also noted that Cuba had withdrawn from the International Bank for Reconstruction and Development while continuing to remain a member of the Fund, but that there was no requirement in the Articles of the Fund that a member must continue to be a member of the Bank. He quoted the statement which the Executive Directors of the Fund had authorized in connection with the exchange system of Cuba and which has been quoted earlier in this article.

The court went on to say:

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> The pre-trial stipulation states the issue in terms of whether or not the court is required to recognize and give effect to these Cuban decrees and laws either under our municipal law or under the two Bretton Woods Agreements and 22 U.S.C. §286 et seq., Acceptance of Membership by United States in International Monetary Fund.[13]

The court held that it was not required to give extraterritorial effect to the Cuban laws and decrees. The defendants had assumed that because the plaintiffs were Cuban nationals by origin, they were subject to Cuban sovereignty and bound by Cuban law. However, the argument could not be accepted, because the plaintiffs were refugees and residents of the United States. Neither the parties nor the subject matter of the actions was subject to Cuban sovereignty. The defendants' assets in Havana bore no necessary relation to the causes of action.

Passing from the question whether the Cuban legislation had extraterritorial effect, the court then considered the question whether that legislation must nevertheless be applied under the private international law of the forum. It recognized that by applying traditional choice-of-law rules, a strong argument could be made for holding that the contracts were governed by Cuban law. However, it preferred a choice-of-law rule based on the consideration of giving maximum protection to the insured, and on this basis the law of the domicile of the insurers governed. The court held, nevertheless, that the choice of law was not necessary for the determination of these cases, and repeated its opinion that the legislation had no extraterritorial effect.

> . . . Even if the court is mistaken as to the National status of the plaintiffs as refugees, these laws do not apply to cover the situation of a Cuban national enforcing an executory contract in the forum of another jurisdiction according to the terms of an obligation existing prior to the passage of those laws. Further, we do not believe that such laws and decrees can have any force and effect over the persons of these litigants who are not only without Cuba, but, as refugees, are not subject to its in personam jurisdiction. . . . On the basis of the foregoing, The Bretton Woods Agreement and 22 U.S.C. §286 et seq. would not appear to have any applicability.[14]

Menendez Rodriguez v. Pan American Life Insurance Co. and *Vento Jaime v. Pan American Life Insurance Co.*

In January 1945, the defendant insured the lives of the plaintiffs in these suits, who were then resident in Havana, in the amount of $20,000 each. The applications were accepted by the defendant in

[13] *Id.* at 226.
[14] *Id.* at 229.

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New Orleans. The policies provided that annual premiums would be paid for 20 years, and that all payments by either party would be "verified in the City of New Orleans in the legal money of the United States." From 1945 to 1952 the plaintiffs had paid the premiums in dollars, and from 1952 to 1958 in pesos. In July 1960, the plaintiffs, after having become refugees and residents of Florida, demanded the cash surrender value of the policies in Tampa and were refused. The plaintiffs were advised by the defendant to make the premium payment in Havana and to apply for the cash surrender value there.

The defendant argued that the controversy was justiciable solely under the laws of Cuba and in its courts. It argued, inter alia, that Cuban law prevented it from paying in dollars. For a variety of reasons, including the finding that the policies were governed by Cuban law, the U.S. District Court dismissed the actions on the ground of *forum non conveniens*. The U.S. Court of Appeals, Fifth Circuit, reversed this decision on the ground that the defendant had not discharged the burden of showing that the plaintiffs could obtain justice in the Cuban courts and that those courts would be more convenient for the determination of the cases. The court also held that the act of state doctrine did not lead to a different result, but it did not deal specifically with Article VIII, Section 2(*b*).[15] This silence led to a petition for rehearing, which the court denied as follows:

> Appellee further suggests here that the Bretton Woods Agreement and certain Cuban currency control statutes require dismissal of this complaint. Since the entry of our opinion in this case this Court has on November 7, 1962 rejected this contention in Pan American Life Insurance Company v. Inocencio Blanco, 311 F.2d 424.[16]

It will be noted that the court relied on the decision of the Court of Appeals in the *Blanco* case, but that court merely held that it would not take judicial notice of the Cuban laws on which the argument as to Article VIII, Section 2(*b*), rested.

Theye y Ajuria v. Pan American Life Insurance Co.

As in the other cases against Pan American, the plaintiff, a Cuban national, applied, in May 1928, for a policy of life insurance through the defendant's representative in Havana; the application, in Spanish,

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[15] 311 F.2d 429 (decided October 17, 1962).

[16] *Id.* at 437 (rehearing denied December 20, 1962). See also 376 U.S. 779, 84 S.Ct. 1130 (1964).

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was referred to the home office in New Orleans; the application was approved, returned to the local representative, authenticated, and delivered to the plaintiff. The policy stipulated that all premiums were payable in advance at the home office and that on presentation of the policy and proof of the death of the insured, the defendant would pay the proceeds to the beneficiary at its home office. All the annual premiums were paid in dollars until 1942, when the plaintiff exercised one of the options in the policy and had it converted into a paid-up policy. The defendant paid a bonus and made three loans to the plaintiff in 1948, 1950, and 1952; the plaintiff received and repaid all three loans in pesos in Havana. The plaintiff left Cuba in November 1960 and was residing as a refugee in Florida. On arrival in the United States, he demanded the cash surrender value of the policy at the New Orleans office. After the defendant refused the demand, the plaintiff brought suit in the District Court for the Parish of Orleans. In answer to the plaintiff's petition, the defendant argued that (1) the contract was governed by Cuban law; (2) if the contract had originally been governed by Louisiana law, its situs had been changed to Cuba by the subsequent acts of the parties in connection with the bonus and loans; and (3) under the act of state doctrine and certain provisions of the Fund's Articles, the laws of Cuba passed since the execution of the policy governed the contract.[17] The trial judge held that the policy when issued and converted was governed by Louisiana law, and that subsequent Cuban laws could not affect obligations under the policy. He gave judgment for the plaintiff in the amount of $7,090.

The defendant appealed to the Court of Appeal of Louisiana, Fourth Circuit, which reversed the judgment of the lower court.[18] The court held that a sovereign government could enact legislation controlling insurance business within its bounds for the benefit of its citizens. Law No. 568 was adopted before the plaintiff left Cuba on November 4, 1960. Furthermore, the defendant's business and assets in Cuba were nationalized on October 24, 1960. A sovereign nation had the power to change the situs of its nationals' contracts and could impair the obligations of contracts.

[17] 161 So.2d 70, 71.
[18] 154 So.2d 450 (rehearing denied July 1, 1963).

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With these legal propositions before us, the Court must recognize and give effect to the Bretton Woods Agreement signed by the United States, Cuba, and some ninety-five sovereign Nations in 1945. Each signatory to the Compact, which included an International Monetary Fund, bound itself to take steps to implement the principles of the international accord, as part of its domestic law. Our own Congress honored its commitment by enacting a statute to that effect. (22 U.S.C.A. §286 et seq.).

After quoting Article VIII, Section 2(*b*), the court continued:

By accepting and implementing the above, our Congress has undertaken to make the above principle, a part of our national law. On June 14, 1949, the International Monetary Fund, binding on all its members, including Cuba and the United States, issued the following interpretation of Article VIII, Section 2(b):

"An obvious result of the foregoing undertaking is that if a party to an exchange contract referred to in Article VIII, Sec. 2(b) seeks to enforce such a contract, the tribunal of the member country before which the proceedings are brought, will not, on the ground that they are contrary to the public policy of the forum, refuse recognition of the exchange control regulations of the other member which are maintained or imposed consistently with the Fund Agreement. It also follows that such contracts will be treated as unenforceable notwithstanding that under [the] private international law of the forum [the law under which the foreign exchange control regulations are maintained or imposed] is not the law which governs the exchange contract or its performance * * * ."

Cuban Law 568 of September 29, 1959, required payments between plaintiff and defendant be made in Cuba, regardless of the language of the contract. Despite this, plaintiff attempts to defy the decrees and laws of Cuba, the sovereign to whom he owed allegiance to come into this country and collect his debt in the currency of another nation. This would nullify and frustrate his own sovereign's legislative will and powers.

Prior to the Bretton Woods Agreement, plaintiff's position might have been upheld. Our Courts have held it to be the public policy of the forum State to refuse to give effect to exchange control legislation of a foreign sovereign, where such was labelled by the forum as penal, punitive, confiscatory or violative of fundamental concepts of justice. In this connection, the Court calls attention to the cases and authorities cited therein of Menendez Rodriguez v. Pan American Life Insurance Co., 5 Cir., 311 F.2d 429 and Menandez v. Aetna Insurance Co., 5 Cir., 311 F.2d 437.

This Court believes, and so holds, that the Bretton Woods Agreement and our Acts of Congress (22 U.S.C.A. §286 et seq.) supersede the princlples enunciated in the above authorities, as to parties or nations who signed the agreement or treaty. It is now our national policy to deny enforcement, in the Court of this land, of contracts which would frustrate the exchange control regulations of another member of the agreement. Our Congress gave recognition to the will of the signatories to the agreement, declaring that the public policy of its members would be better served by a measure of collaboration among them designed to give effect to each other's exchange control regulations. The U.S. Supreme Court, in Kolovrat v. Oregon, 366 U.S. 187, 81 S.Ct. 922, 928, 6 L.Ed. 218, decided May 1, 1961, interpreted the Bretton Woods Agreement as follows:

"These treaties and agreements show that this Nation has adopted programs deemed desirable in bringing about, so far as can be done, stability and uniformity in the difficult field of world monetary controls and exchange. * * * Doubtless these agreements may fall short of that goal. But our National Government's powers have been exercised so far as deemed desirable and feasible toward that end, and the power to make policy with regard to such matters is a national one from the compulsion of both necessity and our Constitution."

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> We find that the Court below disregarded the above treaty accord between the United States and Cuba and our own Congressional enactments to implement this agreement. Our Courts should not and cannot enforce a contract which transcends the sovereign will of Cuba touching on monetary contracts involving its own nationals. Plaintiff demands should have been rejected.[19]

Having disposed of the case on the basis of Article VIII, Section 2(*b*), the court went on to note that the defendant had maintained reserves in Cuba to meet its Cuban obligations, including the policy involved in this action. The Cuban Government had taken over those reserves and the defendant's obligations. If judgment went against the defendant in Louisiana, it would have to pay the obligation twice, because it could not satisfy the judgment from the Cuban assets that had been nationalized.

The plaintiff appealed to the Supreme Court of Louisiana, which held that there was no room for speculation as to the law which the parties intended as the governing law.[20] This was the law of Louisiana, and the trial judge was right in holding that Cuban legislation passed after the policy became a paid-up policy had no effect on the obligation which existed at that time.[21] Nothing that had happened later showed that the parties intended to change the situs of the contract to Cuba.

The court then passed to the argument based on Article VIII, Section 2(*b*):

> Conceding that Cuba had adopted the Articles thereof as part of its national law as alleged by the defendant, an exhaustive study of the Bretton Woods Agreement, as well as all authorities relied on by the defendant, fails to show where the Agreement or any of the cases are controlling under the particular facts of the case at bar inasmuch as a contract payable in the state of Louisiana in United States currency is not a foreign exchange contract.
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> In Blanco v. Pan American Life Insurance Company, 221 F.Supp. 219, see also 311 F.2d 424, the same defenses to claims by policyholder Blanco and other Cuban refugees were urged therein as here, and in support thereof, the defendant cited the Court of Appeal opinion in the case at bar. That court concluded, however, that Federal courts are not bound by state decisions in interpreting a federal question and disposed of the matter by holding the Bretton Woods Agreement had no applicability in that case because the Cuban government lost whatever jurisdiction it possessed over not only the subject matter of the litigation but also over the persons of the plaintiffs when they fled from Cuba, became alien residents of the United States, political citizens of nowhere, but civil citizens of Florida as they were domiciled there. The court further remarked "* * these laws (relied on by defendant) do not apply to cover the situation of a Cuban national enforcing an executory contract in the

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[19] *Id.* at 453–54.

[20] 161 So.2d 70 (decided February 24, 1964).

[21] In a footnote, the laws and decrees referred to are Laws Nos. 13, 568, and 851; Decree No. 1384; and Resolution No. 3 (*id.* at 71, fn. 2).

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forum of another jurisdiction according to the terms of an obligation existing prior to the passage of those laws. Further, we do not believe that such laws and decrees can have any force and effect over the persons of these litigants who are not only without Cuba, but, as refugees, are not subject to its in personam jurisdiction. * * *"

Moreover, courts, including those of this country as well as those of foreign jurisdictions, in interpreting contracts involving matters affected by the Bretton Woods Agreement are uniform in their holding that the laws of the state or nation where the parties intended the contract to be performed govern.[22, 23]

Judgment for the plaintiff was affirmed.

Pan American Life Insurance Co. v. Raij

The plaintiff applied for and received a 20-year endowment policy according to the practice of Pan American as described in the other cases. The policy provided that all payments by either party would be made in dollars in New Orleans. All premiums were paid until November 1960, when the premium was refused and returned by the defendant. Subsequent tenders of premium were refused, and the plaintiff sued for a declaration that he was entitled to pay the premiums and have them accepted and that the policy was in full force and effect. The defendant relied on Resolution No. 3 and Decree No. 1384. On June 6, 1962 the Circuit Court found for the plaintiff on the ground that these measures did not change the contract in the absence of agreement by the parties to the change.

The District Court of Appeal of Florida, Third District, affirmed this decision. On a petition for rehearing, the court said:

The appellant has filed a petition for rehearing, pointing out that, in rendering the opinion in this cause, the court overlooked and failed to consider its contention that this transaction was governed by the Bretton Woods Agreement relating to the International Monetary Fund and the Federal legislation

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[22] 161 So.2d 74. For the last proposition, the court's citations were: "Menendez Rodrigues v. Pan American Life Insurance Company, 5 Cir., 311 F.2d 429, 432; Pan American Life Insurance Company v. Recio, Fla. App., 154 So.2d 197 (Florida); Pan American Life Insurance Company v. Raij, Fla. App. 156 So.2d 785 (Florida); Menandez v. Aetna Insurance Company, 5 Cir., 311 F.2d 437; Ahmen Bey Naguib v. Heirs of Moise Abner, abstract appears in J.T.M., No. 4003, Nov. 24/25, 1948; Kraus v. Zivostenska Banka, 187 Misc. 681, 64 N.Y.S.2d 208; Cermak, et al. v. Bata Akciova Spoiecnost, Sup., 30 N.Y.S.2d 782; Frankman v. Ango-Prague Credit Bank (London office), 1 All E.R. 337; Frankman v. Ango-Prague Credit Bank, 2 All E.R. 1025; Zivnostenska Banka National Corporation v. Frankman, 2 All E.R. 671." (Note that some names are misspelled.)

[23] After the decision of the Supreme Court in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), the defendant petitioned the Supreme Court for a writ of certiorari to review the decision of the Supreme Court of Louisiana. Certiorari was denied, 377 U.S. 997, 84 S.Ct. 1922 (1964).

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pertaining thereto. See: 22 U.S.C.A. §286 et seq. At the time of the original opinion in this cause, this Agreement was considered and deemed to be not applicable, for the reason that the contract involved was a contract with an American company, made in the United States, payable in United States Dollars; that premiums had been accepted in United States Dollars since 1942, and that the effect of the chancellor's decree was only to require the appellant to continue to accept premium payments in United States Dollars. Not only were we of the opinion that the Bretton Woods Agreement was not applicable to the contract in the instant case, we were further of the opinion that the Bretton Woods Agreement pertained only to contracts "involving the currency of any member" of the Fund and that an American contract, upon which payments were to be made to or by the appellant in United States currency, was not an unenforceable contract within the provisions of Article VIII, §2 (b) of the Bretton Woods Agreement.[24]

On a further appeal, the Court of Appeal held that the decision of the District Court must be quashed on the ground that it was in conflict with the *Ugalde* case, which is summarized below, but on further consideration, the Court of Appeal held that it was not clear that there was a conflict and reversed itself.[25]

Varas v. Crown Life Insurance Co.

In 1944, the plaintiff's mother, as guardian of the plaintiff, applied to the defendant, a Canadian company with a place of business in Cuba, for insurance on the life of the plaintiff, who was then a resident of Cuba. The defendant executed and delivered a 20-year endowment policy in the face value of $5,000 to the plaintiff or her mother in Havana. The contract was in Spanish, but provided that all payments by either party were to be in U.S. dollars. All premiums were paid in Cuba, in dollars from 1944 to 1951, and in pesos thereafter. In August 1960 the plaintiff left Cuba as a refugee and became a resident of the United States. In April 1961 the plaintiff demanded the cash surrender value of the policy at an office of the defendant in Pennsylvania. On the defendant's refusal, the plaintiff sued for the cash surrender value, or alternatively, the return of the premiums.

The court of first instance found for the plaintiff in the amount of the premiums. Both parties appealed, with the plaintiff claiming the cash surrender value. The defendant argued, inter alia, that its obligation was to pay in Havana, which it was prepared to do. It also argued that Decree No. 1384 modified its dollar obligation and Law

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[24] 156 So.2d 785, 786 (1963).

[25] 164 So.2d 204 (rehearing denied June 10, 1964). Certiorari denied, 379 U.S. 920, 85 S.Ct. 275 (1964).

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No. 568 prohibited payment in dollars, and that, as a result of provisions in the Fund's Articles, it was prevented from paying in the United States. The appellate court, the Court of Common Pleas, Montgomery County, Pennsylvania, held that when a life insurance contract fixes no place of performance, the presumption is that this is where the contract was made. Therefore, no demand for performance could be made in Pennsylvania. But the plaintiff could not return to Cuba to recover there, and any agent collecting for her in Cuba would not be able to forward the money to the United States. In these circumstances, the plaintiff was entitled to recover in quasi-contract the value of the premiums that had been paid.

> The plaintiff is obligated to go to Cuba in order to receive any benefits under the insurance contract. It is excusably impossible for her to do so. She had partly performed the contract before this impossibility arose. She is entitled to recover the value of that performance.
>
> Her right to recovery is not based on the contract but is under the theory of unjust enrichment. . . . Therefore, the law governing the performance of the insurance contract is not applicable, and any Cuban law which might bar such a recovery is of no effect. Since no contractual right is being enforced here, the International Monetary Fund Agreement is not involved.
>
> It is true that the defendant has partly performed the contract on its side in that it insured the life of the plaintiff for a period of 17 years. In return for this service the defendant had the use of the plaintiff's money during this period. The total premiums paid are less than the cash surrender value of the policy at the time the demand was made. The use of the plaintiff's money free of any charge for interest is fair compensation for the insurance coverage provided. The result reached is equitable as well as legally proper.[26]

The parties appealed to the Superior Court of Pennsylvania, which noted that:

> . . . Since oral argument, we have been asked by the defendant company to disregard the question raised as to the impact of the International Monetary Fund Agreement as on April 2, 1964, effective on that date, the Republic of Cuba had withdrawn from membership.[27]

The Superior Court disagreed with the lower court's decision that the plaintiff could recover only the premiums, and held that the plaintiff was entitled to recover on the cash surrender option in Pennsylvania, and that the Cuban monetary laws were not applicable. The theory on which it proceeded was that the cash surrender option was an irrevocable offer which became a contract when and where the election was made to exercise the option, and the law of this place was the law governing performance. This contract was distinct

[26] 83 Montg. Co. L.R. 71, 73 (decided December 2, 1963).
[27] 204 Pa. Super. 176, 203 A.2d 505, 507 (decided September 17, 1964).

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from the principal contract and could be subject to a different governing law.

On the subject of Article VIII, Section 2(*b*), the Court said:

> We agree that the currency laws of Cuba must be honored by the government of the United States and by our courts if Cuban law is applicable. The power of a sovereign state over its currency is absolute. This was especially true when both countries were signatories to the Breton [*sic*] Woods Agreement, a treaty of the United States and therefore a part of the supreme law of the land. The Breton Woods agreement specifically requires the recognition and honoring of Cuba's currency laws. The Breton Woods agreement brought into being the "International Monetary Fund Agreement", 60 Stat. 1401–1411, 1945. However, Cuba has withdrawn from membership so that a new look must perchance be taken at the cases based on the fund agreement when membership was held by both countries. It is true, however, that even prior to the currency treaty foreign exchange regulations were held to be applicable in suits in the United States. This is in line with our public policy to prevent evasion of currency obligations in the nation where the obligation is payable.[28]

THE PLAINTIFF FAILS

Confederation Life Association v. Ugalde

In 1948, the plaintiff, then a resident of Havana, applied to the defendant, a Canadian company, for a life insurance policy. The policy was delivered to the plaintiff in Havana. Both the application and the policy were in Spanish. The policy provided that all payments under it were to be made in dollars, and the place of payment was to be Havana. After the adoption of Decree No. 1384, the defendant informed its policyholders in Cuba that pesos would be substituted for dollars under the contracts. The plaintiff made subsequent payments of premium in pesos. In October 1961, the plaintiff demanded the cash surrender value of the policy in the United States, but the defendant offered to pay pesos in Havana and refused to pay dollars in the United States. The plaintiff sued in a Florida court of first instance, and summary judgment was entered for him for $13,825.52, the cash surrender value of the policy.

The defendant appealed to the District Court of Appeal of Florida, Third District, which reversed part of the decision of the lower court by a majority of two judges to one.[29] The defendant argued that the contract was governed by the law of Cuba, and that payments under

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[28] 203 A.2d 505, 510. Certiorari denied, 382 U.S. 827, 86 S.Ct. 62 (1965).

[29] 151 So.2d 315 (decided March 26, 1963).

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it had to be made in pesos at par with the dollar. The plaintiff argued that the law of Florida applied, and that it would be against public policy under that law to enforce a Cuban law that enabled the defendant to discharge its obligation in pesos. The District Court of Appeal held that neither Florida nor any jurisdiction other than Cuba had any contacts with the contract, which was made and was to be performed in Cuba, and the law of which was therefore the governing law. The defendant had offered performance in accordance with that law. Cuba had the right to prescribe its legal tender and to provide that contracts payable in Cuba must be discharged in Cuban legal tender. There was nothing in this repugnant to the public policy of Florida. The majority opinion did not deal with Article VIII, Section 2(*b*).

Notwithstanding the line of argument that it had adopted, the majority did not dismiss the plaintiff's claim. It held that the courts of Florida were open to the plaintiff, and the error of the lower court was not in entertaining the action or giving judgment for the plaintiff, but in the amount of the judgment. The majority saw the issue, therefore, as one of the applicable rate of exchange. It remitted the case to the lower court with instructions to enter judgment for the plaintiff in dollars in such amount as represented 13,825.53 pesos at the rate of exchange on the date of the original judgment.

The minority judge held that two contracts were involved. The first of these was made in 1948 and insured the plaintiff's life. It contained a continuing irrevocable offer by the plaintiff to enter into a contract to pay a cash surrender value. This offer became a second contract when the plaintiff accepted the offer by demanding the cash surrender value in Florida on October 11, 1961. The defendant had broken this contract; Florida law governed it; and the plaintiff was entitled to the full cash surrender value in dollars. However, if Cuban law applied, the Cuban legislation and decrees prohibited the transfer of funds from Cuba but did not affect funds "which may have already been located abroad or possessed by nationals in other states." The defendant had resources in Florida to discharge its obligation to the plaintiff and the defendant could use them for this purpose without violating Cuban law.

The defendant appealed to the Supreme Court of Florida, which confirmed the statement of law and conclusion of the District Court

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of Appeal that Cuban law governed the contract.[30] However, the court also dealt with the impact of the Fund's Articles:

> The Cuban laws relating to the establishment of currency control are similar to those which have been enacted in this country with respect to our own currency and are not violative of United States policy. The Florida Courts are obligated by the International Monetary Fund Agreement to apply the cited Cuban laws to the contract here involved.[31]

The conclusion that Cuban law governed, reinforced by the effect of the Articles, led the court to conclude, not that the plaintiff could recover the dollar equivalent of the peso cash surrender value, but that he could not recover at all. The defendant had offered performance in accordance with the contract, and therefore there was no breach of contract and no cause of action.[32]

After the withdrawal of Cuba from the Fund, the plaintiff presented a motion for the reconsideration and modification or reversal of the judgment. He argued that the Supreme Court of Florida had based its judgment on the membership of Cuba and the United States in the Fund and on Article VIII, Section 2(*b*). However, the provisions of the Articles were for the benefit of member states, and Cuba was no longer a member. The date of proposed relief determined the applicability of Article VIII, Section 2(*b*), so that it would not now be a violation of the Articles if that provision were not applied.[33] The defendant replied that the court's opinion that the contract was governed by Cuban law, under which there had been no breach, was not affected by the withdrawal of Cuba from the Fund. On July 1, 1964, the Supreme Court of Florida denied the plaintiff's motion, and a subsequent petition to the U.S. Supreme Court for certiorari was denied.[34]

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[30] 164 So.2d 1 (decided February 24, 1964; rehearing denied April 8, 1964); order modified accordingly by District Court of Appeal, 163 So.2d 343 (1964); certiorari denied by U.S. Supreme Court, 379 U.S. 915, 85 S.Ct. 263 (1964).

[31] *Id.* at 2.

[32] On April 8, 1964 the Supreme Court of Florida denied a petition for rehearing which had been presented after the Supreme Court of Louisiana reversed the decision of the Louisiana Court of Appeal in the *Theye y Ajuria* case. The Florida court had referred to the Louisiana Court of Appeal decision in the latter case as a "similar case," but on the petition for rehearing the Florida court held that the decision of the Louisiana Court of Appeal was not vital to its own decision, so that the reversal did not affect its decision (164 So.2d 1, 3).

[33] The plaintiff cited *Stephen v. Zivnostenska Banka, National Corporation*, 31 Misc.2d 45, 140 N.Y.S.2d 323 (1955), as authority.

[34] 379 U.S. 915, 85 S.Ct.263 (1964).

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III. Major Issues of Article VIII, Section 2(*b*)

Relation between the Provision and Private International Law

A fundamental question raised by the cases is the relation of Article VIII, Section 2(*b*), to private international law. That branch of the law of each country includes a set of rules that determine the law by which contracts, including their performance, are governed. Article VIII, Section 2(*b*), also establishes a rule for the recognition of certain provisions of a particular system of law. It declares that, if suit is brought in a member's court to enforce an exchange contract, the court must refuse enforcement if the contract is contrary to the exchange control regulations of another member whose currency is involved. In short, the law of the member whose currency is involved must be recognized in the circumstances and for the purpose prescribed by Article VIII, Section 2(*b*).

The rule established by Article VIII, Section 2(*b*), produces two questions in relation to the choice-of-law rules of private international law. The first of these is whether the rule of the provision is an independent one. There has been a tendency by some courts to hold that the law which it indicates will be recognized only if it is the law selected as the governing law under the choice-of-law rules of the private international law of the forum. This would not render Article VIII, Section 2(*b*), meaningless, because some courts might find that a particular system of foreign law was the governing law under their private international law and nevertheless reject recognition of the exchange control regulations of that foreign law as contrary to domestic public policy were it not for Article VIII, Section 2(*b*). On this assumption, the sole effect of the provision would be to change the public policy of the forum but not to affect its rules with respect to the determination of the applicable law.

In at least one of the cases there is evidence of the belief that Article VIII, Section 2(*b*), operates to compel the recognition of the exchange control regulations of a particular system of law if this is the law selected by the private international law of the forum as the law governing the contract. This is the *Theye y Ajuria* case, in which the Supreme Court of Louisiana seems to have said that the provision requires recognition of the exchange control regulations of another

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legal system if the contracting parties intended that system to govern their contract. The court said that foreign and domestic courts had been uniform in observing that principle. The cases cited by the court do not support this proposition, even if one ignores the fact that, apart from Cuban insurance cases, they were decided in that primitive period in the history of Article VIII, Section 2(*b*), in which courts were usually unaware of the provision. The non-U.S. cases cited by the court seem all to have been drawn from the first installment of the series of articles on "The Fund Agreement in the Courts." [35] There was no reference to later cases decided after years of international consideration had clarified the provision.[36]

There should be no doubt that recognition of the exchange control regulations indicated by Article VIII, Section 2(*b*), does not depend on the determination that they are part of the governing law under the private international law of the forum. The purpose of Article VIII, Section 2(*b*), is to provide a certain measure of support for the exchange control regulations of a member if they are consistent with the Articles of Agreement. The criterion adopted by the provision is consistency of the regulations with that international agreement

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[35] In *Ahmed Bey Naguib v. Heirs of Moise Abner*, the provision was not referred to. In *Kraus v. Zivnostenska Banka*, the Articles were mentioned by the court "in passing." In *Cermak et al. v. Bata Akciova Spolecnost*, the court said that before considering the effect of the Articles, it would await the decision of some trailblazing appellate court or at least a case in which counsel briefed the issue and decision was necessary. There are dicta in *Zivnostenska Banka National Corporation v. Frankman* which seem to support the proposition of the Louisiana court, but they merely note the parallel effect of the governing law and Article VIII, Section 2(*b*), and do not say that the latter operates only within the ambit of the former. See Joseph Gold, *The Fund Agreement in the Courts* (Washington, International Monetary Fund, 1962), pp. 14–17.

[36] For example, *Moojen v. Von Reichert*, Gold (1962), *op. cit.*, pp. 148–53, and the decision of April 9, 1962 of the Supreme Court of the Federal Republic of Germany; see also Joseph Gold, "The Fund Agreement in the Courts—VIII," *Staff Papers* (International Monetary Fund), Vol. XI (1964), pp. 465–68, particularly p. 466.

On June 13, 1966 the U.S. Court of Appeals for the Fifth Circuit decided appeals from the U.S. District Court for the Southern District of Florida in the *Blanco*, *Conill*, *Lorido y Diego* and *Zabaleta* cases (*Pan American Life Insurance Co. v. Blanco*, 362 F.2d 167 (1966)). The Court of Appeals held that "although the determination of these cases may require consideration of the act of state doctrine and the Bretton Woods International Monetary Fund Agreement," the court had to apply the private international law of the forum. The court noted, however, that Cuba had withdrawn from the Fund, so that the Articles would not preclude payment under the policies, for which proposition it cited *Stephen v. Zivnostenska Banka*, *etc.* (The court added the following obiter dictum, citing the *Theye y Ajuria* case: "Even though this were not so, the Bretton Woods Agreement would not be applicable to contracts such as the insurance policies here involved.")

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and not the uncertain and diverse rules of private international law applied by members. The issue was settled long ago in the Fund's authoritative interpretation addressed to members on June 14, 1949, in which the Fund said that the contracts covered by the provision "will be treated as unenforceable notwithstanding that under the private international law of the forum, the law under which the foreign exchange control regulations are maintained or imposed is not the law which governs the exchange contract or its performance." [87]

The principle, therefore, is that Article VIII, Section 2(*b*), establishes a rule which requires recognition of the exchange control regulations of the member whose currency is involved without any necessity to show that its system of law is the governing law under the private international law of the forum. With this settled, the second question must be faced. Does the principle mean that where the issue is whether the exchange control regulations of another member must be recognized, Article VIII, Section 2(*b*), has become the sole rule and has abrogated those rules of the private international law of the forum that deal with the identification and application of the governing law? Alternatively, does the principle mean that Article VIII, Section 2(*b*), has not abrogated those rules, which remain in reserve until it is seen how Article VIII, Section 2(*b*), operates? If the provision has had the former effect (abrogation), it would follow that if an exchange contract was contrary to the exchange control regulations of the member whose currency was involved, the contract would be unenforceable. But it would also follow that if the contract was not contrary to those regulations, it would be enforceable. This would necessarily be the result because the law of the forum would no longer refer to any other law as the law governing the contract. It is this latter result that would not necessarily follow from a different view of the relationship between Article VIII, Section 2(*b*), and private international law. If it were held that the provision does not abrogate the choice-of-law rules of the private international law of the forum, it would still be true that the inconsistency of a contract with the exchange control regulations of the member whose currency was involved would lead to the unenforceability of the contract. If, however, there was no such inconsistency, it would still be possible to

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[87] See Appendix, p. 53.

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apply the law, including the exchange control regulations, of some other country under the private international law of the forum, as a result of which the plaintiff might not succeed on his contract even though this result was not required by Article VIII, Section 2(*b*).

It should not be held that Article VIII, Section 2(*b*), is an exclusive rule that has abrogated private international law. The object of the provision is to ensure that a currency is not undermined by the non-recognition of the exchange control regulations of a member whose currency is involved when the conditions of the provision are satisfied. The policy of the provision does not extend to those cases in which Article VIII, Section 2(*b*), does not require the unenforceability of contracts. In those cases, it is no part of the purpose of the provision to interfere with the normal workings of private international law. If the provision does not result in unenforceability, the question whether exchange control regulations are to be recognized or not can be left to the vagaries of private international law.

This brief analysis of the relations between Article VIII, Section 2(*b*), and private international law is necessary for an understanding of the Cuban insurance cases. It will be seen that in some of them Article VIII, Section 2(*b*), did not require the recognition of the exchange control regulations of Cuba because Cuba's currency was not involved. This left the way open to the private international law of the forum. This approach justified the weight that was given to certain points of contact in determining the applicable law. These were relevant under private international law but not under Article VIII, Section 2(*b*).

Finally, the analysis that has been offered may explain why some courts continue to approach problems of the recognition of the exchange control regulations of other countries by the route of the traditional private international law of the forum. It may be possible to follow that approach and find on the facts of the case that the governing law is the law which includes certain exchange control regulations, and that the regulations are to be recognized for that reason. In these circumstances, it is unnecessary to plunge into the profundities of Article VIII, Section 2(*b*), because the result will not be affected. The foreign law may also be the law of the currency "involved" under Article VIII, Section 2(*b*), and the law will then be applicable on this basis also; but it will only reinforce and not alter

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the result with respect to the enforcement of the contract.[38] Alternatively, the law which includes the exchange control regulations and which is selected as the governing law may not be the law of the currency that is "involved," but it will be applicable nonetheless under the private international law of the forum. Again, therefore, the result will not be altered by Article VIII, Section 2(*b*). It would only be on a finding that the law which includes the exchange control regulations was not the governing law under the private international law of the forum, so that the regulations were not entitled to recognition on this basis, that it would then be necessary to see if Article VIII, Section 2(*b*), compelled a different result.

The analysis in the preceding paragraph might be clearer in terms of an actual example. Suppose that under the private international law of the forum, Cuban law, which includes certain exchange controls, is the governing law. If Cuban law is applied as the governing law, the Cuban controls will be recognized, and this will not be changed by a finding that Cuban currency is "involved." The Cuban controls will then be entitled to recognition on both bases. Similarly, if Cuban currency is not "involved," the controls will not be entitled to recognition under Article VIII, Section 2(*b*), but they will still be recognized as part of the governing law. Only if Cuban law is not the governing law, so that the controls are not entitled to recognition on this basis, does the possibility exist that the provision may lead to a different result on the issue of recognition.

Exchange contracts

Under Article VIII, Section 2(*b*), the contracts that may be unenforceable are "exchange contracts." In the *Blanco* case, the District Court, in a footnote to its opinion, raised the question whether the insurance policies in that case were "exchange contracts," but the court did not try to answer the question. In the *Raij* case, a dictum of the District Court of Appeal can be read to suggest that the court thought the contract was not an exchange contract because it was

[38] This must not be taken to imply that the legal effect will necessarily be the same on both bases. For example, under the private international law of the forum, the effect may be invalidity in contrast to unenforceability under Article VIII, Section 2(*b*).

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for the payment of dollars, although the court couples this fact with further facts showing the relationship of the contract to the United States. In the *Theye y Ajuria* case, the Supreme Court of Louisiana dismissed an argument based on Article VIII, Section 2(*b*), on the ground that "a contract payable in the state of Louisiana in United States currency is not a foreign exchange contract."

These are the only reasonably direct references to the question whether insurance contracts are "exchange contracts." It is interesting that although the courts in these cases were attempting to formulate some delimitation of the concept, they did not suggest that the concept could not include insurance contracts as such. They have, therefore, avoided the too simple view, which had a little support at one time, that "exchange contracts" were confined to contracts for the exchange of international media of payment, usually the exchange of one currency for another. Exchange control regulations normally control other categories of transactions as well, and there is no reasonable explanation, based on the economic purposes of Article VIII, Section 2(*b*), or the Articles as a whole, for restricting the provision to only one of the categories of contracts that affect the exchange resources of a member.[39]

The *Raij* and *Theye y Ajuria* cases imply a limitation of another kind. Some of the language of the opinions can be read to suggest that the test of an exchange contract is whether it calls for payment in a currency foreign to the forum or perhaps foreign to the law governing the contract under private international law. The only virtue of these tests would be their mechanistic character. They would have no necessary relation to the objective of Article VIII, Section 2(*b*). For U.S. courts to hold that they will enforce contracts providing for payment in U.S. dollars because these are not exchange contracts ignores the fact that they are most obviously exchange contracts when viewed by the member in which an obligor-defendant is resident. That member's foreign exchange resources would be directly drained away by a judgment. Similar unfortunate consequences could follow from the test of the governing law under private international law. The tests of forum or governing law to determine

[39] For earlier discussions of "exchange contracts," see Gold (1962), *op. cit.*, pp. 83–84, 91–93, 96, 116–17, 146; and Gold (1964), *op. cit.*, pp. 459, 467–68.

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whether an exchange contract is before the court makes the application of Article VIII, Section 2(*b*), depend largely on the will of contracting parties. These tests, therefore, are in opposition to the international monetary objective of Article VIII, Section 2(*b*), which is that international recognition should be given to regulations controlling the will of contracting parties where, because the tests of the provision are met, this is necessary for the defense of member currencies.

The currency "involved"

Recognition of the exchange control regulations of a member in accordance with Article VIII, Section 2(*b*), depends on a determination that they are the regulations of a member whose currency is involved in the performance of the exchange contract that someone seeks to enforce. Although other views are still expressed from time to time, the more expert and more generally held opinion is that the currency of a member is involved if the contract affects that member's exchange resources. Where other views are expressed, they tend to be based on a purely linguistic approach to the provision which ignores the economic considerations that were responsible for its adoption.[40]

The criterion of effect on a member's exchange resources is not a traditional one for lawyers. It is tempting, therefore, to wonder whether the criterion is an economic formulation of the legal principle that the member had legislative jurisdiction under established norms of public international law to adopt the exchange control regulations in question. Another possibility is that Article VIII, Section 2 (*b*), establishes a new norm in the concept of the currency involved that goes beyond earlier norms of legislative jurisdiction.

States sometimes write legislation with the intention that it shall regulate matters with which, in the eyes of some foreign observers, the legislation has an insubstantial contact, or they may use language that is loose enough to permit this application. Legislation of this

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[40] See, for example, the majority opinion of the New York Court of Appeals in *Banco do Brasil, S.A. v. A.C. Israel Commodity Co., Inc.*, 12 N.Y.2d 371, 190 N.E.2d 235, 239 N.Y.S.2d 872 (1963), discussed in Gold (1964), *op. cit.*, pp. 468–73.

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kind is likely to be applied uncritically by the courts of the legislator, but other states may hold that the legislator has gone beyond the bounds of legislative jurisdiction. They are then likely to hold that the legislation does not produce legal results which they will recognize. Of course, it does not necessarily follow that they will recognize the effects of foreign legislation even when the existence of legislative jurisdiction is uncontested, but in that event, if they refuse recognition, it will be for different legal reasons. For example, in the field of exchange control, they may hold, apart from Article VIII, Section 2(*b*), that the exchange control regulations of another state cannot be recognized because they purport to be more than "territorial" and, therefore, to that extent, go beyond the bounds of legislative jurisdiction to adopt them. Where the objection of the absence of legislative jurisdiction is not available on the facts, they may hold that recognition would conflict with the public policy of the forum.

The difficulty of reaching a conclusion on the relationship between the criterion in Article VIII, Section 2(*b*), that a currency is involved (in the sense of effect on exchange resources) and the test of legislative jurisdiction is twofold. On the one hand, the norms of legislative jurisdiction in international law are still to some extent controversial.[41] On the other hand, the determination of when a country's exchange resources are affected has not been made with precision.

In the absence of the further analysis which needs to be made to answer the question that has been posed above as to the scope of the criterion, it is submitted that the currency of a member is undoubtedly involved where the member regulates the transactions of its residents or transactions dealing with assets within its territory. It must not be assumed that this is a simple rule that can be applied without difficulty. For example, in numerous cases the courts have struggled to establish where certain kinds of property are situated. One of these, debts, will be referred to in more detail later. Nevertheless, once it is decided that persons are resident or assets are present within the legislator's territory, it will be possible to say with confidence that there is legislative jurisdiction to adopt exchange control regulations affecting those residents or assets, and also that the exchange resources of the legislator are affected by the contracts thus controlled. If

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[41] F.A. Mann, "The Doctrine of Jurisdiction in International Law," *Académie de Droit International, Recueil des Cours*, Tome 111 (The Hague, 1964, I), pp. 9–162.

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regulations seek to go beyond the control of residents or of assets within the territory, the burden should then be on anyone who argues that the regulations affect the exchange resources of the legislator to prove that fact. If the fact is proved, the case will have to be treated as one that is covered by Article VIII, Section 2(*b*). If the case is one which is not covered by traditional norms of public international law on legislative jurisdiction, it will follow that Article VIII, Section 2(*b*), has created a new norm in the field of exchange control.

An examination of the Cuban exchange control legislation and decrees does not lead to an incontrovertible conclusion that an effort had been made to go beyond the control of residents or local assets. No comment will be made here on Law No. 13 and Decree No. 1384 for reasons that will be explained later. Law No. 568 is written in general terms, but these could be read as relating only to residents or assets situated within Cuban territory. There is no language which unambiguously shows an intention to go beyond these jurisdictional bases. The exchange control features of Law No. 930 give even less evidence of an intention to exercise control on some basis other than residence or the situs of assets in Cuba. The minority judge in the Florida District Court of Appeal in the *Ugalde* case [42] and the U.S. District Court in the *Blanco* case [43] and then in the cases consolidated with that case [44] suggest that the Cuban enactments were intended to have this limited application.

It is more important to see what the U.S. courts actually decided than to speculate about the scope that the Cuban legislator intended for the legislation and decrees. There is very little discussion of the question whether Cuban currency was "involved." In the *Blanco* case, the U.S. District Court held that the legislation could not affect litigants who were not only outside Cuban territory but were also refugees, and that for this reason the Articles of the Fund did not apply. In an earlier part of its opinion, the court noted that the contracts did not call for performance from the defendants' assets in Cuba, the implication of which is that the legislation could not affect the defendants' assets outside Cuba. The court seemed to be reaching for a thesis that Article VIII, Section 2(*b*), did not require the recognition of exchange control regulations if they purported to

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[42] 151 So.2d 315 (1963).
[43] 311 F.2d 427, 428, fn. 9.
[44] 221 F.Supp. 219, 229.

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control nonresidents in transactions involving assets outside the jurisdiction. The *Blanco* case influenced the decision in a number of other cases. In the *Theye y Ajuria* case, the Louisiana Court of Appeal used language suggesting that Article VIII, Section 2(*b*), required the recognition of exchange control regulations based on the control of nationals, but it is not impossible that the court intended residents by this. However, the Louisiana Supreme Court followed the *Blanco* decision in holding that Cuba had no jurisdiction over the refugee plaintiffs. In the *Raij* case, there is a suggestion in the opinion of the Florida District Court of Appeal that Cuban currency was not involved because the contract called for payments in dollars. It must be added, however, that the court referred to the contract as an "American contract," by which it undoubtedly meant that there were many other contacts with the United States.

If a contract between two nonresidents of Cuba provides, expressly or implicitly, that it can be performed outside Cuba without affecting assets situated in Cuba, and such performance is in fact sought outside Cuba, any Cuban exchange control regulations that purport to prevent or control that performance are not entitled to recognition under Article VIII, Section 2(*b*), on the ground that Cuban currency is involved. This was the situation and result in the *Blanco* and similar cases. The contracts were made with nonresident American companies through resident Cuban agents or branches, but the suits were against the companies and not against the agents or branches. Cuban exchange control regulations could have regulated payments and transfers by the agents or branches, and these regulations would have fallen within the ambit of Article VIII, Section 2(*b*). The courts found, however, in the *Blanco* and similar cases that the contracts did not require payments from assets held by the agents or branches in Cuba, and that the assets of the companies, wherever they were situated and could be reached, were available for the performance of the contracts.

If the contract calls for performance in Cuba, the problem is more difficult.[45] The issue can be stated in this form: if nonresident parties

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[45] This is not the same as saying that the contract calls for payment with assets situated in Cuba. The discharge of a contract in Cuba can be made with assets that are not situated in Cuba until they are brought there for the purpose of performance.

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to a contract agree that performance shall be made in Cuba, does this enable Cuba to adopt regulations requiring performance in Cuba that would be entitled to recognition under Article VIII, Section 2(*b*)?

A traditional way of looking at this question in private international law would be to consider whether the debt is property situated in Cuba because it is payable there. This is an issue relating to the debt as intangible property and is not necessarily the same as the issue whether the law of the place of performance regulates the mode of performance of the contract giving rise to the property right. For example, if a resident of France agrees to pay a resident of England in Germany, the fact that German law may determine how the debt shall be discharged does not necessarily lead to the conclusion that the debt is situated in Germany instead of France, where the debtor can be reached. Even if it could be demonstrated that it is established in private international law that a debt as property is situated where it is payable, it still would not follow that this was the rule that had to be adopted for Article VIII, Section 2(*b*). The situs of a debt is a legal fiction, and the situs can be held to be in different places for different rules if the purposes of the rules are not the same.

Although there is some authority for holding that a debt is situated where it is payable for some purposes of private international law, it has been questioned whether this is or should be the rule, at least when the debts of insurance companies doing business in several jurisdictions are involved. It has been argued that

> . . . the selection of the place where the principal or home-office of a corporation is situated is the natural and obvious solution of the problem which arises where a corporation maintains branches in different countries. The corporation may be present, in the sense of being amenable to jurisdiction, in many countries but its principal presence which must determine the situs of the debts owed by it should be at the place where the home-office is established.[46]

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[46] J. Unger, "Life Insurance and the Conflict of Laws," *The International and Comparative Law Quarterly*, Vol. 13 (1964), pp. 482–501, especially p. 497. Professor Unger points out that the author of the leading U.S. monograph on the subject (C. W. Carnahan, *Conflict of Laws and Life Insurance Contracts*, 2nd ed. (Buffalo, New York, Dennis, 1958), pp. 438–47) comes to the same conclusion.

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If traditional private international law provided any valid analogy for the special purposes of Article VIII, Section 2(*b*), it would follow from the conclusion quoted above that the debts payable in Cuba by the foreign insurance companies were not situated in Cuba, and therefore were not subject to Cuban exchange control regulations that would have to be recognized under Article VIII, Section 2(*b*). This result would follow to the extent that the involvement of a currency is deemed to depend on the presence of assets within Cuban territory.

It is interesting to note one consequence of the view that a debt payable in Cuba by one nonresident to another nonresident is an asset situated in Cuba and therefore subject to control by regulations entitled to recognition under Article VIII, Section 2(*b*). It would follow that Cuba could prevent the two nonresidents from amending their contract so as to provide for payment elsewhere than in Cuba, because that would amount to the withdrawal of an asset from Cuba. Other members would be required to respect regulations of this kind.

If a solution is sought without the dubious assistance of private international law in attributing a situs to debts, it is not easy to accept the idea that, because nonresidents have agreed to pay a debt in Cuba, Cuban currency is involved and Cuba's exchange control regulations may preclude payment elsewhere. Even if payment is made in Cuba, it may be argued that Cuban currency is not involved. If the debtor pays with pesos newly acquired for foreign exchange, Cuba's foreign exchange assets are increased, but the increase is matched by Cuba's currency liability represented by the peso balance in the payee's hands. If payment is made with an existing peso balance, Cuba's currency liability is transferred from one nonresident holder to another. It may be replied that what counts is Cuba's gross foreign exchange position, or Cuba's ability to improve its net position by restricting the use of peso balances, and therefore that Cuba's currency would be involved if payment were made in Cuba. These hypotheses show the ambiguity of the test that a member's exchange resources must be affected and the need for the further refinement of that test. It is not necessary to resolve these ambiguities because the real issue is not whether Cuba's currency would be involved in payment in Cuba, but whether it would be involved in payment by one

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nonresident to another nonresident outside Cuba with assets outside Cuba. That, it is submitted, is the real issue because the exchange control regulation that was relied on in the cases was said to be one that forbade payment outside Cuba. In more general terms, this submission can be restated as follows. A member's currency will be involved in an exchange contract if the member's exchange resources will be affected by the actual performance of the contract that is sought. There appears to be no way in which it could be demonstrated that payments between nonresidents outside Cuba with assets outside Cuba would affect Cuba's exchange resources by adding to or subtracting from those resources.

To the extent that the insurance companies were relying on Article VIII, Section 2(*b*), when they argued that they were bound to pay in Cuba and were prevented by Cuban regulations from paying elsewhere, they were implicitly arguing that Cuban currency was involved because they had agreed on payment in Cuba. The issue arose in its sharpest form in the *Ugalde* case, in which the courts held that the place of payment was indeed Cuba, in contrast to the finding in the cases against U.S. insurance companies in which the Supreme Court of Florida held that the place of payment was in the United States. The *Ugalde* case is of some importance because of its influence on a number of other decisions.[47]

One basis for the decision in the *Ugalde* case was that Article VIII, Section 2(*b*), required the recognition of Cuban exchange control regulations.[48] If it were concluded that Cuba's currency was not "involved," it would follow that the case was decided on the wrong principle to the extent that the *ratio decidendi* was Article VIII, Section 2(*b*). There is, however, one version of the facts which would show that Cuba's currency was "involved." It is possible that in this case the plaintiff was not a refugee but continued to be a resident of Cuba even though he brought suit in Florida. This has been

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[47] *Crown Life Insurance Co. v. Calvo*, 151 So.2d 687 (1963), quashed in part per *Ugalde* decision, 164 So.2d 813 (1964); *Sun Life Assurance Co. of Canada v. Klawans*, 162 So.2d 704 (1963), quashed in part per *Ugalde* decision, 165 So.2d 166 (1964); *Trujillo v. Sun Life Assurance Co. of Canada*, 166 So.2d 473 (1964); *Confederation Life Association v. Brandao*, 173 So.2d 515 (1964).

[48] Cf. the *Zabaleta* case, in which the parties had agreed on payment in Cuba but in which the plaintiff nevertheless succeeded in the Florida courts.

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alleged in a discussion of the cases which appeared in a periodical.[49] It is interesting that in the report of the *Ugalde* case there is no mention of the residence or émigré status of the plaintiff. Although the court does not rely on the fact that the plaintiff was a resident of Cuba, Article VIII, Section 2(*b*), was clearly applicable if he was. Resources accruing to a resident of Cuba are resources of Cuba that could be conscribed for the support of Cuba's currency. Cuba could therefore control the place and form in which a resident should receive payment, and regulations that were intended to do this would be entitled to recognition under Article VIII, Section 2(*b*), on the assumption, of course, that the provision was satisfied in all other respects.

The basic test for determining whether the currency of a member is involved in an exchange contract, it has been submitted, is whether the contract is entered into by a resident of that member or deals with assets situated within the member's territory. This test is not affected by the currency in which payment is called for, although the District Court of Appeal in the *Raij* case may have taken the view that Cuba's currency could not be involved in a contract requiring payment to be made in dollars. Moreover, observers might be tempted to explain the difference in result in the *Ugalde* and *Blanco* lines of cases in terms of the currency of payment. However, Cuba's resources may be affected where a contract calls for payment in dollars and not affected where a contract calls for payment in pesos. If a resident pays a nonresident in dollars, Cuba's foreign exchange assets are reduced; and if a resident receives payment in dollars from a nonresident, Cuba's assets are increased.[50] (If the same payments

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[49] According to the article "Insurance Claims—Cubans Raise a Storm," *Business Week*, No. 1728, October 13, 1962, p. 120, the plaintiff returned to Cuba after filing his suit in the United States and went on paying premiums in pesos in Cuba. In the brief for the appellee on appeal to the Superior Court of Pennsylvania in the *Varas* case, this article is referred to (pp. 14–15) as explaining the passage in the opinion of the court in the *Ugalde* case (151 So.2d 315, 323) that reads as follows: "The courts of Florida were open to the *Cuban citizen, while here*, to seek redress . . ." (italics in the brief). Note that the plaintiff filed suit in Florida on November 6, 1961 and made a premium payment in pesos in Cuba on March 7, 1962. (See brief of appellant on appeal to District Court of Appeal of Florida, Third District, in the *Ugalde* case, p. 3; reply brief of appellant, p. 2, footnote; and brief of petitioner, Supreme Court of Florida, p. 24.)

[50] Cf. the opinion of the Court of Appeals of Paris in *Moojen v. Von Reichert:* "There is no doubt that, although the transfer was expressed in French francs, it could have an effect on the Dutch economy, for the Treasury of that country has an interest in the resident's repatriation of the foreign currency obtained after selling the shares for a just price. . . ." See also Gold (1962), *op. cit.*, p. 146.

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are made in pesos, the economic effects are comparable in that Cuba's liabilities are increased or decreased, respectively.) If a nonresident pays another nonresident in pesos, prima facie Cuba's exchange resources are not affected, because there is simply the transfer of a liability from one nonresident to another. However, Cuba's resources may be affected if the transfer is of an asset within Cuban territory, such as a peso bank balance, because of the possible greater propensity of the transferee to withdraw (convert) the balance and thereby reduce Cuba's assets.

The circumstance that a contract calls for payment in Cuba or in pesos does not in itself justify the conclusion that Cuban currency is involved under Article VIII, Section 2(*b*). Of course, it does not follow from this that the place or currency of payment is irrelevant for all purposes. It has been explained that private international law can still apply where a contract is not unenforceable under Article VIII, Section 2(*b*). If it is assumed that the contract in the *Ugalde* case was not unenforceable under Article VIII, Section 2(*b*), it would still be possible to conclude that under the private international law of the forum Cuban law was the governing law, for example, because it was the law intended by the parties or the *lex loci solutionis*. It would also be possible for the forum to decide whether it would recognize exchange control regulations that were part of this law or whether it would refuse recognition because of the public policy of the forum. If it found the regulations offensive to the public policy of the *lex fori*, Article VIII, Section 2(*b*), could not be relied on to compel recognition if it had been found that the contract was not unenforceable under that provision. This must not be taken to suggest that a court could not find that the effect of the Articles as a whole had changed public policy and the former refusal to recognize foreign exchange control regulations even though the case was not covered by Article VIII, Section 2(*b*).

Exchange control regulations

Article VIII, Section 2(*b*), refers to exchange contracts that are contrary to "exchange control regulations." It has been shown in an earlier article that these words must not be taken to include all forms of economic regulation, and, in particular, must not be understood

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to embrace controls on trade in contrast to exchange.[51] The Cuban insurance cases involved a limitation of a different kind.

The cases tend to deal with all of the laws and decrees that have been mentioned earlier in this article as if they were of the same character. For example, the pre-trial stipulation in the *Blanco* case stated that the issue was whether all of them were entitled to recognition under the Articles of the Fund. There is a similar implication in the dictum of the Supreme Court of Florida in the *Ugalde* case in which a parallel is drawn between "the Cuban laws relating to the establishment of currency control" and laws enacted in the United States with respect to the U.S. currency.[52]

Law No. 13 and Decree No. 1384 are legal tender laws in contrast to exchange control legislation.[53] The purpose of legal tender legislation (*cours légal*) is to prescribe the currency that payees must accept in discharge of obligations. In these days, this legislation also frequently declares that the notes and coins issued by the monetary authorities of the legislator have the quality of legal tender.[54] This aspect of the law is sometimes referred to as dealing with the *cours forcé*. Laws dealing with the *cours légal* and the *cours forcé* may be coupled in practice with exchange control legislation, but they are not in themselves exchange control legislation. Although usually it is not difficult to distinguish between them in practice, formulation of the difference is more difficult because of the absence of precise definitions. Normally, legal tender legislation deals with the establishment and characteristics of a currency, and exchange control legislation deals with the defense of a currency by husbanding national

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[51] Gold (1964), *op. cit.*, pp. 460–64.

[52] However, the U.S. District Court in the *Blanco* case may have been reaching for a distinction in quoting the following passage from the appellee's brief: "The 1948 law, for example, does not require that payment of obligations due Cuban nationals be made only in pesos. The law does require that, if an obligation is paid within the Republic of Cuba, then, and in that event only, the national currency of Cuba, pesos, must be accepted in payment of obligations" (311 F.2d 427, 428, fn. 9). Cf. petitioner's brief to the Supreme Court of Florida in the *Ugalde* case: "The legal tender statute and decrees of 1948–1951 . . . are similar to those that have been adopted by this country with respect to our own currency. The exchange control measures imposed after 1959 . . . , although not having any present counterpart in United States law . . ." (p. 18).

[53] Law No. 851 and Resolution No. 3 deal with nationalization and fall into a third category.

[54] See F.A. Mann, *The Legal Aspect of Money*, 2nd ed. (London, Clarendon Press, 1953), pp. 33–39; Arthur Nussbaum, *Money in the Law, National and International* (Brooklyn, Foundation Press, 1950), pp. 45–59.

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resources.[55] It must be repeated that this is not a precise formula by which to distinguish between them. For example, the experience of the Fund itself shows that exchange control regulations are sometimes adopted for such nonbalance of payments reasons as the preservation of national or international security.[56]

If, however, the rough distinction that has been made is accepted as adequate for normal working purposes, Law No. 13 and Decree No. 1384 should be regarded as no more than legal tender legislation. They provided for the establishment of a national currency as the sole legal tender within Cuba, but they did not deal with the control of Cuba's exchange resources. For example, a Cuban resident obligor was given the right to settle his obligation in pesos, but there appears to be nothing that prevented a Cuban resident from undertaking a dollar obligation abroad. Moreover, Cuban residents were expressly permitted to make foreign exchange deposits in Cuban banks and to draw against them in the form of foreign exchange. That Law No. 13 and Decree No. 1384 were not exchange control regulations is demonstrated by the fact that Cuba was not required to get approval of them under Article VIII, Section 2(*a*), when Cuba gave notice that it was prepared to perform the obligations of Article VIII, Sections 2, 3, and 4.[57] Of course, Law No. 568 and Law No. 930 were quite obviously "exchange control regulations," so that before Cuba withdrew from the Fund the question of the application of Article VIII, Section 2(*b*), to these laws could not have been avoided on the ground that they were not exchange control regulations.

Capital and current transactions

One of the more troublesome issues raised by the cases before Cuba withdrew from the Fund was whether the Cuban exchange control regulations that the defendants relied upon were "maintained or imposed consistently with this Agreement." Cuba had notified the

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[55] See *de Sayve v. de la Valdene*, 124 N.Y.S.2d 143 (1953); Gold (1962), *op. cit.*, p. 74.

[56] *Selected Decisions*, pp. 75–76; see also p. 82.

[57] Restrictions on payments and transfers for current international transactions introduced by a member before it gives notice that it is prepared to perform the obligations of Article VIII, Sections 2, 3, and 4, require the approval of the Fund for the maintenance of the restrictions after the notice becomes effective.

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Fund that it was prepared to accept the obligations of Article VIII, Sections 2, 3, and 4. Therefore, it was bound by Article VIII, Section 2(*a*), to obtain the approval of the Fund for the imposition of any "restrictions on the making of payments and transfers for current international transactions." It remained free, however, to control capital transfers under the authority of Article VI, Section 3:

> 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. . . .

Payments for current transactions are defined as follows by Article XIX (*i*):

> 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;
> (4) Moderate remittances for family living expenses.
> The Fund may, after consultation with the members concerned, determine whether certain specific transactions are to be considered current transactions or capital transactions.

The Fund authorized the issuance to counsel for a number of litigants, who applied for it, of the statement that was quoted by the U.S. District Court in the *Blanco* case. That statement referred to the legal position of a member like Cuba under Article VIII, Sections 2, 3, and 4, and Article VI, Section 3. It declared that, apart from a 2 per cent exchange tax on remittances abroad, the Fund had not approved any restrictions under Article VIII, Section 2, or any of the other exchange practices that require approval under Section 3.

The upshot of this was, therefore, that any Cuban exchange control regulations that restricted payments and transfers for current international transactions, apart from the exchange tax, were not maintained or imposed consistently with the Articles. By contrast, any regulations that merely controlled capital movements were maintained or imposed consistently with the Articles.

It will be apparent from what has been said that, while Cuba was still a member of the Fund, it was necessary for the courts, if all other

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elements of Article VIII, Section 2(*b*), were present, to determine whether the Cuban exchange control regulations dealing with insurance on which the defendants relied affected payments and transfers for current transactions or capital transfers. This is a difficult question on which the Fund has not adopted any interpretations. The following comments do not purport to arrive at a final conclusion.

One difficulty in reaching a view on the classification under the Articles of the exchange controls adopted by Cuba is a difficulty resulting from the facts. It has been seen that the problem of classification calls for a determination on whether Cuba was controlling capital transfers or payments for current transactions. Presumably, this means a determination on whether the controls were on capital transfers or payments for current transactions from the viewpoint of Cuba. For example, it is understandable that the drafters of the Articles should accept the idea that a member could control payments that were capital movements, whether inward or outward, of its own. It would not be easy to understand why the right to control capital transfers should depend on some abstract definition of capital transfers unrelated to any particular member. If it is accepted, therefore, that the classification implies a member in relation to which the classification must be made, payments under a contract between two nonresidents of Cuba not affecting assets situated in Cuba do not appear to be either capital transfers or payments for current transactions of Cuba. This is perhaps another way of saying that Cuba had no legislative jurisdiction to adopt exchange regulations controlling these payments.

The analysis cannot stop at this point because the facts may not have been as stated above in all of the cases, and they seem to have been different in the *Ugalde* case. It is necessary, therefore, to consider the case in which Cuba attempts to control payments between a resident insured and a nonresident insurance company.

A first approach to the question of classification might be that it is settled by Article XIX (*i*). This approach might be that any of the payments listed in categories (1) to (4) in that provision are decisively for current transactions and are not affected by the words "which are not for the purpose of transferring capital." The argument would then proceed that "all payments due in connection with . . . other current business" are included in category (1) and that insurance is

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"other current business." [58] If this view were accepted, all payments to or by insurance companies, whether of premium or benefits, and whatever the form of insurance, would be considered as payments for current transactions. But it does not follow that this is the final answer, and that one should conclude forthwith that Cuba would be controlling payments for current transactions, and that it was not entitled to apply these controls because they had not been approved by the Fund. The doubt that this is the final answer is induced by the reflection that it would provide an easy and obvious technique for the wholesale transfer of capital abroad. The single premium endowment or annuity policy is a good example of what could be done to transfer resources abroad as payments for alleged current transactions notwithstanding a member's policy of controlling capital transfers.

The suggestion that the problem may not be wholly resolved by classification from the viewpoint of the nonresident insurance company means, once again, that the payments should be examined from the viewpoint of Cuba. How does Cuba view the payments made by its residents to nonresident insurance companies or by nonresident insurance companies to its residents? The answer to this question might turn on the particular form of life insurance policy that is involved. For example, it might be held that term insurance differs from whole-life and endowment contracts in that the last two involve a savings and investment element as well as protection against risk whereas the first provides only protection against risk. Under term insurance, nothing is payable at the end of the term, and no cash surrender value accrues during the term. It might be argued, therefore, that when the insured pays premiums for term insurance, he is making payments for a return in the form of a current service and therefore for current transactions. In contrast to term insurance, some forms at least of annuity contracts are considered to include no insurance benefit. If the annuitant dies and a cash value is paid to a named beneficiary, the payment is treated as a death benefit and not insurance against risk.[59] It might be concluded that premiums paid

[58] See Bernard S. Meyer, "Recognition of Exchange Controls After the International Monetary Fund Agreement," *Yale Law Journal*, Vol. 62 (1953), pp. 867–910, particularly p. 903.

[59] *Principles of Life Insurance*, published for Life Office Management Association, Vol. 1 by J. E. Greider and W. T. Beadles (Homewood, Illinois, Irwin, 1964), pp. 247–48.

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under this form of insurance are not paid in respect of current transactions.[60] Between term insurance at one extreme and these annuity contracts at the other are whole-life and endowment contracts under which it might be held that premiums are paid partly for the insurance service and partly for savings and investment. If this view were accepted, it would lead to the conclusion that the premiums are paid for both current transactions and as capital transfers.

The Fund has made no official determinations on the classification of insurance, but its *Balance of Payments Manual* contains the following passage:

> 294. Three aspects of life insurance transactions may be distinguished. First, life insurance premiums represent additions to, and life insurance claims payments represent withdrawals from, the funds which the insurance companies have set aside as cover for future claims on the basis of an actuarial calculation (hereinafter referred to as their life funds). Life funds, including the interest accrued on them, constitute savings of the policy holders; therefore, changes in residents' share of the life funds of foreign insurance companies are appropriate to the capital account of the balance of payments. Second, the interest accruing on the policy holders' accumulated shares of the life funds of the insurance companies represents investment income and should be recorded in Table VI. Third, part of insurance premiums and interest accruals, net of claim payments, is used to cover the administrative cost of the insurance companies, including their profits. This part, which represents payment for a pure insurance service, is the only element of life insurance transactions that is appropriate to Table VIII, item 1.[61]

It will be observed that this passage makes no distinction among the various types of life insurance. Secondly, the point is made that some part of the premiums can be treated as paid in respect of the administrative cost of the insurance companies, and, therefore, in respect of current transactions. Presumably, this would be true of premiums paid under all forms of insurance contract. If this view were adopted, the contrast between term and other forms of insurance would not be absolute. It must be borne in mind that the *Balance of Payments Manual* does not seek to present legal interpretations of the Articles. It might still be held, therefore, that the element of payment for the administrative cost of the insurance company in premiums paid under term insurance was secondary or consequential and did not prevent a country from controlling the payments of

[60] Subject to what is said below about covering the administrative cost of the insurance companies. It should be noted that the courts have had to decide for various reasons whether particular forms of insurance are predominantly for protection or for savings. See, for example, *Penn Mutual Life Insurance Co. v. Lederer*, 252 U.S. 523, 531, 40 S.Ct. 397, 400 (1920).

[61] International Monetary Fund, *Balance of Payments Manual*, 3rd ed. (Washington, 1961), p. 97.

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premium as capital transfers. This element would not affect the view that has been advanced of payments of premium under other forms of life insurance, because these may be regarded as payments for current transactions on other grounds.

The cases summarized earlier in this article did not involve term insurance. They involved the other forms of life insurance and a variety of claims under them, including claims to recover the cash surrender or maturity value of policies, to compel the defendants to accept premiums, and to get the return of premiums. Whatever the analysis that may be applied to the payment of premiums, there might be greater agreement that the payment of the cash surrender or maturity value of a policy to a resident represents the receipt by him of a capital transfer.[62] Therefore, the member would be able to prescribe for its residents how and where they should receive such transfers, and the member would not need the approval of the Fund for this. It may be objected, however, that the proceeds are not exclusively of a capital nature, because they include some element of interest and, therefore, recent interest. Here again the interest might be of too symbiotic a character to obstruct the conclusion that the payment must be treated as a capital transfer.

Before the discussion of the "current" and "capital" dichotomy is terminated, it is legitimate to wonder whether it was necessary to make a final classification of the payments in the Cuban insurance

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[62] In *Catz and Lips v. S. A. Union Versicherung*, a Belgian court held that the transfer of insurance moneys was a capital transfer under Article VI, Section 3 (see Gold (1962), *op. cit.*, pp. 30–31), but it is doubtful that life insurance was involved. In the *Ugalde* case, the appellant argued as follows in its brief to the Florida District Court of Appeals: "It may be that the purely insurance feature of an insurance contract is a service and that the premium payment is a payment for a current service within the definition of Article XIX (i)(1). The cash surrender value of a policy represents, however, not a payment for a service but a repayment on an investment much like an ordinary savings account. The establishment of a savings deposit is the most obvious kind of capital transaction. The transfer of such a deposit from one country to another is thus an international capital movement. The transfer from one country to another of the savings portion of an insurance policy—in this case the cash surrender value—is likewise an international capital movement" (p. 29). Paradise, *op. cit.*, pp. 70–72, disagrees on the ground that there is no debtor-creditor relationship under an unmatured policy until the insured exercises the option to get the cash surrender value. His theory of a current transaction involves the idea of a current liability, but it is quite unusual to classify transactions according to the contingent or accrued character of the liability of a party to the transaction instead of according to the subject matter of the transaction. See *Balance of Payments Manual*, pp. 23–24.

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cases. It will be recalled that under Article VI, Section 3, a member is authorized to regulate international capital movements but not in a manner "which will restrict payments for current transactions or which will unduly delay transfers of funds in settlement of commitments. . . ." It might be argued that even if a member was authorized to control payments connected with insurance policies as capital transfers, it could not do this consistently with the Articles if commitments to make these payments had been entered into. This argument would rely more particularly on the words "which will unduly delay transfers in settlement of commitments," although it would be necessary to imply that the commitments referred to were entered into before the capital controls were adopted in order to avoid the absurdity of the total negation of authority to control capital transfers. This line of argument would rely on the fact that Article VI, Section 3, does not expressly confine the commitments to those connected with current transactions. Indeed, the separate mention of current transactions would imply the rejection of any such limitation. The conclusion of this reasoning would be that the Cuban controls were inconsistent either with Article VIII, Section 2(*a*), if they affected current transactions, or with Article VI, Section 3, if they affected capital transfers, and that in either event they were not entitled to recognition under Article VIII, Section 2(*b*).

The clause dealing with commitments in Article VI, Section 3, is undoubtedly obscure, but it is most unlikely that it applies to capital transfers. For example, it would be difficult to understand why there was so much discussion at the Bretton Woods Conference of the drafting of "payments of moderate amount for amortization of loans, etc.," in Article XIX (*i*) (3) if a member would be unable under Article VI, Section 3, to restrict transfers in settlement of commitments to pay more than moderate amounts. Furthermore, if "commitments" applies to capital transfers, a member that was availing itself of the transitional arrangements of Article XIV, Section 2, would have less authority to control capital transfers than payments and transfers for current transactions. Under Article XIV, Section 2, the member would be able to control payments and transfers for current transactions whether or not commitments had been entered into, but its ability to control capital transfers would not extend to transfers covered by commitments. This result could not be reconciled with the

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purpose of the Fund "to assist in the establishment of a multilateral system of payments in respect of current transactions between members" and the absence of any comparable purpose with respect to capital transfers. In order to help members availing themselves of the transitional arrangements of Article XIV, Section 2, special authority was given by that provision to restrict payments and transfers for current transactions notwithstanding the purpose of the Fund to work toward the elimination of these restrictions. The absence of a similar provision with respect to capital transfers is to be explained by the fact that there was full freedom to control them whether or not a member was availing itself of the transitional arrangements and not by reference to any decision of the drafters to prevent interference with capital transfers where there were commitments to make them.

The pre-Bretton Woods history of Article VI, Section 3, gives some assistance in clarifying the obscure phrase relating to commitments. Among the unpublished drafts that were discussed at the preparatory conference held at Atlantic City were the following:

> . . . a member country may not use its control of capital movements to restrict payments arising out of current transactions in goods and services *or to delay unduly transfers of earnings, interest and amortization.*
>
> Not to impose restrictions on payments arising out of current transactions in goods and services *or to delay unduly transfers of earnings, interest and amortization. . . .*

One reaction to the words italicized was that they should be transferred to the definition of payments for current transactions in what became Article XIX (*i*). Indeed, the words seem quite obviously to be the ancestors of categories (2) and (3) in Article XIX (*i*), which would have been regarded as capital transfers but for that provision. It is possible, therefore, that the original words were intended to single out certain types of payments of a capital nature in order to ensure their treatment as payments for current transactions.

A later draft at the Atlantic City conference read as follows:

> No member country may control international capital movements in a manner which will restrict payments for current transactions or which will unduly delay transfers of funds in settlement of commitments arising from such transactions. . . .

This language confirms the impression of the purpose of the earlier drafts, and would have made it quite clear that the commitments related to payments for current transactions. Unfortunately, there

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is no explanation for the omission of the words "arising from such transactions" in the final text of Article VI, Section 3. Nevertheless, the provision should be understood as if they were still there. The object of the clause would then be the perfectly sensible one of making it clear that the concept of restrictions on current payments included not only the prohibition of such payments but also undue delay in allowing them to be carried out where they were permitted. With this analysis, it must be concluded that, if Article VIII, Section 2(*b*), was applicable, it was not possible to avoid the classification of the Cuban insurance payments as capital or current.

IV. Other Issues of Article VIII, Section 2(*b*)

Withdrawal from the Fund

The Cuban insurance cases support the thesis that if a country withdraws from the Fund it loses the benefit of Article VIII, Section 2(*b*), even in respect of contracts that were entered into when it was a member. This had already been held by the New York Supreme Court in *Stephen v. Zivnostenska Banka, National Corporation.*[63] In the *Ugalde* case, the plaintiff's motion for reconsideration of the case because Cuba had withdrawn from the Fund was dismissed, but no reason was given by the court. The defendant had opposed the motion on the ground that there was an alternative basis for the verdict, the determination that Cuban law governed the contract under private international law. In the *Varas* case, after the withdrawal of Cuba the defendant company asked the Superior Court of Pennsylvania to disregard the defendant's argument based on the Articles, and the court said that, as a result of the withdrawal, a new look had to be taken at the cases that had been based on the Articles when both Cuba and the United States were members.

As a result of the Cuban insurance cases there is also available now the opinion of the law officers of the United States. In *Pan American Life Insurance Co. v. Lorido,*[64] the petitioner sought writs of

[63] See fn. 33; Gold (1962), *op. cit.*, pp. 77–78.
[64] 19 Fla. Supp. 167; 154 So.2d 200 (1963).

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certiorari from the U.S. Supreme Court to the courts of Florida, and the Solicitor General was invited to express the views of the United States. The Florida courts had given judgment for the plaintiff on the ground that the place of performance under the contract was the United States. One of the grounds on which the petitioner relied was Article VIII, Section 2(*b*). On this, the Solicitor General's Memorandum for the United States says:

> Further review is not warranted with respect to the petitioner's other contention—that granting recovery to the respondent is contrary to Article VIII (2)(b) of the International Monetary Fund Articles of Agreement. In April of this year, Cuba withdrew from the International Monetary Fund. The provisions of Article VIII (2)(b) are for the benefit of member states and not for the benefit of private parties. Since Cuba is no longer a member of the Fund and since the date of proposed relief determines the applicability of Article VIII (2)(b), a decree granting recovery to the petitioner will not violate the provisions of the Agreement. See *Stephen v. Zivnostenska Banka, National Corporation*, 140 N.Y.S. 2d 323, 326.
>
> In the view of the United States, therefore, this case does not present any substantial question of federal law or policy.[65]

The implications of this view go beyond the immediate question that was raised. For example, it supports the thesis that the sanction of unenforceability under Article VIII, Section 2(*b*), is not invalidity. A contract that was invalid *ab initio* could not be resuscitated by a subsequent event like the withdrawal from the Fund of the member under whose regulations the contract had been invalidated. The view that the sanction is not invalidity permits the conclusion that a contract originally unenforceable may become enforceable because of a change in or the repeal of exchange control regulations, and the reverse will also be true.[66] A contract may also become enforceable or unenforceable as the result of a change in circumstances. A resident party may become nonresident before the performance of the contract, and exchange control regulations may cease to apply. This was the position in most of the Cuban insurance contracts. The reverse may also occur. A nonresident may become a resident and find that the exchange control regulations of the country of his residence apply to a contract he made before he changed his residence.

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[65] Certiorari was denied, 379 U.S. 871, 85 S.Ct. 15 (1964).

[66] Gold (1962), *op. cit.*, pp. 62–66, and Gold (1964), *op. cit.*, p. 464. In the *Blanco* and consolidated cases, the remark of the District Court that Cuban laws could not affect an obligation entered into before the laws were passed must be regarded as an obiter dictum. The laws were not entitled to recognition under Article VIII, Section 2(*b*), because the plaintiffs had become nonresidents.

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Withdrawal from IBRD

The withdrawal of Cuba from the Fund on April 2, 1964 was preceded by withdrawal from the International Bank for Reconstruction and Development on November 14, 1960. In the *Blanco* case, the District Court, in a footnote to its opinion, thought that one of the questions raised by the case was whether Cuba's withdrawal from the Bank constituted such a breach of the purposes of Article I of the Fund's Articles as to render the Articles "ineffective as to Cuba." [67] Later in the history of the case, the District Court noted that there was nothing in the Fund's Articles that required a member to remain a member of the Bank. This is correct. The Articles of the Bank make membership available to countries that are members of the Fund,[68] and any member that ceases to belong to the Fund automatically ceases to be a member of the Bank unless the Bank by three fourths of the total voting power agrees to allow it to remain a member.[69] There is nothing corresponding to these provisions in the Articles of the Fund.

Reciprocity

In the *Blanco* case, among the questions posed by the District Court in the footnote to its opinion which has already been mentioned[70] were the questions whether Cuba had incorporated the Bretton Woods Agreement into its law as had the United States and whether Cuba was performing its obligations under the Agreement. These questions were not confined to Article VIII, Section 2(*b*), but this is irrelevant because, whatever the scope of the implication of the questions, it cannot be accepted as sound law.

It is true that the Articles envisage benefits for all of the members of the Fund as a result of the obligations of the Articles. This does not mean that there is a legal principle of reciprocity by which the failure by one member to perform an obligation releases other members from a similar obligation or other obligations to the defaulter. On the contrary, the purpose of the Articles is to preserve an objective

[67] 311 F.2d 427, fn. 8.
[68] Article II, Section 1.
[69] Article VI, Section 3.
[70] See fn. 67.

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legal order notwithstanding departures from the obligations of the Articles by individual members from time to time. It is not for each member to judge whether and to what extent there have been violations of the Articles by other members and the legal effect on itself. It is the function of the Fund to decide whether there have been violations and what are the legal consequences of them. It should not be assumed, however, that even if the Fund is satisfied that there has been the breach of an obligation by one member, the legal consequence will be that other members are absolved from that same obligation or other obligations in relation to the defaulter or other members.

It is appropriate to recall the words of a Netherlands court in a case involving the recognition of exchange control regulations under Article VIII, Section 2(*b*):

> The Dutch forum must refrain from evaluating the Indonesian foreign exchange provisions and must also refrain from judging the question whether in view of its behavior Indonesia can be considered as a treaty partner. Apart from the fact that a partner to a treaty which has had to protest against violations of international agreements must itself fulfill its obligations, the paramount interest is that the international order to which the Netherlands and Indonesia have both adhered be respected.[71]

Quasi-Contract

In the *Varas* case, one of the lower courts held that the plaintiff's contractual right to payment was in Cuba, and because she could not return to Cuba to collect the benefits under her policy, she should be allowed to recover the value of the premiums that she had paid. This quasi-contractual remedy was available in order to prevent an unjustified enrichment of the defendant insurance company. The court held that Article VIII, Section 2(*b*), did not prevent this recovery because the remedy was in quasi-contract and this did not call for enforcement of the contract. The Pennsylvania Superior Court did not adopt this theory and allowed the plaintiff to recover on the contract.

The relationship of quasi-contractual claims to Article VIII, Section 2(*b*), is an interesting one. The Schleswig-Holstein Ober-

[71] *Frantzmann v. Ponijen*, Nederlandse Jurisprudentie (1960), No. 290; and Gold (1962), *op. cit.*, pp. 113–18.

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landesgericht [72] and the Supreme Court of Hong Kong [73] have both held that if a contract is unenforceable under Article VIII, Section 2(*b*), a party that has performed its part cannot recover what he has paid. This conclusion is sound. If it were not adopted, parties would be encouraged to run the risk of flouting exchange control regulations because at worst the courts would restore them to their pre-contract positions to the extent that this could be done by restitution. Moreover, a remedy in quasi-contract in a forum foreign to the exchange control regulations that have been violated could produce the very result that was sought by the unenforceable contract.[74] It must be repeated that this caveat with respect to quasi-contractual remedies applies to contracts that are unenforceable under Article VIII, Section 2(*b*). In the *Varas* case, the contract was not unenforceable under the provision after the plaintiff became a nonresident of Cuba.

Fragmentation of agreements

After Cuba withdrew from the Fund, the Superior Court of Pennsylvania delivered its decision in favor of the plaintiff on the theory that the exercise of the cash surrender option completed a contract that was independent of the original contract of insurance. Because of the withdrawal, this theory did not determine whether or not Article VIII, Section 2(*b*), required the recognition of Cuban exchange control regulations. The technique by which a single agreement is fragmented into two or more contracts is a dubious one, and on occasion it could result in the circumvention of Article VIII, Section 2(*b*). *Southwestern Shipping Corporation v. National City Bank of New York* [75] is an example of a case in which the willingness of the courts to hold that there were separate contracts made it possible to complete the evasion of exchange control regulations which private parties had planned.[76]

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[72] *Lessinger v. Mirau*, Gold (1962), *op. cit.*, pp. 90–91.
[73] *White v. Roberts*, 33 Hong Kong Law Reports (1949) 231–82; Annual Digest (1962) and Reports of Public International Law Cases, Year 1949, pp. 27–36; and Gold (1962), *op. cit.*, pp. 87–90.
[74] Gold (1962), *op. cit.*, pp. 93–94.
[75] 173 N.Y.S.2d 509 (1958); 178 N.Y.S.2d 1019 (1958); 190 N.Y.S.2d 352 (1959); certiorari denied, 361 U.S. 895, 80 S.Ct. 198 (1959).
[76] Gold (1962), *op. cit.*, pp. 97–100, 102–108.

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V. Summary

The litigation in U.S. courts in which claims have been made under life insurance policies issued by U.S. or Canadian companies to applicants then resident in Cuba is the most extensive body of cases involving Article VIII, Section 2(*b*), that has come into the courts so far. The cases suggest the following reactions.

1. The benefits of Article VIII, Section 2(*b*), cease to be available to a country once it withdraws from the Fund, even in respect of contracts entered into when the country was a member. This conclusion seems to have been accepted by both courts and counsel in the cases. The conclusion has a wider significance in that it supports the view that Article VIII, Section 2(*b*), does not provide for the invalidity of contracts, but only their unenforceability. Whether a contract is unenforceable is determined by the facts at the time when enforcement is sought. (See pp. 45–46.)

2. Notwithstanding the view that seems to have been held in one of the cases, the application of exchange control regulations under Article VIII, Section 2(*b*), does not depend on a finding that they are part of the governing law under the private international law of the forum. (See pp. 21–23.)

3. Article VIII, Section 2(*b*), does not abrogate the choice-of-law rules of private international law. Therefore, if a contract is not unenforceable under Article VIII, Section 2(*b*), the forum may still apply the law which its private international law determines to be the governing law. This may result in the recognition of exchange control regulations that are part of that system, even though this result is not required by Article VIII, Section 2(*b*). (See pp. 23–25.)

4. The cases did not exclude life insurance contracts from the category of "exchange contracts." Suggestions that the test of an exchange contract is whether it calls for payment in a currency foreign to the forum or to the governing law under private international law should not be accepted. (See pp. 25–27.)

5. The test for determining whether a member's currency is involved in an exchange contract is that its exchange resources would be affected by the performance that is sought. This may be equivalent to the principle that the member whose exchange control regulations are in issue has legislative jurisdiction under public international law

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to adopt the regulations. This would seem to mean that the regulations control the transactions of residents or transactions dealing with assets situated within the member's territory. In order to conclude that Article VIII, Section 2(*b*), has created a further norm of legislative jurisdiction, it would be necessary to show that a member's exchange resources are affected by transactions that do not involve residents or local assets. (See pp. 27–35.)

6. The *Blanco* case and cases like it are consistent with the view that a member's currency is not involved in contracts between nonresidents that do not require the transfer of an asset situated in the member's territory. The *Ugalde* case cannot be reconciled with this view except on the assumption that the plaintiff was a resident of Cuba. The fact that nonresident parties have agreed that payment should be made in pesos in Cuba should not lead to the conclusion that Cuba's currency would be involved in performance of the contract elsewhere with assets outside Cuba and therefore that Cuba was entitled to adopt exchange control regulations forbidding performance elsewhere that would be entitled to recognition under Article VIII, Section 2(*b*). This does not prevent a finding by the forum that the regulations must nevertheless be recognized as part of Cuban law because it is the governing law under the private international law of the forum. (See pp. 27–35.)

7. The currency of payment, whether foreign or domestic, is not a test by which to determine whether a currency is "involved" in a contract. Whether a member's resources are affected will be determined by other facts relating to the contract. (See pp. 34–35.)

8. "Exchange control regulations" should not be understood to include legal tender laws (*cours légal* or *cours forcé*). Some of the legislative provisions treated as relevant in the cases were of this character. (See pp. 35–37.)

9. The cases raise the question whether exchange control regulations affecting life insurance control payments for current transactions or capital transfers. If the payments for current transactions or capital transfers of Cuba were involved in any of the cases, the classification of Cuba's regulations as controlling the one or the other would have determined whether the regulations were maintained or imposed consistently with the Articles. The classification of the payment of premiums may depend on the type of life insurance that

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is in issue. If there is an element of insurance against risk, and not solely an element of savings and investment, one view might be that the premium is paid in part for a current service. It has also been suggested that all premiums involve payment for a current service to the extent that they recompense the insurer for administrative cost. The payment of the cash surrender or maturity value of a life insurance policy may be regarded as a capital transfer, although there may again be present a minor element of a current nature, i.e., to the extent that recent interest is included. (See pp. 37–42.)

10. The words "transfers of funds in settlement of commitments" in Article VI, Section 3, should be understood to refer to current transactions. (See pp. 42–45.)

11. Withdrawal from membership in the IBRD does not affect the benefits that a member of the Fund is entitled to under Article VIII, Section 2(*b*). (See p. 47.)

12. A member's enjoyment of the benefits of Article VIII, Section 2(*b*), does not depend on a demonstration to the forum that the member is giving reciprocal treatment under that or other provisions of the Articles. (See pp. 47–48.)

13. Remedies in quasi-contract or the fragmentation of an agreement into two or more contracts should not be resorted to as techniques for frustrating the purpose of Article VIII, Section 2(*b*). (See pp. 48–49.)

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APPENDIX

Unenforceability of Exchange Contracts: Fund's Interpretation of Article VIII, Section 2(*b*)

The following letter shall be sent to all members:

The Board of Executive Directors of the International Monetary Fund has interpreted, under Article XVIII of the Articles of Agreement, the first sentence of Article VIII, Section 2(b), which provision reads as follows:

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 this Agreement shall be unenforceable in the territories of any member.

The meaning and effect of this provision are as follows:

1. Parties entering into exchange contracts involving the currency of any member of the Fund and contrary to exchange control regulations of that member which are maintained or imposed consistently with the Fund Agrees ment will not receive the assistance of the judicial or administrative authoritie- of other members in obtaining the performance of such contracts. That is to say, the obligations of such contracts will not be implemented by the judicial or administrative authorities of member countries, for example by decreeing performance of the contracts or by awarding damages for their non-performance.

2. By accepting the Fund Agreement members have undertaken to make the principle mentioned above effectively part of their national law. This applied to all members, whether or not they have availed themselves of the transitional arrangements of Article XIV, Section 2.

An obvious result of the foregoing undertaking is that if a party to an exchange contract of the kind referred to in Article VIII, Section 2(b) seeks to enforce such a contract, the tribunal of the member country before which the proceedings are brought will not, on the ground that they are contrary to the public policy (*ordre public*) of the forum, refuse recognition of the exchange control regulations of the other member which are maintained or imposed consistently with the Fund Agreement. It also follows that such contracts will be treated as unenforceable notwithstanding that under the private international law of the forum, the law under which the foreign exchange control regulations are maintained or imposed is not the law which governs the exchange contract or its performance.

The Fund will be pleased to lend its assistance in connection with any problem which may arise in relation to the foregoing interpretation or any other aspect of Article VIII, Section 2(b). In addition, the Fund is prepared to advise whether particular exchange control regulations are maintained or imposed consistently with the Fund Agreement.

Decision No. 446–4
June 10, 1949

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