

information and process it. It will analyse material but in the end the good lawyers will still be good and the bad ones bad. It will mean, however, that some of the doubt and much of the mechanical labour could be removed from the lawyer's day.

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### EXCHANGE CONTROL IN THE CONFLICT OF LAWS

The case reported under the name of *Colmenares v. Imperial Life Assurance*<sup>1</sup> is interesting in many ways, not the least of which is this title. The plaintiff's surname in full is Casteleiro y Colmenares, the former being, in the usual Spanish form, his father's name and the latter his mother's. When referring to a man under one name it is naturally his father's and not his mother's that is used. Such illiteracy is not confined to law reporting, and in law reporting is unfortunately not rare: there is for example the recent English case concerning the estate of the late Nawab of Bhopal, H.H. Sir Mohammed Hamidullahkhan, reported as *In re Khan's Settlement*.<sup>2</sup> Shall we live to see a litigant with the illustrious name of Dmitri Ivanovitch Donskoi abbreviated by some nonchalant reporter to "Vitch", or to "Skoï"?

The facts in the case under consideration are not unduly complicated, nor, since Dr. Schacht's financial methods have become respectable, are they particularly unusual. Mr. Casteleiro, a wealthy Cuban, insured his life by two policies in 1942 and 1947 with the Imperial Life Assurance Company, a Canadian company with its head office in Toronto. His proposal in each case was made through the company's Cuban agency, each policy being despatched by the head office in Toronto to that agency. The policy did not become binding until the agent had satisfied himself of the assured's state of health and delivered it to him together with a receipt for the first premium. In the ordinary course of business everything was expected to pass through the Havana office, and it was only in unusual circumstances that Toronto would deal directly with an assured. But the Havana office had no independent authority, all decision being vested in Toronto: in particular, any payment of benefits would be by cheque drawn in Toronto (though on Cuba), and all policies and premium

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1. Ontario, at first instance, (1965) 51 D.L.R. (2nd) 122; Court of Appeal (1968) 54 D.L.R. (2nd) 386; Supreme Court of Canada, 62 D.L.R. (2nd) 138; I have been favored by the defendant with a copy of the record.

2. (1967) Ch. 587.

receipts were signed in Toronto, though they were also countersigned in Havana before being delivered, and in the case of policies the signatures were notarially authenticated in Cuba, because they would otherwise be invalid by Cuban law. The practical consequence of this invalidity would be that no action could be brought on it in a Cuban court.

Each of the two policies in this case was in Spanish, though a policy in English would have been given if required; and the premiums in every ascertainable case were paid in pesos, though the policy itself specified that "all payments, whether to or by the company" should be in United States currency by banker's draft on New York. At the time when these policies were taken out it was still Cuban law that where an obligation had been contracted in a particular currency, payment in that currency could be insisted upon; but whenever the United States dollar and the peso were at par, as they usually were, they were interchangeable.

No place was stipulated for payment,<sup>3</sup> and although the company expected to receive premiums and pay benefits in Havana it would have had no objection to their being tendered or claimed elsewhere. If things had continued as they were Mr. Casteleiro could without difficulty have surrendered his policies for their surrender value and insisted on payment in U.S. dollars in Cuba or elsewhere, and in case of disagreement litigation would have taken place in Cuba: it was for this purpose that the signatures on the policies were authenticated, and that the company was compelled to make a deposit in Cuba as a condition of doing business there.

Things however did not continue as they were. As early as 1951 Cuban law discharged a debtor paying the same number of Cuban pesos, although his debt was in U.S. dollars and the Cuban peso below par. Then at the beginning of 1959 another Doctor came to power in Cuba and made payment outside Cuba on any insurance policy without permission from the National Bank a crime which might be punished by expropriation of the insurer's whole assets in Cuba: in this case the company had had to post securities of a book value of \$3 million. In 1961 the possession of foreign currency in Cuba became a crime, and all debts had compulsorily to be discharged in pesos, in whatever currency contracted.

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3. This is emphasized by MacKay J. A., (1966) 54 D.L.R. (2nd) 386, 408-9 though Stewart J. at first instance spoke of benefits being payable "here" (apparently meaning Toronto) (1965) 51 D.L.R. (2nd) 122, 124—and earlier on the same page—of payments being stipulated for "at New York."

Meanwhile in 1960, at the age of 58, Mr. Casteleiro had gone into exile with his family while that was still possible, and shortly afterwards his whole property in Cuba was confiscated. In 1963 he applied for payment of the surrender value of his two policies in U.S. Currency, as therein stipulated: it was admitted that permission from the National Bank, if sought, would be refused. The Imperial Life were perfectly willing to pay him pesos in Cuba, but, in view of Cuban law, not otherwise.

It is perhaps only fair to add that the Cuban exchange control measures in question were not intended to be extraterritorial: they were intended to regulate payment on these particular policies on the ground that the debt was on the company's Cuban books, and to shift it to its Toronto books was an export of currency from Cuba within the intendment of the law — according to the expert witness.<sup>4</sup> There was the same basis for the claim for Egyptian exchange control in *Rossano's* case<sup>5</sup>, to which the present case bears so close a resemblance.

It was not however on this ground that the defendant in this case argued for the application of Cuban law: it urged that Cuban law was the proper law of the contract, while the plaintiff submitted that the proper law of the contract was the law of Ontario. Given this agreement that the proper law was the criterion there was no room for discussion on the far more interesting question whether the proper law has any relevance to exchange control subsequently introduced.

Is it too much to say that this case, even more than *Rossano's*, is a *reductio ad absurdum* of the proper law as a criterion? Stewart J. followed McNair J. in that case in applying the law of Ontario, thus giving judgment for Mr. Casteleiro; and in this he was upheld by the majority of the Court of Appeal, and unanimously in the Supreme Court of Canada. But the same Stewart J. again following McNair J., found that the country with whose laws these policies had the closest connection (the "objective" proper law) was Cuba: this was also the view of the late Chief Justice (Porter) in the Court of Appeal, who would have decided for Imperial Life. The decision which prevailed was made in the name of proper law, interpreted "subjectively", that is as meaning the law which the parties might be expected to have preferred; but although this helped Mr. Rossano, an Egyptian Jew making his contract at a time when war was already threatening the frontier (in 1940), who would therefore certainly not intend to be caught by Egyptian law, the same reasoning was less obviously useful to Mr. Casteleiro who had no premonition

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4. Not in the report.

5. *Rossano v. Manufacturers' Life Assurance Co.* (1963) 1 K.B. 352.

of the disaster which was to overtake him: his most probable reason for choosing a Canadian insurer was that the Cuban companies existing were negligible.

Whether or not the parties could in this particular case be fairly thought to have had the law of Ontario in contemplation, the "subjective" proper law as a criterion inevitably means that even if the insurer too were Cuban and all elements in the transaction unequivocally Cuban, future Cuban exchange control — even present Cuban exchange control — could be excluded by an express term submitting to Ontario law, which (with respect) is absurd. It also involves the proposition that by intending to contract against the background of a particular system of law the parties intend to submitting to Ontario law, which (with respect) is absurd. It also an assumption as recent<sup>7</sup> as it is unreal, unless indeed one party deliberately puts himself at the mercy of the other's institutions, as in the exceptional circumstances of the *International Trustee* case.<sup>8</sup>

It is submitted that the proper law, subjective or objective, is relevant only to matters within the parties' choice; and, in particular, that it is only where the manner of discharge is open to choice by the parties that it may be said that "the validity of the discharge of a contract . . . normally depends upon the proper law of the contracts:" this is Dicey's Rule 155, to which a significant exception is made for a discharge in bankruptcy. Why not for any discharge by external interference? For we must see supervenient exchange control for what it is. These policies provided implicitly for payment anywhere in the world and explicitly for payment in American dollars, while Cuban exchange control later prohibited payment except in Cuba and in Cuban pesos: as Stewart J. said at the end of the plaintiff's evidence,<sup>9</sup> "the problem is whether a government can change all these policies."

In view of McNair J.'s remark<sup>10</sup> that two other House of Lords cases — *Kahler's*<sup>11</sup> and *Frankman's*<sup>12</sup> — were illustrations of Czech contracts being affected by subsequent changes in Czech law, it cannot be too strongly emphasized that all the speeches relied on Czech exchange control having existed in substantially

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6. So explicitly McNair J. at page 362 at *Rossano's* case, and by Porter C. J. at page 393.

7. *Meens v. Thellusson* (1853), 8 Ex. 638, is express authority that any manifestation of life and change in the governing law after the making of the contract is irrelevant to its effect. Wolff, who was responsible for the phrase "living and changing body of law" (second edition, page 424), relies on *Chesterman's* case (1923) 2 Ch. 466, and he is followed by *Cheshire* (seventh edition page 199)—but the proper law of that contract was English, and the life and change occurred in the value of the German mark. Neither writer on reflection chooses to rely on the *International Trustee* case (below) which was Wolff's original inspiration in (1937) 49 *Juridical Review* 110, 123.

8. *R. v. International Trustee for Bondholders*, A/G (1937) A.C. 500.

9. Not in the report.

10. At page 362 and quoted by MacKay J. A. at page 402.

11. (1950) A.C. 24.

12. (1950) A.C. 57.

the same form since before the formation of the contracts there in question,<sup>13</sup> and that it was for that reason that the parties' supposed submission to Czech law included its exchange control provisions. It is also to be observed that in *Frankman's* case, where the decision was unanimous, performance in Czechoslovakia was stipulated: in *Kahler's* case there was nothing to show that performance was not due in London, performance being the surrender of bailed securities physically held there. This led Lord McDermott<sup>14</sup> to find that English law governed the obligation to surrender the securities there held, and Lord Reid<sup>15</sup> to consider the whole contract to be governed by English law.

The only pre-war case of supervenient exchange control seems to be *De Beeche v. South American Stores*,<sup>16</sup> where the House of Lords held in 1934 that an obligation to remit money from Chile to London by specified means to be performed solely in Chile became unenforceable when Chilean exchange control made it illegal. Not a word was said of the proper law, the decision being an application<sup>17</sup> of the principle that an English Court will not compel performance of an act illegal where it is to be done.<sup>18</sup> Nor was anything said as to the sufficiency as a discharge of payment into court in accordance with the same Chilean legislation.

In the first of the post-war cases, *In re Helbert Wagg's Claim*,<sup>19</sup> it was precisely the validity of such a discharge that was in issue, and it was held valid. The exchange control was German, imposed ten years after the contract had been made. It forbade German residents to pay non-residents, and provided for discharge by payment into a *Konversionskasse* in marks, which the particular German debtor had done. The place for payment was London, but the debtor could not have paid in London without sending money from Germany. Upjohn J.'s primary reason was an express term of the contract that it should be "construed" by German law; and he relied on *Kahler's* case above. As we have

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13. Page 28 (Lord Simonds), 32 (Lord Normand), 41 (Lord MacDermott), 51 (faintly, Lord Reid), 53 (Lord Radcliffe). All these references are to *Kahler's* case; the emphasis was not repeated in *Frankman's* perhaps because of the availability of the alternative ground of illegality by the law of the place for performance—per Lord Simonds at page 71.

14. Page 40, 43.

15. Page 52.

16. (1935) A.C. 148.

17. See page 156: The "proper law" was indeed mentioned by Lawrence L. J. in the Court of Appeal (not reported); but with all respect to Dr. Mann, *The Legal Aspect of Money*, 2nd. ed., 384-5, the adoption by the House of Lords, with that judgment before them, of another criterion indicates rather rejection than tacit acceptance.

18. *Ralli Bros. v. Compania Naviera Sota; y Aznar* (1920) 2 K.B. 287 where supervening Spanish illegality made unenforceable an English contract, the performance made illegal being stipulated in Spain.

19. (1956) Ch. 323.

seen, *Kahler's* case is no authority for supervenient exchange control; and is practical cancellation of the creditor's rights really a matter of "construction"? Would German public law have been impotent merely because two private parties had stipulated for "construction" by English law? There is a more realistic way than this of reconciling this case — and it must be reconciled if it is to stand — with the decision of the English Court of Appeal in 1939 in *Kleinwort v. Ungarische Baumwolle*.<sup>20</sup> That case decided that Hungarian exchange control — pre-existing, but a *fortiori* if it had been supervenient — did not affect a Hungarian firm's obligation to pay money in London. It was indeed mentioned in passing that the proper law was English, but the substantial reason was the place for payment coupled with an assumption<sup>21</sup> that the debtor had funds in London with which to pay: the debtor could pay without doing anything in Hungary (apart indeed from writing a letter) which was forbidden by Hungarian law.

The rule to be extracted from the last three cases would seem to be that foreign exchange control may not destroy or convert an obligation which involves the movement of no money or credit within its own borders, but may convert an obligation any part of the performance of which necessarily involves such movement. Stewart J., although he does not seem to have been referred to any of these cases, certainly had the point in mind when he said<sup>22</sup> in the course of the evidence of the expert on Cuban law: "But not one cent of foreign exchange has left Cuba." On this basis the question would be whether any credit had left Cuba: in the eyes of Cuban law, as we have seen, it would have, by means of a transfer from the books of the Cuban office to those of the head office. The answer would seem to be that the Cuban office was merely a matter of convenience: its intervention was not a term of the contract, and even in the event of payment being made as expected it would have no more to do than physically hand over a cheque already drawn in Toronto and (as Mr. Cas-teleiro had a right to insist) on New York. Aliter, no doubt, if payment were due exclusively in Cuba, or out of the company's funds in Cuba.

There is perhaps another way of arriving at the same result. To the argument advanced in *Kahler's* case that foreign exchange control should be disregarded as confiscatory a negative answer was returned, but it was not unqualified: the reason was that

20. (1939) 2 K.B. 678.

21. Pages 686, 688, 699, 700.

22. Not in the report.

the law there in question "does not appear to differ in material respects from the legislation contemplated by the Bretton Woods Agreement, which is now the law of this country."<sup>23</sup> The agreement is also the law of Canada, though exchange control is not. Upjohn J., while finding in *Helbert Wagg's* case above that foreign exchange control merited recognition, added<sup>24</sup> that this was "subject to the qualification that this court is entitled to be satisfied that the foreign law is a genuine foreign exchange law, that is a law passed with the genuine intention of protecting its economy in times of national stress and for that purpose regulating (*inter alia*) the rights of foreign creditors, and is not a law passed ostensibly with that object, but in reality with some object not in accordance with the usage of nations." The laws recognized in those cases dealt with rights between residents, or between residents and non-residents, and not with rights between two non-residents, even if one had been resident when the law was passed. Payment by Imperial Life to Mr. Casteleiro in American dollars, neither being resident in Cuba, could not have the slightest effect on the Cuban economy; and payment in Cuba out of the company's assets there would not have benefitted the Cuban economy: it would merely have given the government a little more to confiscate. This, and not any economic reason, was why the National Bank would not permit payment outside Cuba in this particular case. These circumstances, it seems, call for the application of the ringing words spoken by Lord Loughborough in 1789,<sup>25</sup> referring to confiscation by another North American government of debts owed to adherents of a former regime: "The penal laws of foreign countries are strictly local and affect nothing more than they can reach and can be seized by virtue of their authority: a fugitive who comes hither comes with all his transitory rights."

To sum up —

(1) Genuine foreign exchange control will affect any obligation any part of the performance of which must necessarily take place within its territory; and in addition

(2) Parties intending any law to supply the background to their contract will be presumed to include any exchange control already forming part of that law, and even, where they submit not only to the law but wholly to the institutions of a country, such exchange control as may be introduced in the future.

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23. *Zivnostenska Banka v. Frankman* (1950) A.C. 57, 72.

24. (1965) Ch. 323, 351-2.

25. *Follot v. Ogden*, 1 H.Bl. 123, 135.

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