Buffalo Law Review

Volume 4 | Number 1 Article 83

10-1-1954

The Law of International Payments. By Walter Hug.

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THE LAW OF INTERNATIONAL PAYMENTS. By Walter Hug, Professor of Law, Swiss Federal Institute of Technology. Académie De Droit International, (Extrait du Recueil des Cours 1951) pp. 515-712. Librairie Du Recueil Sirey, 1953.

Before the recent world-wide economic crisis only rules of private international law controlled the discharge of foreign money obligations. This system of free international payments based upon the automatic restoration of an equalization of exchange rates through the operation of the gold standard came, to a substantial part, to an end with the crisis in the early nineteen thirties, and nearly completely with the Second World War. Foreign exchange control has spread over the world.[1] The objective of Professor Hug's treatise was "to examine critically the new rules and to state their effects on private juridical relations." Only an eminent legal scholar who is simultaneously an expert in economics could write this book. Among the great contributions to many legal fields including labor law, commercial law and comparative law, his books and articles on the law concerning "clearing", on monetary debts, on the law of bank deposits, and on price control, published during the last two decades, have a claim to special appreciation. The present book presents the lectures which Dr. Hug (who was at one time a professor at Harvard) rendered in 1951 at the Hague Academy for International Law.

Every lawyer interested practically or theoretically in the economics of money should assiduously study Part I of the book which deals with the economic bases of international monetary law. The analysis of the economic causes for the grave crisis in the balances of payment resulting in devaluation of currencies, is superb. Devaluation seemed at first to be the alternative to extensive exchange restrictions. Nevertheless, exchange restrictions became inevitable. Their introduction led then necessarily to treaty-regulated systems of bilateral agreements for the mutual exchange of goods, among which according to the author the offsetting,[2] the clearing, and the payment agreements represent the three principal types. They are thoroughly discussed by the author.

1. Only this country, Switzerland, Uruguay, and the International Zone of Morocco remained reasonably free from foreign exchange restrictions, although some restrictions have existed even in these countries. See, *e. g.*, the Gold Reserve Act of January 31, 1934, 31 U. S. C. 441.

2. The author speaks of "compensation" agreements. However, the English word "compensation" has nothing to do with that kind of agreement. It is the Roman-law term *compensatio* which underlies the concepts of these agreements. On the continent the words *Kompensation, compensation, compensazione, compensación, compensacão,* etc., have substantive meaning. This is alien, in concept and expression, to Anglo-American law where recoupment and set-off arose as mere common law pleas.

The European Payments Union and the International Monetary Fund signal the next stage. Their operation, greatly helped by Marshall Aid funds, is excellently pictured to us in subchapter IV of chapter 2 of Part 1 of the book. It is chapter 3 which deals with the origin, development, and sources of the law of international payments, and chapter 4 which explores the legal structure of Exchange Control Regulations. The author asks the question whether, in the absence of a treaty, exchange control regulations are violative of international law which means "general international law".

He agrees, in general, with Professor Nussbaum (Money in the Law, 1950, p. 476) who emphasized that restrictions to safeguard a country's balance of payment constitute acts of "self-preservation", "legitimate even in the teeth of the most-favored-nation clause."[3] But whereas Professor Nussbaum exempts only non-necessary or arbitrary restrictions from the rule, Dr. Hug points strongly to the inequality which exchange control "introduces into international relations," by limiting import for the purpose of reserving foreign currency for the import of essential goods only. Accordingly, each case of currency restriction has to be examined on the basis of its particular facts. One will certainly agree with him that the Nazi regime's exchange control was a model of arbitrariness because it was nothing less than "a weapon in the hands of a totalitarian regime."

The author also discusses the important restrictions placed at present on the member states of the Monetary Fund Agreement with respect to their power to maintain or introduce a policy of exchange controls.[4] May I mention in this connection that the Fund had, as of the year 1953, fifty four members. This is a good example of the modification of general international law by provisions which establish, in form, only "particular" international law, but, in substance, a world-wide standard. Such a legal situation is the equivalent to "common consent" which by international

3. In *Perutz v. Bohemian Discount Bank*, 304 N. Y. 533 (1953), the Court of Appeals of New York came to the same result by holding that the Czechoslovakian currency control laws were not contrary to our public policy. Since the International Law is recognized as part and parcel of our law, the Court could not have reached the result if those laws were regarded contrary to general international law.

4. See Art. VIII Sec. 2 of the BRETTON WOODS AGREEMENT (INTERNATIONAL MONETARY FUND): "Subject to the provisions of Article VII, Sec. 3 (b) and Article XIV, Sec. 2, no member shall, without the approval of the Fund, impose restrictions on the making of payments and transfers for current (in contrast to capital transfers) international transactions." Article VII and XIV provide respectively for exceptions because of scarcity of the Fund's holdings of a particular currency or because of the particular circumstances during the post-war transitional period. Article XIX (i) contains a definition of payments which are considered as being needed for "current transactions." The most important are, of course, payments due in connection with foreign trade or due as interest on loans.

law means the consent of the overwhelming majority of states. See also Article 2(6) of the charter of the U. N.[5]

The examination of scope and effects of currency regulations involves an investigation of fundamental questions of both private and administrative international law. The point of departure is Art. VIII (2) (b) of the Agreement dealing with exchange contracts.[6] One must see in this provision a rule of particular international law requiring the application of foreign currency restrictions if by the conflict-of-laws rule of the forum the foreign monetary law[7] controls the question of the effect of the contract. No doubt, Article VIII is not a model of clarity. It is a pity that the author omitted any detailed discussion of its scope especially with regard to the meaning of the term "exchange contracts" as well as of the phrase "involving the currency of any member" and finally of the term "unenforceable".[8] Likewise omitted is any discussion of the question whether Art. VIII controls where only matters of performance are involved, for example, payment in a country subject to currency restrictions, the contract being validly entered into in a "free" country.

Part III deals with the legal bases of the system of payments under the régime of bilateral treaties. Those treaties represent conventional (particular) international law. However, it is obvious, that such a system can operate only if it is "complemented by provisions of municipal law." Thus, as the author puts it, on the one hand states of the foreign-exchange-control type have to provide for general licenses according to the principles ennunciated in the inter-state agreements; the "free" states such as Switzerland, on the other hand, can not escape enacting executive regulations either because to engage in bilateral economic traffic means to conform the municipal law to the restrictions required by a bilateral treaty which, for example, controls certain classes of payments such as current (commercial) payments or the effectuation of payments in a certain manner, such as payment into a

5. See 1 OPPENHEIM, INTERNATIONAL LAW 17 (7th ed., Lauterpacht 1948). The practical significance lies in the applicability of Art. VIII (2) (b)—see the text in footnote 6, *infra*—also by courts of non-member states and by courts of member states in cases involving the currency of non-members.

6. "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."

7. Mr. Mann's present view (see the following note) is to the effect that the forum has to look at the "legal system of the country whose financial resources are affected" by the enforcement of such contracts. However, the wording of Art. VIII argues against such a wide interpretation.

8. For conflicting approaches see on the one hand NUSSBAUM, MONEY IN THE LAW, 542 *et seq.* and on the other F. A. Mann, *The Private International Law of Exchange Control under the International Monetary Fund Agreement*, 20 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY, 97, 101 (1953).

central clearing account. This way exemplifies the extent to which, therefore, the general civil law of the country is superseded.

One of the many new contributions of the book emerges from this part, which offers a very articulate analysis of the law as laid down in the class of treaties based on a clearing or a payment arrangement system.

A lawyer interested particularly in problems caused by the dual aspects, which means the public law one and the private law one in which the same transaction appears, will find that this chapter (no. 7) is of particular value. The public aspect can be seen from the seizure feature with respect to the creditor's claim in the one contracting country and from the duty imposed upon the debtor in the latter's country. By the seizure effected by the prohibition provision forbidding direct payment by a debtor residing in the latter to a creditor residing in the former country the public authority obtains exclusive control over the claim while upon the debtor is imposed, besides the duty of abstention, also an enforceable obligation to pay the amount of the debt, not to his creditor, but to an authorized agency, e. g., the central bank of his country. The private law aspect can be seen from the fact that the creditor is no longer at liberty to enforce his rights, and that a payment made directly by the debtor breaching those public law obligations does not extinguish this obligation. It may be mentioned that hardly any treaty deals with this impact of its terms upon the private law relationship proximately affected by the treaty. However, it is difficult to challenge the results of Dr. Hug's keen analysis. A short subchapter deals with the question of whether the public policy exception against treaty-based currency restrictions can be given a niche in the conflict-of-laws system of a country which has entered into clearing and payment treaties. The problem is similar to that touched on previously with respect to states which are members of the Fund Agreement, and the answer should be similar too, although the author seems to be doubtful about it.

The last Part of the book deals with the Legal Structure of the European Payments Union based upon the Treaty of September 19, 1950. No private law is involved, and the operation or formation of bilateral clearing or payments treaties is not affected by that Treaty which, therefore, presents only problems of public international law, with which this Part extensively deals.

In brief, Professor Hug's book has provided us with splendid guidance for some of the most complicated and crucial issues of these times.

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